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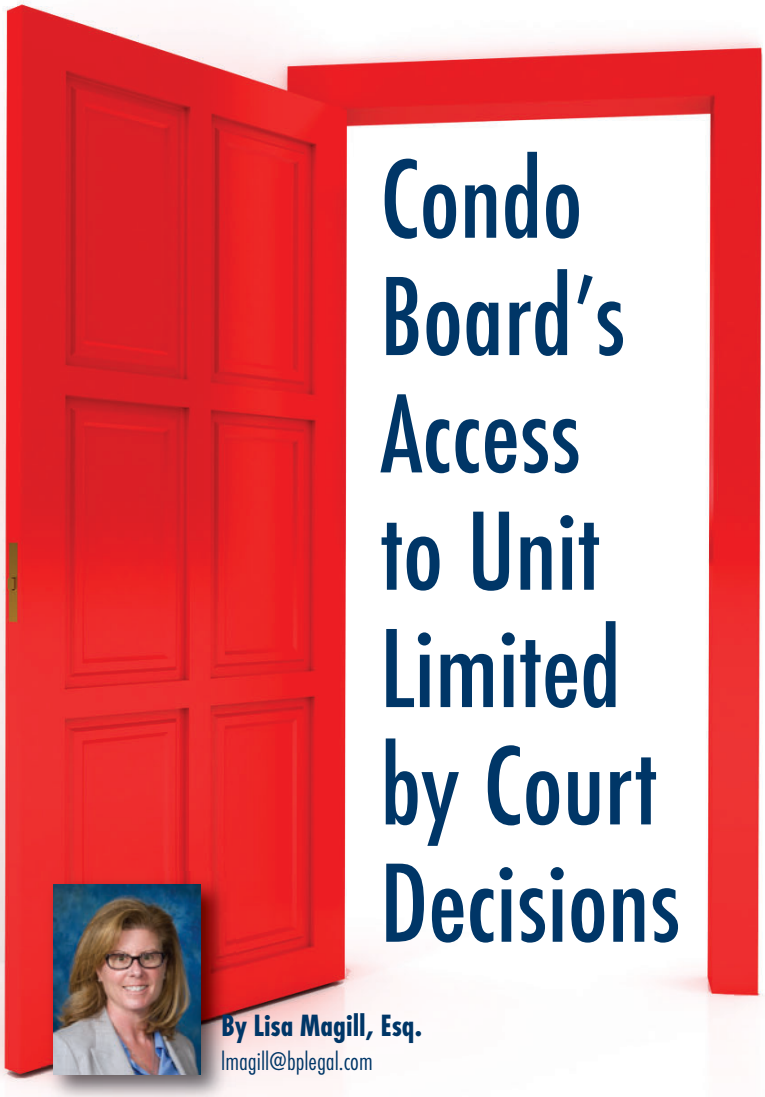
COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980



Condo Board's Access to Unit Limited by Court Decisions

By Lisa Magill, Esq.
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Two recent cases decided by Florida's Fourth District Court of Appeal impose conditions on access to individual units by condominium association boards. The statute provides the association with the irrevocable right of access. Section 718.111(5), Florida Statutes says:

> RIGHT OF ACCESS TO UNITS. The 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 a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.

The court focused on the word "necessary" in both cases – both ruling that additional facts had to be shown in order for the association to prove that access was indeed necessary.

The ruling in the most recent case was issued in April 2014 and involved access to the unit for the purposes of performing monthly pest control. This particular unit owner had allowed the association to have her unit treated for pests on a monthly basis for a number of years. She asked the association to discontinue the service in 2005, claiming she would use an alternative non-chemical pest control treatment. The association agreed until 2009 when it demanded she allow the association to resume pest control treatments. The owner refused and the dispute headed to arbitration before the Division of Florida Condominiums, Timeshares and Mobile Homes.

The arbitrator ruled in favor of the association so the owner filed for a trial de novo as is permitted by the statutes. Section 718.1255, Florida Statutes makes participation in the arbitration program mandatory, but non-binding. The losing party in an arbitration matter has thirty days to re-file the case in court. The case proceeds from the beginning (de novo).

The association was able to obtain a summary judgment granting it access for the pest control treatments. It then was able to obtain a final judgment containing the specifics of the treatments – saying the owner had to permit access on the 3rd Monday of each month for this purpose. She had the option of providing the pesticides or hiring her own vendor to perform pest control services. When she continued to refuse to allow the association's vendor to do this work, it moved for contempt, which the court granted. The unit owner, refusing to give up, appealed the

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ruling to Florida's Fourth District Court of Appeal.

