COMMUNITY COUNSEL

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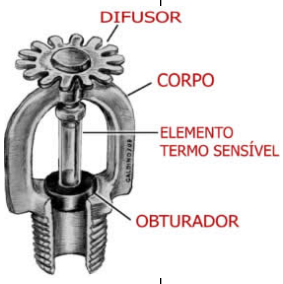
RETROFITTING REDUX

Okay, let's have some more on this summer's hottest topic. Since last month there have been more heated debates and more positions staked out. The Division has been widely quoted as saying that the retrofitting requirement applies to all condominiums. Then someone pointed out that it is the State Fire Marshal, not the Division of Condominiums who has jurisdiction over fire safety. This caused Senator Jordan Ring, one of the sponsors of the 2010 rewrite of Section 718.112(2)(l), Fla. Stat. to write a letter on July 28th to the Division Director explaining the intent (his) intent of the 2010 bill. In the letter he caused more confusion when he said:



***There may be other circumstances where buildings less than 75 feet in height must be equipped with fire sprinklers**, but there is no blanket requirement that all condominiums in the State of Florida, regardless of height or occupancy or date of construction, be equipped or retrofitted with fire sprinklers.* (Emphasis supplied)

His letter just caused more panic and uncertainty. Then at the beginning of August the American and Florida Fire Sprinkler Associations jointly issued a FAQ on the subject. They stated with no uncertainty that:

There is no statutory fire sprinkler retrofit requirement for existing mid-rise or low-rise condominiums and therefore no need to vote to opt out.

So there you have it in a nut shell. You can believe an organization created in 2014, apparently as a trade association and headquartered in Eustis, FL, or you can believe the bill's sponsor. Two things are certain however. If there is an error, the cost of correction is substantial. Further, there is a way to obtain statutory immunization from any fire sprinkler retrofitting requirement that may exist, and that is to take a vote.

As a practical matter the only way to determine whether your facility is subject to the requirement of retrofitting for fire sprinklers is to consult an engineer. But typically, most engineers - in their engagement contracts - require that their clients agree to either absolve them of liability or substantially limit their potential exposure for professional liability to amounts they receive as compensation or to limited insurance coverage they may carry. So if you seek an opinion from an engineer and that opinion is wrong, you may find yourself having to retrofit but having no recourse to recover the expense involved.

The only certain way to obtain immunity from the need to retrofit your units and common elements with fire sprinkler systems (but not from other engineered life safety systems that may be required by the fire marshal) is by taking a vote and getting approval of a majority of the voting interests to waive the retrofitting requirement for fire sprinklers, as permitted by the statute.

So no one is saying that all condominiums must retrofit. But what we are saying is that all condominiums face uncertainty and deserve immunity, and they can do this most economically by taking a simple vote, recording a simple certificate, filing a simple form, and sending their members a simple notice for their records. Simple, isn't it?

RECENT CASES

- CONDO ARBITRATOR REVERSES LONG-STANDING POSITION AND HOLDS THAT ORAL RESIGNATION IN AN OPEN MEETING IS INEFFECTIVE AND MUST BE IN WRITING TO BE EFFECTIVE.
- DECLARATION PROVISION ONLY REQUIRING NOTICE TO ASSOCIATION PRIOR TO SELLING OR RENTING DID NOT PRECLUDE OR CONFLICT WITH RULES REQUIRING APPROVAL OF RENTAL AND MINIMUM RENTAL PERIOD.

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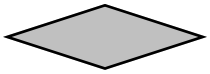
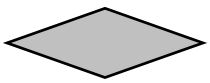
RECENT CASE SUMMARIES

In **In Re: Petition for Arbitration: Brand, et al., vs. Sundance Association, Inc.**, Case No. 2016-00-5242 (Jones, Summary Final Order, July 6, 2016) Petitioner filed an election dispute arbitration action against Association alleging that they did not effectively resign from Association's board of directors. At the November 7, 2015 board meeting, Petitioners verbally resigned from the board of directors. In the arbitration action, Petitioners alleged that their verbal resignations were not effective because, under Florida Law, resignations must be in writing. Association argued that because the resignations were at a properly notice board meeting, the resignations were effective. In the arbitration, the arbitrator noted that a condominium is subject to both Chapter 718, Fla. Stat. (i.e., the Condominium Act) and Chapter 617 (i.e., the Not for Profit Corporations Act). Pursuant to Section 617.0809, Fla. Stat., a "director may resign at any time by giving *written* notice to the board of directors or its chair or to the corporation." Notwithstanding this language, a long line of arbitration decisions held that a verbal resignation given at a board meeting was effective. However, after reviewing a 2013 First District Court of Appeal decision addressing the interpretation of an identical statute contained in Chapter 607, Fla. Stat. (i.e., the Florida for Profit Corporations Act) which held that resignations **must** be in writing to be effective, the arbitrator ruled in favor of Petitioners and held that their verbal resignations from the board were not effective unless in writing, even if made at an open board meeting duly noticed.

Editor's Note: This arbitration decision reverses a long line of prior arbitration decisions going back as early as 1994.



In **Le Scampi Condominium Association, Inc., vs. Hall**, 41 Fla. L. Weekly D1582a (Fla. 2nd DCA, July 8, 2016) Association filed suit for declaratory and injunctive relief against Owners. Association alleged that Owners were leasing their unit for less than one month and without Association's prior approval in violation of the rules and regulations. Association is governed by its declaration of condominium. Attached to the recorded declaration are the original rules and regulations. Section 3 of the declaration provides that if there is a conflict between the rules and regulations and the declaration, the declaration would control. The declaration has two provisions dealing with the sale, lease or transfer of condominium units. The first section provides for "unrestricted" transfer to an owner's spouse or other family members. Such an unrestricted transfer requires notice to Association within thirty days *after* such unrestricted transfer. The second provision of the declaration dealt with any sale, lease or transfer to the persons named in the restricted category. In that event owner must give not less than thirty days *prior* written notice of the proposed transfer. Therefore, under the first provision of the declaration, transfers to certain family members was "unrestricted." Under the second provision, the only restriction was prior notice to Association. The rules and regulations then provided that units may be rented *"subject to the approval of the Association*" and also provided that units could not be rented for less than one (1) month. In the trial court, Owners argued that the provisions of the rules and regulations conflicted with the language of the declaration, and therefore the rules and regulations were unenforceable. The trial court granted summary judgment in favor of Owners. The question on appeal to the Second District Court of Appeal was whether the trial court erred in determining that the portions of the rules and regulations limiting rentals to one month and requiring Association approval prior to leasing are unenforceable because they purportedly conflict with the declaration. The appellate court noted that the trial court's ruling on an interpretation of the declaration as conferring a right to sell, lease, or transfer a condominium unit to persons other than family members is restricted only to the notice requirements of the declaration. Under the trial court's view, portions of the rules and regulations conflict with the declaration because the rules and regulations impose additional restrictions. The appellate court found however that the provisions of the declaration are unrestricted with the exception of the notice requirement. Instead, the declaration merely imposes a prior-notice requirement and specifies the content of the notice. It does not otherwise address an owner's right to sell, lease, or transfer a condominium unit to persons who are not family members. Thus, the appellate court held that the provisions of the declaration were not in conflict with the rules and regulations, and thus Owners were subject to the additional rental restrictions contained in the rules and regulation.



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