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Community Associations

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Community Associations:¹ Statutory Changes and Appellate Law 7/1/00–6/30/01

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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) (2001). The most common forms of community associations are condominium associations, cooperative associations, and homeowners’ associations. This survey covers 2001 Florida legislation and appellate court cases from July 1, 2000 to June 30, 2001. Condominium related arbitration decisions, Declaratory Statements, and Division of Florida Land Sales, Condominiums and Mobile Home rules should also be examined by readers for a comprehensive review of legal authorities affecting Florida community associations for the period covered by this survey. Further, this survey does not cover issues involving timeshare developments, nor mobile home parks.

I. LEGISLATION

A. Condominiums

The most notable aspect of condominium legislation considered by the 2001 Florida Legislature was the bills that were not passed out of the session. Indeed, the only bill involving chapter 718 that was ultimately approved was a reviser's bill.² Among the potentially significant bills that did not pass, including a couple that died on the calendar in the waning moments of the session, were the following: 1) proposed amendments to chapter 718 dealing with a variety of operational issues, including the ability to amend condominium declarations to restrict rental rights,³ the ability to amend documents regarding alterations of common elements,⁴ amendments regarding the transfer of limited common element rights,⁵ and miscellaneous other operational provisions;⁶ 2) reorganization of the Department of Business and Professional Regulation, including the elimination of condominium arbitration;⁷ 3) a proposal to substantially limit the scope of warranty rights enjoyed by condominium unit owners and their associations regarding construction deficiencies;⁸ and 4) a proposed amendment to eliminate the contention⁹ that documentary stamps be paid on a community association's foreclosure of its lien interests.¹⁰

2. H.R. 667, 2001 Leg., (Fla. 2001). H.R. 667 corrects numerous perceived typographical and citation errors in various sections of the *Florida Statutes*, including several amendments to chapter 718. This bill was approved by the Governor on May 25, 2001, 2001-64 Fla. Laws, effective July 3, 2001.

3. See *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 754 So. 2d 831, 833 (Fla. 2d Dist. Ct. App. 2000).

4. See *Wellington Prop. Mgmt. v. Parc Comiche Condo. Ass'n, Inc.*, 755 So. 2d 824, 825 (Fla. 5th Dist. Ct. App. 2000).

5. See *Brown v. Rice*, 716 So. 2d 807, 808 (Fla. 5th Dist. Ct. App. 1998); 2000-302, § 50 Fla. Laws.

6. H.R. 1907, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted). Also treated at H.B. 207; S.B. 348 and S.B. 2210.

7. H.R. 1923, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

8. S. 1742, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

9. See *State v. 100 La Peninsula Condo. Ass'n, Inc.*, Case No. 99-6646, Leon County, Florida (Fla. 1st Dist. Ct. App. 2001).

10. H.R. 1835, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

B. Cooperatives

To the knowledge of the author, no bills affecting cooperatives or cooperative associations¹¹ were considered nor adopted during the 2001 legislative session.

C. Homeowners' Associations

Likewise, no substantial legislation directly affecting the operation of homeowners' associations was passed during the legislative session. A local bill was considered which would have permitted Marion County to adopt special legislation for homeowners' associations.¹² A bill which did pass, but was vetoed by the Governor,¹³ would have permitted homeowners' associations to apply for the vacation of public roads and the simultaneous conveyance of the same to a residential homeowners' association for the purpose of creating a gated subdivision upon a vote of four-fifths of the owners therein.

One clause that was added to the homeowners' association statute was a newly enacted section 720.3075 of the *Florida Statutes*.¹⁴ This law, dealing with a variety of other topics,¹⁵ provides that any homeowners' association documents, including declarations of covenants, articles of incorporation, or bylaws, entered into after October 1, 2001, "may not prohibit any property owner from implementing Xeriscape or "Florida-friendly landscape as defined in section 373.185(1)" of the *Florida Statutes*.¹⁶ The statute defines "Xeriscape" or "Florida-friendly landscape" as "quality landscapes that conserve water and protect the environment and are adaptable to local conditions and which are drought tolerant."¹⁷

11. See FLA. STAT. § 719 (2001).

12. H.R. 1901, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

13. H.R. 1053, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

14. FLA. STAT. § 720.3075 (2001).

15. Including a county's authority to convey property, tax deed application procedures, and tourist taxes. *Id.*

16. FLA. STAT. § 720.3075 (2001).

17. FLA. STAT. § 373.185 (2001).

D. Miscellaneous Legislation Affecting Community Association Operations

The 2001 Florida Legislature amended section 760 of the *Florida Statutes*, regulating, *inter alia*, “housing for older persons.”¹⁸ The 2001 amendment provides that a community claiming to be exempt from prohibitions of state law against discrimination on the basis of familial status,¹⁹ must register with the Florida Commission on Human Relations (“Commission”) stating that the community complies with the requirements of the law.²⁰ The statute provides that a letter shall be submitted on the letterhead of the community and shall be signed by the president of the community.²¹ Registration must be renewed biannually.²² Unfortunately, the filing of these registration forms confers no presumption of compliance with the law, and failure to comply with the law does not disqualify a community from holding itself out as “fifty-five and over housing.”

The Commission is required to make information in the registry available to the public, and the Commission shall include this information on an Internet website. The Commission has also promulgated rules,²³ which were scheduled for a potential Rule Development Workshop on September 7, 2001.²⁴

Section 482 of the *Florida Statutes*, relevant to pest control, was also amended in the 2001 Legislature.²⁵ Newly enacted section 482.242(1)(c)(1) of the *Florida Statutes* permits local governments to require, for multi-complex dwellings in excess of ten units, annual inspections for termite activity or damage, as well as the remediation of same. It is important to note that this law does not mandate the inspections and treatment, but simply permits local governments to adopt such standards; pest control is generally preempted by state regulation and is not susceptible to local regulation.²⁶

18. FLA. STAT. § 760.29(4) (2001).

19. For example, “fifty-five and over communities.”

20. FLA. STAT. §§ 760.29(4)(e), .31 (2001).

21. *Id.*

22. *Id.*

23. Housing for Older Persons Registration and Documentation, 27 Fla. Admin. Weekly 3907 (proposed Aug. 24, 2001) (to be codified at FLA. STAT. § 760.29(4)(e) (2001)).

24. See FLA. STAT. § 760.29(4)(e) (2001).

25. FLA. STAT. § 725.06 (2001).

26. *Id.*

For the second time in as many years,²⁷ section 725.06 of the *Florida Statutes*, which regulates indemnity provisions in construction contracts, was amended with an effective date of July 1, 2001.²⁸

The new statute applies to any construction contract entered into on or after July 1, 2001.²⁹ Included within the ambit of the law are not only contracts directly between the owner and the contractor, but also contracts with architects, engineers and subcontractors.³⁰ Indemnification provisions in such contracts, which do not comply with the law, are declared void and unenforceable.³¹ In order to be valid, an indemnity clause must contain a dollar limit on the obligations of the indemnitor.³² The indemnity obligations must bear a commercially reasonable relationship to the value of the work.³³ Unless otherwise provided in the agreement between the parties, one million dollars is established as the per se minimum level of reasonable indemnity undertakings.³⁴

The new proviso also permits the indemnitor to indemnify the indemnitee for the indemnitee's own negligence, if so provided in the agreement between the parties.³⁵ However, the law specifically limits the parameters of such undertakings, and excludes indemnification caused by "gross negligence, or willful, wanton or intentional misconduct," or for "statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions" of the indemnitor, or for those acts the indemnitor is responsible.³⁶

Attorneys for community associations are frequently called upon by their clients to prepare and/or review various forms of construction related agreements, which will be subject to this statute. Extreme care should be taken in insuring that the relevant provisions of the agreement comply with the statute, particularly when "industry boilerplate" forms, such as those

27. Ch. 2001-372, § 31, 2001 Fla. Laws 4334 (to be codified at FLA. STAT. § 725.06 (2001)).

28. Ch. 2001-211, § 10, 2001 Fla. Laws 1887-88 (to be codified at FLA. STAT. § 725.06 (2001)).

29. FLA. STAT. § 725.06(1) (2001).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. § 725.06(1).

35. § 725.06(1)(c).

36. *Id.*

used by the American Institute of Architects, or similar organizations, form the basis of the contract documents.

II. APPELLATE CASE LAW

A. Introduction

Although the period encompassed by this survey was unusually quiet in terms of legislation,³⁷ there was no shortage of appellate case law impacting the operation of community associations. One interesting side note is that the substantial amendments to the condominium statute in the early 1990s,³⁸ which mandated arbitration of many condominium “disputes,”³⁹ have resulted in the near elimination of what many consider as “trivial” condominium controversies⁴⁰ being decided in the appellate courts. Indeed, with the exception of a jurisdiction case⁴¹ and a couple of collection related cases,⁴² there were no appellate decisions involving what has historically been the fodder of condominium litigation. This is a clear departure from the volume of appellate court cases prior to the implementation of the arbitration program. Thus, to the extent the legislature sought to avoid crowding the circuit courts with disputes of this nature,⁴³ the program appears to be accomplishing that result, at least at the appellate court level. Hopefully, future efforts in the legislature to address the operation of the arbitration program⁴⁴ will be undertaken with due regard for what has gone before.

37. Several Tallahassee lobbyists have advised author that the activity surrounding the Bush/Gore Presidential contest, including involvement by the Florida Legislature, resulted in delays in the pre-session committee process, which precluded many legislative initiatives, even if uncontested, from being guided through the process.