On appeal the court focused on whether access was necessary. In other words, the association had to show that it was necessary to treat this particular unit on a monthly basis. An expert testified there was no evidence of pests in the unit. The court considered the fact that there was a period of at least four years without pest control, seemingly without incident and found that the association did not meet its burden to show that what it wanted was reasonable under the circumstances. The case went back to court, again.

An earlier case established a two prong test to determine whether a condominium board of directors had the right to enter a unit. The test is reminiscent of the test to determine whether a board made rule or regulation is valid and enforceable. The board has to show:

1. it has the authority to take the desired action (in this case, perform pest control services); and
2. that such action is reasonable under the circumstances.

The dispute in Hollywood Towers Cond. Asn. v. Hampton involved exaction of the unit in connection with a balcony/concrete repair project. The expert hired by the association recommended performing concrete repairs at least 4 inches beyond the actual corrosion. The unit owner's expert found that the work done on the balcony itself was perfectly adequate and therefore invasion into the unit was not necessary. Like the pest control case, the court ultimately required the dispute to go back to the trial court for a determination of whether the association's desire to invade the unit, due to the advice of its expert, was reasonable under the circumstances.

The take-away here for community leaders is to understand that the association may have irrevocable access to the unit, but such access is not unfettered. There has to be a valid reason to enter into the unit and the board must act reasonably. How do you know what is reasonable under the circumstances? Well enlisting the help of experts in the particular field is certainly helpful, as is conducting a survey of the operations of similarly situated community associations. In the end the board has to make a judgment call and then be prepared to defend that exercise of discretion.

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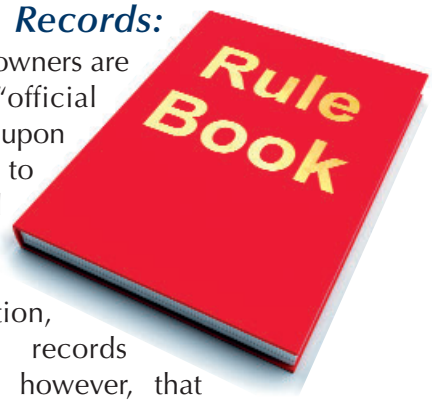

Inspecting Official Records: Florida Statutes mandate that owners are permitted to inspect the "official records" of the Association upon written request, subject to certain limitations and exceptions. Boards may adopt rules which govern the frequency, time, location, notice and manner of records inspections. Be forewarned, however, that rules governing official records inspections are often contested. As such, Boards need to be aware that adopting onerous and highly restrictive rules can result in disputes which could lead to damages being imposed against the Association. Let me provide you with a few examples of prior arbitration decisions on this subject:

-In Maldonado v. MNTY Condominium Association, Inc., Arb. Case No. 2009-05-1376 (Earl / Final Order of Default, February 5, 2010), the arbitrator held that a condominium association which charged 50 cents per page for copies was unreasonable and suggested that 15 cents per page was reasonable.

-In Slovenski v. Paradise Shores Apartments, Inc., Arb. Case No. 98-3493 (Cowal / Summary Final Order, February 22, 1999), the arbitrator held that a rule limiting a unit owner to one inspection per month, with a 200 page limit per inspection, only between the hours of noon and 2:00 p.m. on business days was unreasonable.

-In Porta Bella Yacht & Tennis Club Condominium Association v. Mechler, Arb. Case No. 98-3476 (Final Order, April 17, 1998), the arbitrator held that a rule restricting access to "3 or 4 times per month, for no more than 4 hours per viewing, during enumerated times of day, at the office of the new manager, upon the owner giving 3 days' advance notice" was reasonable.

Responding to Certified Inquiries: Florida Statutes require condominium and cooperative associations to respond to owner inquiries received via certified mail. Boards have the right to further clarify and restrict this right via Board-made rule which limits the number of certified inquiries which the Association must respond to. Florida Statutes suggests that a rule which obligates the Association to only respond to one written inquiry per unit in any given thirty day period is reasonable.

Has your Board adopted rules addressing these issues? If not, you are encouraged to contact your Association attorney to assist you in the drafting and implementation of these Board-made rules.

AFTER FORECLOSURE

You may have title, but what do you do with everything left in the unit?

If you're a member of an Association that has recently foreclosed and taken title to a unit then congratulations! Most of the hard work is done. You now legally own the condominium or home and can hopefully rent or sell it to recoup the Association's loss. But what if it's full of stuff?

