COMMUNITY COUNSEL

September, 2008 **A Publication of Wean & Malchow, P.A.** **Volume 12, Issue 9**

THE 2008 HARVEST OF NEW LAWS - PART IV

We continue our summary of the changes made in 2008 to community association law, starting with the completion of HB 601:

4. Estoppel certificates can be requested by a designee. The cost of the certificate must be stated on the certificate. The permissible charge for an estoppel now can be determined in a management contract or by board resolution. If the closing doesn't occur, the fee is the owner's obligation and can become a lienable assessment if unpaid.

5. A similar provision has been inserted into Chapter 720, as Section 720.30851, Fla. Stat.

6. The name of the Division has been changed and it is now known as "The Division of Florida Condominiums, Timeshares and Mobile Homes." Land sales have been moved elsewhere.

7. The Department now licenses mold remediators.

8. The Division is given power to enter emergency cease and desist orders to protect the public and can seek appointment of a receiver or conservator and can seek restitution for its expenses. It can also ask the court to impose civil penalties for violations of the rules or statute, from $500 to $5000 per violation, as well as restitution for costs and attorney's fees.

9. The Division is given like powers over coops and timeshares.

We now turn to several other bills and describe them briefly.

HB 1105 — 1. It revises receivership proceedings for associations, including the use of a statutory form notice that must be given to all owners.

2. It amends Section 718.121 (not 718.116) to require that before any condo association can file a lien against a unit, a 30 day notice of intent to lien must be given by certified mail and 1st class mail, or if out side the USA by 1st class mail.

3. It adds similar provisions for both coops and HOAs as to receiverships.

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

SB 1378 — HOA members may erect a free standing flagpole up to 20 feet high with a 4.5 x 6 ' flag of several diifferent types.

SB 464 — This bill prohibits so-called "transfer covenants" and purports to negate existing covenants of this type. This appears to be primarily related to documentary provisions that obligate an owner to pay a fee to a developer in order to re-sell their property. Think Disney and Celebration as a possible example.

HB 697 — Permits renewable energy saving devices in condos by the owner if wholly within a unit.

SB 1986 — A re-write of last year's Section 720.3085 - on HOA Collections.

Recent Cases

- **A gift via trust among family members is not a sale or conveyance and did not require Association approval.**
- **A condo association has the power to bring actions of common interest to the members, and this means that an association can also be named in a construction lien foreclosure action as representative of the owners without the need to serve each unit owner separately.**

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM

RECENT CASE SUMMARIES

In **Webster vs. Ocean Reef Community Association, Inc.,** 3 Fla. L. Weekly D2266a (Fla. 3rd DCA 9/24/2008) Owners appealed a judgment in favor of Association finding that two inter-family transfers of a lot violated Association's governing documents. In 2000, Owner's mother created an irrevocable trust whereby she became the sole beneficiary of the trust until the first to occur, her death or the fifth anniversary of the commencement of the trust. In May of 2005, pursuant to the terms of the trust, a deed to Owner was recorded. By this time, Owner's mother was 90 years old and Owner and his wife were living in the home and caring for the mother. Association claimed that both transfers violated the governing documents. The trial court found in favor of Association and voided both transfers. On appeal, the appellate court noted that the governing documents required Association approval of "purchasers" and applied to "sales" of the lots. In the instant case, the two transfers were gifts, not sales, purchases, or leases. The appellate court noted that the ordinary meaning of "sale" and "purchase" signify transfers for a price paid in money or other valuable consideration. In this case, the transfers were gifts, not "sales" or "purchases" and thus no Association approval was required. The decision of the trial court was therefore reversed.

In **Trintec Construction, Inc., vs. Countryside Village Condominium Association, Inc.,** 33 Fla. L. Weekly D2093a (Fla. 3rd DCA 9/3/2008), Association hired Contractor to repair roofs to multi-unit buildings in thirteen separately-declared, but collectively managed, condominiums. The contract provided that Association was the governing body for all of the affected buildings, and the contract was signed by the president of Association. In April, 2006, Contractor claimed a default under the terms and conditions of the contract and recorded a claim of lien for approximately $1.3 million. The property described within the lien identified the entirety of each of the thirteen condominiums by recorded declaration, rather than the individual units and common element parcels in the condominium buildings where the work was performed. In late 2006, Contractor filed a lien foreclosure complaint and lis pendens against Association and the property identified in the claim of lien. The trial court initially granted Association's motion to dismiss the complaint without prejudice, allowing Contractor twenty days within which to amend. Association further persuaded the trial court to enter an order dismissing and discharging the lien "without prejudice". The trial court accepted Association's argument that the individual unit owners were indispensable parties to the lien foreclosure action, and that Contractor's statutory mechanic's lien claim could not proceed without joining those unit owners. Contractor sought certiorari review to the Third District Court of Appeal of the decision rendered by the trial court. The appellate court initially denied Contractor's petition. However, Contractor moved for rehearing and clarification based upon its concern that by statute it could no longer amend its recorded claim of lien. The appellate court then granted the petition and ordered Association to file a response. The primary disagreement was over which law governed, Section 718.121, Fla. Stat. (*i.e.,* the Florida Condominium Act), or Section 713.08, Fla. Stat. (*i.e.,* the mechanics lien provisions). In essence, the question was whether the "owner" for purposes of the lien law's application to a condominium property and improvements to its common elements is: (a) each and every unit owner in the condominium; or (b) the condominium association created by the declaration. Association argued that the mechanic's lien law's use of "owner" means each individual unit owner, such that those owners are indispensable parties. The appellate court was thus left to consider the interrelation of the Condominium Act, the Mechanic's Lien Laws, and the rules of civil procedure related to condominium associations. The appellate court noted that the Condominium Act provides that since the work was authorized by Association, the consent of the unit owners was "deemed" to have been given and each unit owner was liable for the amount in proportion to their share of the common expenses. The appellate court further noted that under the Mechanic's Lien statutes, the lien must state a description of the real property sufficient for identification and also provide the name of the "owner". Contractor's claim of lien described the entirety of the property by condominium declaration and named Association as the "owner." However, the Mechanic's Lien Law does not resolve who is the "owner" of the property to receive service of the lien. Finally, the appellate court turned to the rules of civil procedure and noted that, under the rules, Association clearly could have brought an action in its own name against Contractor had Association been unhappy with the roofing work. The question therefore becomes whether the converse was also true; that is, whether Contractor could bring an action against Association as the representative of all affected unit owners without naming and serving all of the individual owners. The appellate court noted that the competing interests of contractor and the unit owners are substantial and worthy of protection. However, upon consideration of all of the factors, the appellate court found that the trial court's order departed from the essential requirements of the law, and resulted in a total loss of Contractor's statutory remedies. Therefore, Contractor's lien was reinstated and the decision of the trial court reversed.

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TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM