NEWS LETTER

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Pre-Arbitration Notices Under F.S. 718.1255

Florida Statutes §718.1255 requires that certain Condominium "disputes" must be resolved using mandatory non-binding arbitration with the Division of Florida Condominiums of the Florida Department of Business and Professional Regulation. Included within the definition of a "dispute" giving the State sole jurisdiction to hear these types of cases, are covenant enforcement matters. The Statute provides that prior to the institution of any mandatory non-binding arbitration action, the petitioner must provide advance written notice of the specific nature of the dispute and make demand for relief and a reasonable opportunity to comply and notice of the intention to file an arbitration petition or legal action in the absence of resolution of the dispute. Therefore, at the onset, it is important that the Association provide clear and advance written notice of its intent to pursue the arbitration if the violation is not abated. Recent arbitration cases are instructive as to what problems can occur when compliance with this condition precedent of providing valid pre-arbitration demand notice is not complied with.

In the case of 2771 Riverside Drive 112, LLC v Coral Springs Tower Club II Condominium Association, Inc., where more than eight (8) months had elapsed from the time of pre-arbitration notice to the filing of the petition for arbitration, the arbitrator dismissed the arbitration petition as the eight (8) month delay in filing the arbitration action raised a question concerning the intent of the Association to actually pursue an arbitration action if the Unit Owner failed to comply with the Association's directive.

Moreover, the case of Aspen Glen Condominium Association, Inc. v Alan Roden, as Trustee of the Carol Roden Trust, where the pre-arbitration demand letter was directed to Carol Roden and to the Carol Roden Trust and not to the Trustee, the arbitrator dismissed the arbitration action determining that the pre-arbitration demand letters were defective even though Carol Roden was alleged to have the illegal pet. In dismissing the arbitration action, the arbitrator found that the pre-arbitration demand letters referenced a fine for an illegal pet and one referenced a lien to be imposed for the fine, (of course the Florida Condominium Act does not allow the Association to lien for failure to pay a fine), the case was dismissed for insufficient pre-arbitration notice. Any written notice must give the offender

reasonable opportunity to comply.

In the case of Brickell Place Condominium Association, Inc. v Sanz, the arbitrator determined that the pre-arbitration demand letter which demanded immediate removal of a dog, did not provide the owner with a reasonable opportunity to comply with the demand and was considered insufficient statutory notice. By the same token, in the case of Bayview at Fisher Island Condominium II Association, Inc. v Rotta, the arbitrator found that the pre-arbitration notice demanding that the Owner remove nuisance parrots within ten (10) days was reasonable opportunity and complied with the pre-arbitration notice requirements of the Statute.

Then there are cases, all too often, where the pre-arbitration notice is considered unlawful in that it attempts to make demand of the Owner that which is not permitted by the Statute. In the case of Capastrano Condominium Association, Inc. v Breiner, where the Association seeking to remove an overweight dog belonging to a tenant failed to provide tenant with pre-arbitration notice required by the Statute, the Association's arbitration petition was dismissed for failure to comply with the condition precedent. Moreover, the arbitrator found that the pre-arbitration notice which required the Unit Owner to pay the Association the legal fees generated in writing the pre-arbitration notice was invalid as the attempt to assess the noncompliant Unit Owner with the attorneys' fees expended by the Association defeated the intended purpose of the pre-arbitration notice under the Statute. In other words, the tenant letter tried to assess the Owner for attorney fees before the arbitrator could have even had the opportunity to determine that the Association was the prevailing party.

Finally, the case of Cohn v Caribe, Inc. of Broward County, is instructive of the relief requested in the pre-arbitration demand letter not mirroring the relief set forth in the arbitration petition. In this case, the arbitrator found that the demand letter to the Association simply requested that the election be invalidated and the new election be conducted but the petition for arbitration requested the arbitrator appoint new Board Members without the necessity of a new election and other relief, the arbitrator found that the pre-arbitration letter was invalid because it requested relief that was different from the relief requested in the petition.

I recognize that the decisions rendered by the arbitrators in these cases might seem extreme but they are instructive of the need for Associations to engage and follow legal counsel's instructions when pursuing any enforcement action. Pre-arbitration demand notices must be written with due care and need to be specific, clear, concise, consistent and, most of all, not over reaching. And while I empathize with the Associations desirous of having legal counsel include a demand that the non-compliant Owner further pay the fees incurred by the Association in having legal counsel prepare demand letters, it should be noted that making this demand in the pre-arbitration demand letter renders it legally suspect and an arbitrator may dismiss the arbitration petition because of it. Therefore, it is critically important that you work with your legal counsel in preparing the pre-arbitration demand letter to ensure that the demand strictly complies with and falls within what is allowed by the Statutes so that your arbitration petition is not later dismissed for failure to comply with the condition precedent under the statute of providing a valid pre-arbitration demand notice.

Association's Irrevocable Right of Access -- Proceed Cautiously.

