COMMUNITY COUNSEL

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PLAN AHEAD!

RECENT CASES

- **AMENDMENT THAT ELIMINATED MANDATORY MEMBERSHIP REQUIREMENT WAS UPHELD AS VALID.**
- **SUBSEQUENT PARTY WHO TAKES TITLE FROM MORTGAGEE ENTITLED TO SAFE HARBOR ALSO BENEFITS FROM SAFE HARBOR PROVISIONS.**

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.

Did you know covenants can expire? If a homeowners' association does not preserve its covenants before their expiration, the association's ability to enforce its covenants and collect assessments will be terminated! Under Chapter 712, Fla. Stat., also known as the Marketable Records Title Act (MRTA), marketable record title is free and clear of all claims, including association covenants and restrictions, that are older than 30 years from the effective date of the root of title. For homeowners associations, the root of title is its declaration of covenants and restrictions.

Now is a good time to evaluate whether your association needs to preserve its documents. It is far easier to preserve documents than to revive expired documents. To start, take a look at the recording date of the original declaration of covenants and restrictions. The 30-year clock begins to run from the date the original declaration was recorded in the public records. If your Association has recorded an "amended and restated declaration," that does NOT extend the 30-year period. Provided that the original recording date of the declaration was not more than 30 years ago, the association must take three simple steps. First, the association must send a notice called a Statement of Marketable Title Action to its members indicating the association's intention to preserve the documents. Section 712.06, Fla. Stat. contains the exact content that must be sent to members. Second, after sending the notice, the association must call a board meeting and obtain at least a two-thirds vote of all board members to extend the documents. Last, a Notice of Preservation along with an Affidavit of Compliance must be recorded in the public records.

Once the Notice is recorded, the association's documents are extended for another 30 years. Then be sure to calendar the new 30-year deadline so that it is clear when the association will need to repeat this process again in the future.

But what if the 30-year period has already lapsed? Take a deep breath and take immediate steps to revive the documents. Section 720.405, Fla. Stat., sets out the procedure for reviving expired documents. The reinstatement procedure is more complicated, but definitely doable. Instead of only board approval, the association must obtain approval of the owners and the Department of Economic Opportunity. An organizing committee must be created to gather all of the documents to be submitted to the Department. The primary requirements for obtaining Department approval are: that the property in question was governed by a prior recorded declaration; that a majority of the owners approved reviving the documents in writing or at a duly called meeting or by written agreement without a meeting; and that the revived documents are not more restrictive than the previously recorded documents. On this last point, we strongly suggest that the Association vote to revive the original Declaration, and consider any new amendments **after** the reinstatement is approved and recorded. The Department has 60 days to approve the association's submission. After approval is obtained, the association must record the Department approval letter, the approved documents, and the legal description of the effected property. A copy of the recorded and approved documents must be mailed to all owners. Once the approved documents are recorded in the public records, the documents are reinstated and good for another 30 years.

In July 2017 the legislature attempted to amend the revitalization process and make the process of preserving the documents a bit more onerous. These attempts failed, but they are being reconsidered for next year. We will advise you if changes are adopted.

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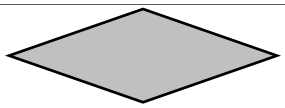
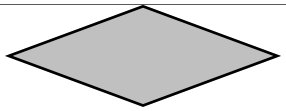
RECENT CASE SUMMARIES

In **Silver Beach Towers Property Owners Association, Inc., et al., vs. Silver Beach Investments of Destin, L.C., et al.**, 42 Fla. L. Weekly D2214a (Fla. 1st DCA, October 18, 2017) Associations sued Developer alleging that certain amendments to the condominium declarations were invalid and that Associations remained liable for certain assessments after the purported amendment. The trial court based its determination on the finding that the amendment procedures used by Associations violated the terms of the declaration and section 718.110(4), Florida Statutes. The declarations governing Associations provided that each unit owner "*shall automatically become a non-equity member of The Club at Silver Shells, Inc."* Unit owner were prohibited from terminating their membership until title to the unit was conveyed to another owner. Beginning in 2008 Associations and their members sought to terminate their mandatory membership. The amendment was approved and recorded in 2010. The amendment removed the mandatory membership provision. Developer and the Club filed suit against Associations arguing that the amendment was invalid. The trial court held that the amendments were invalid and that the Club memberships were "appurtenances" to the units. On appeal to the First District Court of Appeal, the appellate court reversed and held that the amendments were lawfully adopted and that the mandatory membership requirement could be eliminated.



In **Villas of Windmill Point II Property Owners' Association, Inc., vs. Nationstar Mortgage, LLC**, 42 Fla. L. Weekly D2278a (Fla. 4th DCA, October 25, 2017), CitiMortgage held the 1st mortgage. CitiMortgage filed a mortgage foreclosure action against several defendants, including Association. A foreclosure judgment was entered in favor of CitiMortgage. CitiMortgage took title to the property, then deeded the property to FNMA. A dispute arose over whether FNMA was entitled to the safe harbor provision which limits the liability of a 1st mortgage holder for unpaid assessments. FNMA's agent, Nationstar, filed suit against Association to compel Association's compliance with the safe harbor provisions. Nationstar moved for summary judgment. Association filed an affidavit in response, essentially consisting of legal conclusions concerning the applicability of the safe harbor provisions. At Nationstar's request, the trial court took judicial notice of the court file in CitiMortgage's foreclosure action. After hearing the motion, the trial court granted summary judgment and entered a final judgment in favor of Nationstar. The trial court ruled that "*FNMA's liability to [the Association] is limited to 1% of the original mortgage, plus any monthly assessments which accrued after CitiMortgage, Inc., took title*." On appeal to the 4th District Court of Appeal, Association's primary argument was that FNMA was not entitled to safe harbor because it was not a 1st mortgagee (or its successor or assignee) that acquired title to the parcel by foreclosure or by deed in lieu of foreclosure. Although FNMA was not "*a 1st mortgagee, or its successor or assignee as a subsequent holder of the first mortgage who acquired title to a parcel by foreclosure or by deed in lieu of foreclosure*," FNMA does indirectly benefit from the safe harbor provision because, under the statute, it is jointly and severally liable with the prior parcel owner, CitiMortgage, for all unpaid assessments due up to the time of transfer of title, and CitiMortgage did qualify for the safe harbor provision. Notably, in the appeal, Association did not raise any argument challenging CitiMortgage's entitlement to the safe harbor provision. The appellate court found that Association incorrectly read the safe harbour provision in isolation, ignoring the interpretive principle that statutes must be read as a whole. Association overlooked that, under 720.3085(2)(b), FNMA's liability was an extension of any assessments owed by CitiMortgage that were due up to the time of transfer of title, and CitiMortgage's entitlement to the safe harbor protection thereby continued to FNMA's "joint and several liability" with CitiMortgage. Thus, when FNMA acquired title to the property from CitiMortgage, it became jointly and severally liable with CitiMortgage for all unpaid assessments owed by CitiMortgage at the time of the transfer.



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