NEWS LETTER

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Prohibiting New Owners From Leasing Units

We often have clients ask if it is legally permissible to amend a Declaration of Condominium to prohibit new owners (those who purchase after the effective date of the amendment) from leasing units, but to continue to allow existing owners to lease their units. Generally, the answer to that question is no. Florida law requires all owners to be treated equally, and a condominium association cannot create classes of owners with different rights based on when they purchased their units.

Many times, when an association wishes to prohibit new owners from leasing units, the intention is to discourage investor-owners, who have no intention of living in the condominium, and are simply purchasing a unit to lease as an investment, from purchasing units in the condominium. In these situations, there may be a permissible alternative to achieve the same result in discouraging investor-owners from purchasing units in the condominium.

In the Arbitration Decision entitled *In Re: Petition for Arbitration Decision, Geraldine Jaramillo v. Cypress Club Condominium, Inc.*, Case No. 05-03-7541 (November 1, 2005), a rule which prohibited all new purchasers from renting their unit for the first two years of ownership was enforced.

Such a rule would discourage investor-owners, and would treat all owners equally, thereby avoiding the problems associated with the broader rule prohibiting new owners from leasing units ever. However, associations should also consider the potential effect such a rule may have on the value of units in the condominium by removing a significant portion of the potential buyers. Supply, i.e. the number of units for sale in the condominium, will remain the same, but the demand, i.e. the number of potential buyers, will be decreased as only those buyers intending to reside in the unit would likely consider purchasing one of the available units.

Perhaps, instead of trying to prohibit new owners from leasing, associations should consider amending their documents to adopt tighter restrictions on all owners' ability to lease their units, including the right of the Association to approve or disapprove of all owners, and the adoption of objective factors upon which leases may be disapproved.

Keep in mind that in a condominium setting, Section 718.110(13) of the Florida Statutes, provides that any "amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment."

An association should also remember that in light of the 2011 amendment to Florida Statutes Section 718.116 and 720.3085 that allow an association to demand and collect rent from a tenant when an owner is delinquent. As such, even where the association can deny a delinquent owner's right to rent their unit, it may be in the best interests of an association to permit and encourage the rental of a unit where the owner is delinquent.

A Bumpy Road Ahead for Private Rights of Way…

The First District Court of Appeals recently handed down a decision that should please homeowners and condominium associations alike. *Wingate v. Wingate*, (Fla. 1st DCA 2012) Case No. 1D11-2713 (April 2, 2012), simply reversed a summary judgment decision based on a factual issue, however, in doing so, it rejected long-standing law that prohibits speed bumps across private access easements.

The main issue of the case was whether or not speed bumps could be installed on private access easements and if so, what was needed to justify this installation. The *Wingate* Court specifically rejected the proposition that speed bumps are impermissible as a matter of law. Rather, the Court devised a new standard, based on the foundation of earlier decisions in the by *BHB Development, Inc. v. Bonefish Yacht Club Homeowners Ass'n, Inc.*, 691 So. 2d 1174 (Fla. 3d DCA 1997), and *Sand Lake Shoppes Family Ltd. P'ship v. Sand Lake Courtyards, L.C.*, 816 So. 2d 143, 145 (Fla. 5th DCA 2002), and determined that whether or not speed bumps are an "unreasonable interference" to an easement holder's right of passage is a question of fact.

In determining whether speed bumps are unreasonable and interfere with right of passage, the Court stated that there are:

> … significant factors the courts may consider include[ing] the number of speed bumps, their height, the spacing between speed bumps, the necessity for their placement in the particular area, and their effect on vehicles and traffic flow.

Thus, it is likely that many of the speed bumps being installed today, except for those that are too high and too closely placed, will survive the test outlined by the Court. Please recognize however, that this standard only applies where there has been an easement granted with no reference to speed bumps or other speed control devices within the easement grant. In other words, it only applies in instances where the easement grant is silent as to speed bumps.

If your community is considering the installation of speed bumps on its private road system, please make sure to contact our office before doing so. There are additional factors that must be considered before any action is taken. However, the decision in this case is the first step in making it easier for associations to provide for a safer community.

Practical Effects of 2011 Amendments to F.S. Sections 718.116 and 720.3085

We previously highlighted the 2011 Amendments to Florida Statutes sections 718.116 (for condominiums) and 720.3085 (for homeowner's associations) regarding liability for assessments with regard to lien foreclosures by community associations. Florida Statutes section 718.116(1)(B)(2) and 720.3085(2)(D) states:

"An association, or its successor or assignee, that acquires title to a unit through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other association, as defined in s. 718.103(2) or s. 720.301(9), ***which holds a superior lien interest*** *on the unit. This subparagraph is intended to clarify existing law."*

The effect of these statutory amendments, although it may have been unintended, is that a sub-

association would have no liability for unpaid assessments (except for assessments accruing after a Certificate of Title is recorded) to a master association while a master association that holds a superior lien interest to a sub-association would be liable for all unpaid assessments, interest, late fees, and attorney's fees on the unit or property. This provides an advantage to a sub-association that may be interested in acquiring title to a unit until a mortgage foreclosure lawsuit is completed so that the sub-association can rent the unit out and recover some of the unpaid assessments, interest, late fees, and attorney's fees.