38. FLA. STAT. § 718.111 (1991).

39. See FLA. STAT. § 718.1255(1) (2001) (defining “disputes”).

40. By way of example, but not limitation, these include pet cases, vehicle parking controversies, and election challenges.

41. Fla. Tower Condo., Inc. v. Mindes, 770 So. 2d 210, 211 (Fla. 3d Dist. Ct. App. 2000)

42. Nationsbanc Mortgage Corp. v. The Gardens N. Condo. Ass’n, Inc., 764 So. 2d 883, 884 (Fla. 4th Dist. Ct. App. 1997); Schooner Oaks Ltd. Co. v. Schooner Oaks Condo. Ass’n, Inc., 776 So. 2d 304 (Fla. 4th Dist. Ct. App. 2000).

43. FLA. STAT. § 718.1255 (2001).

44. H.R. 1923, 2001 Leg., Reg. Sess. (Fla. 2001).

B. *Breach of Fiduciary Duty/Tort Claims*

The period covered by the survey includes what appears to be an unusual number of cases involving breach of fiduciary duty or intentional tort claims in varying forms. The condominium statute⁴⁵ provides that each officer and director has a fiduciary relationship to the unit owners. Further, the statute confers a cause of action by unit owners or the Association, against directors who willfully or knowingly fail to comply with the law,⁴⁶ or directors designated by the developer, for actions taken by them prior to the time control of the Association⁴⁷ is assumed by unit owners other than the developer.⁴⁸ The cooperative statute⁴⁹ contains similar provisions.⁵⁰ The statute applicable to homeowners associations⁵¹ similarly imposes a fiduciary duty on officers and directors⁵² and likewise confers a cause of action in favor of the Association or a homeowner against directors who willfully and knowingly fail to comply with the law.⁵³ Notably missing from the parallel clause in the statute for condominium associations is the direct conferral of a cause of action against directors appointed by the developer for pre-turnover acts or omissions.

The case of *Stevens v. Cricket Club Condominium, Inc.*⁵⁴ although benign in result, creates a basis for substantial concern for condominium associations and their boards of directors.⁵⁵ According to the per curiam decision, at the time the underlying dispute went to trial, only counts III and V of the five count complaint remained.⁵⁶

Count III, presented in a class action capacity,⁵⁷ sought compensatory damages for breach of fiduciary duty against the Association.⁵⁸ The plaintiff

45. FLA. STAT. § 718.111(1)(a) (2001).

46. § 718.303(1)(d) (2001).

47. Commonly referred to as "turnover"

48. § 718.303(1)(d).

49. § 719.104.

50. § 719.303(1)(c)-(d).

51. § 720.301.

52. See § 720.303(1).

53. See § 720.305(1)(c).

54. 784 So. 2d 517 (Fla. 3d Dist. Ct. App. 2001).

55. *Id.*

56. *Id.* at 518.

57. See *Cricket Club Condo., Inc. v. Stevens*, 695 So. 2d 826, 827 (Fla. 3d Dist. Ct. App. 1997).

58. *Stevens*, 784 So. 2d at 518.

complained that the Association's board made "false statements concerning new wiring and price savings in regard to cable television service."⁵⁹

Count V, which again pled the unit owner's putative status as class representative, also sounded in breach of fiduciary duty.⁶⁰ Stevens alleged that the board of directors spent funds from a 1992 special assessment on items other than those set forth in the "Notice of Special Assessment."⁶¹ Apparently, \$50,000 was assessed to repair the pool area, however the board did not have that work done.⁶² The funds were instead largely used⁶³ to repair the south terrace area, which was described as an area leading to the pool.⁶⁴

The trial court found in favor of the Association on count III (the cable television claim).⁶⁵ In regard to count V, the trial court ruled in favor of the unit owner, concluding that he had sustained his burden of proof on the misapplication of the 1992 special assessment.⁶⁶ However, the trial court awarded only nominal damages in the amount of \$1.⁶⁷ The unit owner appealed the trial court's judgment on count III and the award of only nominal damages on count V.⁶⁸ The Association cross appealed the finding of liability on count V.⁶⁹ Citing *GNB, Inc. v. United Danco Batteries, Inc.*,⁷⁰ the reviewing appellate panel indicated it would not reweigh the evidence, and that the record supported the trial court's conclusions.⁷¹

With regard to count III (the cable television issue), the court noted that the Association held a "town meeting" to explain cable television options and that various reports were made available for inspection by the unit owners.⁷² The court concluded that the board of directors did not mislead

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Except for about \$2000 which was used for cleaning the pool. *Stevens*, 784 So. 2d at 518.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Stevens*, 784 So. 2d at 518.

69. *Id.*

70. 627 So. 2d 492, 493 (Fla. 2d Dist. Ct. App. 1993).

71. *Stevens*, 718 So. 2d at 518.

72. *Id.* at 519.

the unit owners, but allowed them to draw their own conclusions as to which cable company should be chosen.⁷³

Although the rationale for the court's affirmance of the dismissal of count III is brief, the troubling aspect is the suggestion that under different factual circumstances, a prima facie case for breach of fiduciary duty could have been made. The courts have historically given condominium association boards wide "business judgment" latitude⁷⁴ and indeed the condominium statute permits the board of directors to normally, absent a contrary restriction in the declaration of condominium, choose the bulk cable provider.⁷⁵ Hopefully, the court's disposition of count III will not be construed to imply a broader standard of liability than Florida's case law currently provides.⁷⁶

The more troubling aspect of the court's decision in *Stevens* is the affirmance of count V and the award of nominal damages. Even though it was not contested that the repair of the south terrace area was a proper function of the Association, the court concluded that the Association "did misapply funds."⁷⁷ Although the decision does not include a detailed review of the underlying facts in the matter, the court does note that when Mr. Stevens charged the board with "misapplying" the funds, the board returned the assessment to the unit owners, and thereafter, presumably properly, specially assessed the funds necessary to repair the south terrace.⁷⁸ Although the use of special assessment funds for purposes other than that for which they were levied appears to violate the condominium statute,⁷⁹ the court does not address⁸⁰ why the dispute did not become moot when the assessment was returned.⁸¹ Clearly, of greatest practical significance to the Association is the fact that Mr. Stevens would presumably be declared the "prevailing party" in count V, and as such, would be entitled to the recovery of reasonable attorney's fees incurred with the prosecution of that count.⁸²

73. *Id.*

74. *Farrington v. Casa Solana Condo. Ass'n*, 517 So. 2d 70, 72 (Fla. 3d Dist. Ct. App. 1987).

75. *Id.* FLA. STAT. § 718.115(1)(d) (2001).

76. *See, e.g., Perlow v. Goldberg*, 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

77. *Stevens*, 784 So. 2d at 519.

78. *Id.*

79. FLA. STAT. § 718.112(2)(c) (2001).

80. It is unknown whether the issue was raised in the pleading or the briefs.

81. *See, e.g., 51 Island Way Condo. Ass'n, Inc. v. Williams*, 458 So. 2d 364, 367 (Fla. 2d Dist. Ct. App. 1984).

82. FLA. STAT. § 718.303(1) (2001).

Another breach of fiduciary duty case which is troubling from the perspective of unit owner or homeowner controlled associations is *Turkey Creek Master Owners Ass'n, Inc. v. Hope*.⁸³ In this case, a homeowners association sued the officers and directors of the Association who had been appointed by the developer.⁸⁴ The Association's claims sounded in breach of fiduciary duty, conversion, breach of contract, and accounting.⁸⁵ In connection with the underlying action, the trial court entered an order that required the Association to pay the attorney's fees of the developer's board appointees.⁸⁶ The basis of the trial court's award was section 607.0850(9) of the *Florida Statutes*, the section of the corporation laws applicable to indemnification.⁸⁷ The statute provides that a trial court may order a corporate plaintiff to indemnify a defendant for fees and expenses incurred in defending a suit filed by the corporation against one or more of its directors or employees.⁸⁸ The statute limits indemnification in such situations to cases where the court finds that the defendant or defendants are "fairly and reasonably entitled to indemnification or advancement of expenses or both, in view of all of the relevant circumstances . . .".⁸⁹

Although disagreeing with the Association's contention that the trial court should have dismissed the claim to indemnification entitlement on the pleadings, the appellate court ruled that the trial court did not set forth a sufficient basis for determining whether the "fairly and reasonably" entitlement standard was met, nor did the trial court explicate the "relevant circumstances" upon which such judgment was rendered.⁹⁰ The parties stipulated that the trial courts order of indemnification was based upon the pleadings; the appellate panel, writing per curiam, sent the order back to the trial court, on remand, for reconsideration in light of the standards explicated in the opinion.⁹¹

In dicta, the appellate court noted that the indemnification statute is more likely to be applied when a corporate employee or director is sued by a third party in relation to the actions of the employee or director as a

83. 766 So. 2d 1245 (Fla. 1st Dist. Ct. App. 2000).

84. *Id.* at 1246.

85. *Id.*

86. *Id.*

87. Although most condominium and homeowners associations are not-for-profit corporations, the indemnity provisions of the Florida Business Corporation Act are incorporated into the Florida Not-for-Profit Corporation Act. FLA. STAT. § 617.0831 (2000).

88. § 607.0850(9).

89. *Id.*

90. *Turkey Creek*, 766 So. 2d at 1246.

