

COMMUNITY COUNSEL

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Recent Cases

- ♦ **The ability to Special Iy Assess for alterations or improvements is not applicable to repairs.**
- ♦ **Foreclosing bank can't be charged assessments on condo unit before it completes the foreclosure.**
- ♦ **Where suit was moot before it was filed but both parties pursued a trial anyway, neither party was entitled to an award of attorney's fees.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

AND NOW FOR SOMEONE COMPLETELY DIFFERENT ...

This monthly newsletter has been published 172 times and during that run it has been quoted locally with some frequency and cited in publications as far away as China and Hawaii. We have tried to stick with discussions of law and policy that impact the operation of community associations, and next month we will start to summarize those bills that have passed the 2010 session of the Florida Legislature and received consideration from the Governor.

Now we take a moment to endorse a local policy- and difference- maker as she competes in a crowded race for Orange County Mayor.

Teresa Jacobs is someone completely different. Trained in economics and investment banking, Teresa and her husband, Bruce, raised four children while she served eight years as a county commissioner in Orange County. Because she is a tireless worker she made it look almost easy, though it certainly wasn't. As cream rises to the top, during that time she also was elected by over 300 fellow Florida county commissioners to be president of their statewide organization. Yet she has also never been afraid to stand alone when she felt that important principals warranted. One local newspaper recently speculated that she has been the most effective Orange County commissioner in past thirty years.

So what makes her different? Precisely this: Ms. Jacobs brings to the table an amazing intellect and an extraordinary gift for analysis. She will out-prepare anyone on any issue and wring every last ounce of understanding from an issue. Her incisive skills of comprehension and extrapolation are filtered by an equally remarkable yet simple set of guiding principals. They consist of uncompromising honesty and a desire to do the right thing for her community. How refreshing to find someone who eschews ideology and partisanship when they serve as expediencies; substituting for wrong-headed policies or ill-conceived ideas. In such situations she invariably will take an independent approach advocating better, more reasoned ideas.

What makes Ms. Jacobs of even more interest to those concerned with community association living is that **she gets it**. She lives in a local HOA and understands how and why they exist. As a community association attorney who has at-



tended hundreds of community meetings and has heard thousands of speakers, I was nevertheless blown away when I heard her speak at a meeting of her own HOA back in 1995. Without specific training or background on community association issues she nevertheless "got it" fully and completely. Since then she has gone on to serve as Chair of the Orange County Homeowners Association Alliance, providing aid and educational programs for

over 100 member HOAs, and she has been a delegate to CAI's Florida Legislative Alliance, working on legal and policy issues. She can be counted on to understand how to make our entire community better.

In her eight years on the county commission Ms. Jacobs has shown herself to be a consistent champion of common sense; and she has applied her considerable talents to control growth and development, to create sane, safe and sustainable living spaces for people and pets. She has also sought to hold local government to her core principles of honesty and community first by insisting on government transparency, so that all citizens can be assured that their elected representatives hold their constituents' interests paramount.

Teresa Jacobs is a leader because she can out-perform all comers. Orange County has a unique opportunity. It has the chance to elect a uniquely talented, principled and courageous person to do a tough and thankless job that most of us wouldn't wish on our worst enemy. But It is a necessary job, and one that needs to be done well. Let's not elect a politician. Let's elect a leader. If you live in Orange County, we respectfully recommend that you consider Teresa Jacobs for mayor.

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RECENT CASE SUMMARIES

In **Carniello vs. Second Horizons Condominium Association, Inc.** 35 Fla. L. Weekly D768a (Fla. 3rd DCA, April 7, 2010) the primary issue involved in the case was the validity of a so-called "assessment lien" imposed for \$4,051.74 in favor of Association upon a unit purchased on June 2, 2004. The charge was incurred in repairing the air-conditioner on May 16, 2003, when it was owned and occupied by another unit owner. The trial court found the special assessment lien to be a valid lien against the unit. On appeal to the Third District Court of Appeal, the appellate court noted that the declaration of condominium provides for a special assessment on non-common elements, like unit owner's unit, only in the case of an "alteration" or "improvement." The appellate court noted that this provision did not apply to this case, in which the inoperative air conditioner was simply repaired. The court cited case law which supported this conclusion and noted that "alteration" is defined as a "change or modification made on a building that does not increase its exterior dimensions" and "improvement" is defined as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is distinguished from ordinary repairs." Additionally, the appellate court noted that the statutory prerequisites to a valid "special assessment," as provided by the Condominium Act, were simply not demonstrated in the trial court. Therefore, with the exception of \$150 plus interest for repairs to the common element swimming pool, the imposition of a lien against the condominium unit for repairs made to the air-conditioning unit serving only that condominium unit was invalidated.

In **Deutsche Bank National Trust Company as Trustee vs. Coral Key Condominium Association, Inc.**, 35 Fla. L. Weekly D835b (Fla. 4th DCA, April 14, 2010), Bank filed a mortgage foreclosure action, naming the Unit Owner and Association as defendants. After seven months of no record activity, Association filed a motion to compel bank to proceed with the foreclosure sale or pay monthly assessments due to Association. The trial court granted the motion, explaining that it was fair and equitable for the mortgage holder to pay monthly assessments due Association if there is an extended period of delay in the foreclosure proceedings for no good reason. On appeal to the Fourth District Court of Appeal, the appellate court noted that the order of the trial court was entered before the Third District Court of Appeal decision in *U.S. Bank National Association vs. Tadmor*, 23 So. 3d 822 (Fla. 3rd DCA 2009), which addressed this exact same issue. In *Tadmor* the court rejected the notion that equity and fairness support an order requiring a bank to pay condominium assessments while foreclosure proceedings are pending since section 718.116(1)(b), Fla. Stat., makes it clear that the first mortgagee is required to pay assessments only after acquiring title, and equity follows the law. The Fourth District Court of Appeal concurred with the decision in *Tadmor* and reversed the order of the trial court.

In **Hidden Hills Country Club Estates Homeowners Association, Inc. Vs. Bray**, 35 Fla. L. Weekly D861b (Fla. 1st DCA, April 20, 2010) Association filed a lawsuit against Owners seeking injunctive relief to cure alleged violations of certain restrictive covenants. In the lawsuit Association requested an award of attorneys' fees and costs, pursuant to a provision in the covenants. Owners also sought an award of fees and costs. The lawsuit was resolved without the necessity of an injunction, and the court entered an order making the parties responsible for their own fees and costs. On appeal to the First District Court of Appeal, the appellate court noted that although the trial court apparently misconstrued a provision in the covenants with regard to a requirement for written notice and an opportunity to be heard, the trial court found that Association had not acted reasonably in pursuing legal action without making an adequate attempt to resolve the matter privately. The trial court further observed that the dispute on the merits had become moot before the lawsuit was filed, and that the parties each bore some fault in having the case proceed to trial anyway. Based on those findings, the appellate court affirmed the trial court's ruling making the parties responsible for their own fees and costs.