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## Community Associations

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1. The reference to "community associations" means any mandatory membership corporation tied to the ownership of real property, which corporation has a right of lien for the collection of assessments. See FLA. STAT. § 468.431(1) (1995). The most common forms of community associations are condominium associations, cooperative associations, and homeowners' associations. This survey covers legislation and cases from July 1, 1995 to June 30, 1996.

## I. LEGISLATION

A. *Condominiums and Cooperatives*

The first half of the 1990s might be described as the zenith of legislative micromanagement for Florida's condominium and cooperative communities. Various perceived abuses of power by boards of directors led to significant "reform" legislation in 1991,<sup>2</sup> the sweeping nature of which resulted in public outcry and a resultant deferral of implementation of that law until 1992.<sup>3</sup> Since that time, most legislative efforts appear to have focused on removal of "glitches" created by the 1991-92 "reforms" to the law.

The year of 1996 saw little in terms of significant policy shifts in the condominium and cooperative statutes. Perhaps most indicative of the laissez-faire legislative philosophy of 1996 were the pre-filed bills that were not sent to the floor for vote. For example, legislation was introduced,<sup>4</sup> and subsequently withdrawn, which would have overruled the 1995 amendment to the statutes<sup>5</sup> which permitted the right to "opt out" of the statutory election procedures, including the ability of an association<sup>6</sup> to use proxies in the election of directors.

The main operational change to the statutes involves whether meetings of "committees" are subject to the "sunshine" requirements of the statutes, which generally require posting of meeting notices, right of attendance by unit owners, and the right of unit owners to speak to designated agenda items.<sup>7</sup> The 1992 amendments to chapters 718 and 719<sup>8</sup> of the *Florida Statutes* defined a "committee" as "a group of board members, unit owners, or board members and unit owners appointed by the board or a member of the board to make recommendations to the board regarding the association budget or take action on behalf of the board."<sup>9</sup>

Notwithstanding the apparently clear intent of this language, the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division")

2. See 1991 Fla. Laws ch. 91-103.

3. 1991 Fla. Laws ch. 91-426.

4. Representative Geller introduced the relevant bill. See Fla. HB 263 (1996).

5. 1995 Fla. Laws ch. 95-274 (codified at FLA. STAT. §§ 718.112(2)(d), 719.106(1)(d) (1995)).

6. All references in this article to a particular association will be referred to as "Association."

7. FLA. STAT. §§ 718.112(2)(c), 719.106(1)(c) (1995).

8. See 1991 Fla. Laws chs. 91-103, -426.

9. FLA. STAT. §§ 718.103(6), 719.103(5) (1995).

advanced a restrictive interpretation, basically finding that all “committees” are subject to the “sunshine” provision of the statutes.<sup>10</sup> In response to this position, several different bills were drafted which were specifically intended to reverse the Division’s restrictive interpretation, and to promote a more liberal application of the statutes, i.e., that a “committee” was only subject to “sunshine” requirements if it could take *final* action on behalf of the board of administration, or alternatively, make recommendations to the board regarding the association budget.

The final language approved on the floors of both chambers of the legislature introduced an additional element of compromise. Specifically, although the more liberal provision was emplaced in the statute, the governing documents must permit closure of “committee” meetings. The operative language is found in sections 2<sup>11</sup> and 7<sup>12</sup> of chapter 96-396 of the *Laws of Florida*, which became law without the Governor’s approval on June 2, 1996.<sup>13</sup> Section 2 provides:

Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this paragraph. Meetings of a committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this section, unless those meetings are exempted from this section by the bylaws of the association.<sup>14</sup>

The other noteworthy operational change to the condominium and cooperative statutes addresses delivery of notice of the annual budget meeting of the association. Through apparent oversight in the legislative drafting process, both the condominium and cooperative statutes previously permitted notices of all types of meetings (except the budget meeting, the notice of which could only be served by United States mail) to be hand delivered, upon

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10. See Memorandum of Division of Florida Land Sales, Condominiums and Mobile Homes Lead Attorney, Karl Scheuerman dated April 19, 1995, ref. Legal Case 94N-0144.

11. See ch. 96-396, § 2, 1996 Fla. Laws 2462, 2462 (amending FLA. STAT. § 718.112(2)(c) (1995)).

12. See *id.* § 7, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.106(1)(c) (1995)). Section 7 of Chapter 96-396, amending the Cooperative Act, contains neutral language.

13. Chapter 96-396 may be cited as the “Isabelle Greenwald Memorial Condominium Act of 1996,” and honors the deceased condominium activist from the Sunrise Lakes condominium community in Broward County. See *id.* § 1, 1996 Fla. Laws at 2462.

14. *Id.* § 2, 1996 Fla. Laws at 2462 (amending FLA. STAT. § 718.112(2)(c)).

obtaining a written waiver of notice, or in some cases, evidenced by affidavit. Sections 2 and 7 of chapter 96-396 amended sections 718.112(2) and 719.106(1)(e) of the *Florida Statutes*, respectively, to remove this inconsistency.<sup>15</sup>

Under the new law, notice of budget meetings may be hand delivered to unit owners. Evidence of hand delivery is perfected through the execution of an affidavit of compliance, executed by an officer of the association, the manager, or other person who delivered the notice.<sup>16</sup>

The other notable aspect of the amendments regarding notice of the budget meeting was an amendment that made the Cooperative Act<sup>17</sup> parallel to the Condominium Act.<sup>18</sup> Although section 718.112(2)(c) was amended in 1984 to change the minimum period required to give notice of the budget meeting from thirty days to fourteen days, a parallel amendment was never adopted for the Cooperative Act. The 1996 amendment to section 719.106(1)(e) of the Cooperative Act now makes the two statutes contain the same procedural requirements.<sup>19</sup>

However, it must be noted that more restrictive provisions of the bylaws of the association (condominium or cooperative) will still control.<sup>20</sup> Therefore, it is especially important in pre-1984 condominiums, and all cooperatives, to examine the association's bylaws regarding notice requirements, since many such bylaws were written to incorporate then-existing provisions of the applicable statute.

In 1996, the Florida Legislature also attempted to refine the allocation of common expenses in "mixed-use condominiums." The concept of "mixed-use condominiums" was created in the 1995 legislative session through the enactment of section 718.404 of the Condominium Act.<sup>21</sup> The apparent intent of the 1995 legislation was to prevent the owners of non-residential units in "mixed-use condominiums" from receiving preferential treatment in the declaration of condominium relative to voting rights and sharing in the common expenses of the association.

The 1995 version of the statute prohibited the owners of residential units from paying more than fifty percent of the common expenses when the non-

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15. *See id.* §§ 2, 7, 1996 Fla. Laws at 2462, 2465 (amending FLA. STAT. §§ 718.112(2), 719.106(1)(e)).

16. *See id.* § 2, 1996 Fla. Laws at 2462 (amending FLA. STAT. § 718.112(2)(c)).

17. *See* FLA. STAT. §§ 719.101–.622 (1995).

18. *See id.*

19. Ch. 96-396, § 7, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.106(e)).

20. *See id.*

21. *See* ch. 95-274, § 38, 1995 Fla. Laws 2462, 2531 (amending FLA. STAT. § 718.404).

residential units comprised less than fifty percent of all units.<sup>22</sup> Read literally, the creation of a small percentage of “commercial” units, such as retail shops, would require those units to shoulder at least fifty percent of the common expense burden.

Sections 3<sup>23</sup> and 4<sup>24</sup> of chapter 96-396 provide that for “mixed-use condominiums” created on or after January 1, 1996,<sup>25</sup> the ownership share of common elements and the concomitant sharing of common expenses and common surplus must be based either “on the total square footage of each unit in uniform relationship to the total square footage of each other unit in the condominium or on an equal fractional basis.”<sup>26</sup> This change appears to be a common sense solution to the previous anomaly in the statutes.