A recent ruling raises questions concerning the unbridled authority of a condominium association's irrevocable right of access to a unit under Section 718.111(5) of the Florida Statutes. In *State of Florida v. Vino*, 2012 WL 4448866 (Fla.3rd DCA), an owner was sleeping at home when he was awoken after his dogs started barking. Unknown to him, two Florida Power & Light Company ("FPL") employees had used a ladder to climb over his fence to shut off the power. The owner believed serious criminal

activity was afoot and after securing his rifle, he fired a warning shot into the ground. After learning that the two men were FPL employees, the owner ordered them off his property, and as they were leaving fired another warning shot into the air.

The owner was later charged with two counts of aggravated assault, improper exhibition of a weapon, and unlawful discharge of a firearm. The owner responded to these charges by invoking statutory immunity under Section 776.013(3) of the Florida Statutes. This section better known as Florida's Stand Your Ground Law provides as follows:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

Under these circumstances a person is immune from criminal prosecution. After weighing the evidence, the court dismissed the two counts of aggravated assault and improper exhibition of a weapon and ruled that the owner was statutorily immune from prosecution pursuant to Florida's Stand Your Ground Law. The court did note, however, that the owner could be prosecuted on the charge of unlawfully discharging a firearm, because he shot the gun after learning the men worked for FPL and were not a threat.

The case is noteworthy when viewed in a condominium context. The Florida Condominium Act expressly provides that an association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair or replacement of any common elements or any portion of the unit that is to be maintained by the association, or as necessary to prevent damage to the common elements or to a unit or units. Generally speaking, advance notice is not specifically required by the Florida Condominium Act, and thus if it is necessary for an association to access a unit for routine maintenance, the association should take reasonable steps to provide owners with notice of why and when the association will be entering the unit.

With that in mind, let us assume for a moment that an association needs to perform routine maintenance on a unit because the unit has been abandoned in foreclosure or perhaps a seasonal owner has left for the summer. The association is unaware that the owner has in fact returned to the unit, and the association does not provide notice to the owner. As an employee of the association puts the key in the lock, turns the knob and enters the unit, the owner is startled and believes someone is breaking in. It is not inconceivable that these circumstances could result in a tragedy. Under the *Vino* ruling and Florida's Stand Your Ground Law the owner may be justified in using deadly force against the employee. This is troubling to say the least.

The impact of this case on associations remains to be seen. However, this case raises a number of serious issues to think about and should not be taken lightly. In light of this ruling, even though associations have an irrevocable right of access, associations should revisit their notification policies and procedures before entering units.

Dealing with Sexual Offenders and Sexual Predators in Your Community.

Concerned residents in homeowners and condominium associations struggle with how to address sexual offenders and sexual predators living in their communities. In Florida, the legislature has created a statutory scheme designed to identify, register and monitor persons convicted of sexual offenses. A person who has been convicted of certain sexual offenses can be designated as either a sexual predator or a sexual

offender. Not all sexual offenders, however, are predators. The two designations are distinguished mostly by the degree or offense committed. A person designated as a sexual predator is subject to stricter registration and notification requirements than those imposed on a person designated as a sexual offender.

When a sexual offender moves into the community, the first question may be what can I do to protect my children and ensure the safety of the community? A second question may be what can I do to maintain my property value?

There isn't a simple answer to these questions and there isn't a consensus of opinion. However, when an association becomes aware that a sexual offender or sexual predator is residing within the community, it may take the following steps to protect its residents:

1) Verify the Accuracy of the Report: The association should always perform a careful due diligence investigation of the information initially reported to the association. Accusing someone of being a sex offender or predator could cause a lot of harm and subject the accuser to liability if untrue. The Florida Department of Law Enforcement ("FDLE") has a web-site that keeps track of registered sex offenders and predators including their place of residence. The website address is www.fdle.state.fl.us. The association should contact the Florida Department of Law Enforcement to confirm the status of the alleged sex offender. In addition, the association can obtain information by contacting the local prosecutor's office, or potentially the State police department, State corrections agency, and the Probation agency.

2) Measure the Threat: Not all sex offenders and sex predators are guilty of the same degree or offense. For example, someone may have been required to register as a sexual offender for having too much to drink and urinating in public. This type of situation is clearly less serious than a repeat offender committing rape or preying on children.

3) Consult with Legal Counsel: Megan's Law, which was enacted by Congress, mandates that each state have a mechanism for informing the public of the location of sexual offenders. However, every state has slightly different versions of the law including immunities and disclosure. Another option available is to implement restrictions in your association's governing documents which authorize proactive measures to prevent sexual offenders or sexual predators from moving into the community. However, it is important to note that whether an association can prevent sexual offenders or sexual predators from living in an association is a hot button issue and an evolving area of the law nationwide. Therefore, it is important to have an attorney provide guidance if this is an option your association would like to consider.

4) Provide Notice to Residents: Once the information in the report has been verified and it is determined that the threat level is sufficient, it is appropriate to alert the residents within the association. The association must provide a notice which provides nonspecific information. It is critical that the notice does not use the offender's name or contain anything about the offender or the incident. The notice should inform residents that a sexual offender is living in the community, refer them to the FDLE website, and to contact the FDLE for more information.

