COMMUNITY COUNSEL

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THE 2008 HARVEST OF NEW LAWS - PART III

We continue our summary of the changes made in 2008 to community association law, turning now to HB 601:

1. Condo directors can now abstain from voting without having a conflict of interest, and when they do they are presumed to take no position on the matter under consideration.

2. A complete re-write of the condominium insurance provisions that:

A. requires that replacement cost be based on an appraisal done every three years.

B. permits risk pooling by at least three communities.

C. permits the board to set reasonable deductibles based on what is standard in the industry for that area, and/or on other available funds on hand, and on any pre-authorized special assessment adopted by the board at an open meeting for the purpose.

In 2008 there is much confusion and few good ideas included in about a dozen new laws.

D. permits land condos to require that the individual members insure the residential structures they occupy.

E. delineates what the master policies written after 1/1/09 must insure.

F. delineates what each individual unit policy must insure, including:

1. Loss assessment coverage of $2000

2. Excess coverage over the master policy

3. No right to subrogate against the master policy

G. permits associations to require persons using facilities not available to all owners to pay to insure those facilities.

H. Mandates that all owners have coverage and provide proof at least once a year. Association can buy a policy and lien for the cost as an assessment.

I. Regardless of who insures, the association oversees all reconstruction.

J. Adopts the Plaza East approach - making deductibles, liability over policy limits and uninsured losses - a common expense unless there is fault on the part of the owner. The Association can amend its documents to opt out of this system of expense sharing and go back to the system in the documents by a majority vote of all members. The vote is later reversible by the same vote. A notice has to be recorded if there is an opt out.

K. The association does not insure non-standard improvements, whether installed by the developer or the unit owner.

3. Government mandated expenses, such as life safety improvements and water or sewer improvements that impact master meters are common expenses, regardless of the absence of any statement in the Declaration. *Continued next month >>>*

Recent Cases

- **Division is soundly rebuked by the Court for its *Plaza East* doctrine. Unfortunately, that same doctrine was incorporated into the new condo insurance statute.**
- **Court reads declaration and fails to find a requirement that dock and dwelling be transferred together, and denies current dwelling owner the right to claim docks two (2) decades after docks were transferred separately.**

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RECENT CASE SUMMARIES

In **Costa Del Sol Association, Inc., vs. State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes**, 33 Fla. L. Weekly D 1693a (Fla. 3rd DCA July 2, 2008), Association appealed a declaratory statement issued by the Department which held that items, such as Jacuzzis, trellises, and elaborate screen enclosures – which are purchased, installed, used and removed only by individual unit owners – are nevertheless "condominium property," which under Section 718.111(11), Florida Statutes (2006), must be insured by Association, merely because they are located on the patio outside, rather than inside, the individual unit. On appeal, the Third District Court of Appeal (in a harshly worded rebuke) noted that the Department's ruling could just as easily apply to barbecues or lounge chairs, and noted that the Department's decision could not survive ". . . . any conceivable standards of review which may apply to our consideration of this case." The appellate court held that the Department's decision was both a "clearly erroneous assessment of the facts" and was ". . . . entirely contrary to any acceptable interpretation of the statutory language the administrative agency in question is charged with enforcing." The appellate court further noted that the Department's decision had the further utterly unfair consequence of making members of Association responsible for insuring property which they do not and cannot use, and from which they derive no benefit. Finally, the court noted that Association most likely had no "insurable interest" in the property which would even permit Association to maintain valid insurance. In conclusion, the appellate court summarized the Department's decision thusly; ". . . .it is bad enough to compare apples and oranges; it is much worse to find that apples *are* oranges."

In **Esbin, et al., vs. Erickson, et al.,** 33 Fla. L. Weekly D1841b (Fla. 3rd DCA July 23, 2008) Developer created a small subdivision which consisted of three (3) lots which had been further subdivided into six (6) dwelling units. Two of the lots were located adjacent to a navigable harbor, the third lot was located across a public street. Developer also created six (6) "dock lots" which were constructed along the waterfront and immediately adjacent to the two (2) waterfront lots. In 1989, Developer recorded a Declaration of Restrictive Covenants and shortly thereafter, conveyed by warranty deed each of the six dwelling units with a corresponding dock lot. As a result of these transfers, each original purchaser owned both a dwelling unit and a dock lot. Shortly after the conveyance of the properties to the original purchasers, and well before the purchase of two (2) dwelling units by Esbin, two dock lots originally transferred along with the two dwelling units purchased by Esbin, were conveyed separate and apart from the dwelling units. Esbin claimed the right to ownership and/or use of the two dock lots originally conveyed to his dwelling units. Suit was eventually filed to resolve the dispute. Esbin argued that pursuant to the language of the restrictive covenants, the dock lots could not be transferred separate and apart from a dwelling unit. The trial court entered summary judgment against Esbin and found that the dock lots could be sold or assigned separate and apart from the dwelling units and that Esbin was not entitled to usage of any dock in the development, nor to access the easements related thereto. On appeal to the Third District Court of Appeal, the appellate court noted the longstanding policy in Florida that covenants and restrictions are strictly construed in favor of the free and unrestricted use of property. Where the terms of a covenant are unambiguous, the courts will enforce such restrictions according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. A covenant which is substantially ambiguous is resolved against the party claiming the right to enforce the restriction. In the instant case, the appellate court found that the declaration set forth maintenance obligations with respect to the dock lots and **may** have presumed that the owners of the dwelling units would keep the dock lots originally transferred to them. However, the declaration did not unambiguously require the dock lots to remain attached to the dwelling units as originally paired. The appellate court also found that it would be patently unfair to undo, nearly two decades later, the transfers of the dock lots and to grant Esbin use or ownership of the dock lots. As such, the appellate court affirmed the entry of summary judgment by the trial court.

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