

# COMMUNITY COUNSEL

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## Recent Cases

- ♦ **Bank hit with frivolous action attorney's fees award when it could not prove it owned the note and mortgage it was trying to foreclose when it filed the suit.**
- ♦ **Suit for discrimination failed - Plaintiff failed to show intent or improper motivation when denied right to buy, where evidence showed that others not of the same class were treated in the same fashion by Association.**

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## SIX OF ONE-HALF DOZEN OF ANOTHER. DOES IT MATTER?

In the world of Florida community associations, certain concepts confuse over and over. Indeed, that confusion can extend far beyond the innocent and hapless property owner and into the courts, regulatory agencies and so-called experts in the field. When that occurs, the slow pace at which the law evolves can perpetuate confusion in key areas for years.

One area where confusion reigned for well over a decade is determining when a change to a portion of the common areas/common elements of a community also constitutes a change to the appurtenances that are part of what a property owner purchases. When a change to the appurtenances is made, a much more difficult vote is needed for approval. Despite case law on the subject, regulators still make errors when addressing the issue.

Another area where problems have occasionally arisen for over a decade, and where we forecast that many more problems will arise as communities and their members each tighten their respective belts, is how an expense can be made an individual expense (in lieu of being a common expense) or visa versa. For example, how does an association vote to install sub-meters and exclude water and similar charges from the common expenses paid through member assessments? The same for cable TV service. Is this a "simple" matter of amending the Declaration according to its terms, or is something more required? Both Chapters 718 and 720 expressly prohibit the making of any change to the original system of how the members share the common expenses without first obtaining the consent of all persons impacted by the proposed change. Some commentators say that making a



change like this merely shifts the economic burden of some expenses but does not change the relative sharing of common expenses paid by each owner. Under this logic, however, it would seem possible to shift all expenses to individual owners – except perhaps for the cost of postage stamps. So long as whatever remains to be paid in common is shared among the owners in accordance with the original Declaration, their argument would seem to work, even if the real consequence of expense shifting could bankrupt a non-consenting owner.

But if the only change made is to shift the cost of postage from being a common expense to an individual expense, it would seem to be overkill to argue that unanimous approval is needed to accomplish this.

The truth would seem to lie in the middle, but explaining when a re-categorized expense is just a shift in the economic burden and when it changes the method of sharing the common expenses seems sufficiently difficult as to confound the courts and the experts for years to come.

One suggestion is to adopt a dollar limitation in the amount of shifted expenses. This would prevent expense shifting from overwhelming any owner. Such a limitation would seem most appropriate for upholding the legitimate expectation interests of owners when they purchase a unit. The expense type and its relation to the core functions for which associations are created would also seem relevant, and it would be appropriate to require greater approval to shift the cost of core functions back to individual owners.

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## RECENT CASE SUMMARIES

In **Country Place Community Association, Inc., vs. J.P. Morgan Mortgage Acquisition Corp.** 36 Fla. L. Weekly D31a, (Fla. 2<sup>nd</sup> DCA December 29, 2010) Association appealed the trial court's order denying its motion for attorneys' fees under Section 57.105(1), Fla. Stat. Association moved for attorneys' fees after the trial court dismissed Bank's mortgage foreclosure action. Bank filed its foreclosure action and included in its complaint a count seeking to reestablish a lost note. The lender named in the copy of the note and mortgage attached to the complaint was First Franklin Financial Corporation. The mortgage designated Mortgage Electronic Registration Systems, Inc., as the mortgagee. Bank did not attach to its complaint any evidence of an assignment of either the note or the mortgage in its favor. When Bank filed the foreclosure action, no assignment of the mortgage in its favor had been recorded in the public records. Association answered the complaint and alleged that Bank lacked standing to bring the action because it did not own the note and mortgage. During the pendency of the foreclosure action, Bank never produced any evidence that it owned the note and mortgage that were the subject of the proceeding. Bank admitted that it had no evidence to show that it owned or possessed the note and mortgage on the date it filed the foreclosure action when it failed to respond to requests for admission. Association moved for summary judgment based on Bank's inability to demonstrate that it owned or possessed the note and mortgage when the action was filed. After an evidentiary hearing, the trial court granted Association's motion. However, the trial court denied Association's motion for attorneys' fees on a finding that Bank could possibly prevail in subsequent litigation. On appeal to the Second District Court of Appeal, the appellate court noted that Bank did not own or possess the note and mortgage when it filed its lawsuit, and therefore Bank lacked standing to maintain the action. Based upon its finding that Bank's foreclosure action was unsupported by the material facts necessary to establish the claim because Bank lacked standing when the action was filed, it was error for the trial court to deny an award of attorneys' fees to Association.

In **Teresa Henderson vs. Imperial Point Colonnades Condominium, Inc., et al.**, Case No.: 09-CIV-61639 (U.S. Dist. Ct., Southern District of Florida, December 30, 2010) prospective Purchaser filed suit against Association and its President and Manager alleging discrimination. Association's governing documents provided that, "No purchaser shall be entitled to receive approval unless the purchaser pays at least ten percent (10%) of the purchase price on the property with purchase financing not to exceed ninety percent (90%) of the purchase price." Association enacted the rule to prevent prospective purchasers from mortgaging their property for 100% (or more) of its value. In Purchaser's case, Purchaser was approved by the State Housing Initiatives Partnership Program ("SHIP"), via the City of Fort Lauderdale, for \$35,000.00 that she could use for her entire down payment. Unlike bank loans, the recipient of SHIP money need not pay it back. However, to obtain money from SHIP, the recipient must execute a Purchase Assistance Program Second Mortgage. Likewise, the recipient of SHIP money must execute a Purchase Assistance Program Promissory Note. If the recipient fails to remain in the home for fifteen (15) years, the City may exercise its lien rights, convert the SHIP money to a loan, and require Purchaser to pay the money back. Consequently, SHIP is similar to a loan in some respects and similar to a grant in other respects. Purchaser agreed to purchase a condominium unit for \$55,000. Purchaser intended to use the \$35,000 from SHIP, representing roughly sixty-four percent of the purchase price, as her down payment for the unit. Association denied Purchaser's application because she would not be paying at least 10% of the purchase price. Purchaser claimed that Association and its President and Manager denied the application because she was a black African-American. The court noted that it is generally unlawful for Association to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling on the basis for race. The court further noted that to prove intentional discrimination, a plaintiff has the burden of showing that the defendants actually intended or were improperly motivated in their decision to discriminate against persons protected by the Fair Housing Act. The court ultimately entered summary judgment in favor of Association based upon the court's finding that Association had not approved the sale of units to others outside of Purchaser's protected class who had qualifications similar to Purchaser's.