The “Roth Act” section of the Condominium Act,<sup>27</sup> governing the conversion of existing improvements to condominium, was also amended by chapter 96-396 of the *Laws of Florida*. In 1995, section 718.616(4) was added to the Condominium Act to provide that when a conversion occurred in a municipality, the chief administrative official for the municipality was obligated to sign a letter verifying that the proposed condominium complied with the municipality’s code, zoning ordinances, and all other local legislation.<sup>28</sup> Due to the apparent recalcitrance of local officials to execute such letters, section 718.616(4) of the Condominium Act was relaxed by the 1996 legislation to provide that the municipality need only verify that it has been notified of the proposed conversion to condominium.<sup>29</sup>

Section 719.1055 of the Cooperative Act was amended by the 1996 Legislature.<sup>30</sup> Subsection (3)(a) of that section now provides that the association may materially alter, convert, lease or modify common elements by a seventy-five percent vote unless otherwise provided in the cooperative documents.<sup>31</sup> This language appears to only apply to mobile home cooperatives. In contrast to the Condominium Act,<sup>32</sup> a cooperative association may also change

22. FLA. STAT. § 718.404(3) (1995).

23. See ch. 96-396, § 3, 1996 Fla. Laws 2462, 2464 (amending FLA. STAT. § 718.115(2)).

24. See *id.* § 4, 1996 Fla. Laws at 2464 (amending FLA. STAT. § 718.404(3)).

25. The January 1, 1996 “grandfathering” date is curious since the legislation took effect on June 2, 1996. See *id.* §§ 3–4, 1996 Fla. Laws at 2464 (amending §§ 718.115(2), .404(3)).

26. See *id.*

27. See FLA. STAT. §§ 718.604–.622 (1995).

28. See ch. 95-274, §40, 1995 Fla. Laws 2462, 2532.

29. *Id.*

30. See *id.* § 6, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.1055(3)).

31. See *id.*

32. See FLA. STAT. § 718.110(4) (1995).

the configuration or size of a unit if the action is approved by seventy-five percent of the total voting interests of the cooperative.

### B. Homeowners' Associations

A particular deed restriction (declaration of covenants and restrictions) for an influential subdivision in the Tampa area was set to expire by its own terms in 1996. Since the declaration contained no amendatory procedure, Florida common law would dictate that unanimous approval would be needed to extend the restrictions.<sup>33</sup>

The residents in this community were able to influence the legislature to enact new legislation.<sup>34</sup> Section 617.306(1)(b) of Florida's "Homeowners' Association" statute now provides that "unless otherwise provided in the governing documents or by law," any "governing document" may be amended by the affirmative vote of two-thirds of the voting interests of the association.<sup>35</sup> The definition of "governing documents" includes the declaration of covenants, the articles of incorporation, and the bylaws of the association.<sup>36</sup>

One exception is that amendments pursuant to this statute may not impair "vested rights" without unanimous approval of association members and lienors. The creation of a statutory concept of "vested rights" will certainly create fodder for future litigation, as that term has no apparent significance in Florida's community association common law. Perhaps the legislature would have been better advised to incorporate the concept of "appurtenances," as governed by section 718.110(4) of the Condominium Act, since at least one court has already applied that concept to homeowners' associations.<sup>37</sup> The amendments to section 617.306 became law without Governor Chiles' signature on June 1, 1996.<sup>38</sup>

### C. Not-For-Profit Corporations

In addition to the fairly significant amendment to section 617.306, discussed above, the 1996 Florida Legislature also enacted various "housekeeping" amendments to chapter 617, commonly cited as the "Florida

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33. See, e.g., *Harwick v. Indian Creek Country Club*, 142 So. 2d 128, 129 (Fla. 3d Dist. Ct. App. 1962).

34. See ch. 96-343, § 4, 1996 Fla. Laws 1967, 1968 (amending FLA. STAT. § 617.306(1)).

35. See *id.* § 4, Fla. Laws at 1968 (creating FLA. STAT. § 617.306(1)(b)).

36. FLA. STAT. § 617.301(6) (1995).

37. See *Roth v. Springlake II Homeowners Ass'n*, 533 So. 2d 819 (Fla. 4th Dist. Ct. App. 1988).

38. See 1996 Fla. Laws ch. 96-343.

Not For Profit Corporation Act.”<sup>39</sup> Chapter 617 not only applies to most community associations (some pre-1977 condominium associations are unincorporated and mobile home park cooperatives are sometimes structured as for profit corporations), it also governs every not for profit corporation incorporated under the laws of Florida.

In 1996, the Florida Legislature also amended section 617.0505(1) to permit not for profit corporations to authorize distribution of corporate assets and income upon “partial liquidation” of the corporation, but only if provided in the articles of incorporation.<sup>40</sup>

Chapter 96-212 of the *Laws of Florida* also amended certain provisions of chapter 617.<sup>41</sup> These changes became law without Governor Chiles’ signature on May 25, 1996.<sup>42</sup> Subsections (3) and (5) of section 617.0502 of the *Florida Statutes* were amended.<sup>43</sup> The amendments concern the procedures for a registered agent changing its address and authorizing an administrative fee in connection with notification of the same to the Department of State.<sup>44</sup>

#### D. *Fair Housing Act—Housing for Older Persons*

The federal Fair Housing Amendments Act of 1988<sup>45</sup> prohibited, among other things, housing discrimination based on “familial status.” Familial status was defined by the federal legislation to mean having custody of minor children or being pregnant. This statute essentially outlawed “adults only” housing, which was prevalent in Florida’s development landscape. Florida followed suit through the enactment of chapter 760 of the *Florida Statutes*, entitled the “Fair Housing Act,” which largely mirrors the federal statute.<sup>46</sup>

One exception to both the state and federal statutes was the so-called “55 and over” provision. This exemption allowed housing providers, including community associations, to prohibit occupancy by families with children if the housing facility met all three of the following tests:

- (i) at least eighty percent of the dwelling units were occupied by at least one person age fifty-five or older; and

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39. FLA. STAT. §§ 617.01011–.312 (1995).

40. See ch. 96-343, § 2, 1996 Fla. Laws 1967, 1967 (amending FLA. STAT. § 617.0505(1)).

41. See ch. 96-212, § 8, 1996 Fla. Laws 791, 795 (amending FLA. STAT. § 617.0502).

42. See *id.* at 572.

43. *Id.*

44. *Id.*

45. 42 U.S.C. §§ 3601–3619 (1994).

46. See FLA. STAT. §§ 760.20–.37 (1995).



- (ii) the housing provider promulgated policies and procedures demonstrating an intent to provide housing for older persons; and
- (iii) the housing provider provided “significant facilities and services” specifically designed to meet the physical or social needs of older persons, or demonstrated that providing such facilities and services was not practicable.<sup>47</sup>

Many of Florida’s “adults only” complexes met the eighty percent threshold. Most community associations initiated “policies and procedures” through amendment of restrictions such as declaration of condominium, cooperative owners’ agreements, and declarations of covenants.

The most problematic aspect of compliance was the proof of “significant facilities and services.” The United States Department of Housing and Urban Development promulgated several sets of proposed and/or enacted administrative regulations which were intended to flesh out this concept.

Ultimately, all of the proposed and/or enacted regulations proved unsatisfactory to “seniors” communities. The federal resolution was the adoption of the “Housing for Older Persons Act of 1995,”<sup>48</sup> which became law on December 18, 1995. This law deleted the “significant facilities and services” requirement as a prerequisite to compliance with the “55 and over” exemption.<sup>49</sup>

However, the federal law provided no relief to Florida communities, since chapter 760 of the *Florida Statutes* and various county or municipal ordinances still outlawed “adults only” housing. In fact, some county ordinances<sup>50</sup> did not even contemplate the availability of the “55 and over” exemption, even if “significant facilities and services” were provided.<sup>51</sup> Section 760.29(4)(b)3a of the *Florida Statutes* retained the “significant facilities and services” requirements.<sup>52</sup>

In order to place state and local law on par with the federal statute, the 1996 Legislature adopted chapter 96-191 of the *Laws of Florida*, signed into law by Governor Chiles on May 21, 1996. Essentially, the language of the state statute provides that a community association (or other housing provider) can provide “housing for older persons” if it complies with the federal stan-

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47. See *id.* § 760.29(4)(b)3.

48. Housing for Older Persons Act of 1995, Pub. L. No. 104-76, 109 Stat. 787 (codified at 42 U.S.C. § 3607(b)(2)(c)(1994)).

49. See *id.*

50. See, e.g., Broward County Human Rights Ordinance.

51. See FLA. STAT. § 760.29(4)(b)3a.

52. See *id.*

dards.<sup>53</sup> Additionally, the statute prohibits counties or municipalities from contravening the state statute<sup>54</sup> and also mirrors the federal statute by insulating individuals from monetary liability if they reasonably relied in good faith on the application of the exemption.<sup>55</sup>

#### E. *Regulatory Council of Community Association Managers*

In 1987, section 468.432 of the *Florida Statutes* was created to regulate the licensure, education, and discipline of community association managers.<sup>56</sup> These functions were delegated by this statute to the Division of Florida Land Sales, Condominiums, and Mobile Homes (“Division”).<sup>57</sup>

Through the late 1980s and early 1990s, community association managers (“CAMs”) grew increasingly disenchanted with the Division’s oversight. The Division was apparently equally disenchanted with its charge, resulting in a call by the Division Director to abolish CAM regulation in 1994.

