

apm NEWS

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An Open Letter to Our Representatives in Tallahassee

By John R. Math, LCAM

Dear Legislative Representative:

We need help for our Community Associations, now! Owners in associations are being shouldered with more unnecessary regulation, higher costs and responsibilities. This has become a crisis and we are disappointed that you have ignored our plight. We have ideas that you can implement now that will help provide relief to all owners in community associations in Florida.

To us, it seems that the Banking Lobby has taken priority over the owners in Community Associations. There are 62,000 properties in various stages of foreclosure in the state of Florida! In past years, banks would foreclose on a delinquent unit owner within 4 to 6 months, with the association receiving a reimbursement of 6 months maintenance or a percentage of the total of the mortgage. It now takes 18 to 24 months to foreclose and the amount that the association is reimbursed for is totally inadequate, compared to the loss of income and costs associated with this procedure. We need legislation that requires banks to foreclose within 6 months and if they can't do that, then they need to immediately pay for the past due assessments and start getting billed like a real owner. It is real simple, if they want to be bankers in Florida or make loans in Florida, they will have to agree to this. Otherwise, they cannot do business here!

Despite the budget problems in Florida, we need more foreclosure judges to handle foreclosures in our counties. In Palm Beach County there are approximately 14,000 units in foreclosure and *one* judge! This does not make sense to us as the

legislature should place their resources where there is need. We need more judges handling this problem for the associations. If we can speed up the foreclosure process, the lenders would take notice and become more diligent in their duties, in order to save legal fees and costs.

We need to quickly make laws for Florida which will allow associations to collect past due amounts, and if need be, foreclose as cheaply and as fast as possible. The idea of Blanket Receiverships needs to be explored and made into law as this will take care of a large amount of delinquent units, at a low legal cost to community associations.

The legislature should allow associations to form special taxing districts that would receive all past due assessments, bundle and create these assessments as a "real estate tax" and have the County bill the owners for this tax (the owners would be paying for the past due assessments anyway, through the association in the form of higher assessments). But now, the past due assessments are converted to a real estate tax, and after a certain period of time that the tax is unpaid, it then becomes an unpaid lien, that would take priority over the lenders mortgage lien. Thus, in this manner, the association is ahead of the lender's lien. We need new and creative ways to handle this problem now and in the future and it is only through our state government can we get this done.

We need the legislature to make laws that will legally allow associations the right to rent units that are delinquent after 4 months. Right now, they are either sitting there empty or being rented out by some investor who has no intention of paying the association or the bank. It is the waste of

an asset that the association can use to their advantage in order to recoup unpaid assessments and costs.

Speaking of investors, associations should have a law that allows them to have the rents assigned to them when an investor is delinquent. Right now, this type of provision has to be in the documents and acknowledged by all parties. Don't make a law that says "If the documents so provide..."! This doesn't help us to get things done quickly. There is a practical side to our business and we need for the legislature to begin to look at this from our point of view.

In the last few years the legislature has put into law some amendments that need to be temporarily put on hold or somehow allow the associations to opt out of these laws, without any legal consequences or liability. They are administrative provisions and laws that require retrofitting of fire systems and elevators in certain buildings, of a certain height and age. Though this is extremely important, most associations cannot afford this expense at this. These laws need to be suspended, or an opt out position can be granted without liability or the time for compliance lengthened. We need relief at this time, as we cannot afford these laws.

We are now required to have audits and reviews depending on revenues and have complied within a certain period of time (depending on the law, annually or within 3 years). Suspend this provision across the board, unless the unit owners vote to have an audit or review. Instead of the other way, as it now stands where the unit owners are only allowed to waive these provisions. This is an unnecessary expense for most

Continued On Page #2

Continued From Page #1

associations. In the alternative, allow an association to form an "Audit Committee" made up of unit owners, other than who are on the Board to review the books, bank statements, paid bills, contracts, etc. This group of volunteers would save the association money, provide the owners with a level comfort and if they were to find questionable practices or transactions, they can deal with it accordingly or then hire a CPA to investigate further. Do not make us waste money at this time on unnecessary audits.

