

# Sun-Sentinel

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Outlook

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## Today's Outlook

Seems no matter what lawmakers do, condominium and homeowner association politics remain a quagmire.

Or maybe not. Attorney Dennis Eisinger says some laws approved by the Legislature in the last two years will create a more level playing field between boards and unit owners. And, of course, other laws won't. To get a scorecard of sorts, check out what he has to say in today's Outlook cover essay.

**Antonio Fins, Editorial Page Director**

## New laws a mixed bag for condo, homeowner association rules

Dennis Eisinger

The meltdown in residential real estate had disastrous consequences for condominium and homeowners associations. Laid-off owners and over-extended investors who no longer paid their mortgages also stopped paying their maintenance assessments. That income - essential to the upkeep of residential communities and the preservation of home values - is now flowing faster, thanks to legislative action.

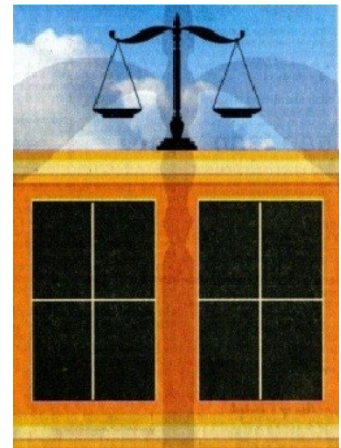
As the mortgage foreclosure rate soared towards 50 percent in some communities between 2007 and 2009, the income of the associations plunged. Some homeowner and condominium owners fell one or two years behind in their assessments as lenders were slow to foreclose and associations lacked meaningful power to collect fees.

As a result, many associations had difficulty paying for basic services such as utilities and landscaping, and for essentials such as casualty and windstorm insurance. Associations faced tough questions: Should we dip into reserves, raise association fees, or cut back on spending?

Florida lawmakers have sought to address this fiscal crisis with legislation approved in both the 2010 and 2011 sessions. To better understand the strengths or weaknesses of these measures, and their impact on associations and their members, let's analyze each set, starting with the 2010 laws.

### The 2010 measures

The Florida Legislature last year approved laws that assisted community associations in their efforts to collect delinquent maintenance assessments. While not a complete success,



many associations have improved their finances and have become better able to care for their communities.

The laws gave associations an important power to collect rents directly from tenants within their communities whose unit owners were delinquent in the payment of their maintenance assessments or any other monetary obligations to the association.

Before the new laws took effect, many owners pocketed rents on their units but did not pay maintenance assessments. Now, an association equipped with a legal order can evict a renter occupying a unit in arrears if that tenant fails to pay rent directly to the association. The association can also seek unpaid rents from the renter in court. The laws prohibit the owner-landlord from terminating the tenant's lease or unleashing other retribution when the tenant directly pays the association.

It is our experience that 70 percent to 75 percent of tenants obey a legal mandate to pay rent to the association. Because of this new legal pressure, community associations have been able to collect a vast amount of delinquent assessments.

The laws have also helped associations collect past-due assessments when the lender that holds the first mortgage on a house or condominium unit completes a mortgage foreclosure. The old law allowed condominium associations to collect the lower of 1 percent of the mortgage amount or six months of past-due assessments. The new law has raised that figure to 12 months. As a result of this change, many associations have undoubtedly collected additional monies (though it must be noted

that, even prior to last year, homeowner associations were entitled to collect up to 12 months of prior assessments).

The new laws have not had the desired effect, in many cases, in successfully cutting off use of common areas and community services. Owners who are more than 90 days delinquent in the payment of their assessments (and their guests) can be barred from using amenities such as pools and spas, but in practice, that has not worked particularly well. According to one published report, a community that installed a fingerprint reader at an entrance gate to its pool area received complaints that the procedure invaded people's privacy. In another community, residents physically confronted each other over who could or could not enter a common area pool.

Additionally, the laws were not clear on whether an association could cut off cable TV service paid for through the association. The laws did not state whether this utility was an essential service like water and electricity. A bill passed in the latest legislative session makes it clear, for homeowner communities, that cable TV is not a service that can be shut off. However, no corresponding law was adopted for condominiums.

Some of the efforts by the 2010 Florida Legislature have helped the collection of delinquent assessments for community associations throughout the state. Let's hope that additional legislative and judicial efforts this year will also have a positive effect on collections and, ultimately, improved finances for the nearly 55,000 community associations within our state.

## The 2011 measures

Legislation adopted in the 2011 session will bring about important changes in the way condominium and homeowner associations treat their owners who fall behind in assessment payments, including suspending their voting rights.

The changes in the laws follow a rash of foreclosed and abandoned residential properties dating back to 2007. Many owners stopped paying assessments, and associations lacked adequate powers to correct a situation that threatened the financial health of their communities.

Some of the newest rules build on changes that lawmakers passed in its 2010 legislative session regarding collections from late-paying and nonpaying owners. Associations were given the power to prohibit the use of common elements and facilities, suspend owners' voting rights, and collect rents directly from tenants of delinquent owners.

In 2011, many of those rights were either expanded or clarified. For example, associations now must use a specific statutorily required form to demand payment from tenants of delinquent owners.

The law also clarifies that the tenant must pay rent to the association every month without a receiving a reminder of that obligation. And the law confirms that tenants are immune from retribution from delinquent owners for bypassing them and sending their rent payments directly to the association.