91. *Id.* at 1246-47.

corporate agent.⁹² Conceding that the statute recognizes circumstances where the corporation must indemnify the agent it is suing, the court further noted that, since the corporation faces the possibility of being required to pay the legal fees and the expenses of the very party it is suing, it is “especially important to determine whether the circumstances justify a finding that the agent is reasonably entitled to indemnification.”⁹³

Perhaps most puzzling, the *Turkey Creek* court does not discuss the effect of section 617.0831 of the Florida Not-for-Profit Corporation Act which provides that “the term director, as used in section 617.0850, does not include a director appointed by the developer to the board of directors of a condominium association under chapter 718, a cooperative association under chapter 719, a homeowners association defined in section 720.301, or a timeshare managing entity under chapter 721.”⁹⁴ Unfortunately, the court’s decision does little to develop objective standards in the law as it pertains to the unique circumstances of the relationship between associations and those directors who were appointed by the developer.

Obviously, the specter of paying a developer-appointee’s attorney’s fees, pursuant to the corporate indemnification statute, could create a chilling affect on an associations’ vindication of legal rights, and the pursuit of recognized causes of action. Interestingly, the court does not address the standards for indemnification for cases of this nature, as enunciated in *Old Port Cove Property Owners Ass’n, Inc. v. Ecclestone*.⁹⁵ In *Old Port Cove*, the Association sued the principal in the development entity, also a member of the Association’s board, for selling the road system within the development back to the Association at a price of approximately two million dollars.⁹⁶ The developer prevailed on the Association’s claim of breach of fiduciary duty.⁹⁷ The trial court awarded Mr. Ecclestone his attorney’s fees, based upon language in the Association’s articles of incorporation, which entitled directors of the Association to indemnification.⁹⁸ The appellate court, relying on the then existing version of the law struck down the indemnification award.⁹⁹ The *Old Port Cove* court also cited *Penthouse*

92. *Id.* at 1247.

93. *Id.*

94. FLA. STAT. § 617.0831 (2000).

95. 500 So. 2d 331 (Fla. 4th Dist. Ct. App. 1986).

96. *Id.* at 332.

97. *Id.* at 333.

98. *Id.* at 336.

99. *Id.* at 335. The version of the indemnification statute litigated in *Turkey Creek* is different than the version that existed when the *Old Port Cove* case was decided.

North Ass'n, Inc. v. Lombardi,¹⁰⁰ where the Supreme Court of Florida held, on essentially public policy grounds, that the indemnification provision in the articles of incorporation of a condominium association could not be invoked to support a claim by the developer-appointees to the board.¹⁰¹

Another "pre-turnover" breach of fiduciary duty type case,¹⁰² *Larsen v. Island Developers, Ltd.*¹⁰³ has the twist of the not-for-profit corporation structured as an "equity club."¹⁰⁴ At issue in the case was the trial court's dismissal of the derivative action complaint, brought by members of the club, against the developer of Fisher Island, an exclusive development in Miami-Dade County.¹⁰⁵

According to the complaint, the club's developer enticed prospective purchasers of equity memberships in the club on the basis of representations that a right of first refusal existed for undeveloped land on Fisher Island and a similar right with respect to the developer's unsold condominium units, if the developer decided to offer the units for sale below a stated price level.¹⁰⁶ The developer ostensibly breached the agreement by marketing to third parties its remaining undeveloped land, along with its inventory of unsold condominium units.¹⁰⁷ After having sold the property in question, the developer gave notice of a proposed sale to its own employee, as president of the club, but provided no opportunity to purchase.¹⁰⁸

The trial court dismissed the complaint, holding that derivative actions could not be brought for the benefit of, or on behalf of, not-for-profit corporations.¹⁰⁹ The trial court's ruling was based upon a 1993 amendment to chapter 617¹¹⁰ which "burned the bridge" between that statute and chapter

100. 461 So. 2d 1350 (Fla. 1984).

101. *Id.* at 1351.

102. The reported decision does not specifically identify the theories of action pled in the case. The case does, however, involve actions of the developer's appointee to the board.

103. 769 So. 2d 1071 (Fla. 3d Dist. Ct. App. 2000).

104. *Id.* Although the term "equity club" has no statutory definition, it generally involves property interests and use rights with respect to recreational amenities (golf courses, country clubs, etc.) which are not tied to the ownership of real estate, and which do not involve mandatory membership in a community association. Community association practitioners are, however, frequently called upon to address issues pertaining to "equity clubs," which are often included as a feature of master planned developments.

105. *Larsen*, 769 So. 2d at 1071.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1072.

110. *Larsen*, 769 So. 2d at 1071 (citing The Florida Not-for-Profit Corporation Law, section 617.1908 of the *Florida Statutes*).

607.¹¹¹ The appellate court acknowledged that chapter 617 contains no specific grant of authority to bring a derivative action on behalf of a not-for-profit corporation.¹¹² However, the court further noted that the derivative rights conferred upon shareholders in corporations for profit were not initially derived from the legislature, but granted at common law as an equitable remedy.¹¹³

Thus, and in light of there being no specific prohibition in chapter 617 against derivative suits, the court applied the same rationale that led to imposition of derivative action rights at common law for profit making corporations.¹¹⁴ The court's opinion, written by Judge Ramirez, confesses that the intent of the 1993 amendments to the relevant statute is unclear.¹¹⁵ The court reasoned, however, that there were likely other reasons why the statute was amended, and there was no indicia of legislative intent to "completely eliminate a long-recognized, common law cause of action."¹¹⁶ Going a step further, the court went on to say that, "[t]o hold otherwise could likely raise the possibility of an unconstitutional restriction on access to courts."¹¹⁷ The procedural vehicle of a derivative suit is a potentially important right to homeowners or unit owners within associations still controlled by developers. Indeed, prior to the definitive announcement of the *Larsen* court, the existence or non existence of derivative actions for not-for-profit corporations remained an open question since the 1993 statutory amendments.

A relatively straightforward breach of fiduciary duty case, *Florida Discount Properties, Inc. v. Windermere Condominium, Inc.*,¹¹⁸ presents a fact pattern in a unit owner-controlled association which is most notable for the ostensible audacity of the two condominium association directors involved.¹¹⁹ Harold Glover and Jack Gerzina sat on the board of directors of Windermere Condominium, Inc.¹²⁰ Windermere Condominium was subject to a "recreation lease."¹²¹ Over a period of some twenty five years, the

111. *Id.* (citing The Florida Business Corporation Act, section 607 of the *Florida Statutes*).

112. *Id.* at 1072.

113. *Id.*

114. *Id.*

115. *Larsen*, 769 So. 2d at 1072.

116. *Id.*

117. *Id.*

118. 786 So. 2d 1271 (Fla. 4th Dist. Ct. App. 2001).

119. *Id.* at 1272-73.

120. *Id.* at 1271-72.

121. *Id.* at 1272; FLA. STAT. § 718.401 (1997).

association paid a total of \$750,000 in lease payments.¹²² In 1995, the board of the association voted to buy out the lease.¹²³ The association was able to negotiate a purchase price with the developer of \$35,000.¹²⁴ At a December 1996 Board meeting, Gerzina and Glover, along with the Association's attorney, urged the association to contest the lease based upon the argument that it was unconscionable.¹²⁵ Initially, a quorum was not present because only three of the seven directors were at the meeting.¹²⁶ Apparently at the attorney's recommendation, two more Board members were appointed, making the Board nine members in total, and thus creating a quorum of five.¹²⁷

Subsequently, a dispute in the condominium developed as to who was lawfully on the Board.¹²⁸ A receiver was appointed in 1997 to operate the association and Gerzina and Glover were recalled from the Board, as ultimately confirmed by an arbitrator.¹²⁹ Prior to their removal from the board, however, Gerzina and Glover began negotiating with the recreation lease's owner to purchase the recreational lease property.¹³⁰ A week after Gerzina and Glover were recalled from the board, they entered into a contract to purchase the property from the owner.¹³¹ Thereafter, they filed suit against the association to collect back rents.¹³² Although the opinion, written by Judge Stevenson, does not involve a detailed recitation of the trial court's legal findings, the appellate court summarily upheld the trial court's order that Gerzina and Glover "utilized their position on the [board] to negotiate an advantageous economic position for themselves personally to the detriment of Windermere."¹³³ The trial court also ordered that the association be given a right of first refusal to purchase the property for

122. *Id.*

123. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1272.

124. *Id.* The decision does not specify why such an apparently low purchase price was involved in light of the fact that the lease presumably provided a substantial income stream. *Id.* at 1271-73.

125. *Id.* (citing FLA. STAT. § 718.122(1)(a)(i) (1997) ("detailing guidelines for determining whether a lease is presumptively unconscionable.")).

126. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1272.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1272-73.

131. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1273.

132. *Id.*

133. *Id.*

\$20,000, the same amount Gerzina and Glover paid for it.¹³⁴ One of the issues on appeal was whether or not the subject lease was subject to the right of first refusal found in section 718.401(1)(f) of the *Florida Statutes*.¹³⁵ The appellate court found that it was not necessary to reach this question, because the trial judge properly granted the right of first refusal based on Gerzina's and Glover's "disgorgment for usurping the corporate opportunity."¹³⁶

Unfortunately, it is not uncommon in condominium governance for disputes to erupt as to who is, or is not, legally seated on the Board. The action of appointing two directors as an emergency matter at a Board meeting certainly seems suspect, although the relevant provisions of the association's bylaws are not set forth in the decision.¹³⁷ However, when unit owners and Board members engage in conduct that implicates personal profit making pertinent to condominium business, this case drives home the fact that the liability limitations and immunities generally sprinkled throughout the applicable statutes and relevant case law will find no application.

