COMMUNITY COUNSEL

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LOW RATE MORTGAGE MONEY? DON'T BET THE FARM JUST YET.

More and more of our clients are looking for ways to help their members obtain low-rate mortgage money for purchase or refinance via government-backed programs, including reverse mortgage programs. Many of these communities are condominiums. All of them eventually seem to get frustrated with the inability of the system to accommodate the nature and structure of their communities.

Although FNMA ("Fannie Mae") operates the single largest mortgage program, it does not offer a single program to certify entire condominium projects as meeting legal requirements for low interest mortgages. Instead, for condominiums such programs fall under the auspices of FHA, the Federal Housing Administration, a part of HUD. At this time, the FHA condominium guidelines date back to 1980. The legal guidelines a condominium community must meet, found in Appendix A to Handbook 4265.1, are almost 40 pages long and include several problematic areas, including a requirement that:

The right of a unit owner to sell, transfer, or otherwise convey his or her unit in a condominium shall not be subject to any right of first refusal or similar restriction.

The governing documents of very few condominiums in Florida have absolutely no transfer restrictions and the ones that don't usually are resort or hotel condominiums that would not qualify for FHA financing on other grounds. So the issue of financing comes now down to whether, in return for the possibility of lower mortgage rates, a community is willing to amend its documents to make rather fundamental changes to the character of the community. The fact that different lenders have different understandings of the legal requirements for these programs doesn't help the situation.

Recently, President Obama's economic stimulus package expanded the types of housing eligible (at least in theory) for such programs, so that manufactured homes are included for the first time. But the most significant change may be yet to come. In an administrative change to be effective on October 1, 2009 and found in a document entitled "Mortgage Letter 2009-19," dated June 12, 2009, FHA has acted to remove the prohibition on transfer restrictions . However, the language accomplishing this is poorly drafted, to say the least. It says simply:

Cheap mortgage money continues to be illusory for many.

Right of first refusal *is permitted unless it* ***violates*** *discriminatory* ***conduct*** *under the Fair Housing Act regulation in 24 CFR 100.* (Emphasis supplied)

From this we can see that (a) a straightforward right of approval (not involving a forced purchase by the association) is probably still not permitted, and (b) the word "violates" is a complete non sequitur in this sentence, and (c) a documentary provision does usually not constitute conduct, so it is unclear how existing documentary text could be discriminatory conduct. As we said, don't bet the farm.

Recent Cases

- **A condo unit owner could not rely on oral permission of president of developer controlled board to approve owner's alterations to the common elements, and board could not be estopped in the absence of formal board action.**
- **Statute of Limitations to enforce a restrictive covenant is five years, not one year applicable to specific enforcement of contracts in equity.**

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RECENT CASE SUMMARIES

In **Curci Village Condominium Association, Inc., vs. Diana Santa Maria**, 34 Fla. L. Weekly D1228a (Fla. 4th DCA June 17, 2009) Association brought suit against Owner seeking to require Owner to remove landscaping modifications Owner made to the backyard of her condominium unit. Owner purchased her unit before control of the Association was transferred to the unit owners. Owner inquired of the developer whether she could put "decorative improvements" in her backyard. Developer's representative, who was also the president of Association at the time, stated that he "didn't see a problem with it" as long as it did not impede the water runoff, was not permanent in nature, and did not require a permit. He told Owner that stones and mulch would be fine. When he gave her his "opinion" that it would be fine to make these modifications, he did so as president and director of Association. Owner never requested or obtained written permission from Association to make the modifications. The board of directors did not discuss during any meeting the decision to grant Owner permission to make modifications. Relying solely on the verbal approval, Owner installed mulch beds, small paver stones, and crushed rock along the outside of the property. She also placed chairs and other leisure furniture in the area. Shortly after control of Association was turned over to the unit owners some four months later, Association retained counsel who sent a letter to Owner stating that the modifications were causing damage and flooding to the common elements and were violative of the declaration. Owner filed suit against Association alleging a claim for declaratory relief and requesting that the court enter an order finding that Owner was not required to remove the landscaping modifications. Owner also sought damages pursuant to Section 718.303, Fla. Stat., due to her being forced to defend the landscaping modifications. Association claimed that Owner was in violation of the declaration of condominium by extending her patio without the prior written consent of Association and in violation of the governing documents. The trial court granted summary judgment in favor of Owner and allowed Owner to keep the modifications. On appeal to the Fourth District Court of Appeal, Association argued that summary judgment in favor of Owner was improper because the evidence was clear and undisputed that Owner did not obtain the prior written consent of Association prior to making the modifications. Owner claimed that Association was estopped from claiming lack of compliance with the condominium documents because developer's representative, as president and director of Association, gave her verbal permission to make the modifications. The appellate court reversed the summary judgment in favor of Owner on the basis that Owner failed to obtain the written consent of Association prior to making the modifications. The appellate court noted that estoppel was inapplicable because the board of directors did not give Owner permission to make the modifications, and Owner could not reasonably rely on the verbal approval of developer's representative. The appellate court further reversed an award of attorneys' fees based upon the trial court findings. However, the appellate court remanded the case to the trial court for further hearings based upon Owner's allegations that Association's enforcement was arbitrary and capricious, as these issues involve disputed issues of material fact which preclude entry of summary judg-

In **Fox vs. Madsen**, 34 Fla. L. Weekly D1343a (Fla. 4th DCA July 1, 2009), Madsen filed suit against her neighbor, Fox, to enforce the declaration of covenants and restrictions. Madsen filed suit for injunctive relief, seeking to require Fox to remove driveway paving constructed to the property line between Madsen's property and Fox' property. Madsen claimed that the driveway (as expanded) violated the declaration. Fox answered and defended, claiming that the action was barred by the one year statute of limitation for specific performance. On appeal to the Fourth District Court of Appeal, the appellate court noted that Madsen filed a complaint for injunction, and mandatory injunction is the proper method of enforcing restrictive agreements on property. The cause of action was not for specific performance of a contract. As such, the action was subject to a five (5) year statute of limitation, not a one (1) year statute of limitation for specific performance.

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