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PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

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LEGISLATIVE UPDATE (HB 791)

BY: CHRISTOPHER J. SHIELDS, ESQ. and CHRISTINA HARRIS SCHWINN, ESQ.

On June 2, 2015, Governor Scott signed HB 791 into law. HB 791 affects communities and associations governed under Chapters 617, 718, 719 and 720 of the Florida Statutes. The effective date of these changes is July 1, 2015.

1. New Electronic Voting. (Pertaining to Condominiums, Cooperatives and HOAs)

Chapters 718 (condominiums), 719 (cooperatives) and 720 (HOA's) are all amended to allow electronic voting for elections and other matters voted upon by owners through an internet-based online voting system if a unit owner consents, in writing, to online voting and further provided that the association provides each owner:

a. with a method to authenticate the owner's identity on the online system;
b. a method to insure secrecy and integrity of each ballot as to board elections;
c. a method to confirm, at least 14 days before the voting deadline that an owner's electronic device can successfully communicate with the online voting system;
d. a method to authenticate votes cast;
e. the online voting system stores the electronic votes; and
f. with an online voting system which transmits a receipt to the voting owners.

While the new law provides a welcomed opportunity, it raises more questions regarding its implementation. First, as of June 20, 2015, the State has not adopted nor even drafted any administrative rules on online voting. Second, while we are aware that there are vendors in other states which have apparently managed online elections in those states, to our knowledge, no current vendors have systems which comply with these new statutory requirements. Obviously, those vendors will now enter the Florida market but the burden of making sure the statutory requirements are complied with will still rest with the association. Hopefully, the State will adopt rules to provide further guidance. It is important to remember that the new law which allows for electronic voting only applies to those owners who, in fact, consent in writing to online voting. If the owner does not consent in writing, the owner is entitled to vote by paper ballot.

2. Electronic Transmission of Proxies (Pertaining to Condominiums, Cooperatives and HOAs)

While current law does not specifically address or authorize owners to transmit a copy of their proxy by fax or emailing a scanned copy to the association, fax or email delivery has been commonly allowed since mailing originals particularly from out of state and out of the country via U.S. Mail can be slow and unpredictable. Effective July 1, 2015, F.S. 617.0721 will allow members of any corporation not-for-profit (i.e. condominiums, cooperatives and HOAs) to transmit their proxy to the association by fax or by emailing a scanned copy.

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3. Electronic Notices to Owners (Pertaining to Condominiums, Cooperatives and HOAs)

Prior to July 1, 2015, in order for a condominium, a cooperative or an HOA to send notices to owners electronically, the association bylaws had to specifically provide for electronic notice and the owner had to consent in writing to receive electronic notices. Effective July 1, 2015, the requirement that the bylaws specifically authorize notices to be transmitted by electronic means has been removed. However, before the association is authorized to send notices by electronic means (i.e. email); the owner(s) must still consent in writing to receive electronic notices. Owners who have not consented in writing are still entitled to receive notices by regular mail.

4. Official Records (Pertaining to Condominium and Cooperatives)

Effective July 1, 2015, the new law provides that the statutory reference to "all other records of the association" is limited to "written records". As such, tape recordings are not subject to inspection as they, technically, are not "written record".

5. Levying Fines (Pertaining to Condominiums, Cooperatives and HOAs)

Effective July 1, 2015, the law has been changed to clarify that it is the board of the respective condominium association, the cooperative or the HOA which has the power to levy fines, that the role of the committee formed to hear cases is to confirm or reject the fine so imposed by the board.

6. Suspension of Voting Rights (Pertaining to Condominiums, Cooperatives and HOAs)

When a unit owner is delinquent more than 90 days in paying a fee, fine or other monetary obligation and the owner's voting rights have been suspended by the board, then in calculating the votes needed for any action (i.e. vote to waive reserves) the total number of voting interests is reduced by the total number of members whose voting rights have been suspended. Keep in mind suspension of voter's rights still require formal board action.

7. Board Eligibility (Pertaining to HOAs)

§ 720.306 is amended to provide that any owner who is delinquent on any monetary obligation owed to the association on the day that he or she could last nominate himself or herself for the board is not eligible to run for the board and may not be listed on the ballot. Further, if any board member serving on the board becomes more than 90 days delinquent in the payment of any monetary obligation owed to the association is deemed to have abandoned his or her board seat. This change to Chapter 720 is now consistent with what the statute has already provided under 718.112(2) as it relates to board member eligibility in a condominium setting.