The result was the formation of a grass roots organization known as the Coalition of CAM Organizations (“COCO”), which consisted of delegates from nearly every community association trade organization in Florida. In the face of overwhelming odds, when “rightsizing” (cutting) government was the order of the day in Tallahassee, COCO was successful in obtaining the enactment of chapter 96-291 of the *Laws of Florida*, which became law without Governor Chiles’ signature on May 30, 1996.<sup>58</sup>

Chapter 96-291 creates the “Regulatory Council of Community Association Managers.”<sup>59</sup> The Council displaces the Division as the body with oversight responsibility for the licensure and education of CAMs.<sup>60</sup> Discipline of CAMs was transferred to the Division of Professions.<sup>61</sup>

The Council is to consist of seven members, all appointed by the Governor.<sup>62</sup> Five members must be licensed CAMs, one of whom must be affiliated

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53. See ch. 96-191, § 1, 1996 Fla. Laws 508, 509 (amending FLA. STAT. § 760.29(4)).

54. See *id.* § 1, 1996 Fla. Laws at 509 (amending FLA. STAT. § 760.29(4)).

55. See *id.* § 1, 1996 Fla. Laws at 510 (amending FLA. STAT. § 760.29(4)(d)).

56. 1987 Fla. Laws ch. 87-343 (codified at FLA. STAT. § 468.432).

57. See *id.* § 4, Fla. Laws at 2180.

58. See ch. 96-291, § 12, 1996 Fla. Laws 1257.

59. See *id.* § 3, 1996 Fla. Laws 1253 (renumbering and amending FLA. STAT. § 468.434 as § 468.4315).

60. See *id.* § 12, 1996 Fla. Laws 1257.

61. *Id.*

62. See *id.* § 3, 1996 Fla. Laws 1253 (renumbering and amending FLA. STAT. § 468.434 as § 468.4315).

with the timeshare industry.<sup>63</sup> Members are appointed for a term of four years.<sup>64</sup>

#### F. Insurance

The "insurance crisis" in Florida, which was caused in large part by Hurricane Andrew, has hit community associations particularly hard. For those lucky enough to find good coverage with a reputable carrier, rates have skyrocketed while deductibles have been raised substantially.

After considering the positions of both insureds and insurers, the legislature adopted the "Hurricane Insurance Affordability and Availability Act," which was signed into law by the Governor on May 21, 1996.<sup>65</sup>

Of most importance to community associations is the extension of the policy cancellation moratorium for three additional years, for the period of June 1, 1996 to May 30, 1999. The extension includes condominium associations. Insurers can cancel up to ten percent of their policies in each county and up to five percent statewide each year.

#### G. Telecommunications Act of 1996

The effect of this federal legislation,<sup>66</sup> signed into law by President Clinton on February 8, 1996, may be that "[t]he right to channel surf could surpass a community's right to preserve aesthetics . . . ."<sup>67</sup> Section 207 of the Telecommunications Act of 1996 provides:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.<sup>68</sup>

On August 6, 1996, the Federal Communications Commission ("FCC") released a proposed rule which prohibits community associations from enforcing restrictions which unreasonably restrict or impair an owner's right to

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63. *See id.*

64. *Id.*

65. Ch. 96-194, § 1, 1996 Fla. Laws 574, 574.

66. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

67. P. Michael Nagle, *Channel Surfing*, COMMON GROUND, May-June 1996, at 31.

68. Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56.

install satellite dishes of one meter or less.<sup>69</sup> This rule still permits some reasonable restrictions, such as location designation, or a requirement for screening, as long as signal quality is not impaired, or costs unreasonably increased. This rule only applies to situations where the owner actually owns the area where the satellite dish will be installed, such as single family subdivisions. Rules for commonly maintained property, such as condominium buildings, still have not been promulgated.

## II. CASE LAW

### A. Condominiums

The bulk of condominium case law from July 1, 1995, to June 30, 1996, the period which is the subject of this survey, involves collection of assessments. Since this period is not considered to be one of economic downturn, it may be that one goal of the mandatory non-binding arbitration program, reduction of judicial adjudication of condominium disputes,<sup>70</sup> is being met.

*Scudder v. Greenbrier C Condominium Ass'n*<sup>71</sup> involved the propriety of transportation expenses as a common expense. In *Rothenberg v. Plymouth #5 Condominium Ass'n*,<sup>72</sup> the Fourth District Court of Appeal held that bus service was not a proper common expense for a condominium association. In 1988, section 718.115(1) was amended by chapter 88-148 of the *Laws of Florida* to provide that common expenses could include reasonable transportation services if the services had been provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or if provision was made in the "condominium documents" (a term not defined in the statute) or bylaws.<sup>73</sup>

The unit owner/complainants in *Scudder* challenged the propriety of the association's provision of bus service, advancing several points in court. The Fourth District Court of Appeal, rendering its second decision in this litigation,<sup>74</sup> issued a nine-page opinion.

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69. 61 Fed. Reg. 46,557, 561 (1996) (adding 47 C.F.R. § 1.4000).

70. See FLA. STAT. § 718.1255(3)(b) (1995).

71. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1995).

72. 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987).

73. See 1988 Fla. Laws ch. 88-148.

74. See also *Scudder v. Greenbrier C Condominium Ass'n*, 566 So. 2d 359 (Fla. 4th Dist. Ct. App. 1990).

The first issue confronted by the court was the relevance of whether the Association was the provider of the transportation services.<sup>75</sup> The appellate court recited the trial court's findings of fact and intimated that the transportation services were provided through various umbrella organizations within the Century Village Community.<sup>76</sup> The fourth district held that a "condominium association" must have been the provider of services to be validly charged to unit owners.<sup>77</sup> Although the appellate court found the evidence at trial to be contradictory, it upheld the trial court's factual finding that the "Association" provided the transportation services.<sup>78</sup>

The next issue adjudicated on this appeal was whether, prior to 1988, the transportation system had actually incurred the costs to be assessed as a common expense. Upon close reading of the 1988 amendment to section 718.115 of the Condominium Act, the fourth district concluded that the transportation services, if *continuously* provided since transition of control, did not have to be assessed as a common expense during the same time.<sup>79</sup>

The fourth district also refused to find the 1988 amendment to be unconstitutionally vague. Interpreting the "ordinary meaning" of the words used in the statute, the court found that people of common understanding and average intelligence had fair warning that transportation expenses could be assessed as a common expense so long as the association was continuously providing such services since transition of control.<sup>80</sup>

In a victory for the unit owners, the court held that the Association's "one-rider rule" unlawfully discriminated against multiple-resident units.<sup>81</sup> The court also found that the "second rider surcharge" violated section 718.115(2) of the Condominium Act, which provides that unit owners share common expenses in the same proportion as their ownership share of the common elements.<sup>82</sup> The court also found the "one-rider rule" was unreasonable.<sup>83</sup>

Finally, the court found the Association to be the "prevailing party," which entitled it to an award of its costs and attorney's fees, even though the

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75. *Scudder*, 663 So. 2d at 1365.

76. *Id.*

77. *Id.* at 1366.

78. *Id.*

79. *Id.* at 1367.

80. *Scudder*, 663 So. 2d at 1368.

81. *Id.* at 1369.

82. *Id.*

83. *Id.* at 1368-69.

association did not prevail on the “one-rider rule” issue.<sup>84</sup> The fourth district ultimately remanded the case to the trial court for re-evaluation of the attorney’s fees issue in light of its opinion.<sup>85</sup>

This decision is thorough and well reasoned. The fourth district gave due deference to the intent of the 1988 Legislature, which overruled *Rothenberg*. Associations wishing to provide off-site transportation services are well advised to carefully review this decision. Although the outcome was ultimately favorable to the Association, the “continuity” of the provision of services appears to have been the dispositive factor. Associations which cannot show this continuity are best advised to amend the condominium documents to legitimize the provision of off-site transportation services.

*Griffin v. Berkley South Condominium Ass’n*<sup>86</sup> was another assessment case involving the definition of “prevailing party.” The Association filed a lien foreclosure action against Griffin. After realizing that it had been improperly charging late fees due to lack of documentary authority,<sup>87</sup> and had also improperly sought electricity charges, the Association voluntarily dismissed its lien foreclosure action.

Griffin moved for an award of attorneys’ fees pursuant to section 718.303 of the *Florida Statutes*.<sup>88</sup> On the authority of *Stuart Plaza, Ltd. v. Atlantic Coast Development Corp. of Martin County*,<sup>89</sup> the fourth district found the unit owner to be the prevailing party, and thus entitled to an award of his attorney’s fees.

