COMMUNITY COUNSEL

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THE SMOKE CLEARS AND ALL IS REVEALED, PART I

RECENT CASES

- ISSUES REMAIN FOR TRIAL WHEN AN OWNER AGREED TO SELL A UNIT TO A BUYER AND THEN BACKED OUT AFTER DECIDING HER PRICE WAS TOO LOW AND ASKING HER ASSOCIATION TO REJECT THE SALE.
- ARBITRATOR FOUND THE PROPER SIZE OF A CONDO BOARD WAS THREE, NOT FIVE BECAUSE THE INITIAL SIZE WAS THREE AND THE MEMBERS COULD CHANGE IT LATER BUT DID NOT HAVE TO.

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.

The Governor has acted and the results are out. In what was actually a very predictable move in light of the terrible tragedy that befell the occupants of the Grenfell Tower in London two weeks earlier, it was not surprising that Rick Scott vetoed HB 653, which contained an extension of the opt-out provisions for fire sprinkler installation and also an ability to opt-out of engineered life safety systems. Although Florida high- and mid-rise condominiums have nothing in common with the construction of the public housing blocks in London, Mr. Scott did not want to appear soft on fire safety, notwithstanding that the opt-out provisions have been on the books since 2004.

This leaves HB 1237 as the surviving omnibus piece of community Association legislation. Perhaps not coincidentally, it is the more poorly drafted of the two bills. Last month we discussed a few of the horribles contained in this bill, provisions in common with the now vetoed HB 653 (criminal penalties for directors, poorly revised recall process, inspection of records by tenants and difficult suspension of voting rights of delinquent owners). This month we start to go into more detail about what is in this bill, which became effective on July 1st, 2017.

Term limits—Unless approved by the membership or unless there aren't enough candidates, members of the board are limited to four consecutive two-year terms. It appears, however, that there is no limit on the number of consecutive single year terms that a director can serve. Once again poor drafting is an issue

Arbitration— the Division is authorized to employ private arbitrators who are attorneys that meet the requirements in the statute. The problem with this provision is that these arbitrators must render a decision within 30 days of holding a hearing, or the failure to do so may result in cancellation of the arbitrator's credentials.

Conflicts of Interest—A conflict occurs if an attorney represents the manager of an association. It looks like this can arise if the attorney handles defense of a manager under the association's contractual obligation to indemnify, or if the manager then acquires a new client to be represented by that attorney. Additionally a manager, maintenance provider or board member may not acquire a unit by foreclosure or deed in lieu. So Board members lose any ability to invest in units in their communities. Also service providers may not be owned by directors or officers or by anyone with a family relationship who owns more than 1% of the provider. Contracts with parties owning 50% or more of the units in a community and providing management or maintenance services are voidable by a majority vote of the remaining members. Certain transactions create a rebuttable presumption of a conflict of interest.

Webites—Although Section 718.116(8), Fla. Stat. already seems to require that all condominiums have a website where persons desiring to obtain an estoppel certificate can find out how to obtain one, this bill requires all condominiums with 150 or more units to have a working website by July 1, 2018 and to have certain official records available to the members thereon.

Continued next month >>>>>>>

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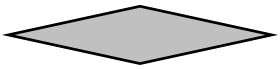
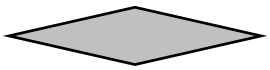
RECENT CASE SUMMARIES

In **Head vs. Bayfront Tower Condominium Association Residential, Inc., et al.**, 42 Fla. L. Weekly D1380a (Fla. 2d DCA, June 16, 2017) prospective Purchaser sued Owner and Association over Association's denial of prospective Purchaser's application to purchase Owner's unit. Owner obtained title to the unit upon the death of her father. Owner immediately sought to sell the unit to raise cash to pay claims against the estate. Owner retained a real estate agent who, after considering the market, the desire for a quick sale, and the condition of the unit, recommended a sales price of $405,000. Owner agreed, and the unit was listed for sale at a price of $405,000. Prospective Purchaser accepted the offer on the same day the condominium was listed for sale. A contract was signed by prospective Purchaser and Owner and the closing was set for July 13, 2015. As part of the sales process, prospective Purchaser was required to obtain the approval of Association to purchase the unit. The day the MLS listing went up, Owner received a phone call from another unit Owner in which the other unit Owner said that the sales price for the unit was too low and Owner could have gotten much more for the unit. Prospective Purchaser applied for approval from Association and submitted all required documents. Shortly thereafter, Owner contacted Association and advised that she did not want to go through with the sale and advised Association that "legal issues" may prevent the closing. Association denied prospective Purchaser's application because of the low sales price and prospective Purchaser filed suit to enforce the contract for sale. The trial court entered summary judgment in favor of Owner and Association. On appeal, the Second District Court of Appeal reversed the trial court and found material issues of fact remained for resolution by the trial court.



In **In Re: Petition for Arbitration: Sihaya 3 Limited Partnership vs. Raintree Village Condominium No. 3 Association, Inc.**, Case No.: 2016-05-5599 (Earl, Summary Final Order, February 17, 2017) Owner brought an arbitration action against Association alleging that Association had improperly conducted its October 2016 election. The question presented to the arbitrator was whether the number of board members on Association's board of directors is three or five, and, if it was determined that the board consisted of five members as claimed by Owner, the appropriate relief. Association had operated with a three person board since its inception. At the October 2016 annual meeting, there were four candidates on the ballot. No election was held because fewer than 20% of the members returned a ballot. Association declared that the three incumbent directors would continue to serve for another term. Owner filed the petition alleging that the board should consist of five directors, and therefore, there was no need to hold a contested election because there were fewer candidates than seats open for election and therefore, all of the candidates automatically should have been appointed to the board. Association's articles of incorporation and bylaws provide that Association's board of directors shall consist of not less than three nor more than nine directors. The bylaws further provide that the exact number of directors is to be determined in the first instance in the articles of incorporation and thereafter may be changed by a vote of a majority of the membership. The articles of incorporation state that the first board of directors consisted of three directors. Owner claimed that the membership has never established the exact number of directors and therefore the number of directors should be five in accordance with the Florida Statutes. However, in the instant case the arbitrator found that association's bylaws specifically established the number of directors stating that the exact number of directors is to be determined in the first instance in the articles of incorporation. The articles of incorporation specifically stated: "**First Directors**. The names and address of the members of the first Board of Directors. . . . are as follows" and went on to list three "First Directors." The arbitrator held that the bylaws do not require action by the membership to establish the exact number of directors of association's initial board, but do allow the membership to change the number of directors thereafter. Association's bylaws clearly intended Association's board to be a three-director board until changed by the membership. Because the membership never changed the number of directors, the board consisted of three directors and Association acted properly to continue the terms of the three existing board members when the election failed for lack of participation.



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