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COMMUNITY ASSOCIATION NEWSLETTER

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MORTGAGE HOLDERS IN UNINCORPORATED LEE COUNTY MUST TAKE RESPONSIBILITY FOR DISTRESSED PROPERTY

BY: SUSAN M. MCLAUGHLIN, ESQ.

Many counties and municipalities now have ordinances that attempt to force mortgage holders to maintain distressed properties. So far, not many have been very helpful to community associations but that is changing. One of the potential examples is Lee County Ordinance No. 13-18 which became effective in September of last year and is now being implemented.

This applies to properties in unincorporated Lee County. It requires a mortgagee to take responsibility for maintaining the property within ten (10) days of declaring the mortgage to be in default. The maintenance responsibilities specifically include the duty to maintain the yard and any pool or spa. There is also a specific requirement to remove accumulated newspapers and other items that give the appearance that the property is abandoned. All windows and doors, as well pool and spa enclosures, must be secured. The mortgagee also has a very broad general duty to maintain the property according to all relevant County regulations including Chapter 6, Building Regulations.

The property must be posted with a sign with the 24-hour contact information for the mortgagee's designated local property manager unless the covenants do not permit the sign. The mortgagee must inspect occupied property quarterly and unoccupied property every sixty (60) days thereafter until it is sold to a third party. A non-complying mortgagee is subject to fines. The County is also authorized by the ordinance to take remedial action and charge the mortgagee for the cost.

Lee County Code Enforcement has just started sending notices to the attorneys for mortgage holders when a Lis Pendens is recorded. The Lee County Ordinance is also broad enough to potentially be helpful in contaminated condominium situations. However, we expect that Lee County will not take action in any case where a community association is arguably secondarily liable to take action under its governing documents so reporting a situation could result in the community association receiving a notice of violation as well. The new Lee County Ordinance also permits enforcement: "… by any other legal means". This potentially opens the door for a community association to take direct action against a mortgagee and that may be a better choice in some situations.

Properties in other locations may be subject to similar ordinances. For instance, the City of Fort Myers has had Ordinance No. 3639 in effect since 2010 but that provision is not nearly as broad nor is there a strong argument that an Association can take direct action to enforce it. However, any statute or ordinance that requires the mortgagee to do things like mow the lawn can be helpful to an association trying to get reimbursed for those costs from a mortgagee that takes title at the foreclosure sale or by a deed in lieu.

The banks may have constitutional arguments and fact specific defenses to the enforcement of these types of laws so caution is always in order. It is also important to give prior notice and a specific demand for action by the mortgagee if the association is trying to preserve its rights to reimbursement for any costs it incurs for maintaining the property.

In summary, any association that has a derelict property should certainly take a second look at the options especially if the property is in unincorporated Lee County and other locations that have adopted similar ordinances.

MANY ASSOCIATION TOWING PRACTICES HAVE BEEN IMMOBILIZED

BY: CHRISTOPHER L. POPE, ESQ.

As many homeowners' and condominium associations are quickly finding out, in October 2013 Lee County adopted a new Towing and Immobilization Ordinance, Lee County Ordinance No. 13-19, to regulate the towing and immobilization of vehicles in unincorporated Lee County. Under the new ordinance, there are many new requirements that towing companies and associations must comply with before a vehicle can be legally towed without the vehicle owner's consent.

Of most concern to associations and community managers is the new requirement that, before a vehicle can be towed or immobilized, the towing company must prepare a tow sheet that includes the name, address and phone number of the individual who requested towing service. The individual must sign the tow sheet and must have their identity verified by the tow truck driver. When the vehicle is later recovered, the vehicle owner will receive the tow sheet that includes all of the personal information of the individual who authorized the tow. As a result of this new requirement, an authorized agent, presumably a board member or community manager, not only must be present while a vehicle is being towed to sign the tow sheet, but must also consider the perils of an angry vehicle owner having their personal information.

Additionally, while towing can be an effective remedy to deal with vehicles which are improperly parked, authorizing a vehicle to be towed is not without risk. If a vehicle is illegally towed, the person who authorized the vehicle to be towed and the Association may be liable to the owner of the vehicle for the cost of removal, transportation, and storage; any damage resulting from the removal, transportation, or storage of the vehicle; and attorney fees and court costs.

