

# Community Association Law

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## Legislative Report

### 2013 Session

**June 22, 2013**

# About the Panelists

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## **Paul L. Wean, Managing Shareholder**

Paul is a graduate of Boston University and a Law Review Alumni of Western New England College School of Law. Prior to becoming a member of the Florida Bar (1987) and moving to Florida (1988) he was a partner in a Boston-area law firm and thereafter he became a partner in a major Florida law firm, but left in 1995 to start Wean & Malchow, P.A. with the goal of keeping it a small and personal operation. Despite its size, Wean & Malchow, P. A. stays in the forefront of developments in the law effecting Florida communities by actively participating in CAI-FLA's legislative initiatives and lobbying, and by monitoring new case law developments. Paul is also a Florida Supreme Court certified circuit court mediator and he also serves on both Orange County's Planning & Zoning Commission and its Animal Services Advisory Board. More recently, Paul and his wife Joan co-founded "Pawsitive Shelter Photography, Inc.," an effort to save good pets through better photography, presenting the companion animals in Central Florida public shelters as desirable pets, thereby reducing euthanasia rates. It now has 50 volunteers.

# About the Panelists

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## **Helena G. Malchow, Shareholder**

Helena G. Malchow is a shareholder/partner in the firm of Wean & Malchow, P.A. She graduated with honors from Florida State University College of Law in May, 1992. In September, 1995 she joined Paul Wean in the opening of Paul L. Wean, P.A. Three years later, she became a partner with Paul Wean and the firm's name was changed to Wean & Malchow, P.A. Wean & Malchow, P.A. focuses on the representation of all types of community associations. Since 2007, Helena has been a Florida Supreme Court Certified Mediator, which enables her to assist in the resolution of issues primarily involving community associations. Helena is originally from Miami, Florida and speaks fluent Spanish.

# About the Panelists

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## **James E. Olsen, Senior Associate**

Jim was born and raised in Orlando. After graduating from Edgewater High School (1979) he earned a BA in Economics from UCF (1984). After graduating UCF, he attended the Levin College of Law at the University of Florida and graduated in 1986. Jim first started the practice of law under the tutelage of his father and brother as a partner in the law firm of Olsen & Olsen. While at Olsen & Olsen, Jim gained a vast experience in a wide variety of practice areas such as landlord and tenant, domestic law, bankruptcy, and association law. In 1996, Jim began to specialize in association law and he joined Wean & Malchow, P.A., in July 2000. Jim is currently the senior litigation associate at Wean & Malchow. Jim obtained his private pilot's license in 2009. Jim volunteers his time and airplane flying for Pilots-N-Paws Pet Rescue Service to help transport abandoned or shelter dogs to their new homes.

# About the Panelists

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## **Ian J. Lymen, Associate**

Ian J. Lymen attended the University in Miami (Bachelor's of Arts in Political Science, 1986) and the University of Miami School of Law (Juris Doctorate, 1989). Mr. Lymen has been a member of The Florida Bar since 1989 and is admitted to practice in Federal District Court for both the Southern and Middle Districts of Florida. He has extensive experience in a number of practice areas, including civil litigation, real estate, secured creditor's rights, bankruptcy and transactional matters. Mr. Lymen joined Wean & Malchow, P.A., in August, 2010 and now focuses his practice in the areas of association law, including turnover, construction defects, covenant violations, transactional matters and civil litigation. He is a member of the American Bar Association - Real Property, Trust and Estate Law Section; Common Interest Ownership Development Committee.

# Checking on Bills & Laws

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- ❖ Governor's website: [www.flgov.com](http://www.flgov.com)
  - ❖ Click on "Media Center" located in the menu bar across the top, then select "Bill Actions" from the drop-down list.
- ❖ Legislature: [www.leg.state.fl.us](http://www.leg.state.fl.us)
  - ❖ Click on "Senate" or "House" and search by Bill number, or text
- ❖ Wean & Malchow, P.A.: [www.wmlo.com](http://www.wmlo.com)
  - ❖ the monthly ***Community Counsel*** newsletter – we call them as we see them.