One interesting aspect of this case is the incorporation of section 718.303 of the Condominium Act. Although this is the general “prevailing party fees clause” of the statute, it is unclear why the provisions of section 718.116, which govern the foreclosure of liens, was not cited as the operative statutory provision. Section 718.303 only deals with actions for “injunctions” and “money damages,” neither of which directly pertains to an action to foreclose a claim of lien. The lesson to be learned by associations is that once legal process is initiated to collect assessments, the association cannot “bail out” of the case, even if brought in error, without exposure to an award of the unit owner’s fees.

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84. *Id.* at 1369.

85. *Scudder*, 663 So. 2d at 1370.

86. 661 So. 2d 135 (Fla. 4th Dist. Ct. App. 1995).

87. *See* FLA. STAT. § 718.116(3) (1995).

88. *See id.* §718.303(1) (1993).

89. 493 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1986).

*Maya Marca Condominium Apartments, Inc. v. O'Rourke*,<sup>90</sup> involves the use of deficiency judgments in condominium assessment collection. In a common scenario, the Association obtained a foreclosure judgment against the unit owner in the amount of \$13,748.00. The Association was the highest bidder at the foreclosure sale.

Subsequently, the unit owner's mortgagee foreclosed the Association's interest in the property. The Association ended up with nothing. The Association then moved for the entry of a personal judgment against the unit owner, which the trial court refused to grant. The Association appealed.

The Fourth District Court of Appeal reversed the trial court and held that the Association was entitled to entry of a money judgment.<sup>91</sup> The Association argued that the trial court abused its discretion in refusing to grant a deficiency judgment.

Perhaps giving the Association more than it asked for, the appellate court held that the common law of deficiency judgments has no application in the condominium foreclosure setting.<sup>92</sup> Rather, the court reasoned, section 718.116(1) of the Condominium Act provides that a unit owner is personally liable for all assessments that came due while he is the owner of a unit.<sup>93</sup>

This case should provide a significant advantage to associations confronted with the foreclosure of superior mortgage liens. Rather than facing the sometimes excruciating choice of electing remedies, or the vagaries of trial courts in granting deficiency judgments, it appears that the association "can have its cake and eat it too." Association collection practitioners should consider the application of this case when advising clients of the benefits of foreclosure versus money judgments.

In *Oakland East Manors Condominium Ass'n v. La Roza*,<sup>94</sup> the facts of the assessment dispute are not set forth in the court's opinion in adequate detail to facilitate a complete understanding of the court's disposition of the legal issues. Apparently, the Association obtained a judgment for unpaid assessments against the unit owner. The unit owner subsequently paid the docketed judgment amount.

The Fourth District Court of Appeal upheld the trial court's denial of the Association's claim of foreclosure.<sup>95</sup> It is unclear, procedurally, why the

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90. 669 So. 2d 1089 (Fla. 4th Dist. Ct. App. 1996).

91. *Id.*

92. *Id.*

93. *Id.*

94. 669 So. 2d 1138 (Fla. 4th Dist. Ct. App. 1996).

95. *Id.* at 1139.

judgment of foreclosure was not entered in conjunction with liquidation of the amounts owed. In any event, citing the “acceptance of benefits doctrine,” the appellate court held that the Association could not accept the benefits of the judgment, and then seek to have it reversed on appeal.<sup>96</sup>

The appellate court did, however, reverse the trial court on the issues of prejudgment interest and attorneys’ fees.<sup>97</sup> The Association’s bylaws provided for interest of “the highest rate of interest . . . permissible under the usury laws of the State of Florida.”<sup>98</sup> Since Florida’s usury statute<sup>99</sup> permits interest at eighteen percent per annum, the appellate court held that the trial judge had no discretion in the award of interest.<sup>100</sup> The court also held that the trial court erred in not awarding the Association’s attorney’s fees, in light of the language permitting recovery of the same in the Association’s bylaws.<sup>101</sup> Interestingly, the court also cited section 718.303 of the Condominium Act, without embellishment.<sup>102</sup>

The final “assessment” case involves the law of “phantom units.” *Winkelman v. Toll*<sup>103</sup> is a complex appellate decision founded upon a quiet title action. The issue was whether certain “declared” but “unbuilt” condominium “units” were subjected to the terms of a declaration of condominium by virtue of certain “phase amendments.”<sup>104</sup> The trial court held that they were not. The Fourth District Court of Appeal reversed.<sup>105</sup>

In 1980, the declaration of condominium for Mission Lakes Condominium was recorded in the Broward County Public Records. The declaration contained provisions for adding phases which provided that the developer could add phases by amending the declaration. The same language also obligated the developer to attach surveyors’ certificates of completion<sup>106</sup> to the amendments adding the phases. Certain “phases” were “submitted” to the terms of the declaration, although no construction was undertaken, and no surveyor’s certificates were ever filed.

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96. *See id.* (citing *Dance v. Tatum*, 629 So. 2d 127, 129 (Fla. 1993)).

97. *Id.*

98. *Id.* at 1139–40.

99. *See* FLA. STAT. § 687.02 (1993).

100. *Oakland East*, 669 So. 2d at 1140.

101. *Id.*

102. *See* discussion *supra* p. 81 (discussing *Griffin v. Berkeley South Condominium Ass’n*, 661 So. 2d 135 (Fla. 4th Dist. Ct. App. 1995), and its relation to the application of section 718.303 of the *Florida Statutes* to lien foreclosure actions).

103. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

104. *Id.*

105. *Id.* at 107.

106. *See* FLA. STAT. § 718.104(4)(e) (1979).



Relying on the operative version of the Condominium Act in effect when the condominium was created, the court held that failure to record a surveyor's certificate of completion does not nullify the effect of an amendment adding the phases and the "units" therein to the term of the declaration.<sup>107</sup> The court relied upon an amicus brief filed by the Division of Florida Land Sales, Condominiums, and Mobile Homes as justification for its interpretation of the 1979 version of the Condominium Act.<sup>108</sup> The court also found that 1984 amendments to section 718.403(1) of the Condominium Act clarified the legislature's intent.<sup>109</sup>

Predictably, the party seeking avoidance of submission to the declaration cited the fourth district's decision in *Welleby Condominium Ass'n v. William Lyon Co.*<sup>110</sup> In its only footnote, the court carefully distinguished *Welleby* and it appears to have specifically limited that case in the fourth district to the peculiar language in the *Welleby* declaration of condominium.<sup>111</sup>

*Winkelman* appears to signal the fourth district's inclination to follow the lead of the second district in finding that "phantom units" are generally created upon the filing of the declaration or phase amendment, regardless of whether actually constructed.

In addition to the five condominium "assessment" cases discussed above, 1995-96 saw a couple of other "association versus unit owner" cases litigated in the appellate courts. These cases involve behavior oriented disputes. An example of the bizarre extremes of the condominium experience is seen in, *Kittel-Glass v. Oceans Four Condominium Ass'n*,<sup>112</sup> which involved a unit owner accused of seventy-nine violations of the condominium documents, including indecent exposure, reckless display of a firearm, public intoxication, and assault and battery.

Pursuant to section 718.303(3) of the Condominium Act, the unit owner was fined \$50.00 for each of seventy-nine alleged violations. However, the

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107. *Winkelman*, 661 So. 2d at 105.

108. *Id.* at 106.

109. *Id.*

110. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987), *review denied*, 531 So. 2d 169 (Fla. 1988).

111. *Winkelman*, 661 So. 2d at 107 n.1. *Welleby* is considered by many commentators to be in conflict with the decisions of the Second District Court of Appeal in *Hyde Park Condominium Ass'n v. Estero Island Realty*, 486 So. 2d 1 (Fla. 2d Dist. Ct. App. 1986) and *Estencia Condominium Ass'n v. Sunfield Homes, Inc.*, 619 So. 2d 1008 (Fla. 2d Dist. Ct. App. 1993). It should also be noted that *Welleby* was legislatively overruled by 1990 amendments to section 718.104(2) of the *Florida Statutes*.

