COMMUNITY COUNSEL

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AN AREA IN NEED OF REFORM — NOW

Every community has to deal with the pets. They are a part of our collective lives, beloved by many, an essential part of our families. To others they are an annoyance, noisy and a source of allergies. Associations are called upon to hold the line between these camps all the time.

To complicate matters there is the matter of "service animals" and "emotional support pets" – two separate and distinct classifications of animals recognized by federal law as providing benefits to handicapped persons to such an extent that housing facilities are required to permit them even where "no pet" regulations are in place.

Aside from the differences between these two classes of animals and the standards which they must meet (service animals are not pets, they are working animals with training and/or skills; emotional support pets are just that, they are pets) and the standards to which they can be held (service animals can go where people can go, emotional support pets can be excluded from places like restaurants), there are two further complicating factors that make matters even more confusing for community leaders.

The first factor is the matter of health privacy to which all people are entitled by law. This makes inquiries into the bona fides of the animals and the needs of their people rather indirect and circumspect at best. It is hard to elicit with certainty enough information to satisfy a suspicious board of directors. That suspicions may be present at all is the second factor, and they often arise from the existence of a large number of places purporting to offer fraudulent "certifications" for service animals, when in fact there is no organization that "certifies" service animals. Many Internet sites sell vests and certificates for animals with no training or skills and the people buying them will try to pass off their undisciplined animals as service animals.

The popular media is replete with horror stories of so-called animals going berserk on airplanes and running up and down the aisles. Such incidents poison the well for everyone else. Despite these stories, it appears that no serious national work is being done on either an administrative or legislative front to fix the problem and this is a shame, because it does harm both to handicapped persons who have real service animal needs and to the dedicated organizations that work so hard to train animals to assist them.

It also presents a dilemma for communities who cannot understand what a bona fide emotional support pet is and how to distinguish it from a regular pet and a service animal. That distinction needs to be made much clearer and the rights, privileges and duties that go along with having an emotional support pet also need to be made clear, for the sake of the pet, the pet owner and the community where both live. That the government chooses to sit on its hands is surprising, since all sides are calling on it to act on this issue, and to act now.

RECENT CASES

- DOCUMENTS THAT PROHIBIT IMPROVEMENTS "OFFENSIVE TO ADJACENT NEIGHBORS" DID NOT GRANT A VETO TO THOSE NEIGHBORS, BUT LEFT DECISION TO THE BOARD.
- PRO SE OWNER WHO REQUESTED AN OPPORTUNITY TO APPEAR BY PHONE SHOULD HAVE BEEN GIVEN THAT OPPORTUNITY BEFORE ALLOWING PROPERTY TO BE FORECLOSED.

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.

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 **Leamer vs. Omni Amelia Island, LLC, et al.,** 40 Fla.L.Weekly D283b (Fla. 1st DCA, January 27, 2015) Owner brought suit against the owner of the adjoining townhouse objecting to yard lights installed by the adjoining owner. The governing documents of Association provided that "ostentatious site features" such as "*topiary, sculpture, free standing fountains in the foreground of townhouses or lighting systems which may be offensive to adjacent neighbors is unacceptable*." Adjacent Owner installed landscape lighting without submitting an application for approval by association. Deeming the light offensive, Owner complained to the board that the lighting was "offensive" to him and shined in his windows at night. Adjacent Owner who installed the lighting lives part time in Atlanta, Georgia and desired that the home look occupied when he is away. Association's board interpreted the provision of the governing documents as giving a "veto" power to adjacent neighbors. Therefore, in addition to submitting an application and paying the fee, the Adjacent Owner who installed the lighting was required to obtain the written approval of his neighbors. Ultimately, the Adjacent Owner who installed the lighting paid the fee and submitted the necessary application but did not obtain his neighbor's consent. The board reviewed the application and found the lighting "generally consistent" with the community's standards, recommended minor alterations, but found that it was powerless to approve the installation without his neighbor's consent, which was not to be forthcoming. Eventually, Owner filed suit based upon his objection that the lights were "excessively bright" and positioned in such a way that they shined into his unit. Owner further complained that the lighting "flooding into his home" was a source of "serious discomfort, distress and inconvenience." In the interim, Adjacent Owner made minor changes to the lighting plan as suggested by the board, which now deemed the lighting to be fully consistent with the neighborhood requirements, but for approval of the Owner. In the trial court, Adjacent Owner sought a declaration from the court that the board's interpretation giving Owner a "veto" was unreasonable. Association and Owner also sought summary judgment that their interpretation be upheld. The trial court granted summary judgment in favor of Association and complaining Owner. On appeal, the First District Court noted that the provisions of the governing documents establish a general principle that "ostentatious site features" are "unacceptable." However, it is not at all clear what "ostentatious" means in this context. The appellate court rejected as unreasonable that the governing documents were intended to prohibit *any* lighting system, no matter how benign, that "may be offensive to adjacent neighbors." The determination of whether a lighting system that "may be offensive to adjacent neighbors" is "ostentatious" requires the exercise of aesthetic judgment. The question for the court was who gets to exercise the judgment? The appellate court reversed the trial court and held that it is the board, not an objecting adjacent owner, who gets to determine what is, or what is not, ostentatious and thus in violation of the governing documents. Adjacent neighbors do not have "veto" power, which would be contrary to the long history in Florida that restrictions should be narrowly construed in favor of the free use of land, and judicially grafting a neighbor's "veto" restriction would violate this long established policy.

In **Hubsch vs. Howell Creek Reserve Community Association, Inc., et al.**, 40 Fla.L.Weekly D214a (Fla. 5th DCA, January 16, 2015) Association brought an action to foreclose an assessment lien against Owner. Owner's daughter filed an answer, allegedly on her mother's behalf, admitting the claim and seeking a workout arrangement. Association sought summary judgment. Owner responded by filing a motion for continuance and, failing that, to appear telephonically at the summary judgment hearing. The motion for continuance was denied without a hearing, but the trial court took no action on the motion for telephonic hearing even though both motions were filed at the same time. The summary judgment hearing took place as scheduled, and Owner's daughter appeared at the hearing. However, as a non-attorney, Owner's daughter had no authority to act for her mother. The trial court entered summary judgment. On appeal to the Fifth District Court of Appeal, the appellate court reversed the entry of summary judgment and held that it was error for the trial court to proceed without giving Owner the opportunity to appear by telephone.

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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