Accordingly, given the potential liability involved with towing, it is imperative that any association have its restrictions on parking reviewed by competent counsel to ensure that they are clearly drawn and comply with both state and local law. The association must also make sure that the towing company it is using is in compliance with applicable governing laws and ordinances. Furthermore, the association's contract with the towing company must comply with the new ordinance and should clearly outline the rights and responsibilities of the parties so as to avoid problems which may otherwise arise.

BOARD RECALLS

BY: CHRISTOPHER J. SHIELDS, ESQ.

Professional football season is coming to an end and annual meeting season has begun where traditionally new members are elected to the board. However, can recall season ever be far behind?

When a recall petition is received by the board both Florida Statute §720.303(10) and §718.112(2)(j) require the board hold a board meeting within five (5) full business days of receiving a recall petition upon which to timely certify (approve) or not certify (not approve) the recall arbitration petition. Obviously, a standing board may be tempted or so inclined to look for valid reasons why a recall petition should not be considered legally sufficient and while boards must evaluate the authenticity and verify any recall petition, the board is limited on its ability to "toss out" signatures on recall petitions even for seemingly valid reasons.

The following have been held not to be a valid legal basis to disregard the recall petitions:

1. The fact that the recall petitions served upon the board were simply photocopies or facsimiles as there is no legal requirement that the original recall petitions actually be served on the board.
2. Where the Association's governing documents required a voting certificate but the Association had a history of not enforcing a voting certificate requirement or any requirement for any authorized designee in the past, the board could not so impose a voting certificate requirement in any recall attempt.
3. The fact that the recall petitions were "pre-marked" as voting to recall an individual.
4. The fact that the owner's signature was illegible was not a legal basis to consider it invalid absent any record by which to compare the challenged signature to determine whether authorized persons, in fact, had signed the petition. Moreover, in

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what is a very interesting wrinkle in the recall arbitration proceeding entitled Hampton Beach Club Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 05-0262, the state arbitrator found that the board's rejection of petitions because the signatures on the petitions were not similar to those signatures on copies of the owner's maintenance fee checks was improper, as there was no legal requirement that an owner actually be the one who, in fact, signed their own maintenance fee checks.

RECENT CASE CALLS INTO QUESTION ASSOCIATION'S ABILITY TO PROVE DELINQUENCY

BY: CHRISTOPHER J. SHIELDS, ESQ.

If your Condominium or Homeowners association is one of the thousands in Florida managed by a professional management company the recent Fourth District Court of Appeals case Yang v. Sebastian Lakes Condominium Association, 38 Fla. L. Weekly D1836 may impact your ability to prove in court how much your association is owed in past due assessments.

In this case, the delinquent owner contested the alleged delinquency which arose over several years and raised the issue of poor record keeping by the association. The association was forced to prove the delinquency and the owners asserted that their payments were misapplied and not accounted for correctly. The association's ability to prove its case was further complicated by the fact that it had hired a new management company and when the association sought to recover a balance brought forward during the period in which a former management company was keeping the records, the current management company could not confirm the owners starting balance, was not familiar with how the previous records were kept and could not authenticate that the records kept by the previous management company were accurate. The bottom line is that in order to provide the association's case, the association would have to subpoena the prior management company.

So why is this important? The next time your association is tempted to fire or otherwise terminate your current manager or management company, associations should be well advised to make any termination professional and free of acrimony as associations never know when and how they may need the cooperation of their prior managing agents to testify to matters that occurred during their period of employment.

Same would be true with the current boards' relationship with those who previously served on the board. It is more common than not that in the course of any litigation or contested collection matter, the association may have turned over several management companies and even the entire board that was involved at the commencement of the matter may no longer be on the board and/or willing to assist the current board. So, as a teachable moment, associations need to appreciate that it may need the willingness and cooperation of its prior managing agents and prior board members should it become necessary for them to provide testimony in litigation matters.

BAD DEBTS

BY: SUSAN M. MCLAUGHLIN, ESQ.

We frequently get questions as to whether the Association is required to "write off" an account to "bad debts". This is really an accounting question that depends on whether all or part of a delinquent account can be collected. The amount the Association reasonably expects to collect is kept on the books as an asset so it is important to make the appropriate adjustment when there is no longer any reason to expect that an item on the ledger can be collected.

