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COMMUNITY ASSOCIATION NEWSLETTER

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FAILURE TO COMPLY WITH FLORIDA'S CONSTRUCTION LIEN LAW CAN RESULT IN ASSOCIATIONS PAYING TWICE FOR THE SAME WORK

BY: CHRISTOPHER J. SHIELDS

Anytime an association undertakes repairs, replacements and reconstruction to its existing improvements, it is critically important that the association understand and comply with Florida's Construction Lien Law, Chapter 713.

Chapter 713 of Florida Statutes is very technical in nature and legal guidance is critical. There is perhaps no other area in the law that is more commonly misunderstood and for which the failure to comply can have a devastating impact on associations.

First, understand that the statute is written to protect the interests of laborers, materialmen, suppliers and subcontractors and those who do not understand the laws consequences do so at their peril.

At a minimum, the first step is for the association to properly draft and record a Notice of Commencement in the County where the property is located before any work is commenced and to post a certified copy of the recorded Notice of Commencement on the job board at the job site. Any persons or companies that supply labor or materials who are not in "privity" with the association (i.e. subcontractors or suppliers who were not directly engaged by the association) are entitled to serve a "Notice to Owner" on the association in order to preserve their right to lien the job, if they later do not receive full payment for their services from those who engaged them.

When the association receives a Notice to Owner(s) the association must ensure that it receives a proper lien release from any party who served a Notice to Owner for every time it disburses a draw to the general contractor. Of course, the association should also require a lien release from the general contractor for each draw payment. However, it is simply not enough to rely upon the general contractor's release. In order to comply with Chapter 713, releases must be received from all subcontractors or suppliers who have timely served the association with a Notice to Owner.

Finally, before final payment is disbursed to the general contractor, the association should require that the general contractor provide a final lien release from all parties who have served a Notice to Owner as well as a final release of lien and final contractor's affidavit from the general contractor.

This is merely a brief and cursory overview of Chapter 713. The key is that those who simply rely upon lien releases from the general contractor are acting at their own peril as lien releases from the general contractor will not protect any association from liens from subcontractors and suppliers.

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CHANGING PROPERTY MANAGEMENT COMPANIES? BE SURE TO OBTAIN YOUR ASSOCIATION'S OFFICIAL RECORDS

BY: CHRISTINA HARRIS SCHWINN

When a community association changes management companies, the board of directors needs to be sure to obtain its official records from the soon-to-be-former property manager. Why? Because there may come a time when a member requests access to those records or the records need to be admitted as evidence in a court proceeding.

In an assessment lien foreclosure litigation, the assessment roster evidencing past due assessments must be admitted as an exhibit in support of an association's claim. Before a judge will admit an association's assessment roster, a representative of the association has to lay the proper foundation by testifying to the authenticity of the records being admitted. In *Yang v. Sebastian Lakes CD'M. Ass'n., Inc.*, 123 So.3d 617, 38 Fla. L. Weekly D1836 (Fla. 4th DCA, August 28, 2013), over the objection of the property owner, the trial court admitted as evidence the association's assessment roster to establish the total amount of past due assessments. On appeal, the Fourth District Court of Appeals reversed and remanded the case to the trial court finding that the association had failed to establish a proper foundation to have its assessment roster admitted in the trial court proceeding as evidence. The association's witness was unable to authenticate the data contained in the records from the association's prior accountant because the association did not have the records from its former accountant. When changing accountants or management companies, it is absolutely critical that the association's official records be transferred to the new accountant or property management company. Board members are well advised to make sure that they take an active role in ensuring that the official records of their associations are properly transmitted to any successor accountant or property management company. While there are no cases on point, failure to ensure that official records are obtained when changing accountants or management companies could be a breach of fiduciary duty.

CONFIDENTIAL MEANS CONFIDENTIAL

BY: CHRISTINA HARRIS SCHWINN

Commonly, a mediated settlement agreement will contain a confidentiality clause that restricts disclosure of the information contained in the settlement agreement to unrelated parties to the settlement agreement. In an interesting case from the east coast, the settlement agreement at issue in an employment case prohibited a former employee from:

> … directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this agreement. … A breach … will result in disgorgement of the plaintiff's portion of the settlement payments.

