COMMUNITY COUNSEL

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CHANGING HOA RESERVES – WHAT DO YOU THINK?

One proposal that is likely to see the light of day in the 2017 legislative session is one that would require all Florida homeowner associations to have mandatory reserve accounts by default. Currently, HOAs are only required to have reserve accounts for deferred maintenance or replacement of their capital assets in very specific situations, i.e. when the reserves were required by the developer at the outset of the community's development, or when the members themselves vote to establish specific reserve accounts and make them mandatory, or when some other government authorities requires the establishment funding of mandatory reserves.

Except for those three specific instances reserves are discretionary and a Florida homeowners association is free to establish non mandatory reserves and the Board of Directors may dip into such reserves and use those funds for any legitimate Association purpose.

Under proposals that are likely to come before the Florida legislature in 2017, reserves would be treated much as they are for Florida condominiums and cooperatives. This means that for any assets having replacement cost in excess of $10,000, an HOA would be required to set aside funds to replace or rehabilitate the asset. The funds allocated to the asset could not be used for any other purpose, nor could the funding be waived or reduced without the prior consent of the members— usually by a vote of least a majority of a quorum of the members at a duly called membership meeting. The question is, what do you think of this?

While the condominium system makes sense, because of the extensive physical systems involved in the typical condominium structure, it is not at all clear that a typical homeowner Association has the same type of assets or needs. To the contrary, due to the great variety and size of homeowner associations throughout the state, flexibility in the use of reserves seems to be a better policy than the one-size-fits all approach that is being contemplated regarding reserves. This approach seems to unnecessarily straitjacket HOAs without taking into account the diversity of assets and division of maintenance responsibilities that are found throughout the state of Florida.

It would seem a better approach to allow the members to vote on which system they find more appropriate, or to have multiple systems available and sanctioned by statute based upon factors such as (1) the size of the community, (2) the common and recreational amenities available to the members, (3) whether or not the roads in the communities are public or private, (4) whether the community Association is responsible for maintaining portions of the private dwellings and/or the individually owned lots.

Absent an approach that is more tailored to the diversity found in Florida HOAs, an attempt to impose the condominium approach to reserves onto Florida homeowner associations would seem to do nothing but make statutory regulations consistent between the two types of communities for convenience sake while imposing a substantial increase in the assessment burden borne by members of Florida HOAs, often for no good or apparent reason. Do you agree?

RECENT CASES

- CONDO ASSOCIATION DENIED RECOVERY OF ATTORNEY'S FEES WHEN UNIT OWNER ARGUED THAT ITS COMPLAINT ABOUT BOTHERSOME NEIGHBORS WAS AN INQUIRY AND THE ASSOCIATION'S VAGUE PROMISE TO TAKE APPROPRIATE ACTION WAS NOT A SUBSTANTIVE RESPONSE.
- FANNIE MAE COULD NOT PREVAIL IN ACTION TO REQUIRE ASSOCIATION TO WIPE OUT ASSESSMENTS DUE PRIOR TO IT ACQUIRING TITLE WHEN IT FAILED TO INCLUDE THE ASSOCIATION IN THE FORECLOSURE ACTION.

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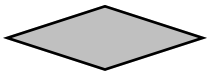
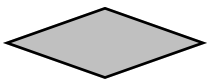
RECENT CASE SUMMARIES

In **Waterside at Coquina Key South Condominium Association, Inc., vs. Gamboni, et al.**, 23 Fla. L. Weekly Supp. 671a (Fla. 6th Judicial Circuit (Appellate), November 3, 2015), Owners filed an action for declaratory and injunctive relief against Association. The trial court dismissed Owner's second amended complaint with prejudice. Association then sought an award of attorney's fees and costs. In response to the fee motion, Owners filed correspondence sent to Association via certified mail. In the letter, Owners vigorously complained about the conduct of their neighbors and reminded Association of its prior statement that "if the destructive behavior continued, the Association would take legal action." Owner's implored Association to take legal action as the tenants' conduct continued to be a problem. In response to Owner's letter, Association stated that if would take whatever measures are permitted by law to stop the harassment. The issues before the trial court were whether Owner's letter was a "unit owner inquiry" and whether Association's reply constituted a "substantive reply." The trial court found that Owner's letter was in fact a "unit owner inquiry" and that Association's reply was not "substantive" and thus denied Association its attorneys' fees. On appeal, Association argued that Owner's letter was more in the nature of a complaint, not an "inquiry", and thus it had no duty to respond. Association further argued that even if the letter was an inquiry, Association's response was a "substantive reply." Applying the law to the facts, the appellate court upheld the decision of the trial court and found that Owner's letter was an "inquiry", and that Association's response was not "substantive", and therefore upheld the trial court's denial of attorneys' fees to Association.



In **Ballantrae Homeowner's Association, Inc., vs. FNMA**, 41 Fla. L. Weekly D2037a (Fla. 2d DCA, September 2, 2016) Fannie Mae brought suit against Association for declaratory and injunctive relief regarding the extent of Fannie Mae's liability for unpaid assessments. Fannie Mae held a first mortgage on property located within Association. Servicers of the loan initiated foreclosure proceedings against the real property. Association was not named as a defendant in the action. As such Association's lien rights were never adjudicated. A final judgment of foreclosure was entered and Fannie Mae purchased the property. Fannie Mae sought an estoppel letter from Association as to Fannie Mae's liability for unpaid amounts due on the property. Association sent an estoppel letter stating the full amounts owed to Association, including the amounts owed by the prior owner. Fannie Mae rejected the estoppel letter and filed the instant lawsuit. In its count for declaratory relief, Fannie Mae sought a determination that, pursuant to the terms of the declaration, its financial responsibility to Association was limited to the assessments that accrued after it acquired title. In its count for injunctive relief, Fannie Mae sought to compel Association to provide an estoppel letter for the "correct" amounts due under the declaration. Association contended that because it had not been named or joined in the foreclosure action, its liens rights were not impacted by the foreclosure judgment and thus the unpaid amounts remained due and owing. Further, Association asserted that had it been made a party to the foreclosure action, it would have been afforded certain opportunities as a junior lienholder, including the right to bid on the properties and share in any surplus proceeds. The trial court entered summary judgment in favor of Fannie Mae and ordered Association to issue a revised estoppel letter. On appeal to the Second District Court of Appeal, the appellate court reviewed the specific language of the declaration. The declaration specifically provided for subordination of Association's lien to that of any first mortgage. In distinguishing this case from prior cases, the appellate court noted that the declaration in this case contains only one of two "promises", unlike the cases relied upon by Fannie Mae. Specifically, the declaration contains the first promise, subordinating the assessment lien to the first mortgage. However, the declaration did not contain language specifically limiting or eliminating a subsequent owner's liability for unpaid assessments. Furthermore, the cases relied upon by Fannie Mae were found to be distinguishable in that they did not address a subsequent owner's liability for assessments following a foreclosure that failed to include the Association. The appellate court found that Association was prejudiced by the fact that it was not named as a defendant because it had no right to bid for the property, nor to attempt to stir up other bidders in order to maximize the price paid for the property. The appellate court found that the only remedies available to Fannie Mae against an omitted junior lienholder were either moving to compel redemption or filing a de novo action to re-foreclose. Fannie Mae opted to bring these matters before the court as actions for declaratory judgment and injunctive relief, neither of which is recognized remedy for removing the lien of an omitted junior lienholder. As such, the appellate court reversed the trial court's summary judgment.



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