We need the legislature to develop and enact laws that allows associations to get out of unfair Bulk Rate Cable Contracts. We need laws that require cable companies to be able to shut off cable to delinquent units and not charge the association for this. Why should associations (unit owners who pay their assessments) have to pay the cable company when they are not receiving the income? Allow associations to be able to get out of the bulk rate cable contracts and have the individual unit owners pay directly to the cable company. Something needs to be done to swing this arrangement back in the favor for the owners in community associations and not for the Cable TV Lobby in Tallahassee.

We also could use help in getting out of Recreation Leases, 10-year elevator contracts, 10-year washing machine contracts, unfair service contracts and other unreasonable leases and contracts. We need help and it is time that the unit owners in Florida were given this help by you!

Overall, we need our representatives in the Florida Legislature to begin to look at this financial crisis in new and creative ways. After all, the majority of the unit owners living in community associations are paying their assessments; therefore the legislature should be looking out for our interests more than the special interest lobbyists in Tallahassee.

Please share this with your friends, neighbors and legislative representatives. Maybe with your help and urging, we can get some help from our state government for our Community Associations in Florida.

A Concerned Owner Who Lives In A Community Association and is also a Licensed Community Association Manager

John R. Math, Owner, LCAM
Associated Property Management
of the Palm Beaches, Inc.

To Contact Your State Representatives

<http://www.myfloridahouse.gov/>

Ask The Attorney

By Peter C. Mollengarden, Esq.

Q. Our air conditioner is on the roof of our condominium. It was recently struck by lightning or there was a power surge. The unit is severely damaged and needs to be replaced. Who is responsible for this replacement, me or the Association? Hurry with your answer...it is hot in here!

A. The Florida Condominium Act has flip-flopped in recent years regarding the responsibility to insure and repair air conditioning/heating equipment serving individual units damaged by a casualty such as a hurricane or lightning strike. Currently, Section 718.111(11) of the Act provides that the Association shall insure and repair casualty damage to such equipment.

A. Our Board of Directors insists upon fining owners for infractions. They do this without a Fines Committee. They have the manager send letters to the owners with arbitrary fine amounts, they then bill it to their owner account and they personally try to collect the fine money for the association. Aren't their rules for fining? By the way, I cannot find anything in the documents that says they can fine.

B. The Florida Condominium and Homeowners Association Acts provide that in order to impose fines for violations of the governing documents, the Declaration or Bylaws of a condominium association or the Declaration, Bylaws or Articles of Incorporation of a homeowners association must expressly authorize the association to do so. If such documents, as originally recorded or properly amended, contain such authority then both Acts provide that fines may not be levied unless the alleged violator (and the unit

owner with respect to a condominium association) has been provided prior notice (at least 14 days in a homeowners association) and an opportunity for a hearing before a Committee. In a condominium association the Committee must be comprised of other unit owners (no directors or persons residing in a director's household) and in a homeowners association the Committee must be comprised of at least three members appointed by the Board who are not officers, directors or employees of the Association, or the spouse, parent, child, brother or sister of an officer, director or employee. No fine may be levied unless the Committee agrees to it, thus the Board may not overrule the Committee if the Committee determines a fine shall not be imposed. Both Acts also provide no fine may become a lien against a unit or lot.

Mr. Mollengarden is a partner with the firm Katzman Garfinkle Rosenbaum (KGR) in West Palm Beach, Florida. He has spent his entire legal career concentrating on Community Association Law, including several years as an attorney in the Washington D.C. metropolitan area. KGR presently represents more than 1000 community associations throughout the State of Florida. He can be reached at 561-653-2900 or by email pmollengarden@KGRLawfirm.com

REMINDERS!