112. 648 So. 2d 827 (Fla. 5th Dist. Ct. App. 1995).

notice of the fining hearing issued by the Association listed only fourteen incidents. The trial court upheld the fines as levied by the Association and also entered an injunction, punishable by contempt, barring the unit owner from the condominium.<sup>113</sup>

On appeal, the fifth district reduced the fine to the fourteen specified violations.<sup>114</sup> More importantly, the court held that the injunction amounted to a judicially forced sale of the condominium unit, in violation of the owner's right to just compensation for the taking of her property.<sup>115</sup> The appellate court reasoned that the trial court could enjoin the violations, and punish noncompliance through fines or incarceration.<sup>116</sup>

This decision, while based on sound legal reasoning, is detrimental to the rights of unit owners to live peaceably in their community, free from threats of irrational persons. While the law cannot cure all societal ills, it is submitted that this case justifies the view that some statutory provision for "forced buy-out" (at fair market value) should be available to associations in controlling the composition of their community.

*Woodlake Redevelopment Corp. v. Woodlake Condominium Ass'n of Marco Shores*<sup>117</sup> also involves internal "disputes" and the use of that term of art regarding the necessity of the use of mandatory, nonbinding arbitration.<sup>118</sup> A group of unit owners sued the Association and its individual directors, alleging five counts. The trial court dismissed all five counts, finding that the subject matter of all counts were arbitrable "disputes," as defined in the statute.<sup>119</sup> The unit owners appealed. The Second District Court of Appeal reversed the trial court.<sup>120</sup>

The reported decision does not detail the basis of Counts I, II, or III.<sup>121</sup> Apparently, they pertain to disagreements involving maintenance of the common elements. Count IV was an action for breach of fiduciary duty against the individual directors.<sup>122</sup> Count V was an action for an accounting against the condominium association.<sup>123</sup>

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113. *Id.* at 828.

114. *Id.* at 829.

115. *Id.*

116. *Id.*

117. 671 So. 2d 253 (Fla. 2d Dist. Ct. App. 1996).

118. See FLA. STAT. § 718.1255.

119. *Woodlake*, 671 So. 2d 254.

120. *Id.* at 255.

121. *Id.*

122. *Id.* at 254.

123. *Id.*

The court concluded that two counts of the complaint (breach of fiduciary duty against the directors and the accounting action against the association) are subject to arbitration, while three counts (those involving disagreement over maintenance of the common elements) were not subject to arbitration.<sup>124</sup>

Finding that the Association arbitration rules provided no guidance, the court turned to the *Florida Arbitration Code*<sup>125</sup> and held that Counts IV and V should be stayed in the main action, while Counts I, II, and III should proceed in the trial court.<sup>126</sup>

Clearly, the court correctly found that Counts I, II, and III, to the extent they involve disagreement over maintenance of common elements by the Association, are not “disputes” as defined in Section 718.1255(1)(a)2 of the *Florida Statutes*, unless the “dispute” involved the authority of the board to alter or add to the common elements.<sup>127</sup> However, without discussion, the court found Counts IV (breach of fiduciary duty) and V (accounting) to be “arbitrable” disputes.<sup>128</sup> Unfortunately, there is no support in the statute for the court’s conclusion.

Section 718.1255(1)(b) deals with those alleged actions of the association which are arbitrable “disputes.”<sup>129</sup> The same includes the failure to: 1) properly conduct elections; 2) give adequate notice of meetings or other actions; 3) properly conduct meetings; or 4) allow inspection of books and records.<sup>130</sup>

An action against individual directors (not the association) for breach of fiduciary duty and an action for an accounting against the association do not fall within any of these categories. The court’s invocation of the *Arbitration Code* is also disturbing. Arbitration is typically the result of contractual selection of that forum for dispute resolution. In the condominium context, the statutorily mandated arbitration is “nonbinding,” in apparent recognition of the parties’ constitutional right of access to the courts. Limitation on those rights should be applied sparingly. This decision is not predicated on a reasoned analysis of the intention of the Condominium Act regarding the use of alternative dispute resolution.

124. *Woodlake*, 671 So. 2d at 55.

125. FLA. STAT. § 682.03(3) (1995).

126. *Woodlake*, 671 So. 2d at 255.

127. *Id.* at 254.

128. *Id.* at 255.

129. See FLA. STAT. § 718.1255(2)(b).

130. *Id.*

The final series of condominium cases involve unit owner and/or association disputes with third parties, including developers, recreational facilities lessors, and an insurance company. *Island Breakers—a Condominium, Inc. v. Highlands Underwriters Insurance Co.*<sup>131</sup> reversed a summary judgment entered in favor of the insurance company. At issue was whether a commercial “all risk” insurance policy provided coverage for building “collapse” caused by “hidden decay.”<sup>132</sup> In its per curiam opinion, the Third District Court of Appeal found that issues such as the nature, extent, and cause of damage to the condominium building’s balconies, as well as when the problems were discovered by the association, could only be resolved by the trier of fact, not at summary judgment.<sup>133</sup>

Judge Cope, in his concurring opinion, fleshes out the nature of the dispute in more detail, including the relevant policy language and the nature of the problem at the condominium (the common scenario of cracked concrete, and rusting of steel reinforcing bars).<sup>134</sup> To Judge Cope, the issue was whether there was a “collapse,” which does not require the balcony to fall off the building.<sup>135</sup> Judge Cope also discussed the issue of “hidden decay” and whether the existence of the balcony cracks placed the association on notice of the decay.<sup>136</sup>

This case does not plow new legal ground with respect to the propriety of summary judgment in resolving factual disputes. However, the case does send community association practitioners an important message in advising their clients regarding the often-encountered “spalling” cases. Simply stated, counsel should advise their client to review current and historical insurance policies to ascertain whether there is “collapse” coverage. These cases usually involve substantial sums of money, which may justify the extra effort in ascertaining the existence of potential insurance coverage.

Another association “pleading” case, this one involving a motion to dismiss, is *Moorings at Aberdeen Homeowners’ Ass’n v. UDC Homes, Inc.*<sup>137</sup> Various entities served as the developer of a planned development known as Aberdeen.<sup>138</sup> The developers created a master association.<sup>139</sup> Count IV of the

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131. 665 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1995).

132. *Id.*

133. *Id.* at 1085.

134. *Id.* (Cope, J., concurring).

135. *Id.*

136. *Island Breakers*, 665 So. 2d at 1086.

137. 673 So. 2d 981 (Fla. 4th Dist. Ct. App. 1996).

138. *Id.* at 982.

139. *Id.*

complaint alleged that UDC Homes, through control of its subsidiary, caused master association expenses to be improperly shifted to plaintiffs (three homeowners' associations and one condominium association, all "sub-associations" under the Aberdeen master declaration).<sup>140</sup>

The trial court dismissed the claim against UDC Homes as insufficient to "pierce the corporate veil."<sup>141</sup> Applying *Steinhardt v. Banks*,<sup>142</sup> the fourth district held that the subassociations' allegations that UDC Homes (the subsidiary) was a "mere device to engage in improper conduct of managing Sunbelt and the Master Association [Aberdeen POA] in a manner contrary to the Declaration in order to obtain a financial benefit for Sunbelt and UDC Homes" were sufficient to survive a motion to dismiss.<sup>143</sup>

Although this case is not remarkable from a common law pleading standpoint, it serves as a reminder to association practitioners and developer counsel that "corporate shell games" in the development of real estate projects are subject to attack if corporate formalities are not adhered to.

*Brickell Biscayne Corp. v. WPL Associates*,<sup>144</sup> involves common law indemnity and equitable subrogation in the condominium setting. As part of its settlement with a condominium association which had sued for construction defects, Brickell Biscayne Corporation (the condominium's developer) obtained an assignment of all of the Association's rights.<sup>145</sup>

The developer subsequently sued several parties, some of which were not parties to the original action.<sup>146</sup> Having reached a fifth amended complaint, the trial court dismissed the developer's action for common law indemnity and subrogation, which was filed against subconsultants which were not parties to the original action.<sup>147</sup> In affirming the dismissal of common law indemnity claims, the appellate court reasoned that since the association had not sued the subconsultants, and since the developer had no relationship with the subconsultants, the developer had no indemnity rights.<sup>148</sup> Additionally, since the association assigned only rights arising out of the main action, there were no rights to assign regarding parties who were not subject to that action.<sup>149</sup>

140. *Id.*

141. *Id.*

142. 511 So. 2d 336 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1273 (Fla. 1987).

143. *Moorings*, 673 So. 2d at 983.

144. 671 So. 2d 247 (Fla. 3d Dist. Ct. App. 1996).

145. *Id.* at 248.

146. *Id.*

147. *Id.* at 249.

148. *Id.*

149. *Brickell*, 671 So. 2d at 249.