These statutory amendments have also created a significant amount of interest from both master and sub-associations to enter into an agreement in which one of the associations would take the lead in attempting to rent the unit out and the cooperating association would receive a certain percentage of the profit from renting the unit. Many of these proposed agreements heavily favor the association intending to manage the unit. In some circumstances it may be against the interest of the "cooperating" association to enter into such an agreement and the following factors should be considered to ensure a fair agreement:

1. Whether the association is getting the benefit of sections 718.116 and 720.3085 discussed above.
2. Whether the "managing" association would recover all of its unpaid assessments, etc. before providing any rental income to the cooperating association.
3. Whether either of the associations would be waiving the right to collect those unpaid amounts of the rental is not successful.
4. The allocation of the rental proceeds between the associations in relation to each association's periodic assessments.
5. Any potential liability from renting the unit.
6. Any repairs or improvements that need to be made to make the unit inhabitable.

Cable Contracting: Don't Get Tangled Up

Recently, there has been an upsurge in requests for termination, renewals, amendments, and review of cable services contracts. The exact culprit for this is unknown, however, one could guess that there are a few contributing factors. Whether it is the difficult economic times, dissatisfaction with service, the new technologies available or additional competition in the marketplace, it is clear that many communities are looking for alternatives in providing for cable bulk services.

Keeping in mind that each contract contains different terms, when terminating a contract it is important to first look to the terms of the contract to determine when it expires. Many contracts have language that provides for automatic renewal of the contract for subsequent periods of time if notice is not given. For example, a contract may automatically extend if notice of termination is not given 90 days prior to the expiration of the original term of the contract. If this is the case, then notice needs to be provided as per the contract, usually in writing, to the addresses provided in the contract. Each contract is different, however, there are certain procedures that must be followed and timeframes abided by so that the association can exercise its right to terminate the contract in a legally effective manner.

Also, keep in mind that some contracts may give the current provider the exclusive right to negotiate with the association after termination. The contract also may require that the current provider be given the first right of refusal on subsequent services provided. If these provisions for termination are not followed as per the contract, then it is likely that litigation will result.

When searching for a new provider and entering into a new contract, it is important to begin the process early. Starting negotiations with various providers two years before the expiration of the existing contract is not too soon. A period of less than six months may make it difficult to consider all options for telecommunications services.
In the quest for a new service provider and contract, it is critically important for associations to

prepare a detailed Request for Proposal ("RFP") that is specifically tailored to the needs of the community. Preparation of the RFP and negotiations with different providers should involve an experienced, knowledgeable and independent consultant that specializes in telecommunications services contracting. The consultant can help determine what level of service is needed and the infrastructure existing and required to provide those services. The consultant should also be knowledgeable on the state of the industry including what is currently available and what will be available in the future.

The RFP should include a request for all the information necessary to understand what the potential provider intends to install and how. Additionally, the RFP needs to require that bidders state whether or not they will agree in advance to specific contractual provisions that aim to protect the association over the term of the contract. Finally, it should outline the ownership of the infrastructure that will be installed.

Once the RFP is complete and given to bidders, each company bidding should be investigated as to the quality of prior installations, service and customer satisfaction. Complete review and comparison of all bids is required to determine which system and services is right for the community. After the winning bid is selected, contract negotiations can begin.

It is extremely important to involve an attorney in contract negotiation and formation. There is specific language that is required to be included in all cable contracts by the Florida Statutes and there may be additional provisions required by the association's governing documents. Having an attorney involved will ensure that the new contract protects the association and meets all requirements of law.

Our office has a great deal of experience in dealing with cable companies and can assist you with any part of the process. If you have questions, please feel free to contact us.

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This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (Christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also specializes in Labor/Employment Law. Charles B. Capps (charlescapps@paveselaw.com) is an Associate with the Pavese Law Firm. Andrew Hoek, Esq. (andrewhoek@paveselaw.com) is an Associate with the Pavese Law Firm. Ms. Bennings, Mr. Capps and Mr. Hoek handle all aspects of Community Association law for the Firm. Neysa Borkert (neysaborkert@paveselaw.com) is an Associate with the Pavese Law Firm. Ms. Borkert specializes in land use and community association law, Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke Martinez (brookemartinez@paveselaw.com) is an Associate with the Pavese Law Firm. Mr. Hagman and Ms. Martinez handle collections, lien foreclosures, and covenant enforcement and general litigation. Each attorney practices in the area of Real Estate Development and Community Association Law. Please feel free to contact them via the e-mail addresses listed above.

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