The final tort based conduct related case, *Hollywood Lakes Country Club, Inc. v. Community Ass'n Services, Inc.*,¹³⁸ presents yet another twist. Here, it was the developer who sued a management company, arising out of services provided by the management company regarding the community the developer had developed.¹³⁹ The developer's complaint sounded in breach of contract, misrepresentation, equitable subrogation, and malpractice.¹⁴⁰ The "trial court dismissed the fourth amended complaint with prejudice," resulting in the appeal.¹⁴¹

The issue in the underlying dispute was whether the management company hired by the developer-controlled association failed to take appropriate steps to collect assessments from unit owners.¹⁴² The developer claimed to be damaged since the governing documents for the community required the developer to fund any shortfalls in assessments collected from non-developer unit owners.¹⁴³ The legal hurdle faced by the developer was that the management agreement was between the association and the

134. *Id.*

135. The 1997 version of the statute was stated to apply to these proceedings. *Id.*

136. *Fla. Disc. Props., Inc.*, 786 So. 2d at 1273.

137. *See id.* at 1271-73.

138. 770 So. 2d 716 (Fla. 4th Dist. Ct. App. 2000).

139. *Id.* at 717.

140. *Id.*

141. *Id.*

142. *Id.* at 718.

143. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

management company, not the developer and the management company.¹⁴⁴ The appellate court held that the fourth amended complaint contained all of the necessary allegations to sustain a *prima facie* case for fraud (misrepresentation) by the management company as to the developer.¹⁴⁵ Citing applicable authorities, the court held that the developer sufficiently alleged misrepresentations by the management company, which caused the developer to refrain from independently acting to collect assessments.¹⁴⁶

The court also addressed the dismissal of the count for equitable subrogation.¹⁴⁷ Citing relevant authorities, and primarily relying on *National Union Fire Insurance Co. v. KPMG Peat Marwick*,¹⁴⁸ the Fourth District's panel, through Chief Judge Warner, found sufficient grounds to sustain a *prima facie* case for a claim of equitable subrogation.¹⁴⁹ The court ruled that the debt was due to the association from the individual homeowners, the management company was responsible for collecting the debt, and the management company's negligence caused the loss of the assessment.¹⁵⁰ The developer's payment of that debt allows it to succeed to the position of the original creditor, the association, under the doctrine of equitable subrogation.¹⁵¹

The court did, however, affirm the dismissal of a breach of contract count, which had been pled under a third party beneficiary theory.¹⁵² Citing *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*,¹⁵³ the court found that there was no indication that both parties to the contract, the association and the management company, intended to benefit the developer.¹⁵⁴ Finally, without discussion, the court dismissed the "malpractice" complaint against the management company, "as there was no allegation that [the management company] was a professional, and no privity of contract alleged."¹⁵⁵

This case presents developers with some interesting food for thought in terms of structuring the contractual relationship for communities they

144. *Id.*

145. *Id.*

146. *Id.* (citing *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984)); *see also* *Frenz Enters, Inc. v. Port Everglades*, 746 So. 2d 498, 502-03 (Fla. 4th Dist. Ct. App. 1999).

147. *Id.*

148. 742 So. 2d 328, 332 (Fla. 3d Dist. Ct. App. 1999).

149. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

150. *Id.* at 718-19.

151. *Id.* at 719.

152. *Id.*

153. 647 So. 2d 1028, 1031 (Fla. 1994).

154. *Id.*

155. *Id.*

develop with the manager or management company that is typically retained to administer the day-to-day affairs of the development and the association. Although many homeowners in communities under development see the management company as “working for the developer,” in most cases the privity of contract is between the association and the management company, albeit under developer control. Clearly, a manager’s negligence or other tortious conduct can cause as much, perhaps more, damage to the developer than to the association itself, since various statutory provisions and common law theories may result in the developer, and its board appointees, being exposed to liability claims for pre-turnover acts or omissions.

C. Attorney Malpractice Claims

Perhaps as a reminder that community association law is hardly a risk-free endeavor, two decisions announced during the period covered by this survey explore legal malpractice exposure for those engaged in the practice. In decisions issued only three days apart, the first and second districts addressed slightly different scenarios.

*Hunt Ridge at Tall Pines, Inc. v. Hall*¹⁵⁶ involved a malpractice suit filed by a homeowners association¹⁵⁷ against the attorney retained by the developer to draft the governing documents for the community and its governing associations.¹⁵⁸ According to the suit, one of the declaration supplements prepared by the Developer’s attorney incorrectly listed the owner of the property,¹⁵⁹ resulting in the alleged invalidity of the declaration of covenants as to certain lots and the consequent inability to perform anticipated duties and collect corresponding maintenance fees.¹⁶⁰

At issue was whether the attorney-client relationship between the lawyer and the developer, as opposed to the developer and the association, conferred any standing on the association for a malpractice claim, as an intended third party beneficiary of the lawyer-client relationship.¹⁶¹ Citing the *Caretta* case,¹⁶² the second district, through Judge Threadgill, enforced

156. 766 So. 2d 399 (Fla. 2d Dist. Ct. App. 2000).

157. Although not specifically stated in the opinion, it appears that this was the post-turnover association that acted as plaintiff in the suit.

158. *Hunt Ridge*, 766 So. 2d at 400.

159. Allegedly the general partner of the development entity, rather than the limited partnership which was the developer entity itself, was named.

160. *Hunt Ridge*, 766 So. 2d at 400.

161. *Id.*

162. See *Caretta Trucking*, 647 So. 2d at 1028.

the long-standing legal principle that a party is an intended beneficiary to a contract only if the parties clearly express or the contract itself expresses an intent to primarily and directly benefit a third party.¹⁶³

The court observed that the declaration expressly indicated that it benefited the property owners, but made no mention of benefiting the association.¹⁶⁴ Reasoning that the association is not an “owner,” the party whom benefited from the document drafting, the court concluded that the association could not state a cause of action.¹⁶⁵

Although this case was resolved favorably from the perspective of the developer’s counsel, query whether a different result would have obtained if individual owners had filed the suit, rather than the association. Indeed, and although not so expressly stated by the second district, a review of the Court’s rationale could lead one to conclude that the court would have reviewed the matter in an entirely different light, given the language in the Declaration, which could be construed to confer third party beneficiary status on the property owners in the development.

The flip side of the *Hunt Ridge* case involved a malpractice lawsuit by unit owners in a unit-owner controlled condominium association against the association’s attorney. In *Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane*,¹⁶⁶ a group of unit owners sued the association’s attorney for legal malpractice, arising out of allegedly negligent advice given to the association relative to reconstruction of the condominium after Hurricane Opal, which inflicted major damage in the Florida Panhandle in 1995.¹⁶⁷

Silver Dunes, the condominium operated by the association, sustained substantial damage after Hurricane Opal. John Daniel, an attorney with the Law Firm of Beggs and Lane, was retained to provide advice and counsel to the association.¹⁶⁸ Ultimately, it was discovered that insurance proceeds would not be sufficient to repair all of the damage that had been caused by the storm.¹⁶⁹ The Board, with Daniel’s assistance, announced a plan whereby additional units would be built during the reconstruction and sold to make up the monetary shortfalls that were expected due to insufficient insurance proceeds.¹⁷⁰

163. *Hunt Ridge*, 766 So. 2d at 400.

164. *Id.* at 400–01.

165. *Id.* at 401.

166. 763 So. 2d 1274 (Fla. 1st Dist. Ct. App. 2000).

167. *Id.* at 1276.

168. *Id.* at 1275.

169. *Id.* at 1275–76.

170. *Id.* at 1276.

Controversy erupted over the board's plan. At one point, Daniel wrote letters to some of the individual unit owners, threatening legal action if they did not vote in favor of the board's plan.¹⁷¹ In their suit, the unit owners contended that the attorney provided erroneous legal advice to the board in connection with the reconstruction expansion plan, which led to a delay in the ultimate reconstruction of the destroyed units, and a resulting loss of rental income to the affected owners.¹⁷² The trial court entered summary judgment in favor of the attorney and the law firm.¹⁷³

Citing the general rule that an attorney's liability for negligence is generally limited to the persons with whom the attorney shares privity of contract, the court, in its per curiam opinion, noted that a "narrow exception" exists when the non-clients can demonstrate that they are a third-party beneficiary of the agreement for legal services.¹⁷⁴

Without cited authority from other case decisions, the court went on to observe that a condominium association is a "closely held corporation."¹⁷⁵ Thus, the court concluded that the issue was governed, at least in part, by a case from the fourth district.¹⁷⁶ On the authority of *Brennan*, the first district likened the unit owners to "minority stockholders," and accordingly found no basis to conclude that the attorney was representing the legal interests of the individual unit owners.¹⁷⁷ Indeed, the court noted that it would be unusual to argue that the attorney was representing the individual interests of the unit owners when he had sent them letters threatening to sue them.¹⁷⁸

The relationship between a community association attorney and its unit owners is one that is often problematic for community association practitioners. Many unit owners and homeowners feel that they are "paying for" the services, and therefore feel that the attorney's loyalty should be directed to their interests. Unfortunately, the interests of the association and particular unit owners often diverge, and an attorney cannot serve two masters. This case is a common sense result and is consistent with other cases involving the role of community association attorneys and the unit

171. *Silver Dunes*, 763 So. 2d at 1276.