# HB 73 Residential Properties

## Signed into law 6/14/2013

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By Rep. Moraitis & Senator Altman

- ❖ The bill revises several provisions relating to the governance of condominium, cooperative, and homeowners' associations, but first ....

# HB 73 Residential Properties

## Elevator Safety

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- ❖ The bill prohibits the enforcement of the Phase II Firefighter's Service requirements for existing elevators until an elevator is replaced or the elevator requires major modification. Note, this does not apply to Phase I requirements.

# HB 73 Residential Properties

## HOA Changes

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- ❖ Gives association members the right to use a smartphone, tablet, portable scanner, or other technology capable of scanning or taking pictures in lieu of the association providing copies to the member, and without charge to the member; but – problems??
- ❖ Permits associations to print and distribute a directory with the members' name, parcel address, and telephone number. However, the association must permit members to exclude their telephone number from the directory by submitting a written request; but – problems??

# HB 73 Residential Properties

## HOA Changes

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- ❖ Requires that any challenge to the election process be commenced within 60 days after the election results are announced but prohibits recall attempts during that time;
- ❖ Prohibits election recalls when there are less than 60 days before the next election; and
- ❖ Provides that the suspension of an owner's rights for infractions does not apply to common areas that are intended to be used only by that owner; to common areas needed to access the home; to utility services to the home; to parking spaces or to elevators.

# HB 73 Residential Properties

## HOA Changes

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- ❖ Financial reporting requirement changes:

  - complied financial statements = \$150,000 to \$299,999

  - reviewed financial statements = \$300,000 to \$499,999

  - audited financial statements = \$500,000 up

- ❖ Associations of up to 50 lots, rather than 75 or fewer units, or with total annual revenues of less than \$150,000 can prepare a report of cash receipts and expenditures in lieu of a financial statement.

# HB 73 Residential Properties

## HOA Changes

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- ❖ The bill also requires newly elected or appointed members of the board to provide a post-election certification that they have read the governing documents of the association, or alternatively, to submit a certification showing the satisfactory completion of the educational curriculum within 1 year before the election or 90 days after the election or appointment.

# HB 73 Residential Properties

## HOA Changes

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- ❖ The personnel records of management company employees are among the records that are not accessible to the association's members.
- ❖ It also deletes the requirement that the parcel owner submit a written request to speak prior to a meeting in order to exercise his or her right to speak at a meeting.

# HB 73 Residential Properties

## HOA Changes

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- ❖ The ability to use silence as an implied consent by a lender has been added, when lender consent to an amendment is required by the governing documents, unless the mortgagee's priority or right to foreclose or other interests is materially adversely affected, just as in Condos since 2007.

# HB 73 Residential Properties

## Condo Changes

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Most of the condo changes mirror the HOA changes.

- ❖ The use of portable scanners to copy official Condo records is permitted.
- ❖ Condo management company employees records are exempted from the Association's official records.
- ❖ The Association may publish a community directory.
- ❖ The financial reporting requirements of Condos are adjusted like HOAs

# HB 73 Residential Properties

## Condo Changes

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- ❖ The same tweaks have been added to the recall process as in Condos as in HOA and Co-ops.
- ❖ The limitations on the suspension of a member's right to use the common elements and limited common elements are the same as in Condos as in HOAs and Co-ops.
- ❖ Clarifies that the board must maintain a copy of a board member's post election certification for at least 5 years or the duration of the board member's tenure, whichever is longer;
- ❖ Clarifies that broadcast notice by closed-circuit television may be made in lieu of a notice posted physically on the condominium property;