The third district likewise affirmed dismissal of the developer's claim for equitable subrogation.<sup>150</sup> Since the subconsultants were not parties to the main action, the court ruled that the policy of equitable subrogation, to avoid unjust enrichment of the party at fault, would not apply.<sup>151</sup> The court distinguished *Kala Investments v. Sklar*,<sup>152</sup> where the party against whom equitable subrogation was sought was a co-defendant in the main action.<sup>153</sup>

For practitioners of complex construction litigation, the lesson from this case appears to be that the right of recovery from a third party under indemnity or subrogation theories is dependent upon that party's privity of contract with the indemnitee and/or the party being named in the main action.

*Gomez-Ortega v. Dorten, Inc.*<sup>154</sup> involved a class action suit brought by, and on behalf of, "secondary purchasers" of condominium units subject to a recreation lease which contained an escalation clause. The validity of the recreation lease had been resolved in favor of the lessors in previous litigation.<sup>155</sup>

The plaintiffs in this case argued that the lease was not enforceable against them since they were not parties to it.<sup>156</sup> The case was dismissed on the basis of *res judicata*.<sup>157</sup> In affirming the trial court's dismissal, the Third District Court of Appeal reasoned that the "secondary purchasers" were in privity with the condominium Association, which had previously (and unsuccessfully) challenged the escalation clause in the lease.<sup>158</sup> The court found that the privity between the "secondary purchasers" and the Association invoked the requisite identity of parties to permit application of the doctrine of *res judicata*.<sup>159</sup> Furthermore, the court found the requisite identity of issues, since there were also "secondary purchasers" when the Association brought the previous action, and that such claims could have been properly raised in the previous action, although they were not.<sup>160</sup>

To the extent the doctrine of *res judicata* is designed to avoid multiplicity of actions by the same parties involving the same matter, the court's decision is

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150. *Id.*

151. *Id.*

152. 538 So. 2d 909 (Fla. 3d Dist. Ct. App.), *review denied*, 551 So. 2d 460 (Fla. 1989).

153. *Brickell*, 671 So. 2d at 249.

154. 670 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1996).

155. *Maison Grande Condominium Ass'n v. Dorten, Inc.*, 600 So. 2d 463 (Fla. 1992).

156. *Gomez-Ortega*, 670 So. 2d at 1108.

157. *Id.*

158. *Id.* at 1108-09.

159. *Id.* at 1109.

160. *Id.*

demonstrative of sound judicial policy. This is especially true since the "secondary purchasers" could have (or should have) discovered the existence of the lease, its escalation clause, and previous appellate decisions with respect thereto.

### B. Cooperatives

In *Moonlit Waters Apartments, Inc. v. Cauley*,<sup>161</sup> the Supreme Court of Florida answered the following question certified from the Fourth District Court of Appeal<sup>162</sup> as one of great public importance:

WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED.<sup>163</sup>

The supreme court answered in the negative and affirmed the holding of the fourth district.<sup>164</sup> *Moonlit Waters Apartments, Inc.* was the governing Association of a twenty-unit cooperative apartment building with a pool, a dock, and parking areas, all on three subdivision lots.<sup>165</sup> *Moonlit Waters* had a 99-year ground lease, which commenced in 1965, providing for annual rental payments adjusted at ten-year intervals based upon changes in the consumer price index.<sup>166</sup> Joseph J. Cauley was the lessor. In 1991, *Moonlit Waters* informed Cauley that it wished to purchase the entire property, pursuant to section 719.401(1)(f)1 of the *Florida Statutes*, which requires a lease of recreational or other commonly used facilities, entered into before the unit owners received control of the association, to include an option to purchase.<sup>167</sup> Cauley refused to enter into negotiations with *Moonlit Waters* to sell the property.<sup>168</sup>

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161. 666 So. 2d 898 (Fla. 1996).

162. *Moonlit Waters Apartments, Inc. v. Cauley*, 651 So. 2d 1269 (Fla. 4th Dist. Ct. App.), *decision approved*, 666 So. 2d 898 (Fla. 1996).

163. *Moonlit Waters*, 666 So. 2d at 899.

164. *Id.* at 900.

165. *Id.* at 899.

166. *Id.*

167. *Id.*

168. *Moonlit Waters*, 666 So. 2d at 899.

Moonlit Waters filed a motion to appoint an arbitrator to decide upon a sales price for the property pursuant to section 719.401(1)(f)1.<sup>169</sup> The circuit court denied the motion, finding that the statute violated both the *United States Constitution* and the *Florida Constitution*.<sup>170</sup> The court reasoned that appointing an arbitrator would violate Cauley's due process rights by denying him the opportunity to retain property in which he had a vested right.<sup>171</sup> The Fourth District Court of Appeal declined to reach the constitutional issue, finding that the statute applies only to a lease of recreational or other commonly used facilities, and does not apply to an all-encompassing underlying land lease.<sup>172</sup>

In affirming the fourth district, the supreme court applied the "plain meaning rule" of statutory construction.<sup>173</sup> The court found the statute to be unambiguous in its application to leases of "recreational or other commonly used facilities" and not "land leases."<sup>174</sup> The court also considered the language of section 719.4015(1) of the *Florida Statutes*, which prohibits escalation clauses in "land leases" and leases of "recreational facilities land, or other commonly used facilities."<sup>175</sup> Applying another maxim of statutory construction, *expressio unius est exclusio alterius*,<sup>176</sup> the court found a specific legislative intent to exclude land leases from the operative provisions of the subject statute.<sup>177</sup>

*Downey v. Surf Club Apartments*<sup>178</sup> was a cooperative case involving unique facts. In 1977, the cooperative Association's board approved a resolution authorizing the Association to lease certain rooms in the building to shareholders.<sup>179</sup> However, no formal documentation was ever executed.<sup>180</sup>

Downey subsequently sold his cooperative unit, but claimed a residual right to continue leasing the "extra room."<sup>181</sup> The Association notified Downey by letter prior to his sale that he would retain no residual rights with

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 899.

173. *Moonlit Waters*, 666 So. 2d at 900 (citing *Lamont v. State*, 610 So. 2d 435 (Fla. 1992)).

174. *Id.*

175. *Id.* (quoting FLA. STAT. § 719.4015(1) (1993)).

176. *Id.* (citing *Bergh v. Stephens*, 175 So. 2d 787 (Fla. 1st Dist. Ct. App. 1965)).

177. *Id.*

178. 667 So. 2d 414 (Fla. 3d Dist. Ct. App. 1996).

179. *Id.* at 415.

180. *Id.*

181. *Id.*



respect to the "extra room."<sup>182</sup> Downey subsequently sold his unit. The Association sued Downey for declaratory relief. Downey counterclaimed for wrongful eviction. The trial court ruled in favor of the Association.<sup>183</sup>

In affirming the trial court's decision, the Third District Court of Appeal held that Downey divested himself of all ownership rights in the Association, and consequently, all real property interest he might claim in the apartment cooperative complex.<sup>184</sup> The court further held that upon Downey's sale of his unit, the "extra room" reverted to the Association.<sup>185</sup>

The rationale for the court's holding was that a person can have no interest in a cooperative apartment aside from his ownership of stock in the corporation.<sup>186</sup> The court further held that since Downey never received stock "which carried with it the right to lease the subject room," he had no real property interest in the room.<sup>187</sup>

Although the result appears appropriate, the logic used by the court is not easy to understand. What if the Association *had* issued Downey stock that entitled him to lease the room? Would that right be severable from the stock? Would it be an "appurtenance?"<sup>188</sup> If the end justifies the means, the court's opinion can be defended.

### *C. Homeowners' Associations, Common Law Covenant Enforcement, Miscellaneous*

In contrast to the paucity of case law involving internal condominium disputes, 1995-96 produced its fair share of non-condominium, community association case law. Perhaps the most significant case for homeowners' associations is the decision of the Supreme Court of Florida in *Holly Lakes Ass'n v. Federal National Mortgage Ass'n*.<sup>189</sup> The issue decided relates to a mortgagee's lien priority, an issue that is statutorily regulated in the condominium context.<sup>190</sup>

Holly Lakes is a mobile home park with a declaration of covenants recorded in 1974.<sup>191</sup> The declaration required a monthly assessment payment

182. *Id.*

183. *Downey*, 667 So. 2d at 415.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* FLA. STAT. § 719.105 (1995).

189. 660 So. 2d 266 (Fla. 1995).

