NEWS LETTER

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Legislative Update

Senate Bill 714 ("SB 714"), which many anticipated would become law on June 2, 2009, was vetoed by Governor Crist. Accordingly many of the expected changes that have been discussed recently will not go into effect as expected. Below is a recap of some of the anticipated changes that have been eliminated with the veto of SB 714 and the current requirements that will continue in effect.

Perhaps most importantly to the Bill's fate, SB 714 would have amended § 718.112(2)(l) to extend the time for completion of retrofitting of common areas with a fire sprinkler system to December 31, 2025. This is the second time that a bill has been vetoed based on an attempt to extend this deadline. Under the current statute, the time for completion of retrofitting of common areas with a sprinkler system is no later than December 31, 2014. This deadline is quickly approaching and it does not appear that any extension is likely. Accordingly, any condominium association who has not received a certificate of compliance or voted to forego the retrofitting requirements should take diligent action to ensure that the deadline is met.

Pursuant to § 718.112(2)(l) unit owners may vote to forego retrofitting and installation of an engineered life-safety system by the affirmative vote of two-thirds of all voting interests in the affected condominium and the recording of a certificate of the vote in the public records. However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building, i.e., a building that is greater than 75 feet in height.

SB 714 would have also, significantly amended Florida Statutes § 718.111(11) pertaining to insurance, removing many of the additions made by the 2008 amendment.

- SB 714 would have eliminated the requirement of the association as additional named insured on policies, the requirement that unit owners provide proof of insurance upon request, and force placement of insurance by condominium associations. Florida Statutes § 718.111(11)(g) continues to impose insurance coverage obligations on individual unit owners, in part, as follows:

  1. All improvements or additions to the condominium property that benefit fewer than all unit owners shall be insured by the unit owner or owners having the use thereof, or may be insured by the association at the cost and expense of the unit owners having the use thereof.

  2. The association shall require each owner to provide evidence of a currently effective policy of hazard and liability insurance upon request, but not more than once per year. Upon the failure of an owner to provide a certificate of insurance issued by an insurer approved to write such insurance in this state within 30 days after the date on which a written request is delivered, the association may purchase a policy of insurance on behalf of an owner. The cost of such a policy, together with reconstruction costs undertaken by the association but which are the responsibility of the unit owner, may be collected in the manner provided for the collection of assessments in s. 718.116.

SB 714 also proposed significant changes to Florida Statutes § 718.112(2) regarding Board election issues.

- SB 714 would have altered prohibition of co-owners serving as members of the Board of Directors at the same time, excluding timeshare units, and preventing only co-occupying co-owners from simultaneously serving on the Board. Under current law, In a condominium association of more than 10 units, co-owners of a unit may not serve as members of the board of directors at the same time

- SB 714 would have made incumbent Board members eligible for reappointment rather than automatically reappointed where the number of seats up for election exceeds the number of eligible candidates. Under existing law, "[i]f no person is interested in or demonstrates an intention to run for the position of a board member whose term has expired according to the provisions of this subparagraph, such board member whose term has expired shall be automatically reappointed to the board of administration."

- SB 714 would have made Directors who are delinquent in the payment of special assessments and fines, in addition to regular assessments and fees in eligible to serve on the Board, and further provided that any director or officer more than 90 days delinquent in the payment of any fee, fine, or regular or special assessment shall be deemed to have abandoned his or her position.

- SB 714 would have amended the Candidate Certification Form requirement to require that within 90 after being elected to the Board, newly elected directors either certify that they have read the Association's governing documents and will uphold the documents accordingly, OR complete a division-approved condominium education course. Currently, under § 718.112(2)(d)3, all candidates are required to submit a "certification form provided by the division attesting that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of this chapter and any applicable rules." Such certificate form must be submitted prior to the election.

Stormwater Management Permitting and Operation- PART 2

This is the second article in the Stormwater Management Permitting and Operation series to further expand upon the responsibilities of Associations with regard to surface water management system permitting and the transfer of operational duties to the Association.

As was briefly discussed in the first article, the construction permit to build a surface water management system is issued to the developer of a project at the same time the operational permit is issued, these are known as the Environmental Resource Permit or "ERP". Generally, the operational permit includes a set of conditions for the entity responsible for operation of the surface water management system. In addition, it includes conditions to be followed after construction of the system is completed for operation of the system and conditions for the "operational entity" after conversion of the system from the construction phase to the operational phase.

The "operational entity" is identified at the time the construction permit is authorized, usually by the developer of the project. The developer must name the entity that will be responsible for the long term operation of the water quantity, quality and environmental aspects of the permit. Non-profit corporations including homeowners Associations, property owners Associations, condominium Association or master Associations are all acceptable operational entities for residential and commercial developments.

Once the construction of the system is complete and any mitigation areas are established, the permitted entity must file certain forms with the water management district to transfer the operational permit to the Association. This process is known as conversion to the operational phase and includes the transfer of the permit to the Association. The permit transfer form requires the following documents to be submitted: documentary evidence of satisfaction of permit conditions; copy of recorded transfer of title to the operating entity for the common areas on which the surface water management system is located; copy of all recorded plats; copy of all recorded declaration of covenants and restrictions, amendments, and associated exhibits; copy of filed articles of incorporation; and copy of certificate of incorporation. Please note that the operational phase of a project cannot be effective until all required mitigation is complete.

To ensure that all permit conditions have been satisfied, an engineering certification must be provided. Within 30 days of completion of construction of the system, a licensed engineer must certify that construction is completed and the system was constructed in substantial conformance with the permit conditions and plans.

When conversion occurs, the Association becomes the responsible entity for the operation and maintenance of the surface water management system in perpetuity. Therefore, the Association needs to ensure that the engineering certification is complete to establish that the system is in compliance with the permit before conversion. Liability for the Association arises once the permit is transferred to the Association, so it is important that the above steps are taken to ensure protection of the Association.

The law requires that Association documents state that it is the responsibility of the Association to operate and maintain the surface water management system and that the Association own the surface water management system or the system must be described as common area. In addition, Florida Statutes, Chapter 373 and Florida Administrative Code 40E-4 requires that a surface water management system be operated with a permit for operation and maintenance. It is unlawful for any entity to construct, alter, operate, maintain, remove or abandon any stormwater management system without a permit. Therefore, the Association could encounter problems with the Water Management District if they are operating the system post conversion or completetion of the system without obtaining a permit through the proper procedure.

In addition, it is important that the Association accept maintenance responsibility of the system sooner rather than later. It can be very difficult and costly obtaining an engineering certification on a system that was constructed many years ago and was not converted to the operating entity. Using the original engineer on the project for the certification saves money because they are already familiar with the plans and the project. Additionally, portions of the system could change during a long period of time and fall out of compliance with the permit requirements, or the personnel who originally worked on the project could move or switch jobs. Thus, after construction completion, the operating entity should ensure that conversion occurs in a timely manner.

It is not uncommon for issues to arise during conversion and transfer of an ERP permit. Should problems occur, our office can be retained to work with the District, the developer and the Association to ensure that the Association's rights are protected and all required permit conditions are met.

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