# HB 73 Residential Properties

## Condo Changes

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- ❖ Revises the hurricane protection provisions to include impact glass, code-compliant windows and doors, and other types of code-compliant hurricane protection and clarifies the conditions for a unit owner to receive credit for the prior installation of hurricane protection;
- ❖ Extends from 7 years to 10 years (with a member approved amendment) the maximum period for completion of all phases of a phase condominium;

# HB 73 Residential Properties

## Condo Changes

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- ❖ Provides for the creation of a secondary condominium within a primary condominium; (oy vey!!)
- ❖ Permits officers or full-time employees of the condominium ombudsman's office to engage in another profession or any other business that is not directly or indirectly related, or conflicts with, his or her work in the ombudsman's office;

# HB 73 Residential Properties

## Condo Changes

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- ❖ Decreases the number of votes required for the purchase of a lease of property;
- ❖ Corrects an existing error in the condo insurance provision (718.111) regarding responsibility for the reconstruction of condominium property damaged by an uninsured event.

# HB 73 Residential Properties

## Co-op Changes

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- ❖ Co-ops always tend to lag behind Condos and HOAs in Florida law. The changes made in HB 73 are designed to play catch-up, incorporating changes made in past two or three years into the law governing Co-ops.
- ❖ Regarding cooperative associations, the bill provides that meetings of the board held for the purpose of discussing personnel matters are not subject to the open meetings requirement. It also expands the types of official records that are not accessible to members of the association, including records containing specified personal identifying information.
- ❖ The same election certification as HOAs and Condos.

# HB 73 Residential Properties

## Co-op Changes

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- ❖ Co-op official records must be kept with 45 miles of the Co-op property or in the same county where it is located. The official records may be made available for inspection electronically as long as they can be printed as well.
- ❖ There is a penalty for willful failure to allow inspection and willful destruction of Co-op records with intent to harm the Association.
- ❖ Copying of Co-op official records can be done by portable scanners.

# HB 73 Residential Properties

## Co-op Changes

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- ❖ Co-op member directories can be disseminated.
- ❖ The recall process in Co-ops is further conformed to the condo and HOA models, including allowing a recalled director to challenge the recall within 60 days after it has occurred. However, recall challenges are not allowed in the period from 60 days prior to to 60 days after an election.
- ❖ Identical limitations on the suspension of Co-op members right to use the common areas have been made as exist in condominiums.
- ❖ The use of silence by lenders as consent to amendments has been added.

# **HB 73 Residential Properties**

## **Effective Date**

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❖ **These provisions take effect July 1, 2013.**

# HB 7119 – Homeowner Associations

## Signed into law 6/14/2013

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By Rep. LaRosa & Senator Hays

- ❖ Although the bill revises requirements for the governance of homeowners' associations, the first provision in it regulates CAMs.
- ❖ For CAMs, it makes **any** violation of any community association statute (Chapters 718, 719, 720) while performing a management contract a disciplinary offense. By this impossible standard, I'm sorry to say that I haven't yet met a manager who is free of a disciplinary violation.

# HB 7119 – Homeowner Associations

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- ❖ The bill requires homeowners' associations to report specified information to the Division of Florida Condominiums, Timeshares, and Mobile Homes within the Department of Business and Professional Regulation. The reporting deadline is November 22, 2013. The reporting deadline expires in 2016, three years after the reporting has occurred, "...unless reenacted by the Legislature." (Proponents of state oversight of HOAs have given themselves the next three years to pass full regulation of HOAs or die trying.)
- ❖ It requires the department to establish an Internet-based registration system and to submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

# HB 7119 – Homeowner Associations

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- ❖ The bill requires that HOAs provide their members copies of all amendments within 30 days of recording same. It doesn't say whether the failure to do so effects the validity of the amendment.
- ❖ The bill requires that reserves established by the developer be separately accounted for in the budget by reserve component.

# HB 7119 – Homeowner Associations

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- ❖ Transition from developer control occurs when a developer has:
  - ❖ abandoned its amenities or infrastructure by failing to pay assessments or its guarantee for two years, or
  - ❖ filed a Ch. 7 bankruptcy, or
  - ❖ had a receiver appointed and not had it discharged within 30 days, or
  - ❖ lost the property in foreclosure, unless a successor developer takes over.