Dealing with sexual offenders and sexual predators in your community is a difficult issue, and one that does not come without substantial risk. Your association should proceed with caution and seek the advice of legal counsel

before implementing any policies and procedures protecting its residents from sexual offenders or sexual predators.

Recommendations for Resolving Noise Disputes.

Noise disputes between owners are common and can be difficult issues for associations to resolve. These disputes can cause unnecessary expense and increase acrimony among neighboring owners if not handled properly. However, associations that take proper action may be able to resolve the dispute and/or reduce the association's burden by avoiding prolonged litigation.

Noise disputes frequently involve a downstairs owner complaining of noise coming from the upstairs unit as a result of the floor coverings or removal of them. A typical dispute may arise when an upstairs owner removes existing carpeting and installs tile flooring without a sufficient sound barrier. This change can occur without notice or application to the board. As a result, increased noise such as talking, walking, barking dogs, music, or slamming doors transmits to the below unit and the downstairs owner complains of unreasonably loud sounds to the board. The owner then demands that the association intervene and force the upstairs owner to remove the tile and restore the carpet.

When a noise dispute is first presented, the board must determine whether the situation is an appropriate matter for association enforcement or is a dispute that would best be left to the owners to resolve. Floor coverings are part of the unit owner's interest and are not considered a common area that the association would be responsible for. Notwithstanding, however, a complaining owner may assert that the board is required to take action to protect them because an owner has violated a floor covering or nuisance provision that may be in the governing documents. It is important to keep in mind that the governing documents do not require the board to referee personal disputes between owners and the board cannot control the conduct of owners in the privacy of their own homes. Therefore, it may be improper for a board to allocate association resources to resolve certain noise disputes between owners. The board must only act when the offending owner's conduct impacts the association or another owner's express rights.

Although this question is not always easy to answer, the association may take the following steps to respond to a noise dispute:

1) Verify and Investigate the Noise Dispute: The board should verify the noise complaint and listen to each owner's version of the events separately. If the association becomes aware of violations, and fails to investigate and pursue the violations, the association can find itself in a situation where an owner defends an enforcement action on the basis of selective enforcement. Selective enforcement can be used to successfully defend an enforcement action if the owner can show that the association is aware of, or should be aware of, similar violations, and did not enforce the violations against other owners. The board can minimize this risk by taking reasonable investigative measures to determine the level of noise that is being transmitted from the offending unit.

2) Measure the Severity of the Noise Dispute: Although owners have the right to quiet enjoyment of their property, this does not mean they have the right to a noise-free environment. Where a complaining owner has alleged that the noise is a nuisance, associations are not compelled to become involved in disputes where the noise causes mere inconvenience. A nuisance is subjective, and the law does not protect the ultra-sensitive, nor is an association or its members required to protect the ultra-sensitive. To constitute a nuisance, the noise must cause an unreasonable disturbance or annoyance. The occasional

barking dog or slamming door does not rise to the level of a nuisance.

3) Consult with Legal Counsel: Often whether or not board action is required is not entirely clear. For example, not all governing documents are the same and not all floor covering provisions are alike. Floor covering provisions may require board or architectural review committee approval, may prohibit the use of specific materials, or may require certain materials for sound insulation. Other provisions can require objective noise transmission standards be met, or may even include an outright prohibition on changing floor coverings. Another nuance to be aware of is that an association may not even be required to intervene to enforce its governing documents. In *Heath v. Bear Island Homeowners Association, Inc*., 76 So.3d 39 (Fla. 4th DCA 2011), an owner sought an injunction to enforce the Declaration. However, the Declaration stated that the association "may, but shall not be required to, seek enforcement of the Declaration." In ruling that the owner may not obtain an injunction, the court looked to the plain language of the Declaration and held that its enforcement was discretionary. A review of the facts and your association's governing documents may be necessary to determine the association's role and appropriate course of action. An attorney can provide proper guidance, assist the association in minimizing its risk and ideally, keep the association out of court.

4) Set Conditions for Approving Flooring Changes: Often by the time an owner complains to the board of a problem, the offending owner has already violated the governing documents. However, in other cases proper notice is given to the association and the board has the discretion to allow flooring changes. In these cases, the board should be aware that there are several flooring alternatives and soundproofing underlayments that are much less sound invasive than tile. A board might be able to accommodate the request if the owner is willing to use substitute materials. In addition, the association can set conditions for approval such as having the owner submit an application, a copy of the workman's compensation insurance policy, a copy of the contract, evidence that compliant materials have been used, or evidence that equivalent sound transmission standards have been met. The owner should also be required to indemnify and defend the board against any claims made by a third party. If the association gets sued, the association can hold the owner accountable for any related costs in defending itself.

Noise disputes are largely subjective and therefore, there is not always a one size fits all approach to resolve them. Boards must perform a delicate balancing act and weigh their obligation to enforce the governing documents with an approach that allows neighboring owners to resolve their own behavioral conflicts. If your association is faced with a noise dispute, our office can provide guidance on taking swift, aggressive action where appropriate and can assist your association in adopting strategies to avoid litigation.

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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) a Florida Bar Certified Real Estate Lawyer, Partner in the Pavese Law Firm and heads the Real Estate Development and 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. Mr. Capps handles all

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