190. FLA. STAT. § 718.116(1) (1995).

191. *Holly Lakes*, 660 So. 2d at 267.

for maintenance and provided that if the monthly charge was not paid when due, that the Holly Lakes Association had the right to place a lien against the lot and the improvements.<sup>192</sup> The McKessens purchased a mobile home site at Holly Lakes and gave a mortgage for the purchase price to the Federal National Mortgage Association ("FNMA").<sup>193</sup> The mortgage was recorded in 1983.<sup>194</sup> FNMA brought a foreclosure action against the McKessens in 1992. The Association alleged that it had superior lien rights to FNMA's mortgage rights against the property because its lien related back to the 1974 declaration of covenants.<sup>195</sup>

The trial court ruled in favor of the Association.<sup>196</sup> The Fourth District Court of Appeal reversed the trial court, but certified the question to the supreme court as being one of great public importance.<sup>197</sup> The supreme court affirmed the ruling of the district court, answering the certified question in the negative.<sup>198</sup> The supreme court held that the language of the declaration of covenants did not create an ongoing automatic lien, but rather created a right to a lien in the event the maintenance assessment was not paid when due.<sup>199</sup> Because the mortgage was recorded in 1983, prior to the Association's lien (which was recorded in 1991), the court held that FNMA's lien had priority.<sup>200</sup>

The court distinguished the case of *Bessemer v. Gersten*,<sup>201</sup> which dealt with a conflict between a creditor's lien and the owner's homestead right.<sup>202</sup> The supreme court held that the declaration of covenants of Holly Lakes failed to put FNMA on notice that the Association claimed a continuing, automatic lien on the property securing the monthly maintenance assessments, and that FNMA could not be charged with constructive notice of the existence of the Association's lien.<sup>203</sup> The court intimated, in dicta, that in order for an association's claim of lien to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the

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192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Holly Lakes*, 660 So. 2d at 268.

197. *Federal Nat'l Mortgage Ass'n v. McKesson*, 639 So. 2d 78, 80 (Fla. 4th Dist. Ct. App. 1994), *decision approved*, 660 So. 2d 266 (Fla. 1995).

198. *Holly Lakes*, 660 So. 2d at 269.

199. *Id.* at 268.

200. *Id.*

201. 381 So. 2d 1344 (Fla. 1980).

202. *Holly Lakes*, 660 So. 2d at 268.

203. *Id.*

association's lien relates back to the date of the filing of the declaration, or that it otherwise takes priority over intervening mortgages.<sup>204</sup>

Although the court's ruling leaves association practitioners with the right to create (or in some cases amend) non-condominium covenants with "super-lien" rights, caution should be exercised before advising a client to do so. Specifically, the client needs to be aware that such "super-lien" status runs afoul of secondary mortgage market guidelines, and may deter lenders who would not accept mortgages with lower priority than an assessment lien.

*Jakobi v. Kings Creek Village Townhouse Ass'n*<sup>205</sup> is another significant (and troubling) homeowners' association case. *Jakobi* involves the application of section 57.105(2) of the *Florida Statutes*. *Jakobi*, a townhouse owner, filed a suit against the Association after his request for permission to install a screened enclosure was denied.<sup>206</sup> Ultimately, the parties executed a stipulation whereby the Association agreed to allow *Jakobi* to construct the enclosure.<sup>207</sup> The Association had previously approved similar installations.

Subsequently, *Jakobi* moved for an award of attorney's fees pursuant to section 57.105(2), reasoning that the Association's bylaws contained a provision allowing the Association to recover fees incurred in litigation with an owner.<sup>208</sup> The trial court held that the bylaws did not constitute a contract within the meaning of the statute.<sup>209</sup> The Third District Court of Appeal reversed the trial court, holding that the bylaws were a contract within the meaning of the statute.<sup>210</sup> The premise for the court's decision was that since *Jakobi* had to file suit to prevent the Association from arbitrarily refusing to approve his installation, this was an action "with respect to the contract" as contemplated by section 57.105(2) of the *Florida Statutes*.<sup>211</sup>

The court rejected the Association's argument that the bylaws (initially adopted before 1988) predated the October 1, 1988 "grandfathering" date referenced in the statute.<sup>212</sup> The court reasoned that the 1992 deed transferring title to the owner created a "novation."<sup>213</sup> Because the owner took title with record notice of the bylaw provisions, the court held that he assumed a new

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204. *Id.*

205. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

206. *Id.* at 326.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Jakobi*, 665 So. 2d at 327.

211. *Id.*

212. *Id.*

213. *Id.*

personal contractual obligation with the Association for compliance with its restrictions, and for payment of fees, which formed the basis for the contractual undertaking required by the statute.<sup>214</sup> This, the court held, gave rise to a new contract which, by law, had the attorney's fees clause of the bylaws incorporated within its terms.<sup>215</sup>

This logic, if not result-oriented, is certainly problematic. Taking the court's position to its logical conclusion, an association's legal relationship with its members will depend on the date that the owner purchased, and on the law in effect at that time. This is certainly the "morass of legal entanglement" that the courts have sought to avoid in the condominium setting.<sup>216</sup>

As a practical matter, the enactment of section 617.305(a) of the *Florida Statutes* should minimize the impact of this decision. The referenced statute now provides for the recovery of prevailing party attorney's fees in homeowners' association disputes.

*Kay v. Via Verde Homeowners Ass'n*<sup>217</sup> is a homeowners' association collection case. The trial court granted the Association's claim to foreclose its lien for unpaid assessments and dismissed the owner's counterclaim for breach of contract, fraud and breach of fiduciary duty.<sup>218</sup> The trial court ruled that the counterclaims did not state a cause of action.<sup>219</sup>

The Fourth District Court of Appeal affirmed the dismissal of the counterclaim, except for dismissal of the owner's cause of action for breach of contract.<sup>220</sup> In her counterclaim, the owner had alleged that the Association had agreed to repair and maintain certain sub-surface air conditioning pipes in the common property, that the Association failed to do so, and that the owner was damaged by the Association's failure to perform.<sup>221</sup>

The appellate court, accepting these allegations as true, found the same sufficient to state a cause of action for breach of contract.<sup>222</sup> The court does not discuss whether the alleged contract was oral or written, nor does it discuss whether the governing documents for the community required the Association to maintain these particular pipes.<sup>223</sup> Had that issue been litigated in the case,

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214. *Id.*

215. *Jakobi*, 665 So. 2d at 327.

216. *See, e.g., Rothfleisch v. Cantor*, 534 So. 2d 823, 825 (Fla. 4th Dist. Ct. App. 1988).

217. 677 So. 2d 337 (Fla. 4th Dist. Ct. App. 1996).

218. *Id.* at 338.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Kay*, 677 So. 2d at 338.

223. *Id.*

it would have been interesting to see whether the court would still have dismissed the breach of fiduciary duty counterclaim.

*Carmelitas Holding Co. v. Paradise Beach Resorts St. Augustine, Inc.*<sup>224</sup> is a homeowners' association case involving enforcement of judgments against a homeowners' association and its successor in interest. The Association apparently took out a loan with Barnett Bank and defaulted. Although the opinion does not contain great detail about the apparently unusual transfer of all of a homeowners' association's rights and assets to a successor entity, the trial court essentially treated the Association and its successor as one party.

The successor to Barnett Bank attempted to impose a creditor's bill against the Association's right to assess its members. The trial court held that the Association could only levy assessments for specified purposes, and that payment of judgments was not one of such purposes.<sup>225</sup> Thus, the trial court refused to grant a creditor's bill against the Association's right of assessment.

The appellate court initially noted that the articles of incorporation for the Association authorized the Association to levy assessments to pay all lawful obligations incurred in connection with the affairs of the Association.<sup>226</sup> The court also found it noteworthy that the articles of incorporation authorized the Association to borrow money.<sup>227</sup>

Having concluded that the Association had the authority to borrow money and that the declaration authorized assessments for general expenses of the Association, the court held that "[t]he law simply does not allow an association to borrow money and then absolve itself from repayment through its declarations or bylaws."<sup>228</sup>

There are two points from this case which merit discussion. First, the court appears to implicitly accept that the Association's authority to borrow money is predicated solely on enabling authority in the governing documents. The court does not consider (perhaps it was not raised by the parties) the provisions of section 617.0302(7) of the *Florida Statutes*, which permit all not-for-profit corporations to borrow money, unless otherwise specified in the articles of incorporation.

A second related point is the court's consideration of the governing documents without regard to the complementary or supplementary nature of the governing statute. This is, somewhat curiously, the opposite of the

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224. 675 So. 2d 660 (Fla. 5th Dist. Ct. App. 1996).

225. *Id.*

226. *Id.* at 661.