Often foreclosed owners or their guests leave behind furniture and other personal belongings. Sometimes these items have not been touched for years and have fallen into major disrepair. Even if it looks like trash though, **DO NOT** remove the items until you've executed a writ of possession.

A writ of possession is a legal document that entitles the Association, as the new owner of the property, to take physical possession of the unit and everything inside. Your attorney must file a motion, and in some counties attend a hearing, to obtain the writ from the court. Once the court issues the writ of possession it is delivered to the Sheriff to post and "execute." Usually within a week of the hearing or order from the court the Sheriff will post the writ on the door of the property giving any occupants or parties in interest notice that they have 24 hours to vacate and gather their belongings. The Sheriff can return anytime after 24 hours have passed but more often than not (simply because of the volume of foreclosures right now) the Sheriff will schedule their return with the Association or your attorney approximately 1-2 weeks after posting.

When the Sheriff finally comes to "execute" the writ of possession, they simply appear to keep the peace. They will not change the locks or move the items out of the unit for you. The Association will need to have a locksmith present that day to change the locks so that you now have sole possession and access to the unit. From there, you have several options for whatever may be inside:

INVENTORY. No matter what you ultimately decide to do with the items, it is a good practice to fully inventory everything inside just in case a former owner or occupant appears later to contest what happened. My recommendation is to photograph or make a video of the entire unit before anything is moved. Then prepare a list of the furniture and items found, especially anything of significant value.

TOSS IT. Once the writ of possession has been executed you may dispose of any personal belongings that the owner hasn't claimed. You've probably come across trash or items too far gone to be of any value to anyone and these can be thrown away.

USE IT. If the Association is planning to rent the unit and there is furniture in reasonable condition you can use it to market the unit as furnished or partially furnished. Of course, if it hasn't been touched in a while it is best to have it cleaned and checked for pests.

DONATE IT. Items that are still in reasonable condition but of no use to the Association can be donated to your local non-profit (clothes, housewares, etc). Some organizations will even provide free pick-up.

STORE IT. Florida law also contemplates storing abandoned property at the owner or former occupants' expense. This is usually not worthwhile to the Association but may be a good option if you encounter something valuable, like jewelry. Contact your attorney for more information about how to notice the owner or former occupant about storing abandoned property.

SELL IT. After abandoned property has been stored for a certain amount of time it can be auctioned (there are several reality shows that have popularized this process). Again, it is best to consult your attorney before attempting this step to be sure you've given adequate notice to everyone.

I cannot stress enough how important it is to document this process even if the former owner has passed away or disappeared. A few minutes spent photographing and inventorying can save many a headache (and potentially legal fees) later if someone comes out of the woodwork asking what happened to their stuff. Be patient with the process and feel free to reach out to our collections department if you need assistance or have questions.

RULES GOVERNING OWNERS' RIGHTS

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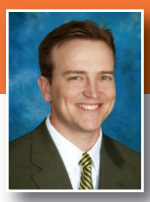

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What Every Board Needs To Know

Owners within a Community Association have rights to attend meetings and obtain information and documentation from their Association. These rights are contained within not only Florida Statutes but also within the respective Governing Documents for each Community. Did you know that the Board has a right to adopt rules which further clarify and restrict these owner rights? These rules are critically important for an Association that is trying to minimize and avoid potential disputes with owners, some of whom may attempt to abuse these rights. Below is a listing of several owner rights which are, per Florida law, subject to further governance via Board-made rules:

Recording Board Meetings: Florida Statutes permit owners to audio record or video record both membership meetings and certain board meetings. Boards are empowered to clarify and restrict this right via rule. Such rules must be in writing and should be adopted prior to attempting to restrict an owner's efforts to record a meeting. Typically such rules will require prior notice to the Association that the owner intends to record the meeting. Further, the rules may specify where recording equipment must be placed, and provide that none of the equipment used for the taping may interfere with, or obstruct the meeting, or create a safety hazard.

Participating in Board Meetings: Florida Statutes permit owners to attend membership and Board meetings, subject to limited exceptions, such as a Board meeting with the Association attorney to discuss pending or threatened litigation. In addition to the right to attend meetings, Florida Statutes also provides owners an opportunity to participate in them. The Association may, however, adopt reasonable rules and regulations regarding the frequency, duration, and manner of owner participation. The Association may not unilaterally forbid an owner from either speaking or asking questions on certain designated agenda items, however.

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