The New Year marks the fifth anniversary of the crash of the real estate market in 2008 and the wave of delinquencies that followed. Recovery of the assessments that came due in 2008 is now time barred by the five (5) year statute of limitations under Section 95.11, F.S. These items on the ledgers that came due in 2013 are now clearly "bad debts" that need to be "written off" the Association's books. Recovery of the amounts that came due on January 1, 2014 is also now time barred.

Many collection cases are stalled awaiting the outcome of a mortgage foreclosure and in most of those cases

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the Bank will take title and get "safe harbor". In cases where the original owners are "judgment proof", the deficiency after the collection the "safe harbor" amount will also be a bad debt. Therefore, the balances due from owners in mortgage foreclosure are usually written down to a percentage which reflects the likelihood that the Association may not make a full recovery at the conclusion of the mortgage foreclosure.

In cases where we see that an owner in mortgage foreclosure has potential exposure for a personal judgment, we usually do not want to wait until the outcome of the mortgage foreclosure to a file a law suit against the owner. The suit against the owner will toll the statute of limitations and also better position the association to force a short sale sooner rather than later. A prompt collection law suit against the owner in cases of new delinquencies should be the general rule but that is a subject for another day.

The main point we are making here is that the Association needs to take inventory of the old delinquent accounts and consider whether it needs to write off all or a portion of what is being carried as an asset to bad debts. Likewise, we may need to start a law suit against the original debtor in many of the cases to avoid a statute of limitation problem.

55 + HOUSING FOR OLDER PERSONS REGISTRATION AND RENEWAL REQUIREMENT

BY: MATTHEW P. GORDON, ESQ.

As a reminder, all communities that meet the housing for older persons requirements and that intend to be operated for occupancy by persons 55 years of age and older must register with the Florida Commission on Human Relations ("Commission"), and the registration with the State of Florida must be renewed every two (2) years. If your Association renews late, then it will not be recognized as a registered 55+ community by the Commission for the period that the registration lapsed. The exact date by which your Association must be renewed may be obtained by visiting the Commission's online 55+ Housing Directory at:

http://fchr.state.fl.us/housing_directory/search

The renewal form must be signed by the Association's President attesting that the community meets the housing for older persons requirements, and a $20.00 renewal fee must be submitted with the form. The renewal form is available on the Commission's website at:

http://fchr.state.fl.us/resources/55_housing/renewal/55_renewal_form

LANDLORD – TENANT LAWS CHANGED TO FOLLOW CONDO AND HOA STATUTES

BY: CHENÉ THOMPSON, ESQ.

In 2010 the Condominium and Homeowners statutes were amended to allow an association to collect rent from a tenant in the event the owner was delinquent in the payment of assessments to the association. This gave the associations the tools to fight the common problem of an owner earning rental income while at the same time refusing to pay his or her fair share of assessments. When changed, the Condominium and Homeowners statutes afforded tenants protection from an owner who sought to evict a tenant. Both statutes state that a tenant is immune from any claim by the owner related to the rent paid to the association after the association has made written demand.

Problems arose however when the associations began sending a "demand for rent" to the tenant and owner pursuant to the statute. If the tenant complied with the demand and tendered their rent to the association, many owners retaliated and tried to evict the tenant. The tenant was stuck in the middle trying to comply with the request of the association but at the same time concerned about getting evicted.

The 2013 legislature amended the Landlord – Tenant statute to correspond with the Condominium and Homeowners statutes Florida Statute 83.64, entitled "Retaliatory Conduct" states that (1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the

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defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where:

(a) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health code of a suspected violation applicable to the premises;

(b) The tenant has organized, encouraged, or participated in a tenants' organization;

(c) The tenant has complained to the landlord pursuant to s. 83.56(1);

(d) The tenant is a service member who has terminated a rental agreement pursuant to s. 83.682;

(e) The tenant has paid rent to a condominium, cooperative, or homeowners' association after demand from the association in order to pay the landlord's obligation to the association; or

(f) The tenant has exercised his or her rights under local, state, or federal fair housing laws. [Emphasis added]

This change to the law eliminates any questions for the court as to which statute should control and has now afforded both the association and tenants much needed peace of mind.

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