227. *Id.*

228. *Id.*

philosophy often exhibited by the courts in condominium issues where the language of the statute is found to control, without regard to the language in the governing documents.<sup>229</sup>

*Americas Homes, Inc. v. Esler*<sup>230</sup> involves free speech with regard to a dissatisfied homeowner's "picketing" in a residential development. The Eslers bought a home from an affiliate of Americas Homes, Inc. ("Americas"). The property was classified as being in flood zone "C," a zone which the court said is not normally prone to flooding.<sup>231</sup> The Eslers lived in the home for two years without a flooding incident, and apparently decided to sell their home. Right after the Eslers listed their property for sale, a flooding condition occurred in the vicinity of the Eslers' property.

According to the opinion, a broker advised the Eslers that they would not be able to sell their home without disclosing the flooding condition.<sup>232</sup> The Eslers complied with their broker's request by posting a sign in their yard which read: "DUE TO LOCAL FLOODING THIS PROPERTY IS FOR SALE."<sup>233</sup> The sign also posted photographs of the area during flooding. The sign did not disparage Americas in any fashion, or even mention that Americas had sold Eslers the property.

Americas sued Eslers, seeking a temporary injunction requiring removal of the sign. The trial court refused to grant the injunction and Americas appealed. In affirming the denial of the temporary injunction, the court found *Zimmerman v. D.C.A. at Welleby, Inc.*<sup>234</sup> to be dispositive. *Zimmerman* involved unhappy condominium owners picketing a developer's sales office.<sup>235</sup> The *Zimmerman* court allowed the owners to picket and peacefully protest because it was protected speech under the First Amendment and not subject to prior restraint (although the *Zimmerman* court held that the conduct could be tortious and actionable in damages).<sup>236</sup>

The appellate court in *Esler* affirmed that freedom of speech is a fundamental personal right and liberty which is constitutionally protected under both the *United States Constitution* and the *Florida Constitution*.<sup>237</sup> The court held that the Eslers, by placing a sign on their property in compliance with the

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229. See, e.g., *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985).

230. 668 So. 2d 239 (Fla. 5th Dist. Ct. App. 1996).

231. *Id.*

232. *Id.* at 240.

233. *Id.*

234. 505 So. 2d 1371 (Fla. 4th Dist. Ct. App. 1987).

235. *Id.* at 1372.

236. *Id.* at 1374.

237. *Americas Homes*, 668 So. 2d at 240.

instructions from their broker, were exercising their right of free speech.<sup>238</sup> Accordingly, the Fifth District Court of Appeal affirmed the trial court's denial of the temporary injunction.<sup>239</sup>

This case affirms the proclivity of the courts to treat free speech as sacrosanct, even though "commercial speech" may be involved. In *Esler*, the developer did not seek damages at the trial court (and in fact alleged that it had no remedy at law). However, counsel is wise to re-read *Zimmerman* when considering the availability of picketing or other protest as a means of influencing dispute resolution. Although the *Zimmerman* court also declined prior restraint of the picketing, it was clear that the court held open the possibility of a damages award (which in such cases could obviously be significant) if the conduct was found to be tortious. In other words, although this type of "speech" may be insulated from prior restraint through injunction, it is not absolutely privileged in terms of tort liability.

A year of community association case law would not be complete without a "dog case." Although these cases are usually considered one of the least glamorous aspects of practicing community association law, *Barrwood Homeowners Ass'n v. Maser*<sup>240</sup> reinforces the sometimes serious aspect of animal control in common interest communities.

Alexander Maser, a minor, was bitten by a dog. Apparently, the bite occurred on the common areas owned by the Association. Although not specifically set forth in the facts of the opinion, it appears that the dog belonged to one of the owners in the community.

Maser's parents sued the Association, but not the dog's owner. A jury verdict was rendered against that Association for negligence. The trial court also ruled during the trial that the dog's owner should be put on the verdict form and that the minor's damages would be reduced by the dog owner's percentage of fault.<sup>241</sup> Maser appealed this aspect of the case.

The Fourth District Court of Appeal affirmed the trial court's verdict form, which permitted apportionment of liability to the dog's owner, even though he was not a party to the case.<sup>242</sup> The Fourth District Court of Appeal also upheld the jury's verdict against the Association.<sup>243</sup> Citing *Vasques v.*

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238. *Id.*

239. *Id.*

240. 675 So. 2d 983 (Fla. 4th Dist. Ct. App. 1996).

241. *Id.* at 984.

242. *Id.*

243. *Id.*

*Lopez*,<sup>244</sup> the court concluded that a land owner could be held liable for damages caused by a dog on its property if the landlord had knowledge of the dog's vicious propensities.<sup>245</sup>

Although many associations are wont to become involved in internal disputes between community residents, this case demonstrates the need for an association to pay serious attention to complaints regarding potentially threatening animal behavior.

*Robins v. Walter*<sup>246</sup> is a decision of the Third District Court of Appeal involving the application of subdivision covenants. Mr. and Mrs. Robins purchased a lot in Highlands, a platted subdivision, in Walton County.<sup>247</sup> The Robins obtained a building permit which allowed them to construct a residential home with attached garage and a "mother-in-law apartment" above the garage.<sup>248</sup> According to the plans, the Robins built a five-bedroom main home and a "carriage house" above the garage.<sup>249</sup> Each bedroom in the main home had a separate entrance to the outside.<sup>250</sup>

The Robins then advertised the facility as a "bed and breakfast."<sup>251</sup> Other lot owners in the subdivision sued the Robins, resulting in an order after nonjury trial which enjoined the Robins from renting out the "carriage house," or operating the main structure as a bed and breakfast.<sup>252</sup> The order also precluded the Robins from selling food from their property, whether charged separately or included as part of a rental.<sup>253</sup>

The three covenants in question were articles 2, 3, and 6 of the declaration of covenants.<sup>254</sup> The appellate court held that while not a model of clarity, the

244. 509 So. 2d 1241 (Fla. 4th Dist. Ct. App. 1987).

245. *Barrwood Homeowners*, 675 So. 2d at 984.

246. 670 So. 2d 971 (Fla. 1st Dist. Ct. App. 1995).

247. *Id.* at 973.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Robins*, 670 So. 2d at 973.

252. *Id.* at 974.

253. *Id.*

254. The three covenants provided:

2. No structure shall be erected, altered, placed, or permitted to remain on any residential building lot other than one detached single family dwelling unit with attached or detached garage, with quarters for domestics attached to the garage.

3. No structure of any said lot shall be used for business or commercial purposes provided, however, the renting of the premises in whole or in part shall not be construed to be a business or commercial operation. . . .

....



intention of the covenants was to allow parties to lease or rent their premises for residential purposes, but not to allow an ongoing commercial enterprise to take place on lots which are designated for noncommercial purposes.<sup>255</sup>

The Robins also argued that article 2 of the covenants, while limiting original construction, does not limit the use of the structure once it is built.<sup>256</sup> Although the appellate court recognized case law from other jurisdictions which stands for this proposition, the court read article 2 in conjunction with articles 3 and 6.<sup>257</sup> After reading the covenants as a whole, the court found that a “bed and breakfast inn” is an ongoing business or commercial use of the property in violation of the intent of the covenant.<sup>258</sup> The court then went on the find that a “bed and breakfast inn” is essentially the same thing as a “motel” which have been precluded by the courts in other Florida decisions involving similar covenant language.<sup>259</sup>

The court also distinguished *Moss v. Inverness Highlands South and West Civic Corp.*<sup>260</sup> on the basis that an adult congregate living facility (at issue in *Moss*) is entirely different than a transient motel.<sup>261</sup> Finally, the court held that in light of the language in the restrictions which exempts rentals from being designated commercial (meaning that rentals can be “residential”), the trial court’s ruling on the “carriage house” rental was “overly broad” and stricken.<sup>262</sup> The apparent intent of the appellate court’s pronouncement on this issue was that the lot owners could rent out the “carriage house” as a residential apartment.

Although courts tend to strictly construe covenants, the court in *Robins* gave a fair meaning to the covenants as a whole and reached a just result in this case. The court’s ruling on the “carriage house” may have been an attempt to “split the baby” since article 2 of the covenants specifically contemplates that quarters detached from the main residences are for “domestics,” which would typically be considered an adjunct of a “single family” usage, as clearly contemplated by article 2 of the covenants.

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6. No business shall be permitted or maintained on any lot or lots except lot 16-A, 17, 18, 19 and 20 in Block B, lots 1, 2, 14 and 15 in Block D, and lots 1, 2 and 3 in Block F.

*Robins*, 670 So. 2d at 973.

255. *Id.* at 974.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Robins*, 670 So. 2d at 974.

260. 521 So. 2d 359 (Fla. 5th Dist. Ct. App.), *review denied*, 531 So. 2d 1353 (Fla. 1988).

261. *Robins*, 670 So. 2d at 975.

262. *Id.*