172. *Id.*

173. *Id.* at 1277.

174. *Id.* at 1276; see also *Hunt Ridge*, 766 So. 2d at 400.

175. *Id.* at 1276.

176. *Silver Dunes*, 763 So. 2d at 1276 (discussing *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994)).

177. *Id.* at 1277.

178. *Id.*

owners.¹⁷⁹ However, the case is also instructive that association lawyers need to be constantly on the guard to insure that their representational roles are clear, and to insure that they remain so.

D. Condominium Cases

An interesting case, apparently reviewing issues of first impression, involves the liability of unit owners in a condominium for the negligent acts or omissions of their association. *Cooley v. Pheasant Run at Rosemont Condominium Ass'n, Inc.*¹⁸⁰ involved claims made by a person who was injured on the common elements of the condominium, while a guest at the condominium.¹⁸¹

However, in addition to suing the Association as a corporate entity, the plaintiff also sued each unit owner individually.¹⁸² The trial court dismissed the action against the individual unit owners, with prejudice, and indeed suggested that it would favorably entertain motions filed pursuant to section 57.105 of the *Florida Statutes*, which provides sanctions for frivolous litigation.¹⁸³ On appeal before the fifth district, Judge Cobb writing for the panel, examined the provisions of section 718.119 of the *Florida Statutes*.¹⁸⁴ Finding the issue to be one of "legislative intent,"¹⁸⁵ the court reasoned that

179. See, e.g., *Ocean Club of Palm Beach Shores Condo. Ass'n v. Estate of Daly*, 504 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1987).

180. 781 So. 2d 1182 (Fla. 5th Dist. Ct. App. 2001).

181. *Id.* at 1183.

182. *Id.*

183. *Id.*

184. Same provides:

Limitation of liability.—

(1) The liability of the owner of a unit for common expenses is limited to the amounts for which he or she is assessed for common expenses from time to time in accordance with this chapter, the declaration, and bylaws.

(2) The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit.

(3) In any legal action in which the association may be exposed to liability in excess of insurance coverage protecting it and the unit owners, the association shall give notice of the exposure within a reasonable time to all unit owners, and they shall have the right to intervene and defend.

Id. at 1183–84.

185. *Cooley*, 781 So. 2d at 1184.

the requirement that an association give notice to unit owners of potential liability in excess of insurance proceeds was indicative of the intention that the unit owner would not be an original party to the action, otherwise such notice would not be necessary.¹⁸⁶ The court found the focus of section 718.119 of the *Florida Statutes* to stand for the proposition that the association, as a corporate entity, would be the party liable for personal injuries on the condominium common elements, while the individual unit owners would be liable for assessments proportionate to such damage, up to the value of the unit.¹⁸⁷ Citing cases relative to a condominium association's status as a defendant in class action proceedings,¹⁸⁸ the court found¹⁸⁹ that the association, and only the association, would serve as the appropriate defensive class representative in matters of this nature.¹⁹⁰ The result in this case is consistent with the apparent legislative intent of section 718.119 of the *Florida Statutes*, which the court found to be less than "clear-cut," and is also consistent with the unique feature of condominium associations¹⁹¹

As noted previously, the introduction of mandatory, non-binding arbitration for most condominium "disputes" has resulted in a paucity of appellate cases exploring the limits of the dos and don'ts of condominium living. However, exploration of the limits of arbitrators' jurisdiction continue to emanate from the courts.¹⁹² *Florida Tower Condominium, Inc. v. Mindes*,¹⁹³ authored by Chief Judge Schwartz, dealt with a controversy over the right to use a particular parking space at the condominium.¹⁹⁴ Finding

186. *Id.*

187. *Id.*

188. *Graves v. Ciega Verde Condo. Ass'n, Inc.*, 703 So. 2d 1109, 1111 (Fla. 2d Dist. Ct. App. 1997); *Kesl, Inc. v. Racquet Club of Deer Creek II Condo, Inc.*, 574 So. 2d 251 (Fla. 4th Dist. Ct. App. 1991).

189. While apparently disagreeing with the trial court's perception that the issue was so clear-cut so as to invoke section 57.105 of the *Florida Statutes*.

190. *Cooley*, 781 So. 2d at 1184.

191. *Id.* See *The Florida Bar*, 353 So. 2d 95, 97 (Fla. 1977); *Avila South Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977).

192. See *Neate v. Cypress Club Condo. Inc.*, 718 So. 2d 390 (Fla. 4th Dist. Ct. App. Dist. 1998); *Ruffin v. Kingswood E Condo. Ass'n, Inc.*, 719 So. 2d 951 (Fla. 4th Dist. Ct. App. 1998); *Clark v. England*, 715 So. 2d 365 (Fla. 5th Dist. Ct. App. 1998); *Summit Towers Condo. Ass'n, Inc. v. Coren*, 707 So. 2d 416 (Fla. 4th Dist. Ct. App. 1998); *Carlandia Corporation v. Obermauer*, 695 So. 2d 408 (Fla. 4th Dist. Ct. App. 1997); *Seamaan v. Sea Ranch Club Condo. Ass'n, Inc.*, 695 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997); *Blum v. Tamarac Fairways Ass'n, Inc.*, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996).

193. 770 So. 2d 210 (Fla. 3d Dist. Ct. App. 2000).

194. *Id.* at 211.

that because the statutory definition of “dispute”¹⁹⁵ does not include disagreements that involve “title to a unit or any common element,” the court ruled that such controversies were not arbitrable, and that original jurisdiction for the adjudication of such claims therefore lies in the courts.¹⁹⁶ Noting that the Arbitration Section of the Department of Business and Professional Regulation has, nonetheless, accepted jurisdiction over a variety of parking assignment disputes,¹⁹⁷ the court “decline[d] to follow [those] contrary decisions of arbitrators.”¹⁹⁸

It can be argued that the court ascribed a definition to the term “title” which is different from the use of that term in normal legal parlance.¹⁹⁹ Since common elements by their nature are not “owned” by individual unit owners,²⁰⁰ the legal basis for concluding that a disagreement as to who may use a parking space involves “title” is perhaps debatable. However, unless addressed in a contrary fashion by the Legislature, or treated differently outside of the third district, practitioners should add to their rule enforcement checklist the existence of this case in jurisdictional determination. The case of *Schooner Oaks Ltd. Co. v. Schooner Oaks Condominium Ass’n, Inc.*,²⁰¹ is the latest in the “phantom unit cases” rising out of the Fourth District Court of Appeal²⁰² which appears to address the “phantom issue” differently than the second district.²⁰³ Schooner Oaks Limited Company (“Schooner Oaks”) constructed Schooner Oaks Condominium, a phase condominium, “which ultimately consisted of four phases.”²⁰⁴ When Schooner Oaks stopped making payments on unconstructed units, Schooner Oaks Condominium Association, Inc. (“Association”) initiated foreclosure action against the unconstructed units.²⁰⁵ The trial court entered summary

195. FLA. STAT. § 718.1255(1) (2001).

196. *Florida Tower*, 770 So. 2d at 211.

197. *Id.*

198. *Id.* at 211 n.1.

199. See BLACK’S LAW DICTIONARY 1485 (6th ed. 1990) (defining title to include “the union of all the elements which constitute ownership”).

200. FLA. STAT. § 718.106(2)(a) (2001).

201. 776 So. 2d 304 (Fla. 4th Dist. Ct. App. 2000).

202. See also *RIS Inv. Group, Inc. v. Dep’t of Bus. & Prof’l Regulation*, 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997); *Welleby Condo. Ass’n, Inc. v. The William Lyon Co.*, 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987). Cf. *Winkelman v. Toll*, 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

203. See *Estancia Condo. Ass’n v. Sunfield Homes, Inc.*, 619 So. 2d 1008, 1010 (Fla. 2d Dist. Ct. App. 1993); *Hyde Park Condo. Ass’n v. Estero Island Real Estate, Inc.*, 486 So. 2d 1, 2 (Fla. 2d Dist. Ct. App. 1986).

204. *Schooner Oaks*, 776 So. 2d at 305.

205. *Id.*

judgment finding that Schooner Oaks was liable for assessments on the unconstructed “units,” from which order Schooner Oaks appealed.²⁰⁶

On appeal, the central issue was whether unimproved land was subject to assessments.²⁰⁷ As the grant of a summary judgment was on appeal, the court, in its per curiam opinion, felt constrained to review the matter in a light most favorable to Schooner Oaks.²⁰⁸ In reviewing the various provisions of the declaration of condominium, which largely tracks statutory definitions verbatim, the court concluded that a reasonable inference could be drawn that “units” were created immediately upon a new phase being added, regardless of the phase of construction.²⁰⁹

However, the court noted that section four of the Declaration of Condominium, which defines the “unit boundaries,” supported a different conclusion.²¹⁰ Recognizing that these “boundaries” did not exist, the court ruled that a genuine issue of material fact as to the intention of the declaration of condominium was presented.²¹¹ The court held that the declaration permitted differing reasonable inferences, and thus remanded the case to the trial court for plenary proceedings.²¹²

This case, although perhaps judicious in terms of summary judgment standards, continues the judicial trend in the fourth district, which fails to recognize that in condominiums, there are only two types of property, common elements and units. Property that is submitted to a declaration must be one or the other, it can not be neither, nor can it be both. In fact, after the fourth district’s *Welleby* decision, the statute was specifically amended to provide that upon the recording of a declaration, or an amendment adding a phase to the terms of the declaration, all units described in the declaration or phase amendment as being located in or on the land then being submitted to condominium ownership shall come into existence “regardless of the state of completion of planned improvements in which the units may be located.”²¹³ Although it was not stated in the opinion whether this declaration pre-dates or post-dates the 1990 amendment to the statute, it appears that the views of the Fourth District continue demonstrating the court’s hesitation to impose

206. *Id.*

207. *Id.*

208. *Id.* at 306.