8. Application of Payment of Assessments (Pertaining to Condominiums and Cooperatives only)

Under current law, when partial payment is received on a delinquent account, the payment is applied first to interest which has accrued, then to any administrative late fees, then to any costs and attorney's fees which the association has incurred and then to the delinquent assessment itself. Effective July 1, 2015, the law, as it relates to condominiums and cooperatives, has been changed to clarify that the application of payment still applies if the check which has been tendered is for less than the total amount claimed. This new law is intended to legislatively overrule the Florida Appellate Court case entitled *St. Croix & M.L. Shapiro v. St. Croix at Pelican Marsh*, where the Court held that the Association's acceptance of a check for less than the total amount of a disputed claim constituted "accord and satisfaction" and precluded the Association from recovery of the balance owed. Still in all cases and particularly in HOAs, as this amendment only applies to condominiums and cooperatives, all Associations, should still be careful when accepting partial payments which are tendered as full satisfaction. If there is any question as to whether tendered partial payments should be accepted, legal advice is strongly recommended.

LEGISLATIVE UPDATE (HB 643) CONDOMINIUM TERMINATIONS

BY: CHRISTOPHER J. SHIELDS, ESQ.

Condominiums by law are creatures of statute and both case law and statutory law provide that regardless as to the state of construction, condominium units come into being when a condominium declaration has been recorded. Issues occur when units are recorded and thereby created and yet never built. These issues can better be described as nightmares for a developer since assessments accrue even on unbuilt units. In addition, many developments and older condominium communities in particular for a variety of reasons, including change of use, casualty events which have destroyed buildings seek to terminate the condominium regime and sell the remaining land where the condominium sits on to a third party purchaser.

Over the recent years and especially subsequent to July 1, 2007 when the legislature adopted major changes to facilitate termination because of economic waste or impossibility, the legislature has struggled with balancing the interests of those who seek to remain unit owners with those who seek to terminate the condominium and move on.

An in depth analysis of new HB 643 which amends F.S. Section 718.117 is not possible in this newsletter. However, here are the highlights of the changes to F.S. 718.117 that took effect on June 16, 2015:

1. Plan of optional termination will require the following thresholds:

    a. At least 80% of the total voting interests must approve the plan. If 10% or more of the total voting interests reject the plan; the plan of termination may not proceed.

    b. If rejected, there must be a cooling off period and a subsequent new plan may not be considered for at least 18 months.

2. For unit owners who have received homestead status on their property by the county property appraiser, these unit owners are entitled to receive a relocation payment equal to 1% of the termination proceeds allocated to their unit.

3. The plan of termination must provide for payment to any unit owner whose unit is encumbered by a first mortgage sufficient to satisfy the lien, but the payment may not exceed the unit's share of the proceeds under the plan.

4. A termination vote may not take place until five (5) years after the condominium has been created, unless no unit owner objects to the termination.

5. What is particularly odd is that contrary to all other voting rights, voting rights of members that have been suspended are still entitled to vote on the plan of termination. As such, unit owners who are delinquent in the payment of their assessments, fines or other charges will still be given the right to vote on the plan of termination. This gives unusual leverage to those unit owners who are not even in compliance with their own condominium documents.

AMEND YOUR DOCUMENTS IF YOU DO NOT WANT TO HONOR AN EXEMPTION FROM THE DUTY TO PAY FOR ASSESSMENTS ON PROPERTY ACQUIRED THROUGH MORTGAGE FORECLOSURE

BY: SUSAN MCLAUGHLIN, ESQ.

Before July 1, 2007, Chapter 720 did not address the issue of the liability of subsequent purchasers for delinquent assessments and most Developers put a provision in the original Deed of restrictions subordinating the lien for assessments to the lien of the first mortgage holder. The purpose of this is to facilitate the financing of initial home sales by assuring lenders that they can sell the properties free and clear of all encumbrances in conjunction with the foreclosure of the mortgage.

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Effective July 1, 2007, Section 720.3085, Florida Statues was added to Chapter 720 and provided:

> A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner.

After lobbying from the banks, Section 720.3085 was amended, effective July 1, 2008, to provide an exception limiting the liability of foreclosing first mortgage holders to the lesser of one percent of the original mortgage or the last 12 months of regular maintenance assessments. The Condominium Act has contained similar provisions for well over twenty years. Although, before July 1, 2010, the limitation on the first mortgage holder's liability was one percent of the mortgage or 6 months of past dues assessments. This progression of statutory changes is juxtaposed against existing loans and also existing governing documents that provide a better deal for a mortgage holder as well as anyone who purchases the property at a mortgage foreclosure sale.

In *Coral Lakes Community Association, Inc. v. Busey Bank, N.A* 30 So.3d 579, (Fla. 2nd DCA 2010), the Court held that the Association could not enforce the "joint and several liability" provision in the 2007 amendment against a first mortgage holder taking title because to do so, would violate the constitutional prohibition against laws that impair contracts as the loan in that case had been made before the amendment. But, in the dicta, the Court in *Coral Lakes* also stated:

> We conclude that because of the Declaration's plain and unambiguous language subordinating any claim for unpaid HOA assessments to a first mortgagee's claim upon foreclosure or deed in lieu of foreclosure, it controls and absolves the Bank, as first mortgagee, from liability for any assessments accruing before it acquires the parcel. Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms.

