COMMUNITY COUNSEL

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RECENT CASES

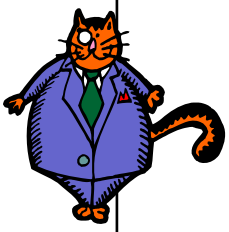
- COURT REFUSES TO INCLUDE IN LIEN FORECLOSURE JUDGMENT ASSESSMENTS THAT WERE NEITHER INCLUDED ON THE CLAIM OF LIEN NOR INCLUDED IN THE PLEADINGS.
- COURT DENIED ASSOCIATION A TEMPORARY INJUNCTION TO PREVENT AN OWNER FROM USING ITS ROADS TO HAUL EQUIPMENT TO CLEAR LARGE TRACT OF ADJACENT LAND IN ABSENCE OF EVIDENCE OF IRREPARABLE HARM.

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.

THE – AHH – FAT CAT HAS SUNG — PART III

We continue our review of 2014 community association legislation with more of HB 807.

This omnibus bill also includes catch-up measures for co-ops and HOAs. Specifically, co-ops are now governed by financial reporting requirements similar to those that have governed condominiums for the past several years. Compare Sections 719.106 and 718.111(13), Fla. Stat.



Also, as in condominiums, co-op members are now disqualified to be candidates for service on the board if they are delinquent in financial obligations due to the association. Compare Sections 719.106 and 718.112(2)(d), (n) and (o), Fla. Stat.

Finally, both co-ops and HOAs are given the same emergency powers—operable when a state of emergency has been declared by governmental authorities—that have been on the books for condominium associations for about a decade. Compare Sections 719.128 and 720.316 to 718.1265, Fla. Stat.

In addition, some problematic additions have been made to the HOA statute, Chapter 720. As of July 1, 2014 that statute allows a handicapped person entitled to attend board and/or membership meetings to give notice of the person's desire to have the meeting(s) held in a handicap-accessible location. The problem is that the statute fails to set any time parameters for this notice to be given. So what happens if the notice arrives just before such a meeting is set to begin? Does this require the meeting to be cancelled or postponed? There is no guidance given. The issue is especially murky when dealing with a board meeting that requires only a forty-eight hour notice to begin with.

At least equally troublesome is an amendment to an already confusing provision adopted in 2013. That provision, which requires adopted amendments to be provided to the members within 30 days of recording, still fails to identify a consequence or remedy for failure to do so. In addition however, it has been modified to provide that once adopted and recorded, it is sufficient to notify the members that the amendment has been recorded and to provide them with the recording information and with an as-recorded copy upon request, *unless the content of the amendment has changed from the as-proposed version to the as-adopted version* (in which case the as-adopted version must be provided).

The obvious problem with this language is that it implies that something can occur which most community association practitioners believe cannot lawfully occur. i.e. that a proposed amendment can be changed by something other than a membership vote. In the normal course of events a proposed amendment is drafted and sent to the membership, and then placed before the members for voting. There is generally no ability to accept suggested changes from the floor, since those changes have not been noticed to the members for consideration. So not only does the statute continue to require the association to take action according to a time frame without giving any indication of the consequences of failing to meet the deadline imposed, but the statute does mischief to the procedure used by nearly all HOAs in Florida, opening a door wide for controversy and dispute; as if another avenue for that was needed in this state.

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RECENT CASE SUMMARIES

In **Losner vs. The Australian of Palm Beach Condominium Association, Inc.**, 39 Fla. L. Weekly D1227b (Fla. 4th DCA, June 11, 2014) Association brought suit to collect unpaid assessments. Owner argued that the trial court's order foreclosing upon two special assessments in addition to the regular quarterly assessments, when the special assessments were not contained in any pleading, was error. On appeal to the Fourth District Court of Appeal, the appellate court noted that Section 718.116(5)(b), Fla. Stat., states that a claim of lien by a condominium association for unpaid assessments "secures all unpaid assessments that are due *and that may accrue after the claim of lien is recorded* and through the entry of final judgment." (emphasis added). However, the word "accrue" references assessments already made before a claim of lien is filed, but coming due afterwards, but it does not refer to additional assessments for other purposes, such as separate assessments that are assessed against an owner after the time the complaint to foreclose on a claim of lien is filed. Adding assessments not naturally accruing from assessments pled in the complaint violates due process because the owner does not have notice to prepare a defense, including alleging separate defenses in regards to the later added assessments. The appellate court reiterated that "it is improper to 'piggyback' unplead assessments on top of those claimed in the claim of lien and the foreclosure complaint." Thus, the appellate court held that the trial court erred in the instant case in awarding Association its claims of two special assessments in the final judgment where those claims were not found in a proper pleading. Thus, the appellate court reversed the portion of the final judgment awarding Association two special assessments, as well as any interest, fees, and costs associated with that award and remanded the case to the trial court to correct the final judgment.

In **McCue Holdings, LLC, *et al.,* vs. Heritage Farms Property Association, Inc.**, 39 Fla. L. Weekly D1323a (Fla. 2d DCA, June 20, 2014) Association obtained a temporary injunction against Owner enjoining Owner from using the roads within the subdivision regulated by Association to transport or deliver equipment, material, or personnel to improve adjacent property owned by Owner. Owner lives in the subdivision operated by Association. Behind Owner's house is forty-one acres of unimproved agricultural land that is also owned by Owner. This forty-one acres is not part of Association's subdivision. Owner trailered a bobcat to his residence to clear a portion of his lot to build a fence. Owner then proceeded to clear a portion of the acreage. Owner testified at the hearing that he had permits for all the work he performed. It appeared from the testimony that Association was primarily concerned with Owner's decision to clear the acreage. However, Association filed an action to enjoin Owner from using its road system to transport the bobcat or any other items to the acreage. Following a hearing, the trial court granted the temporary injunction. The trial court then entered an order on the emergency verified motion for injunction. However, the order contained no findings of law or fact. On appeal to the Second District Court of Appeal, the appellate court noted that the order does not "specify the reasons for entry" as required by the rules of civil procedure. An injunction must include specific findings regarding the likelihood of irreparable harm, unavailability of an adequate remedy at law, substantial likelihood of success on the merits, and consideration of public policy. The order under review also failed to specify any reasons for entry of the temporary injunction. In reversing the trial court, the appellate court noted that there appeared to be very little evidence of any irreparable harm to Association's streets if they are used occasionally to transport some equipment to owner's lot. Other owners of lots could transport equipment over the roads for the purpose of performing heavy landscaping on their lots within the subdivision. Thus, the order of the trial court was reversed and remanded for further proceedings in this action in which Association sought both damages and permanent injunction.

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