# HB 7119 – Homeowner Associations

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- ❖ Regarding the homeowner's access to official records of the association, the bill:
  - ❖ Requires that the official records must be maintained for seven years and maintained within 45 miles of the community or within the same county;
  - ❖ Permits associations to maintain the records electronically;
  - ❖ Permits members to photograph records using a camera or other electronic device at no charge;

# HB 7119 – Homeowner Associations

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- ❖ Permits associations to charge copying costs and personnel costs required to retrieve and copy records that exceed one half hour, but the cost may not exceed \$20 per hour, except that personnel costs may not be charged for requests that result in 25 or fewer pages; and
- ❖ Decreases the cost of copies provided on the association's photocopier from 50 cents per page to 25 cents per page.

# HB 7119 – Homeowner Associations

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- ❖ The bill provides that associations do not have to allow nominations at the meeting where the election is to be held if it permits nominations in advance of the meeting. It also provides that an election is not required unless more candidates are nominated than board vacancies exist.
- ❖ The bill limits the liability of associations for assessments that came due before the association acquired title through a foreclosure.

# HB 7119 – Homeowner Associations

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- ❖ Regarding the officers and directors of homeowners' associations, the bill requires:
  - ❖ Newly elected directors to certify that they have read, and will uphold, the governing documents;
  - ❖ Contracts with interested directors to be disclosed and approved by a two-thirds vote of the board, and permits the contract to be cancelled by a vote of the members;

# HB 7119 – Homeowner Associations

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- ❖ The removal of officers and directors who solicit or accept things of value from anyone providing or offering to provide services to the association, with exceptions;
- ❖ The removal of officers or directors charged with theft or embezzlement of association funds; and
- ❖ Associations to maintain insurance or fidelity bonding, but permits the associations to annually waive the insurance requirement upon a majority vote of the members.

# HB 7119 – Homeowner Associations

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- ❖ These provisions take effect July 1, 2013.

# HB 87 – Mortgage Foreclosures

## - Signed By the Governor on 6/7/13

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By Rep. Passidomo & Senator Latvalas

- ❖ The provisions of this bill are controversial.
- ❖ Some say it is good because it will allow associations to move stalled mortgage foreclosure cases by filing for an expedited order via a “show cause” procedure.

# HB 87 – Mortgage Foreclosures

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- ❖ An association can request an “order to show cause” for entry of a final judgment. But many obstacles exist to getting there. The court’s show cause order must contain a long list of rights available to the property owner and this may prompt the exercise of those rights, making the process longer than if the case proceeded normally. It may create a procedural death match between the Association and the property owner.

# HB 87 – Mortgage Foreclosures

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- ❖ It shortens the statute of limitations on actions to seek a deficiency judgment against a delinquent borrower following a mortgage foreclosure from 5 years to 1 year. It also limits the size of deficiency judgments on residential property based on actual value, not debt.
- ❖ It helps lenders deal with document authentication, lost documents and authority to foreclose - all issues that have plagued lenders over the past 6 years.
- ❖ It provides that after a foreclosure sale has occurred and becomes final no challenge can be made to recover the property. Money damage are the only remedy available. Return of the property is NOT an option.

# SB286 (Negron)/ HB575 (Passidomo) Design Professionals

**- Signed By the Governor 4/24/2013**

Gives **individual design professionals** absolute immunity from liability for economic damages for their own professional negligence.

The only conditions on this grant of immunity are:

- (1) that the individuals not be direct parties to the contract, but rather use a business entity as the contracting party, and
- (2) the contract state in large, conspicuous type that there is no personal liability, and
- (3) that the business entity carry whatever liability insurance, if any, is required by the contract.

