

# COMMUNITY COUNSEL

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## RECENT CASES

- ◆ **BUSINESS PROPERTY OWNER ON NOTICE OF ASSOCIATION'S RIGHT TO AMEND DECLARATION TO PROHIBIT RESIDENTIAL USE OF THE PROPERTIES AND SUCH AMENDMENT WAS CONSISTENT WITH THE SCHEME OF DEVELOPMENT.**
- ◆ **TRIAL COURT CORRECTLY RESOLVES WATER LEAK CASE, HOLDING UPSTAIRS OWNER LIABLE TO DOWNSTAIRS OWNER AND ASSOCIATION FOR WATER DAMAGES.**

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.

## ELEMENTS OF A CONSTRUCTION CONTRACT

Many clients enter into construction contracts, large and small, without the aid of legal counsel. Often there is no consequence to this action and the work is done without problem.

Sometimes, however, there can be serious negative ramifications to doing it on your own, including: the placement of liens against association property of common areas/elements; the failure of contractors to complete the work at all or as contracted; the loss of money to contractors who are paid too much upfront and who then stop working; the failure to obtain warranties or to have them honored; the occurrence of accidents which cause damage or injury, without adequate recourse to insurance. Most, if not all of these issues can be prevented by some careful craftsmanship in a construction contract, and we strongly encourage clients to have their attorney prepare or review any proposed construction contract.

What won't be addressed by an attorney are the technical specifications for performing the work that is the subject of the contract. Attorneys do not try to practice outside their areas of expertise, and ours is dealing with the rights and obligations of the parties to the contracts relative to how the contract is performed, not how the work that is the subject of the contract is performed. So here is a quick summary of the legal subjects that should be covered in any decent construction contract:

1. Brief description of the work being performed. This is necessary to make the contract enforceable.
2. Time for completing performance. Otherwise, performance of a contract could go on indefinitely, especially if a contractor has

been paid its profit upfront. It will then be tempted to find other work and leave a small crew to work on your project.

3. Payment terms. Never pay more than you have received in value at any time. This gives the contractor incentive to continue to work to complete the job.

4. Insurance coverage. Make sure there is adequate liability and workers' compensation. Do not accept a waiver of the latter, as it exposes you to unlimited liability for workers' injuries, without the protection of insurance coverage.

5. Change order procedures. To be sure that necessary changes are properly priced and the altered work gets done.

6. Indemnification provisions. To make the contractor responsible for damage and injuries that it causes to third persons.

7. Dispute resolution procedures. This includes inspection or work and withholding of payments for faulty work as well as the nature and location of more formal legal proceedings. Avoid arbitration—it is more expensive and tends to be biased toward the contractors. Be sure to include a venue provision and a prevailing party attorney's fee provision.

8. Adherence to Construction Lien Law requirements. To ensure that lien waivers and releases are obtained in proper form as the project progresses.

9. Warranties. Get express and implied warranties from the contractor and express warranties from material manufacturers and suppliers. Make sure they are fully valid.



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## RECENT CASE SUMMARIES

In **Luani Plaza, Inc., vs. Burton**, 39 Fla. L. Weekly D2103a (Fla. 3d DCA, October 8, 2014), Association filed an action for injunctive relief against Owner to prevent Owner from using his unit for residential purposes. Association can be best described as a commercial plaza of businesses and professional offices. The entire complex resembles a strip mall and consists of 15 separate parcels, each a "unit." The units are held by individual business owners in fee simple. Each "unit" includes that business owner's individual structure, and the land in front and back of the structure. The legal descriptions of each "unit" are established by metes and bounds descriptions found in a declaration of covenants and restrictions. Though not a condominium, the ownership constitutes a "common interest community." The recorded declaration provides that covenants and restrictions run with the land and that each owner of a "unit" is a "member" of Association. Additionally, the declaration cedes architectural control and right of approval of all proposed external modifications to structures within the project to Association. Owner purchased his units in 1990 and 2002. In 2003, Owner applied to Association for permission to erect dormers on the second floor of his units for the purpose of creating storage space. Association neither approved or disapproved the proposal. Rather, Association advised Owner that the plans were not sufficiently complete for Association to make a decision. Owner ignored the request for further information and built the dormers. Thereafter, without notice to Association, Owner applied to the city to convert the second floor of each unit to residential use. In connection therewith, Owner obtained from the city a recordable affordable housing restriction declaration, which he executed on December 7, 2007, without the prior knowledge or approval of Association. On February 11, 2008, Association amended its declaration to prohibit residential use of the units. When Owner continued to move forward with his project, Association filed the present action seeking a mandatory injunction against Owner's use of the property for residential purposes. It was not until after the filing of the lawsuit that Owner received certificates of occupancy for his units. The trial court ruled that Owner could put the units to residential use. On appeal to the Third District Court of Appeal, the court noted that the declaration was properly amended by vote of the unit owners. Owner argued that the amendment was unenforceable against him for 2 reasons: (1) the prohibition against residential use unreasonably and arbitrarily denied him the use of his own private property and (2) the amendment was being impermissibly applied against him retroactively. The appellate court disagreed with Owner. The appellate court found that the amendment was entirely consistent with the nature of the project and constituted a reasonable exercise of the amending power in the declaration. Similarly, the appellate court rejected the second argument, finding that Owner was on notice of the prohibition against residential use of the units prior to the filing of the litigation, and prior to Owner obtaining certificates of occupancy for his units.

In **Devito vs. Hage**, 21 Fla. L. Weekly Supp. 403b (Fla. 6<sup>th</sup> Judicial Cir., January 13, 2014), the litigants were the Downstairs Unit Owner and Upstairs Unit Owner, respectively, of units located in condominium Association. Downstairs Owner discovered a water leak in his unit emanating from the upstairs unit. The water pipe at issue was located within an interior, free-standing wall in Upstairs Unit Owner's unit. On one side of the free-standing wall are two closets. One closet houses a hot water heater and the other contains a washing machine and dryer. On the other side of the free-standing wall from the utility area is a bedroom closet. The leak was a leak from the water line serving the washing machine, and located within the free-standing wall. The declaration provided in relevant part that all ". . . conduits and wires up to their outlets and all other utility lines and pipes up to their outlets, regardless of location, constitute parts of the common elements." The declaration further provided that a unit owner was responsible "for any damage to the common elements or another unit" resulting from "leaking plumbing of any kind. . . within the unit." The trial court determined that the free-standing wall located entirely within the boundaries of the unit was part of the "unit" and not part of the common elements and that the leaking water line was not a "utility line" as contemplated by the declaration. Thus the court entered summary judgment in favor of Downstairs Unit Owner and Association against Upstairs Unit Owner for liability and damages caused by the leaking water line.

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