The employee disclosed the settlement to his daughter and his daughter in turn put a post on her Facebook page indicating that her parents had won the dispute against the employee's former employer. As a result, the defendant sued to recover the payments it made under the settlement agreement. On appeal, the District Court of Appeals reversed the lower court and said that a settlement agreement is a contract and that it has to be interpreted based upon its terms. If the language is clear and unambiguous, then the contract's terms will be enforced. Because the express language prohibited disclosure to parties

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not identified in the settlement agreement, the former employee was forced to give back the $80,000 settlement he received.

While it is true that settlement agreements in the community association context are available for access by members of the association, it is important to remember that if a settlement agreement restricts disclosure to unrelated parties to the settlement agreement (a member is a related party), then any payments made pursuant to the settlement agreement can be recovered by the party who was harmed by the disclosure.

Gulliver Schools, Inc. v. Snay, 137 So.3d 1045, 39 Fla. L. Weekly D457 (Fla. 3rd DCA February 26, 2014).

MATERIAL ALTERATIONS

BY: CHRISTINA HARRIS SCHWINN

Security Cameras

In *Dellagratta v. West Coast Vista Condominium Association, Inc.*, Arb. Case No. 2013-027351, the association installed security cameras after receiving numerous complaints from unit owners about outsiders walking through the condominium property and the loss of pool furniture worth $1,722.00. The arbitrator ruled that the installation of security cameras constituted a material alteration requiring a unit owner vote. The arbitrator found that the installation of security cameras only would have a speculative deterrent effect and that the board had failed to justify the need. When in doubt, it is always best to put the issue to the owners for a vote unless the governing documents give the board the authority to make a decision.

Color and Style Changes

In *Simpkin v. Nine Island Avenue Condominium Association, Inc.*, Arb. Case No. 2013-040108 (Jones/Final Order/May 1, 2014), the arbitrator found that a number of color changes and modifications to the property constituted material alterations to include:

- changing the color scheme of the curbing around a Koi pond;
- changing the color of a gazebo and trellis;
- changing the color of the pool furniture cushions from gray to royal blue;
- changing the type of wood from Cypress to brown stained wood (note that Cypress grays over time);
- increasing the stepping distance into the pool from 12 inches to 14 inches;
- decreasing the number of rungs on a pool ladder;
- changes to landscaping that removed most of the association's trees and the shrubs to provide a dog run;
- adding fish to a reflection pond (note while the arbitrator did not force a removal of the fish because the statute of limitations had run, it is important to note the arbitrator did find the addition of the fish to be a material alteration);
- removal of a water filtration system from the building.

In *Simpkin*, the arbitrator found that all of the foregoing constituted material alterations. The arbitrator ordered the association to put the matters forward for a vote of the owners. This case is a reminder that even small changes may constitute material alterations.

Tidbit

Florida's Minimum Wage increases to $8.05 from $7.93 effective January 1, 2015.

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OPTIONS FOR SPEED LIMIT ENFORCEMENT ON PRIVATE ROADS

BY: KATHLEEN OPPENHEIMER BERKEY, AICP

Speeding drivers on private roads owned and maintained by a community association can endanger the lives of residents and guests, but what can a community association do to enforce traffic laws or rules on its roadways?

Section 720.305(2) (homeowners' associations) and Section 718.303(3) (condominiums) of the Florida Statutes (F.S.) authorizes the Association to levy fines and suspend common area use rights of a member, as well as the member's tenants, guests, or invitees, for failing to comply with the association's governing documents. In the case of speeding in violation of posted signs, a community association should consider fining both the owner and his/her guests or lessees that speed. The community association should keep a running, detailed inventory of the behavior of the violators, and levy fines for each violation.

Beyond fining and suspending use rights as provided under statute and the community association's governing documents, the community association can solicit assistance from its local Sheriff's office or municipal police department to enforce traffic laws and rules on its private roads. Pursuant to Sections 316.006(2)(b) (a municipality's jurisdiction over private roads) and 316.006(3)(b) (a county's jurisdiction over private roads), F.S., the Sheriff's office or a municipal police department may be granted jurisdiction to enforce traffic laws on private or limited access roads, as they would on public streets throughout the County or the city limits, respectively, by way of a written agreement between either the County or City and a community association. At a minimum, the written agreement for traffic control jurisdiction over the private road or roads must provide for reimbursement for the actual costs and liability insurance and indemnification by the community association. The law also specifically allows a homeowners' association board of directors to contract to have state traffic laws enforced by local law enforcement agencies on private roads that are controlled by the association with a majority vote. However, before signing any traffic control agreement, please have your attorney review all terms and conditions.