209. *Schooner Oaks*, 776 So. 2d at 306.

210. The boundary definition in this declaration contained typical “interior shell” definitions, with the “unit” being encompassed within the perimeter walls, floors, and ceilings. *Id.* at 305–06.

211. *Schooner Oaks*, 776 So. 2d at 306.

212. *Id.*

213. FLA. STAT. § 718.104(2) (2001).

liability on raw land. If this case is litigated again to appeal after remand, it will certainly be interesting to see how the court resolves the issues, particularly to the extent that a post-1990 condominium may be involved.²¹⁴

In *Nationsbanc Mortgage Corp. v. The Gardens North Condominium Ass'n, Inc.*,²¹⁵ the quality of title obtained after foreclosure of a condominium lien, where service of process was subsequently contested, was at issue.²¹⁶ In 1997, the bank purchased the subject unit at a foreclosure sale.²¹⁷

The association alleged that, thereafter, the bank failed to pay assessments.²¹⁸ The association filed a lien and subsequent action to foreclose on the same.²¹⁹ Nationsbanc did not file a response to the complaint and a default judgment was ultimately entered.²²⁰ The foreclosure sale was held on March 2, 1998, and a third-party bidder purchased the unit.²²¹

Nearly a year later, the bank moved to quash service of process and dismiss the complaint.²²² Nationsbanc alleged that service of process was defective, specifically that service was effectuated on an administrative assistant in violation of section 48.081 of the *Florida Statutes*.²²³ The association responded that the attempt of service was voidable, not void.²²⁴ The trial court found service to be facially defective, but refused to grant NationBanc's motion to vacate the sale and void the certificate of title.²²⁵

Stating that it was undisputed that the association did not comply with the statute applicable to service of process on corporations, Judge Polen, writing for the court, held that as statutes governing service of process must be strictly construed, attempted service on a random employee without a showing of necessity negated the court's personal jurisdiction over the defendant corporation.²²⁶

214. The *RIS* decision also involved a pre-1990 Declaration of Condominium. *RIS Inv. Group, Inc. v. Dep't of Bus. & Prof'l Regulation*, 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997).

215. 764 So. 2d 883 (Fla. 4th Dist. Ct. App. 1997).

216. *Id.* at 844.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Nationsbanc Mortgage Corp.*, 764 So. 2d at 884.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Nationsbanc Mortgage Corp.*, 764 So. 2d at 884.

226. *Id.* at 884-85 (citing *York Communications, Inc. v. Furst Group Inc.*, 724 So. 2d 678 (Fla. 4th Dist. Ct. App. 1999)).

Distinguishing cases where a judgment is only voidable where service of process does not violate the essential requirements of law, the court concluded that the association's attempted service was facially void, as the affidavit accompanying the proof of service did not contain any statement of supporting the necessity of substitute service on a random employee.²²⁷

Obviously, the consequences for insurers of title, the foreclosure sale purchaser, and the association itself in a case of this nature could be substantial. Since the statute of limitations in a matter of this nature would appear to be seven years,²²⁸ exposure to the foreclosing associations and the attorney handling the case could continue for a substantial period of time. Attorneys handling association foreclosure cases should view this case as inducement to insure that the foreclosure checklist includes verification of appropriate service of process in every collections case before it is taken to foreclosure judgment and sale.

E. Homeowners' Association and Covenant Cases

Another decision involving the occasional legal no man's land of undeveloped phases of a development is *Villages at Mango Key v. Hunter Development, Inc.*²²⁹ At issue in *Villages at Mango Key* was voting rights for lands that were originally intended to be reserved as potential future development in the Mango Key development.²³⁰ Vacations Villages of American Inc. ("VVA") purchased Tract A of Lindfields Unit Six, which consisted of 18.89 acres.²³¹ It replatted a portion of this land into "Villages at Mango Key," consisting of thirty-three platted townhouse lots.²³² An exhibit to the Declaration of Covenants and Restrictions reflected eighty-eight additional proposed lots in the unplatted portion of Tract A, which was set aside for future development.²³³ VVA's interest in the undeveloped portion of the project was ultimately foreclosed, and purchased out of foreclosure by a company who ultimately sold it to Hunter Development

227. *Id.* at 885.

228. *See* FLA. STAT. § 95.12 (2001).

229. 763 So. 2d 476 (Fla. 5th Dist. Ct. App. 2000).

230. *Id.* at 477.

231. *Id.*

232. *Id.*

233. *Id.*

("Hunter").²³⁴ Hunter obtained approval to develop 236 condominium units on the land, including additional adjoining land owned by Hunter.²³⁵

Desiring to use the amenities servicing the Village at Mango Key, Hunter took the position that its purchase of the lands set aside for future phases entitled it to eighty-eight votes (the maximum number of potential lots), which thus would entitle it to control of the homeowners association.²³⁶ The trial court agreed with Hunter's position.²³⁷

In reversing the trial court, Judge Harris writing for the court, opined that the definition of a "lot"²³⁸ contained in the original governing documents was key to the adjudication of the issue.²³⁹ Finding that the voting rights appurtenant to "lots" was limited to the actual "Villages" development, or lands "subsequently added to the project," the court found that the attachment reserving the lands in question for future development was not a "recorded subdivision map" sufficient to grant voting rights.²⁴⁰ The court's reasoning was that there were no lots specifically described, but rather a large developable tract of land.²⁴¹ The court found that Hunter was "at best the fee simple owner of acreage which may or may not be developed into townhouse lots."²⁴²

Had the court stopped here, it seems clear that its decision was well-founded and based upon the intent of the documents and normal allocation of rights and interests in potential future phases of typical real estate developments. The court arguably going a step farther than it needed to, went on to find that the proposed construction of substantially more condominium units than would have been permitted under the original plan "reveals most convincingly that the foreclosure of the Developer's interest in the property released the unplatted land from the Developer's proposed expansion of the Villages project."²⁴³ The court found that Hunter abandoned the right to develop the property as part of Villages of Mango

234. *Villages of Mango Key*, 763 So. 2d at 477.

235. *Id.*

236. *Id.*

237. *Id.*

238. The Declaration provided: "Lot" shall mean and refer to any plot of land on which a Living Unit may be constructed as shown on any recorded subdivision map of the Property or which may hereafter be platted or otherwise created . . ." *Id.* at 477-78. "Living Unit" is defined as a "townhouse residence." *Villages of Mango Key*, 763 So. 2d at 478.

239. *Id.* at 478.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Villages of Mango Key*, 763 So. 2d at 478.

Key by converting the property to condominium project.²⁴⁴ It is perhaps troubling that the court looked at the foreclosure as the act eliminating the developer's interest in the potential future phases pertaining to Villages of Mango Key. Obviously, when developments go sour, the lender or foreclosure purchaser, who may wish to continue the original scheme of development, wants to be sure that a foreclosure will not extinguish reserved rights under the documents. Although the court's statement is perhaps dicta, it is a lesson for document drafters that clear reservation of use rights and the provision for what shall or may happen if potential future phases are put to different uses than originally anticipated, are key elements in drafting initial project documentation.

Although primarily presented as an agency case, *Lensa Corporation v. Poinciana Gardens Ass'n, Inc.*²⁴⁵ is perhaps most enlightening as to the difference in judicial treatment between condominium associations and homeowners associations. Although Florida's appellate courts have suggested that it takes unanimous approval for a condominium association to build a new swimming pool,²⁴⁶ or obtain super majority approval to change the color of a condominium building's paint,²⁴⁷ the *Lensa* court suggests that the board of directors of a homeowners association has the authority to sell all of the property and assets of the Association.²⁴⁸

The president of the Association, Dr. Goodman, negotiated and agreed to sell substantially all of the association's assets, consisting of land, to a company called BBG Appraiser Co. ("BBG"), which was owned by Ms. Sandel.²⁴⁹ It was understood that BBG would assign its contract rights to Lensa Corporation, which would develop the property.²⁵⁰

The parties executed an agreement, which Dr. Goodman signed on behalf of the Association.²⁵¹ After discovering that Dr. Goodman's signature had been witnessed by Mr. Sandel (also the owner of Lensa), Dr. Goodman was asked to execute a second contract to avoid any problems.²⁵² Prior to that time, however, Mr. Sandel had a discussion with Ms. Stole, the secretary

244. *Id.*

245. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).

246. *See* Downey v. Jungle Den Villas Recreation Ass'n, 525 So. 2d 438, 441-42 (Fla. 5th Dist. Ct. App. 1988). It is likely that this aspect of *Jungle Den* is no longer good law.

247. *Islandia Condo. Ass'n v. Vermut*, 501 So. 2d 741, 743 (Fla. 4th Dist. Ct. App. 1987)

248. *Lensa*, 765 So. 2d at 298.

249. *Id.* at 297.

