COMMUNITY COUNSEL

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O. HENRY ENDING TO 2009 LEGISLATIVE SESSION

In the field of community association legislation, 2009 will go down as the year that wasn't. At the start of the session there were many priorities set by many groups with disparate interests, ranging from making banks and other lenders shoulder more of the burden of protecting abandoned property in foreclosure, to correcting some of the wording blunders made in 2008 amendments to the Condo Act, to scrapping the newest insurance changes made in condominium (and HOA townhome) insurance coverage requirements.

Every initiative was hard-fought and ultimately every initiative failed. Despite the perception that advances could be made this year against banks and other institutional lenders because of their low public esteem and their overall financial weakness, the banks and their lobbyists did a stellar job of locking every single initiative down, such that no proposal to make banks pay more of the cost of upkeep of properties that they hold as security ever made it out of committee and on to the floor of either house.

Condo unit Owner insurance is still-manadatory.

Many proposals were aggregated, over the course of the session, into a single legislative vehicle, called SB 714. Some proposals had real merit, others, not so much (in the humble opinion of this observer). Nevertheless, in a move that aptly illustrates the well-known maxim that those who don't learn from history are doomed to repeat it, Governor Crist repeated the action taken by Jeb Bush in his last year as Governor and vetoed the entire bill on June 1st, thereby ensuring that nothing of great and primary substance directly related to the operation of community associations will become law without extraordinary action by the legislature.

It is a shocker that the reason for the 2009 veto was exactly the same as the 2006 veto of HB 391 – an objection to attempts to extend the deadline for retrofitting existing condominiums with life safety equipment from 2014 to 2025. Once again, the pipefitters union prevailed on what is an obvious jobs issue for them, convincing the Governor that this change represents a substantial public safety consideration.

However, in a move that indicates at least some awareness that the issues are not so black and white, the Governor ordered DBPR to undertake a "comprehensive" review of the actual costs of retrofitting, as well as what effect retrofitting would have on insurance premiums. This report, which will obviously have to consider a wide range of housing accommodations and will, as a result, likely reach a broad and varied conclusion, is due by October 1, 2009.

The end result, at least for the time being, is the status quo. Condo unit owners must still carry unit owner property and liability coverage, mandatory pre-suit mediation of HOA disputes is still the law, and the world keeps spinning. How odd is it that in the world of community association legislation, the surprise ending is that nothing changed? Perhaps a breather is to be welcomed, if not embraced.

Recent Cases

- **Rules of Court permit service via fax, with service complete upon receipt. This does not require the person to whom the fax is directed to actually see it, as long as it arrives at his/her office.**
- **Trial Court wrongly interpreted arbitration clause in a private agreement permitting a golf course to be converted to other uses by requiring the golf course to stay open during the arbitration.**

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 **Lamour vs. Deer Run Property Owners Association, Inc., et al.,** 34 Fla. L. Weekly D1071a (Fla. 4th DCA, May 27, 2009) Owners challenged the issuance of a temporary injunction in favor of Association claiming that Owners did not have notice of the hearing. Owners own a lot in the community. In December 2004 Owners sued Association regarding the use of an easement. Owners' lot has a recorded easement for a road called Buck Ridge Trail across it. The easement is set forth in the declaration of covenants and restrictions for the community. On March 15, 2007, while the Owners' lawsuit was still pending, Owners placed two large piles of dirt across the road easement to block it. The next day, a Friday, Association filed an emergency motion for temporary injunction against Owners to prevent this blockade of the easement which interfered with access by emergency vehicles to other properties in the development. That Friday morning, March 16, 2007, Association obtained a hearing date and faxed a notice of hearing to Owners' attorney at 9:23 a.m. The notice stated that the hearing would be held on Monday, March 19, 2007 at 10:00 a.m. Owners' attorney did not appear at the hearing. The trial court conducted the evidentiary hearing and entered an order granting temporary injunctive relief against Owners. The order recited that Owners had been given notice but failed to appear. In November 2007, some six months after its entry, Owners filed a motion to dissolve the temporary injunction. At the hearing on the motion to dissolve, held September 2008, Owners asserted that their attorney had been out of town on a ski trip and that his office was closed between March 16 and March 19. Because their attorney did not receive actual notice, Owners claimed that the court erred in continuing with the temporary injunction hearing. The trial court denied the motion, prompting the instant appeal of a non-final order. On appeal to the Fourth District Court of Appeal, the appellate court noted that Rule 1.080 of the Florida Rules of Civil Procedure permits service of notices via telefax. The appellate court noted that service was complete when the fax was received, whether or not the receiving attorney was in the office or even in town. The notice was sent within a reasonable time prior to the hearing and provided sufficient time for preparation to defend against the motion. As such, the notice given was reasonable and the decision of the trial court was affirmed.

In **Foxfire Properties, LLC, et al., vs. Foxfire Owners Association, Inc.,** 34 Fla. L. Weekly D936a (Fla. 2nd DCA, May 8, 2009) Golf Course Owner appealed an order denying its motion to compel arbitration. Golf Course Owner owned a 188 acre golf course built adjacent to Association. In 2000, Golf Course Owner wanted to rezone a vacant parcel it owned which also adjoined the golf course. Association lodged an objection to the rezoning request. To resolve the objection, in 2002 Golf Course Owner and Association entered into a mediated settlement agreement under which it was agreed that Association would not oppose the rezoning and Golf Course Owner would sign and record a covenant and restriction limited the use of the golf course for golf and country club purposes only. In 2006 Golf Course Owner sold one-half of the golf course to another entity and closed the golf course. The mediated settlement agreement contained two "savings" clauses which would release the property from continued use as a golf course. The first savings clause provided that if governmental regulations made the use of the property no longer economically feasible the covenant would be released. The second "savings" clause provided that if Golf Course Owner gave the required notice, a three person arbitration panel would conduct an arbitration action to determine whether the continued operation of the golf course was economically viable. The trial court determined that Golf Course Owner waived its right to compel arbitration when Golf Course Owner unilaterally closed the golf course, and that the arbitration provision contemplated, if not required, the golf course to remain operating while the arbitration process ran its course. On appeal to the Second District Court of Appeal, the appellate court found that the trial court misinterpreted the language of the arbitration provision and added language to arrive at the conclusion that the golf course had to remain open in order for Golf Course Owner to utilize the arbitration provisions. As such, the appellate court reversed the trial court and remanded the case to the trial court for further proceedings.

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