1. Be sure to update your files to include a new Question & Answer Sheet as of January 1, 2010.
2. Fees to the Division are coming due and are late if not paid by January 1, 2010. The amount is \$4.00 per unit for all condominiums and cooperatives.
3. Corporate Annual Reports will soon be mailed and must be filled out and received by the Secretary of State by May 1, 2010. The Fee is \$61.25 for Not-For-Profit Corporations.

Help Us Go Green!

Give us your Director's email addresses for delivery of the next issue of the APM News

apmnews@assocpropmgt.com

Rule or Document Enforcement

By Peter C. Mollengarden, Esq.

"Our documents are unenforceable...", "our documents aren't worth the paper they are written on", and similar grumblings and complaints can be heard on a daily basis from officers and directors of community associations throughout the State. Such statements are usually due to the frequent inability to quickly and inexpensively enforce the governing documents of an association.

The enforcement of condominium and homeowners association covenants, restrictions and rules are civil matters and, for the most part, are handled through applicable administrative and court procedures which can be time consuming and costly. Typically, the enforcement mechanisms available to an association are:

- (1) Arbitration (mandatory under Section 718.1255, Florida Statutes, for most disputes between a unit owner and the condominium association);
- (2) Circuit or County Court litigation (which court has jurisdiction depends upon the nature of the dispute and the amount of money, if any, in controversy);
- (3) Fines and suspensions; and
- (4) Self help.

Pursuant to Section 718.1255, Florida Statutes, a dispute or disagreement involving the authority of the board of directors of a condominium association under the Florida Condominium Act (the "Act") or the association's governing documents to require an owner to take, or not take, any action involving the owner's unit or the appurtenances thereto, is subject to mandatory nonbinding arbitration by the Division of Florida Condominiums, Timeshares and Mobile Homes of the Department of Business and Professional Regulation. Disputes involving title to a unit or common elements, the interpretation and enforcement of any warranty, the levy of a fee or assessment, or collection of an assessment, the removal of a tenant, alleged breach of fiduciary duty by one or more directors; or claims for damage to a unit based upon the alleged failure to maintain the common elements, are not subject to mandatory arbitration.

The Act requires that advance written notice be provided to the alleged violator describing the specific nature of the dispute and demanding relief and providing a reasonable opportunity to comply prior to the filing of a petition for arbitration. The written notice must also state the intent to file a petition for arbitration or other legal action in the absence of resolution of the dispute. A notice to the alleged violator complying with the above must be attached to the petition otherwise the petition will be dismissed without prejudice (meaning the association is not precluded from starting over and providing the notice and filing another petition if the matter is not resolved).

Under Section 720.311(2), Florida Statutes, disputes between a homeowners association and a lot owner concerning (1) use of or changes to the lot or common area and other covenant (document) enforcement issues (not including the collection of any assessment, fine or other monetary obligation), (2) amendments (3) meetings of the board and committees (4) membership meetings (not including election meetings) and (5) access to official records of the association are subject to demand for presuit mediation by the aggrieved party before filing the dispute in court. If mediation is unsuccessful, the aggrieved party may then file suit in the appropriate court.

The laws governing condominium associations and homeowners associations provide that the prevailing party in arbitration or litigation between the association and owners shall be entitled to recover its attorney's fees from the other party. The ability to recover attorney's fees from the non-prevailing party provides an association

muscle to pursue enforcement actions. The potential liability or burden of paying the association's attorney's fees may be sufficient incentive for an owner to comply with the association's demands to remedy such owner's violation(s).

Chapters 718 (condominium associations) and 720 (homeowners associations), Florida Statutes, provide that the governing documents of the association must authorize the imposition of fines. These statutes also provide that notice (at least 14 days in advance for homeowners associations) and an opportunity for a hearing before a committee must be provided. In a condominium association the committee may not consist of any director or anyone residing in a director's household and in a homeowners association, no officers, directors or employees of the association, or the spouse, parent, sibling, or child of an officer, director or employee of the association may serve on the committee. Under each statute, if the committee does not approve of a fine it may not be imposed. Additionally, both statutes provide that no fine shall become a lien against a unit or lot. Unfortunately, the inability to file liens for fines emasculates the power and effectiveness of fines.