250. *Id.*

251. *Id.*

252. *Id.*

of the homeowner's association board.²⁵³ Ms. Stole apparently told Mr. Sandel that she was not aware that a sales contract existed for the sale of the land.²⁵⁴ In response to Mr. Sandel's concerns, Dr. Goodman assured him that he would straighten out the matter with the board.²⁵⁵

Consequently, a board meeting was held to address the issue.²⁵⁶ According to the court's opinion, it was undisputed that a quorum was not in attendance for this meeting.²⁵⁷ Those who were in attendance agreed that Dr. Goodman was authorized to sign the purchase documents for the sum of \$50,000.²⁵⁸ The signed minutes of the meeting were subsequently faxed to Mr. Sandel, and several days later, a second contract, identical to the first, was entered into.²⁵⁹ Thereafter, the board elected a new president, and informed Mr. Sandel that the contract would not be honored because the selling price was too low.²⁶⁰ Lensa filed a breach of contract action against the Association.²⁶¹

Lensa conceded during the jury trial of the case that Dr. Goodman did not have actual authority to sell the property and that the board had not approved it.²⁶² The jury entered a verdict in favor of Lensa, totaling \$18,000, finding that Dr. Goodman had apparent authority to sign the agreement.²⁶³ The trial court granted the Association's motion for directed verdict and judgment notwithstanding the verdict, finding that Dr. Goodman had no actual authority because the true board of directors did not vote on the agreement.²⁶⁴ Further, the trial court ruled that Dr. Goodman failed to obtain the approval of the directors as required under the Association's bylaws,²⁶⁵ as well as section 617.1202 of the *Florida Statutes*.²⁶⁶ Judge

253. *Lensa*, 765 So. 2d at 297.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Lensa*, 765 So. 2d at 297.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Lensa*, 765 So. 2d at 297.

264. *Id.*

265. *Id.*

266. *Id.*

Sale, lease, exchange, or other disposition of corporate property and assets requiring member approval.—

A sale, lease, exchange, or other disposition of all or substantially all of the property and assets of a corporation, in all cases other than those not requiring member approval

Stone, writing for the court's majority, found that because the bylaws did not require membership approval, the directors had the authority to sell the property and assets of the corporation.²⁶⁷ It being undisputed that the board never approved the transaction, the court then concluded that any liability of the Association would need to be based on Dr. Goodman's apparent authority.²⁶⁸ Discussing the traditional elements of apparent authority, the court held that because sale of the Association's property was not in the ordinary course of business, there could be no presumed authority that Dr. Goodman had the authority to act for the Association.²⁶⁹ Accordingly, in the absence of representation from the Board that Dr. Goodman was authorized to act in this capacity, the court concluded that there was not representation by the purported principal, the Board, as to the agent's, the president's, authority.²⁷⁰

as specified in ss. 617.1201, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares, bonds, or other securities of any corporation or corporations for profit, domestic or foreign, and must be authorized in the following manner:

(1) If the corporation has members entitled to vote on the sale, lease, exchange, or other disposition of corporate property, the board of directors must adopt a resolution approving such sale, lease, exchange, or other disposition, and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, or other disposition of all or substantially all of the property and assets of the corporation must be given to each member entitled to vote at such meeting in accordance with the articles of incorporation or the bylaws. At such meeting, the members may authorize such sale, lease, exchange, or other disposition and may approve or fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization requires at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast. After such authorization by a vote of members, the board of directors may, in its discretion, abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating to such sale, lease, exchange, or other disposition, without further action or approval by members.

(2) If the corporation has no members or if its members are not entitled to vote thereon, a sale, lease, exchange, or other disposition of all or substantially all the property and assets of a corporation may be authorized by a majority vote of the directors then in office.

FLA. STAT. § 617.1202 (2001).

267. *Lensa*, 765 So. 2d at 298.

268. *Id.*

269. *Id.* See *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So. 2d 416, 418 (Fla. 5th Dist. Ct. App. 1982).

270. *Id.*

Judge Gross, specially concurring, agreed with the conclusion that apparent authority had not been demonstrated by *Lensa*.²⁷¹ Judge Gross, noting the absence of a corporate resolution and the absence of a history of completed deals between the parties that would give rise to apparent authority, found there was no formal act by the board which would denote the holding out of Dr. Goodman as possessing the authority to act on the Association's behalf.²⁷²

While the decision appears to accomplish justice, at least from the perspective of the Association, there are a couple of aspects that are noteworthy to the practitioner. First, in most dealings with community Associations, the authority of the board president to bind the corporation is often accepted as a given. This case demonstrates, at least when actions do not involve the ordinary course of business, the practitioner should acquire additional indicia of the president's authority, such as a board resolution, signed minutes, and the like.²⁷³

Perhaps of greater theoretical interest is the court's suggestion that had a full quorum of the board been at the meeting where the second contract was authorized, the action would have been a valid act of the Association.²⁷⁴ Keeping in mind that common properties for homeowners associations are often a central nature of the homeowners' investment in the community recreational facilities, open spaces, etc., one can certainly question the wisdom of applying the general provisions of the Florida Not-for-Profit Corporation Statute relevant to asset disposition, and to disposition of the common areas of a homeowners association.²⁷⁵

In what the court described as a "classic case of waiver," Judge Orfinger, writing for the Fifth District Court of Appeal in the *Woodlands Civic Ass'n, Inc. v. Darrow*,²⁷⁶ reviewed a neighborhood dispute regarding the use of property, which had been originally deed restricted to residential use and which was being used as a chiropractor's office.²⁷⁷ The deed restriction in question²⁷⁸ had apparently been in effect for a number of

271. *Id.*

272. *Id.* at 299 (Gross, J., concurring).

273. *Lensa*, 765 So. 2d at 298. Especially true where the magnitude of the transaction or undertaking justifies same.

274. *Id.*

275. *Id.*

276. 765 So. 2d 874 (Fla. 5th Dist. Ct. App. 2000).

277. *Id.* at 875.

278. In pertinent part:

No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family

years.²⁷⁹ Prior to acquisition of the property in question by Dr. Darrow, the property had been used for the conduct of a real estate business, including exterior parking signage indicating that the property was used primarily for commercial purposes.²⁸⁰ According to the court, the real estate business had been conducted on the property since 1989.²⁸¹

When Dr. Darrow decided to purchase the property for his chiropractor's office, it came to his attention that the president of the voluntary homeowners' association which existed in the development was not happy about his plans, although Association representatives apparently told Dr. Darrow there was nothing they felt they could legally do to stop him.²⁸² After Dr. Darrow closed on the property in 1996 and began his chiropractic practice, the homeowners association²⁸³ and three individual property owners filed suit against Dr. Darrow.²⁸⁴ At trial, testimony was adduced to the effect that prior to Dr. Darrow's acquisition, for at least seven years, the property had openly and notoriously been used for commercial, not residential, purposes.²⁸⁵ For example, Dr. Darrow's predecessor undertook substantial renovations in 1993 and 1994, all geared toward the property's commercial utilization, without objection from the Association, which took no action to stop it.²⁸⁶

The appellate court began its opinion by noting that the trial court, apparently attempting to fashion a solution that it hoped would make all parties happy, made no findings in its final order denying enforcement of the

dwelling not to exceed two stories in height and a private garage for not more than two cars.

No building shall be erected, placed or altered on any lot until the construction plans and specifications and a plan allowing the location of the structure have been approved by the Architectural Control Committee as to quality of workmanship and materials, harmony of external design with existing structures and as to location with respect to topography and finish grade elevation.

Id.

279. *Id.*

280. *Id.*

281. *Woodlands*, 765 So. 2d at 875.

282. *Id.* at 876.

283. *See Palm Point Prop. Owners Ass'n, Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993) (indicating it is not clear as to the legal basis upon which the association filed suit).

284. *Woodlands*, 765 So. 2d at 874.

285. *Id.* at 876.

286. *Id.* at 875. Even though the association was aware of the work, as evidenced by testimony of a telephone call between the then president of the association and Dr. Darrow's predecessor. *Id.*

restrictions.²⁸⁷ On the authority of *Home Depot U.S.A. v. Taylor*,²⁸⁸ the Fifth District concluded that it was obligated to uphold the trial court's conclusion if it was correct for any reason.²⁸⁹ After quotation of black letter law regarding waiver of enforcement of restrictive covenants,²⁹⁰ the standards required to demonstrate waiver,²⁹¹ and Supreme Court cases from Indiana²⁹² and Mississippi,²⁹³ the court concluded, without embellishment, that the substantial delay in objecting to the commercial use of the property resulted in a waiver of the restriction and that the doctrine of laches likewise barred enforcement of the covenant.²⁹⁴

Although the voiding of a covenant running with the land is a harsh result, enforcement of covenants lies largely within the equity jurisdiction of the court.²⁹⁵ While the appellate panel seemed to gently criticize the trial judge for ruling in favor of Dr. Darrow simply based upon an oral pronouncement that it would be inequitable to enforce the restriction.²⁹⁶ It is equally obvious that the appellate court did not fundamentally disagree that enforcement of the covenant would be inequitable in this case.²⁹⁷ Although the concept is not particularly well-developed in the published decision, implicit in the court's holding is that laches will defeat a covenant's enforceability when there is injury flowing from the non-action.²⁹⁸ Here, the Association and the neighbors sat by idly for years while the property was used for commercial purposes, was substantially improved, and then subsequently sold to Dr. Darrow.²⁹⁹

Another pair of cases involving deed restrictions and voluntary homeowners associations are *Cudjoe Gardens Property Owners Ass'n, Inc. v. Payne*,³⁰⁰ (*Cudjoe I*) and *Cudjoe Gardens Property Owners Ass'n, Inc. v.*

287. *Woodlands*, 765 So. 2d at 876.