OFFICIAL RECORDS – COMBATING OWNERS' ABUSE OF THE OFFICIAL RECORDS REQUEST PROCESS

BY: MATTHEW P. GORDON

Every Florida condominium and homeowners' association is required by Florida law to maintain certain documents as part of its official records, and to timely make those official records available to owners for inspection and copying. If an association fails to provide access to the records within 10 business days after receipt of a written request, a rebuttable presumption is created that the association willfully failed to comply with the law, and damages may be awarded to an owner that has been denied access.

Generally, associations should be open to records requests and do what they can to reasonably accommodate members to provide access to those records. Not only is an association required to do so, it helps to foster transparency between the Board and owners, and gives confidence that the association's operations are being well-run. With that said, unfortunately, every once in a while we find that, instead of promoting the free flow of information, the official records request process is abused by a few owners and used mainly as a tool to disrupt association operations, to harass or intimidate Board members and management companies, and to waste association resources that could be devoted elsewhere. Some common tactics used by owners

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include inundating associations with numerous, overbroad, and unduly burdensome requests for official records; requesting access within a short period of time to the exact same records that were copied and provided previously; or demanding access without sufficient notice.

We are often asked what, if anything, can an association do to reign in owners that are abusing the official records process. Fortunately, associations are not completely unarmed to combat these types of situations because the Florida Statutes governing both condominium and homeowners' associations allow associations to adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. If your association has not already adopted any rules governing the manner of record inspections and copying, our office strongly recommends it, and we can provide you with guidance in adopting the reasonable rules and regulations that meet or pass legal muster.

INVESTING ASSOCIATION FUNDS

BY: CHRISTOPHER J. SHIELDS

With the very low interest rates that money market accounts are receiving these days, associations are more frequently asking if there is anything they can do to capture a higher yield and return on their investment of association funds.

The provisions of your association's governing documents are the starting point of this inquiry, and should be reviewed to confirm the limits of the association's investment authority. For example, some association's bylaws provide that funds must be deposited in a County bank, or a State or Federal chartered bank, with FDIC insurance. Furthermore, while both the Florida Condominium Act(Chapter 718) and the Florida Homeowner's Association Act (Chapter 720) addresses association finances, each law is relatively silent regarding the investment of reserves and does not restrict the types of investments that associations may use to generate a return on its funds. This means that other than any limitations or regulations in the Association's governing document, an association's board of directors is responsible for investment decisions, including the protection and enhancement of the Association's reserve funds. Even though directors have some discretion in their association's investment options, individuals can expose themselves to liability for mismanagement of association funds when serving as officers or directors of associations. Community Association officers and directors have a "fiduciary relationship" with the unit owners and must discharge their duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner he or she reasonably believes to be in the interest of the association. Therefore, the directors' actions must be exercised in good faith and in the best must be exercised in good faith and in the best interests of all unit owners, and to avoid exposing themselves to liability, this discretion should be exercised conservatively and directors must invest association funds in a reasonably prudent manner.

Directors should consider three main investment objectives when investing association funds. The most important factor is the safety of the funds and protecting the principal. The principal should be protected from as much risk as possible, which means not having any speculative investments and not having any deposits in financial institutions that

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exceed FDIC protection limits. The second most important factor is the liquidity of the funds and the ease and costs associated with converting an investment into cash or cash equivalent. Investment maturities need to meet cash flow needs and if an association needs to, and cannot access the funds right away or without significant penalty, the funds would not have sufficient liquidity. The last factor is the yield, or the amount of return on an investment. The yield is less important compared to the first two factors, because a board of directors' most important responsibility is to protect the funds the association collects from the members and not to lose it.

Although not limited to bank accounts, the generally accepted prudent investments for associations are conservative. We recommend that associations invest only in savings accounts, FDIC-insured certificates of deposit, U.S. Treasuries and government agency bonds. However, for any associations that wish to expand outside of money market savings accounts and have this authority in their governing documents, they should retain an experienced professional investment manager, implement an investment plan and impose limitations on dollar investments in any particular area.