Individual design professionals are then free to hide behind corporate shell and avoid any liability for losses caused by their own incompetence, so long as innocent third parties are not also damaged.

# SB 120 Latvala Condominiums

- **Signed by the Governor on June 6, 2013,  
effective upon becoming law.**

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This bill makes it easier for a condominium to be created in the event there is a defect in its formation. A condominium will come into existence when a proper surveyor's certification is recorded or "**... upon the recording of an instrument that transfers title to a unit .... which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first.**"

So an innocent buyer who is unaware of a defect in the formation of a condominium can become the instrument by which a condominium is created.

Someone who might otherwise want to set aside the purchase might now be estopped to do so.

# HB 77 Porter Landlords and Tenants

**- Signed By the Governor 6/12/2013**

- ❖ Contains many revisions to the Residential Landlord – Tenant Act that will impact community associations that acquire title and then rent out property to third parties.
- ❖ Excludes from the Acts protections persons who under a contract to purchase pay a year's rent or who pay 5% of the purchase price and at least one month's rent.
- ❖ While it prohibits residential lease from trying to waive claims for prevailing party attorney's fees, it also prevents tenants suing landlords for personal injuries from recovering attorney's fees in connection with their PI claims.

# HB 77 Porter Landlords and Tenants

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- ❖ Changes the form disclosures required to be given regarding prepaid rent and deposits, including a new statutory form of disclosure, beginning no later than 1/1/2014.
- ❖ Places a burden on a landlord to give notice to the tenant within fifteen (15) days of the end of a tenancy of the intent to use some or all of a security deposit.
- ❖ Places a burden on the tenant to object to the use of the security deposit within 15 days after notice, although the tenant's right to sue for damages is preserved.

# HB 77 Porter Landlords and Tenants

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- ❖ Landlords are made responsible for installing and maintaining window screens.
- ❖ If, after giving a notice of non-compliance to a tenant, a subsequent violation of a similar type occurs within twelve (12) months, an eviction can be commenced without further notice and without giving the tenant any further opportunity to cure the violation.

# HB 77 Porter Landlords and Tenants

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- ❖ A Landlord is now free to accept a partial payment without waiving a violation, including non-payment, provided that the landlord:
  - ❖ Gives a receipt showing the date and balance due, and
  - ❖ Deposits the rent with the court's registry, and
  - ❖ Posts a new three (3) day notice for the balance.
  - ❖ Files an eviction action with 45 days of the noncompliance.

# HB 77 Porter Landlords and Tenants

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- ❖ Leases can be written that require the landlord to notify the tenant in advance if the lease will not be renewed, but that period can not be more than 60 days.
- ❖ In an eviction action if the defense of improper notice or a defect in the pleadings is raised, before the eviction suit can be dismissed, the landlord must be given an opportunity to cure the defect(s) and the tenant must pay into the court registry any rent alleged to be due based on a defective three (3) day notice of nonpayment of rent.

# HB 77 Porter Landlords and Tenants

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- ❖ When a writ of possession is entered ordering the landlord to be given possession within 24 hours, weekends and holidays will not toll the 24 hour time period.
- ❖ Among the new bases for retaliation a tenant may allege against a landlord are that the tenant paid rent to the landlord's community association to meet the landlord's obligations.
- ❖ On balance this bill really comes down hard on residential tenants !
- ❖ This bill takes effect on July 1, 2013.

# HB 999 – Submerged Land Leases

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By Rep. Patronis & Senator Altman - signed into law by the Governor on May 30, 2013.

Section 7 of this environmental permitting bill contains language which exempts multi-family residences with docks from paying the state sovereign submerged land lease fees for an area equal to or less than 10 times the riparian shoreline, times the number of units with docks. This will provide not only a tangible net benefit financially, but also logistically, as multi-family residences may now be exempt from the lease fees, the transfer fees, renewal fees, etc.

**The rich get richer ....**

# Community Association Law

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## Legislative Report

### 2013 Session

Questions ??