288. 676 So. 2d 479, 480 (Fla. 5th Dist. Ct. App. 1996).

289. *Woodlands*, 765 So. 2d at 876.

290. 20 AM. JUR. 2d *Covenants* § 239 (1995).

291. *Woodlands*, 765 So. 2d at 876-77 (citing *Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So. 2d 581, 587 (Fla. 1st Dist. Ct. App. 1985)).

292. *Wischmeyer v. Finch*, 107 N.E.2d 661 (Ind. 1952).

293. *Twin States Realty Co., v. Kilpatrick*, 26 So. 2d 356 (Miss. 1946).

294. *Woodlands*, 765 So. 2d at 877.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Woodlands*, 765 So. 2d at 875.

300. 770 So. 2d 190 (Fla. 5th Dist. Ct. App. 2000).

Payne,³⁰¹ (*Cudjoe II*). In *Cudjoe I*, standing of the plaintiff Association was at issue.³⁰² The Association was seeking to enforce a deed restriction that included minimum setback requirements against the Paynes.³⁰³ Because the property owners association was a voluntary organization, the Paynes moved to dismiss the complaint based upon the Association's lack of standing and on the authority of a 1993 case decided by the Supreme Court of Florida.³⁰⁴

In reversing the trial court's order of dismissal, the *Cudjoe I* Court, through Judge Ramirez, distinguished the standing of the Association in the instant dispute from that in *Palm Point*, because the Cudjoe Association owned a platted lot within the subdivision.³⁰⁵ Although the lot was apparently not buildable, the third district held that same would not defeat the Association's standing as a property owner to enforce the deed restrictions. The appellate court remanded the cause to the trial court with instructions that the Association should be granted standing to pursue relief, resulting in *Cudjoe II*.³⁰⁶

After remand, the *Cudjoe II* trial judge again entered judgment against the Association, this time on the grounds that the deed restrictions, as previously amended by a majority vote of the property owners and as authorized by the original deed restriction, were void.³⁰⁷ The written ballots of the property owners did not comply with the two witness requirement of Florida's version of the Statute Deeds, section 689.01 of the *Florida Statutes*.³⁰⁸ The appellate court's opinion, written by Chief Judge Schwartz,

301. 779 So. 2d 598 (Fla. 3d Dist. Ct. App. 2001).

302. *Cudjoe I*, 770 So. 2d at 190.

303. *Id.*

304. *Id.* (discussing *Palm Point Prop. Owners Ass'n, Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993)).

305. *Id.*

306. *Id.* at 190–91.

307. *Cudjoe II*, 779 So. 2d at 598.

308. In pertinent part:

No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in or out of any messages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate, interest, or term of more than 1 year, or by the party's agent thereunto lawfully authorized, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to or out of any messages, lands, tenements or hereditaments, shall be assigned or surrendered unless it be by instrument signed in the presence of two subscribing witnesses by the party so assigning or surrendering, or by the party's agent

found it clear that deed restrictions of this type are “simply equitable rights arising out of the contractual relationship between and among the property owners and emphatically do not constitute interest in real estate which § 689.01 applies.”³⁰⁹

Although both *Cudjoe I* and *Cudjoe II* do not recite facts which enable the reader of the decision to comprehend the precise nature of the underlying disputes involving the setback controversy, it does appear that amendments to the deed restrictions may have been involved. While the condominium statute³¹⁰ contains clear guidance as to the procedure for certifying amendments to condominium documents, there is no parallel guidance in the statute applicable to homeowners associations.³¹¹ Obviously, it remains necessary for those seeking to amend deed restrictions to comply with the amendatory procedures contained therein,³¹² but this case provides safe harbor from adherence to the technicalities of conveyancing laws applicable to real property transfers at least where not specifically required.

*Sugarmill Woods Oaks Village Association, Inc. v. Wires*³¹³ involves the following issue:

Does the issuance of a tax deed to a lot extinguish a homeowner association’s lien placed on such lot, pursuant to a declaration of covenants, recorded prior to issuance of the tax deed, where the declaration provided for homeowner association liens to be placed on lots for delinquent homeowner association assessments, and the homeowners association recorded a lien pursuant to the declaration prior to the issuance of the tax deed?³¹⁴

thereunto lawfully authorized, or by the act and operation of law. No seal shall be necessary to give validity to any instrument executed in conformity with this section. Corporations may convey in accordance with the provisions of this section or in accordance with the provisions of sections 692.01 and 692.02 of the *Florida Statutes*.

FLA. STAT. § 689.01 (2000).

309. *Cudjoe II*, 779 So. 2d at 598–99. *Cudjoe I* states that a setback requirement was in controversy.

310. FLA. STAT. § 718.110 (2000).

311. FLA. STAT. § 720.301 (2000).

312. *Cudjoe II*, 779 So. 2d at 598. Many covenants applicable to homeowners associations and other non-condominium deed restricted communities do require recordation of individual lot owner consents. *Id.*

313. 766 So. 2d 487 (Fla. 5th Dist. Ct. App. 2000).

314. *Id.* at 488.

“The trial court ruled that the liens were extinguished.”³¹⁵ The Fifth District Court of Appeal, through Judge Sharp, agreed, and affirmed the trial court.³¹⁶ According to the court’s opinion, the case turned solely on the interpretation of applicable statutes.³¹⁷ The court first considered a 1973 amendment to section 197.552 of the *Florida Statutes*,³¹⁸ which governs tax deeds. The 1973 amendment to the statute provided that “[n]o right, interest, restriction, or other covenant shall survive the issuance of a tax deed.”³¹⁹ In 1979, this provision was amended to exempt from tax deeds extinguishment, a lien of record held by a municipality or governmental unit.³²⁰ In the same Act, the legislature also amended section 197.573 of the *Florida Statutes*, to provide that certain restrictions and covenants would survive issuance of a tax deed.³²¹ Subsection 2 of the law limited those restrictions that survived to usual restrictions and covenants limiting the use of property.³²² However, the 1979 law also specifically provided that the limited exception for survival of restrictions or covenants “shall not protect covenants creating any debt or lien against or upon the property . . .”³²³ After considering the legislative history of the 1979 amendments, the court concluded that the obvious public policy of the 1979 amendments was to allow local governments to protect their taxing basis by limiting those financial obligations that would survive issuance of a tax deed.³²⁴

The gravamen of the issue in the *Sugarmill Woods* case involved a 1995 amendment to section 617.312 of the *Florida Statutes*.³²⁵ The 1995 amendment was, according to the court, enacted in recognition of the need for homeowners associations to provide governance to the communities encumbered by plats or declarations.³²⁶ The 1995 amendment provided, in pertinent part, that all “provisions of a declaration of covenants relating to

315. *Id.*

316. *Id.*

317. *Id.*

318. *Sugarmill Woods Oaks Village Ass'n v. Wires*, 766 So. 2d at 487, 488 (Fla. 5th Dist. Ct. App. 2000) (citing ch. 73-332, § 21, 1973 Fla. Laws).

319. *Id.*

320. *Id.* at 489 (citing ch. 79-334, § 1, 1979 Fla. Laws).

321. *Id.*

322. *Id.*

323. *Sugarmill Woods*, 766 So. 2d at 489. *See also* *Gainer v. Fiddlesticks Country Club, Inc.*, 710 So. 2d 76 (Fla. 2d Dist. Ct. App. 1998).

324. *Sugarmill Woods*, 766 So. 2d at 489.

325. *Id.* (citing renumbered FLA. STAT. § 720.312 (2000)).

326. *Id.* (citing FLA. STAT. § 617.312 (1995)).

the parcel that has been sold for taxes survive the tax deed.”³²⁷ The issue for the court was whether the provisions of a declaration of covenants relating to a parcel included assessments accruing against the lot prior to the tax deed sale.³²⁸ The court held that it did not.³²⁹ The court further opined that the intent of the statute was obvious, and even though assessments accruing prior to issuance of the tax deed would be extinguished, assessments accruing *in futuro* would be preserved.³³⁰ The court’s distinction of the difference between “covenants” and “assessments” is founded on sound legal principles.³³¹ The court’s interpretation of the 1995 amendment to the statute applicable to homeowners associations strikes a proper balance between the interests of municipalities in encouraging the purchase of tax certificates and the needs of the homeowner association to insure that the right to collect assessments against a particular lot is not abolished in perpetuity.³³² Although one may argue that the equities should lie with the Association,³³³ the situation is no different than in typical mortgage foreclosure situations where the lien of the Association is typically inferior to the lien of the mortgagee, either by declaration proviso³³⁴ or statute.³³⁵

327. *Id.*

328. *Id.*

329. *Id. Sugarmill Woods*, 766 So. 2d at 489.

330. *Id.*

331. *Palm Beach Polo, Inc. v. Hill*, 757 So. 2d 1287, 1288 (Fla. 4th Dist. Ct. App. 2000).

332. *Sugarmill Woods*, 766 So. 2d at 489–90.

333. The association is, after all, continuing to provide services to benefit the property, for which the other homeowners must then pay.

334. *See Federal Nat’l Mortgage Ass’n v. McKesson*, 639 So. 2d 78, 79 (Fla. 4th Dist. Ct. App. 1994).

335. *See* FLA. STAT. § 718.116(1) (2000).