COMMUNITY COUNSEL

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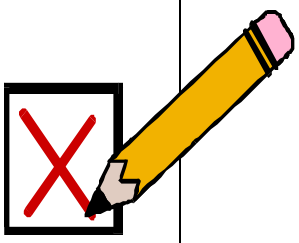
MORE SB 1196 ANALYSIS – ELECTION ISSUES

SB 1196 deals with various issues related to elections occurring after July 1, 2010. Among the changes:

For HOAs, the election process may be changed by amendment to the governing documents of the association to permit the use of absentee ballots. If such a system is adopted, then members must be given an opportunity to nominate themselves for the Board prior to the balloting. Until this amendment persons had to be allowed to nominate themselves from the floor at the election meeting, which made use of absentee ballots inconsistent with such a system. Now which system is used is left to the association's choice via documentary amendment. However, if the association opts to permit absentee voting, the condominium system of balloting applies, i.e. voted ballots are sealed in a blank "ballot envelope" and that is sealed inside a return envelope that is signed by the voting member and returned prior to the scheduled election.



For Condominiums, persons elected to the Board must execute a certificate attesting to having read the governing documents, Chapter 718 and the Division's rules with 90 days after being elected, failing which they are suspended and temporary replacements appointed until the certificate is signed.

Also, persons who are delinquent in the payment of any fee, fine, or special or regular assessment are not eligible for board membership. However, the Division has apparently given a controversial (and - we believe - erroneous) interpretation of this provision. In a letter written by the Division in response to an inquiry, the Division indicated that all of the delinquency provisions that disqualify a person from Board service are predicated on Board membership, meaning that they do not apply until and unless a person is elected. Thus, the Division states that a person's delinquency status the day before, two weeks before, or at some other time prior to being elected is irrelevant, since anything could happen, including payment of the arrearage. In the Division's view the words, "*A person who ... is delinquent in the payment of any fee, fine, or special or regular assessment ... is not **eligible** for board membership*" are not words of ballot eligibility, even though the word "eligible" is used. The problem with this position is that the same logic would permit a non-owner to run even if the community's documents require that all directors be owners, because that person might acquire an ownership interest prior to being elected.

Also, the law now permits co-owners of a unit to serve on the Board simultaneously if the community has ten or fewer unit, or if the same co-owners own more than one unit, or if there are not enough candidates to fill the Board.

While all condominium directors are elected to terms that expire annually (unless the members have voted to adopt two year staggered terms after October 1, 2009), each departing director who has not timely submitted a notice of intent to be a candidate for re-election is eligible for re-appointment to the Board (just like any other eligible person) by the remaining directors in the event there are not enough candidates to fill the Board.

Finally, directors who are suspended by the Division on suspicion of wrong doing, may reclaim their seats once they are cleared, so long as that occurs prior to the expiration of the term to which the director was elected. That represents a change from the original, poorly drafted language.

Recent Cases

- **Mixed residential Developer did not also have to give HOA disclosures to buyer when he gave a condo disclosure.**
- **D&O insurer had no duty to defend suit against Association where policy excluded claims for damage to tangible property, and the claims related to mold and mildew from alleged failure to maintain.**

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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 **Florida Farm, LLC, vs. 360 Developers, LLC,** 35 Fla. L. Weekly D1635a (Fla. 3rd DCA, 7/21/2010) Buyer brought suit against Developer seeking to cancel the purchase agreement and obtain the return of its escrow deposit. Buyer purchased a residential condominium unit from Developer on December 2, 2004. As a condition of ownership, Buyer was required to become a member of both a condominium association and a homeowners association. Almost three years later, Buyer sought to cancel the contract because it did not receive a "Disclosure Summary" pursuant to Section 720.401, Florida Statutes (2004), which governs homeowners associations. As such, Buyer claimed to be entitled to void the purchase agreement under Section 720.401(1)(c), which allows a prospective buyer to rescind a contract for up to three days after the receipt of the Disclosure Summary. Developer argued that it was exempt from Section 720.401 requirements, pursuant to subsection (2), and that it otherwise satisfied the disclosure requirements of Section 718, Florida Statutes. On appeal to the Third District Court of Appeal, the appellate court noted that the Legislature enacted Chapter 718 to deal with condominium associations and Chapter 720 for homeowners associations. Each chapter has its own disclosure requirements. While Chapter 718 includes disclosures for both condominium and homeowners associations, Chapter 720 limits its disclosures to homeowners associations. Chapter 720, however, contemplates situations where a homeowners association is part of a community governed by other statutes, and, when it is, the chapter specifically authorizes alternative disclosures pursuant to those other statutes. Thus, Section 720.401(2), Florida Statutes, identifies two instances when the disclosure summary form is not required. Specifically, Section 720.401(2), Florida Statutes, states that the requirements of Section 720.401 do not apply to any association regulated under Chapter 718, Chapter 719, Chapter 721, or Chapter 723, and also it does not apply if disclosure regarding the association is otherwise made in connection with the requirements of Chapter 718, Chapter 719, Chapter 721, or Chapter 723. The appellate court interpreted this language to mean that Section 720.401, Fla. Stat., does not apply when the association is regulated under Chapter 718 and if disclosure is otherwise made in connection with Chapter 718. The appellate court therefore concluded that Developer was not subject to the requirements of Chapter 720 because the unambiguous language of Section 720.401(2) specifically says that the section does not apply. The appellate court therefore affirmed the trial court's dismissal of the complaint.

In **Eastpointe Condominium I Association, Inc., vs. Travelers Casualty & Surety Company of America**, Dkt Nmr 09-151866, U.S. App. Ct., 11th Circuit, 5/20/2010, Association sued insurance Carrier alleging it had a duty to defend arising under the insurance policy. Association operated a condominium in Singer Island, Florida. One of the unit owners sued Association for failing to adequately maintain and repair the roof and air-conditioning system when two hurricanes hit south Florida in October, 2004. The condominium building sustained severe water intrusion that caused pervasive mold and other damage to owner's unit. Owner sued Association for negligence, breach of fiduciary duty and breach of contract. Association had liability insurance coverage under two different policies: a commercial general liability policy from QBE Insurance Corporation and a directors and officers (D&O) liability policy from insurance carrier. The D&O policy contained a "property damage" exclusion that excluded coverage for any claim arising out of damage to any tangible property, including mold, toxic mold, mildew, fungus, or wet or dry rot. Association timely notified both insurance carriers of the claim. QBE accepted defense of the claim but the D&O Carrier denied coverage and disclaimed any duty to defend pursuant to the property damage exclusion. When owner's lawsuit went to trial, Association obtained a defense verdict on all counts, and then filed this declaratory judgment and breach of contract action against the D&O Carrier, seeking to recover attorneys' fees paid in the underlying suit. The trial court entered summary judgment for insurance Carrier, finding that the sole basis for owner's lawsuit was water damage to condominium property that resulted in leaking, mold and loss of use of her unit, which the court deemed to be destruction of tangible property. On appeal to the Eleventh Circuit Court of Appeal, the appellate court noted that under Florida Law, insurance policies are construed according to their plain meaning, with any ambiguities being construed in favor of the insured. Association raised three arguments: (1) that the origin of the claims was a breach of fiduciary duty, so the fact that the breach resulted in property damage did not trigger the exclusion; (2) that the policy language was ambiguous; and (3) that any wrongful acts committed by Association necessarily related to property, so enforcing the exclusion would render the policy illusory. The appellate court rejected Association's arguments and affirmed the trial court's finding that insurance carrier had no duty to defend.

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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