Under current law, condominium associations may not suspend one's right to use the common element facilities for violations of the law or the governing documents. Homeowners associations may impose such suspensions provided the governing documents authorize such action and the same requirements for fining (notice and opportunity for a hearing before a committee) are followed. If authorized by the governing documents, a homeowners association may also suspend an owner's right to use the common area facilities for failure to pay assessments without notice or a hearing. However, such suspension of common area use rights shall not impair the right of an owner or tenant of a lot of vehicular and pedestrian ingress and egress to and from the lot, including the right to park.

The governing documents of some associations authorize the association to enter a unit or lot to remedy a violation and assess the cost against the unit or lot owner. This remedy is typically referred to as "self help". Florida statutes do not grant an association such authority, it must be set forth in the association's governing documents. In *Demajo v. Coco Wood Lakes Association, Inc.*, 637 So.2d 369 (Fourth District Court of Appeal, 1984) the court upheld the association's authority, under its governing documents, to enter an owner's lot to repair a fence and assess the owner the costs incurred.

Before embarking on an aggressive self help campaign, a word of action, make sure the Declaration of Condominium or Declaration of Covenants and Restrictions as originally recorded, or properly amended, authorizes such action and if so, strictly follow and adhere to the provisions thereof, specifically the notice requirements, if any. Furthermore, if an owner, tenant or other occupant of the unit or lot attempts to physically stop the association's access thereto to remedy the violation, do not get involved in a physical confrontation.

Notwithstanding which remedies are available to an association, it is essential that an association be timely and consistent in its enforcement. It is also important that the covenants, restrictions, and rules be clear and unambiguous, as ambiguities will be construed against the association and in favor of the owner. If an association is inconsistent in its enforcement of a particular covenant, restriction or rule, that will allow the owner to raise the affirmative defense of selective enforcement. In order to effectively assert the

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apm NEWS

PAGE 4.

apm NEWS

Winter 2010

selective enforcement defense, the violation(s) which the owner asserts are being treated selectively must be comparable. For example, if the association is enforcing a "no pet" rule against an owner and the owner contends selective enforcement on the basis that the association has not enforced the architectural control provisions, it will not be an effective defense as the violations are not comparable. The fact that the association has not consistently enforced its architectural control provisions would not reasonably lead an owner to believe that he or she can have a dog, cat or other pet.

In conclusion, although there is no condominium or homeowners association police force to deliver swift justice; through arbitration, mediation and, if necessary, litigation and permissible self help, the governing documents of an association are indeed enforceable. Despite the fact the process can be sometimes slow and frustrating (depending on the type of association and violation involved), not enforcing a covenant, restriction or rule will likely result in it not being enforceable due to owners being able to raise selective enforcement and/or other applicable defenses. To most boards and owners, that is not an attractive or acceptable alternative. Through patience and diligence an association may successfully enforce its governing documents and maintain the type of community desired by the Board and the association's membership.

Mr. Mollengarden is a partner with the firm Katzman Garfinkle Rosenbaum (KGR) in West Palm Beach, Florida. He has spent his entire legal career concentrating on Community Association Law, including several years as an attorney in the Washington D.C. metropolitan area. KGR presently represents more than 1000 community associations throughout the State of Florida. He can be reached at 561-653-2900 or pmollengarden@KGRLawfirm.com

Associated Property Management of the Palm Beaches, Inc., is a twenty one-year-old full-service association management firm. APM serves more than 130 associations in Palm Beach County. If you have any questions or comments, you may contact us at 1928 Lake Worth Road, Lake Worth, Florida 33461. Please call us at 561-588-7210, or you may email us at apmnews@assocpropmgt.com at any time.

USEFUL WEBSITES FOR YOUR ASSOCIATION

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