Now in the case of *Pudlit 2 Joint Venture, LLP. v Westwood Gardens Homeowner's Association, Inc.*, Case No. 4D14-1385 filed on May 27, 2015, the

Fourth District Court of Appeals has ruled that a third party purchaser at a mortgage foreclosure sale is also entitled to the benefit of a clear provision in the governing documents providing that the Association's lien is extinguished by the foreclosure of a first mortgage.

The argument that the result should be different for condominiums because they are "creatures of statute" was also squarely rejected by the Court in *United States v. Forest Hill Gardens East Condominium Association, Inc.*, 990 F. Supp. 2d 1344 (S.D. Fla. 2014). In that case, the Bankruptcy Court held the Condominium statute did not require the Association to collect the "safe harbor" payment from a foreclosing lender when the Declaration of Condominium provided that a foreclosing mortgage holder had no liability for the assessments that came due prior to the acquisition of title.

The Association in these cases also faces significant exposure for the opposing party's attorneys' fees and costs. The owner may also have claims for other damages including inability to use the property as collateral for loans.

Consult with counsel if you are involved in a current dispute before you reach any conclusions based upon this article. Some documents have language incorporating statutory amendments and there may be other considerations based on the exact language in your documents. The moral of this particular story is simply that amending a Declaration containing any form of a lien subordination provision is a necessary first step to avoiding future disputes.

(A motion for re-argument is still pending in Pudlit 2 but it is likely that the decision will stand in light of precedent discussed above.)

WHEN DOES AN ASSOCIATION'S FAILURE TO PROVIDE RECORDS BECOME "WILLFUL"

BY: CHRISTOPHER J. SHIELDS, ESQ.

Pursuant to F.S. 720.303(5), an HOA is required to provide a member access to its official records within ten (10) business days after receipt by the board or its designee of a written request. There is no requirement that the written request be submitted by certified mail, return receipt requested. However, if the HOA fails to provide access within ten (10) business days after receipt of a written request which is submitted by certified mail, then there is a rebuttable presumption that the HOA has willfully failed or refused to provide access to its official records. An HOA member who is denied access is entitled to sue for actual or minimum damages at $50 per calendar day up to 10 days, the calculation to begin on the 11th business day after receipt of the written request. And while an HOA member may still sue the HOA if the HOA has failed to timely comply with their inspection request, there is no rebuttable presumption that the HOA's failure was willful unless the request was received by the HOA and sent via certified mail.

On the other hand, in a condominium setting, pursuant to F.S. 718.111(12)(b) official records must be made available for inspection and copying within five (5) working (business) days after receipt by the board or its designee a written request (e.g. CAM). NOTE: Access to condominium records must be offered within 5 working days, and then after 10 business days, a presumption is created that the failure to provide access was willful. Contrary to HOAs, in a condominium setting, there is no requirement that the written request be sent via certified mail and received by the condominium association for their failure to be presumed to be willful. Willful failure triggers statutory damages of $50 penalty per day, up to $500 per denial.

In a condominium, failure to offer access within five (5) business days may support a member filing a petition for non-binding arbitration to recover the damages. Even if the facts presented do not support a claim for statutory damages, an owner may prevail in obtaining a final arbitration order requiring the association to provide access and award the owner prevailing party attorney's fees.

So, from the association's perspective, the key is making sure that it can overcome the rebuttable presumption that its delay or failure to provide access is not considered "willful". There are a line of arbitration decisions which support the association's refusal where the association is faced with a bona fide legal question as to what official records were accessible to units and sought the advice of counsel and provided a good faith defense to rebut the presumption that its refusal was "willful".

However, more recent arbitration decisions tend to side with the owner who has made the request and are less forgiving to the association. An association asserting that advice was needed from its legal counsel will not suffice unless the confidential nature of the records so requested was a genuine and unsettled question of law. Moreover, typical delays associated with holidays, changing officers, board members and even managers will not save the association. In fact, excuses such as the former CAM or former board members has the records and will not provide them will generally not save the association. Moreover, if the association simply does not maintain the records so requested, this alone may be proof that the association's conduct is willful. While there is no obligation for the association to "create" records, if the record so requested is not enumerated under the statute as that which the association should typically maintain, the failure by the association to keep records, which is usual and customary, may be proof that the association's behavior was willful. On the other hand, providing timely but perhaps not complete set of records requested "may" be sufficient to convince the arbitrator that its refusal was not willful. In addition, if the owner's request for records was not clearly stated, or is ambiguous, the association may be successful in showing that its refusal was not willful.

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 practices in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner with the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm.

Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including but not limited to drafting community documents and amendments; interpretation and enforcement of governing documents; the recovery of assessments through collections and lien foreclosures; reviewing vendor contracts; resolving all disputes including construction defects, turnover disputes, condominium arbitration, HOA pre-suit mediation and injunctions to compel compliance, tenant removal, and general covenant enforcement. Please feel free to contact them via the e-mail addresses listed above.

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