COMMUNITY COUNSEL

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BEWARE OF YOUR FREEDOM LOVING REPRESENTATIVES

RECENT CASES

- COURT DECLINED TO AWARD ATTORNEYS FEES FOR SLANDER OF TITLE TO OWNERS WHO WERE IN A VOLUNTARY ASSOCIATION THAT WAS UNSUCCESSFULLY CONVERTED INTO A MANDATORY ASSOCIATION.
- NO SELECTIVE ENFORCEMENT COULD BE FOUND WHEN OWNERS OF TWO STORY UNITS WERE NOT ASKED TO INSTALL ONLY CARPETING ON THE FLOOR OF THEIR SECOND FLOOR, IN CONTRAST TO THOSE SINGLE STORY SECOND FLOOR UNITS OVER SINGLE STORY FIRST FLOOR UNITS WHERE DIFFERENT OCCUPANTS COMPLAINED ABOUT THE NOISE FROM WOOD FLOORS.

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.

We try not to be too political in this column, especially when there is such a divergence of views among us. But sometimes we can't help ourselves, especially when we work on and with legislative proposals for the coming session in Tallahassee and we see what impact the language in bills being circulated would have on our clients. We recognize that these impacts are not accidental and we ponder the broader significance of the policies behind the words themselves.

One case in point is a proposal to totally rewrite Section 720,303(6), Fla. Stat. This is the reserve portion of the HOA budget statute. The rewrite would make the statute consistent with the Condominium Act in the requirement for the mandatory funding of HOA reserves and the method for waiving or reducing funding of those reserves.

One can argue whether or not the great variety of existing homeowner associations throughout the state need to be told that they now must adopt a system of mandatory reserve funding when in the past they did not need to do this. Surely this will cause some communities to see major increases in the level of the assessments they charge their members, perhaps leading to an increase in liens and lien foreclosures, and the triggering of mortgage delinquencies. Given the wide array of amenities or lack thereof in HOAs across the state, the imposition of one-size fits all mandatory reserves by default is a mistake and another case of legislative overreaching; of our state government not trusting the populace to govern itself.

And here is where the political hooting and hollering comes in. There is no doubt that the Republican Party dominates Florida state government. Yet on a national level, Republicans cry out against excessive regulation of business and personal affairs. Mr. Trump just recently issued an executive order declaring "one in, two out," referring to government regulations; for each one adopted, two have to go.

So how is it that the party of individual freedom and "get-out-of-my-way for progress," finds it so easy and consistent with that philosophy to tell individual homeowners how to maintain their neighborhoods, even when those communities are so diverse in construction and amenities? Is there perhaps some hypocrisy present? How is it that the national message doesn't translate to the state agenda?

From our point of view there is no strong public policy that requires HOA reserves to be regulated in the same fashion as condominiums. Condominiums have extensive common elements that permeate the very fabric of the community, comprising the exterior portions of the buildings, the structure and essential electrical and mechanical portions of many condominium communities in Florida. This is simply not so for Florida homeowner associations, where most of the infrastructure is public, where the homes and lots are privately owned and where many communities have no common amenities at all or where they are minimal. What common areas there are do not require state regulation of the method in which they are given deferred maintenance. Additionally, many of these communities range from gargantuan to tiny, and there should be no singular regulatory scheme for all of therm. Florida Republican legislators are seeking to impose an ill-conceived, burdensome and unnecessary impediment on your personal freedoms.

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RECENT CASE SUMMARIES

In **Sand Lake Hills Homeowners Association, Inc., vs. Busch, et al.**, 42 Fla. L. Weekly D219a (Fla. 5th DCA, January 20, 2017) Homeowner brought an action against Association for slander of title and other causes of action related to Association's attempt to renew its covenants and convert a "voluntary" association to a "mandatory" association. Association was a loosely created community with multiple declarations of restrictions created in the 1970's and 1980's. Owner's home was located in section three of the community. Under the original declarations, the community was a voluntary association. In 2004, Association recorded a "Notice of Preservation of Covenants and Restrictions" pursuant to Florida Law. These amended restrictions ostensibly converted the "voluntary" association to a "mandatory" association subject to Chapter 720, Florida Statutes. Owner did not vote in favor of the change and voted against the proposed amendments. Association sent owner a demand for payment of assessments on the basis that the amendments were "approved by a majority of the owners" and therefore, owner was part of the mandatory association. Owner sued for slander of title and other relief. The trial court found that owner was not part of Association and awarded prevailing party attorneys fees to owner. On appeal, Association argued that there was no statutory or contractual basis to award fees to Owner. The Fifth District Court of Appeal, agreed. Owner was not entitled to an award of attorney's fees pursuant to the amended declaration, because Owner was not a party to the amended declaration. Additionally, the amended declaration was not a sufficiently "false of fictitious" claim under the Marketable Record Title Act to support a claim for attorney's fees. Therefore, the appellate court reversed the award of attorney's fees to Owner.

Editor's Note: The result may have been different it owner had sought fees under the "*Sussman"* and "*Glussman"* line of cases permitting attorneys' fees incurred to clear title to real property through slander of title actions. Apparently, this was not argued by owners at trial or on appeal.

In **Laguna Tropical, a Condominium Association, Inc., vs. Barnave**, 42 Fla. L. Weekly D228a (Fla. 3d DCA, January 25, 2017) Association sued Unit Owner and her Tenant for violations of Association's governing documents. Specifically, Association sued Unit Owner and Tenant for "noise" violations related to the installation of hard surface flooring on the second level of the condominium. Association had a rule which prohibited "noise" and which provided that unless permitted by Association, no floor covering shall be installed in the units other than carpeting or other floor covering installed by the developer." The rule also required owners to install materials for "diminution of noise and sound" to the other units. Finally, the declaration also required Association approval for modifications to the units. In 2010 Unit Owners replaced carpeting with laminated flooring. The old carpeting was damaged by a tenant who resided in the unit and had a dog in violation of the no-pet policy. The Owner did not know of the existence of the dog, and the carpet was severely damaged by the dog during tenant's occupancy. Owner replaced the damaged carpet with laminate wood flooring, without Association approval. In 2011 the unit owner directly below Owner's unit complained of noise caused by the new flooring. Ultimately, the downstairs resident complained to Association that the Owner of the upstairs unit were in violation of the rule and asked Association to enforce the noise and carpeting provisions of the rules and regulations. After an exchange of letters, Association and upstairs Unit Owner engaged in mandatory non-binding arbitration which was dismissed when the arbitration action was not resolved at mediation. The case was then filed with the courts against Owner and the Tenant to enforce the flooring restrictions. Owner and Tenant defended the lawsuit on the grounds of selective enforcement arguing that Association only enforced the provision against 11 of the Association's 94 units. However, only 11 of the 94 units were configured to include both first-floor and second-floor units. The remaining 72 units consisted of units containing both first and second floor living areas. None of the 72 units complained of "noise" due to the fact that all of these units contained both first floor and second floor space. Only the 22 units with 11 downstairs units, and 11 upstairs units, ever received complaints of noise. There was no evidence presented that the Association failed to enforce a noise complaint regarding the downstairs units based only upon replacement of carpet with tile or wood flooring. But the trial court found that Association had selectively enforced its governing documents based upon the fact that it had not enforced the "no carpet" rule against the other 72 units. On appeal, the Third District Court of Appeal noted that it was not likely that any of the 72 unit owners with 2 story apartments would complain about noise, as they owned both the first and second story of the 2 story building. The appellate court reversed the trial court and found that there was no evidence of selective enforcement as Association had routinely enforced the "noise" rule in the units with a second story unit.

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