

COMMUNITY COUNSEL

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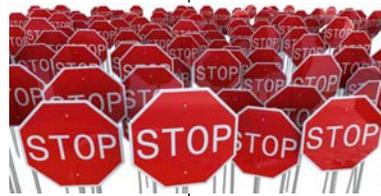
RECENT CASES

- ◆ **CONFLICTING FACTS IN AFFIDAVITS PREVENT ENTRY OF SUMMARY JUDGMENT.**
- ◆ **IN VERY IMPORTANT CASE APPELLATE COURT FINDS THAT AIRBNB TYPE SHORT TERM RENTALS BY OWNER ARE RESIDENTIAL USE OF PROPERTY AND DO NOT VIOLATE GOVERNING DOCUMENTS PROHIBITION ON BUSINESS USE OF PROPERTY. YOUR DOCUMENTS NEED TO SPECIFICALLY PROHIBIT SHORT TERM RENTALS!!**

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.

NEW ESTOPPEL LAW HEADS TO GOVERNOR

This past week the Florida Legislature passed a bill (HB483/SB398) that rewrites the content of, the time for preparing, the fees for generating and the penalties for failing to deliver an estoppel certificate when requested by either a unit owner or the owner's mortgagee, or the designee or either. The changes apply equally to HOAs, condos and co-ops.



The time for preparing a certificate is reduced from fifteen to ten days, although the association is permitted to charge an additional fee of \$100 to \$150 (depending on whether the account is current or delinquent) for an expedited response within three days of a request. Since a lender is generally playing with its borrower's money, associations should count on getting mostly expedited requests.

The bill requires every association to "designate on its website a person or entity with a street or e-mail address for receipt of a request for an estoppel certificate issued pursuant to this section." Without expressly saying it, this provision mandates that every community association create and maintain a website. This is a brand new and potentially burdensome requirement for small communities.

The bill contains a form of estoppel certificate that requires much more information than before. It is becoming more and more like a prospective lender's questionnaire, asking about rights of approval and first refusal and whether such rights have been exercised; the existence of outstanding "rules" violations; whether assessments and other monies are due, including, but not limited to capital contri-

butions, resale or transfer fees; and for contact information for other associations of which the owner is a member as well as for the issuer of insurance covering the property. The amounts stated in the certificate are to be valid for thirty (30) days (thirty-five if mailed) and any omissions may be corrected within the validity period unless a party has already relied in good faith on the certificate, in which case they are waived.

The fees that can be charged for preparation of the certificate are set by the bill and vary depending on whether the owner is delinquent or not. But the failure to respond within the ten (10) day response window constitutes a waiver of all fees for preparation. The failure to issue an estoppel certificate can be the subject of summary proceedings and an award of attorney's fee, if necessary.

The preparation basic fee can not exceed \$250 for a ten (10) day response for a non-delinquent owner. Add another \$150 for a delinquent owner. The fees for owners of multiple units are similarly capped by the bill, ranging from \$750 for up to 25 units, and up to \$2500 for more than 100. The fee schedule has an automatic CPI adjustment every five (5) years.

It is highly probable that this bill will be signed by the Governor and will become law as of July 1, 2017. Your association needs to get an appropriate website up and running by that date with the correct information on it. Needless to say a system for responses to estoppel requests with accurate information also has to be ready to run in a timely fashion immediately, if not sooner.

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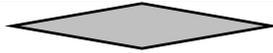
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RECENT CASE SUMMARIES

In **Sexton vs. Southfield Subdivision Maintenance and Property Owner's Association, Inc.**, 42 Fla. L. Weekly D883a (Fla. 2d DCA April 19, 2017) Association filed a complaint against Owner alleging that Owner failed to maintain her lawn in accordance with Association's various governing documents. Owner denied the alleged failure to maintain. Association moved for entry of summary judgment. At the time of the hearing the trial court had before it affidavits from both Association and Owner. Association's affidavits mirrored the allegations of the complaint and stated that Owner's property was unkempt and in violation of the governing documents. Owner filed her own affidavit and responded that the items listed as alleged violations in Association's complaint had been addressed and repaired. The trial court granted summary judgment to Association. On appeal to the Second District Court of Appeal, the court reversed the trial court and found that the conflicting affidavits clearly established disputed issues of fact sufficient to deny summary judgment.



In **Santa Monica Beach Property Owner's Association, Inc., vs. Acord, et al.**, 42 Fla. L. Weekly D984a (Fla. 1st DCA, April 28, 2017) Association filed suit against Owners seeking declaratory and injunctive relief to prohibit Owners from renting their homes short term through online sites like AirBNB and VRBO. Association alleged that Owners short-term rentals violated the covenants restricting the properties' use to residential purposes only, and sought an order prohibiting such rentals. The declaration provided in relevant part that "*Said land shall be used only for residential purposes. . . . nor shall any building on said land be used. . . . for business. . . . purposes. . . .*" In December 2015 Association sent a demand letter to Owners noting that the primary use of the homes were for vacation rentals and they were advertised on the internet for such purposes. Association alleged that such use was a "business" use of the properties in violation of the covenants and restrictions. In July 2016 Association filed suit for declaratory and injunctive relief alleging that Owners' use of their properties violates the restrictive covenant cited above. Specifically, the complaint alleged that Owners' properties were being offered and advertised for rent on the internet as transient public lodging establishments; that Owners were required to collect and remit state sales taxes and local bed taxes on the rentals; that Owners had obtained a license to operate their properties as a transient public lodging establishment under the name "Acord Rental." Owners filed a motion to dismiss the complaint for failure to state a cause of action because the uses alleged in the complaint do not violate the restrictive covenants. Specifically, Owners argued that the short-term vacation rentals were residential uses, and not business uses because renters were using the properties for residential purposes. The trial court agreed with Owners and dismissed the complaint. The trial court reasoned that "[t]he critical inquiry is not the duration of the tenancy, but the character of the actual use of the property by those residing thereon." Because the proper focus is on the actual use of the property, the nature of the properties' use is not transformed from residential to business simply because the properties may be subject to a regulatory scheme that requires licensure. Finally, the trial court noted that because the declaration was silent on the issue of short-term rentals, any ambiguity as to whether that use is permitted must be resolved in favor of Owners' free and unencumbered use of the property. On appeal to the First District Court of Appeal the appellate court noted that the specific issue in this appeal— whether short-term vacation rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting use for business purposes is an issue of first impression in the court. The appellate court cited to numerous out of state cases that held that short-term rentals do not violate such restrictive covenants. The court found that the renters use of the properties was "residential" in nature, irrespective of the duration of the stay. The renters were using the properties for ordinary living purposes such as sleeping and eating, and the receipt of income in no way detracts from the use of the properties as residences by the tenants. Finally, the appellate court noted that even if the restrictive covenants were susceptible to an interpretation that would preclude short-term rentals, the omission of an explicit prohibition on that use in the covenants is fatal to Association's position.