Last, the law says that associations are not required to hold grievance committee hearings when suspending owners from using common elements and facilities.

Unfortunately, the new laws did not fully address whether certain services in a condominium association, such as bulk cable TV and Internet service purchased for unit owners, can be denied to a delinquent owner. However, legislation did pass that expressly prohibits the denial of those services to delinquent owners in homeowner association communities.

Another law should help speed some lawsuits relating to an association (and all lawsuits). The statute has been modified to provide that process servers are permitted unannounced and unimpeded access to gated and secured residential communities so that process can be served upon any defendant or witness who resides within the community.

Community associations also received a big boost in the area of voting rights. The legislation clarified that voting rights of an owner or member that has been suspended are not to be counted toward the total number needed to constitute a quorum, to conduct an election, and for other voting matters. This enables owners in good standing to conduct association business without concern that suspended voting rights can be counted as "no" votes, which otherwise would interfere with matters such as amending community documents.

The new law also addresses members' access to association records and certain

operational aspects of meetings. For example, the law has been amended to clarify that financial records involving compensation of an association employee are now open for review by all members.

For condominium associations in particular, closed board meetings are now also permitted to discuss personnel matters. Also, the official records of a condominium association shall no longer be deemed to include addresses, email addresses or fax numbers of unit owners unless a unit owner gives permission to make his or hers public.

Perhaps even more important than the legislation that passed during this recent legislative session were measures that did not. A proposal to deregulate certain professions and businesses excluded the deregulation of the Division of Florida Condominiums, Time Shares and Mobile Homes, and plans to abolish both the Ombudsman's office and the Community Association Management Licensing Division were also shelved.

Those government agencies provide great education and support to the community association industry. Their abolishment would have had a devastating effect upon our State and would have opened the door to potential managerial abuse if community association managers were neither longer licensed nor required to take continuing education courses.

A proposal to limit liability of certain design professionals such as engineers and architects working with community development properties also failed to pass.

Finally, a proposal to require full "condominium-style" elections for boards

of directors for homeowner association communities failed. While some may argue the virtues of that sort of election system for condominiums, homeowner association communities are somewhat different and the procedural complexities associated with that election system, in my opinion, simply was not needed.



## How one condo association used new strategies, laws to collect delinquent payments

By Dennis Eisinger

All is not glum with community associations and their assessment collection problems. Through hard work, innovative strategies and perseverance, they can make a significant dent in collecting monies owed them, to the benefit of all who live in the neighborhood.

How? The effort by the Lancaster Condominium in South Florida offers a textbook case.

The Lancaster Condominium, located in Hialeah, is comprised of 90 condominium units. For various reasons, this community

was hit particularly hard by the downturn in the economy. According to Joaquin Alvarez, property manager for the community and president of Atlas Property Management Services, Inc., more than half of the units within the Lancaster were subject to mortgage foreclosure proceedings at one time, and an even greater number were delinquent in the payment of their assessments to the association. However, by using aggressive legal and managerial strategies, Alvarez reports that the community's financial status has improved considerably within the last year or so.

Recognizing the long delays occurring with the mortgage foreclosure process, and foreseeing that banks were not "in a hurry" to take title to condominium units in the down market, Lancaster Condominium Association, Inc. embarked upon an aggressive lien foreclosure campaign, with our assistance, whereby it acquired approximately 10 units through the lien foreclosure process. Florida law gives community associations the right to file liens against property owners who are severely behind on their maintenance fees and the right to foreclose on their units to satisfy the liens.

The calculated risk taken by Lancaster's volunteer Board of Directors on behalf of all owners paid off. Within 30 days of acquiring title to each of the foreclosed units, the association was successful in renting all of them according to Alvarez. This can be attributed to the association's willingness to accept approximately 75% to 85% of their market rental value. Regarding the rental income received, Lancaster's Board could not be happier with the results. All rental income goes to the Association's bottom line and is used as a set off to the original

unit owners' assessment delinquencies. What's more, the Association has no obligation whatsoever to remit any portion of the rental monies to the banks. The bank will eventually complete its own mortgage foreclosure and, at that time, will be entitled to the future rental proceeds once a Certificate of Title is issued.

Aggressively pursuing lien foreclosures is not the only strategy employed by the Lancaster Condominium Association. For those unit owners delinquent in the payment of assessments or any monetary obligations and have rented their units to third parties, the association has been extremely successful in recouping those rental monies through the issuance of strong rental demand letters to the tenants occupying those units. This legal action, was made possible through the adoption of Florida Statute §718.116(11) in July of 2010, which requires tenants to remit rental monies directly to the association, rather than to the owner/landlord in such situations. Based on our experience in South Florida, the success rate in procuring rental monies from tenants of delinquent owners for all community associations has been remarkably high.

At Lancaster Condominium, the Board of Directors also took advantage of that portion of the 2010 laws which permits an association to suspend use of common areas and facilities to owners (and their occupants) who are more than 90 days delinquent in the payment of any monetary obligation to the association. According to the property manager, the Association has been successful in prohibiting unit owners from using the pool area, as the pool is fenced in and residents can only gain

entrance with a key. Alvarez reported that delinquent residents, whose use of the pool is quite important to them, were encouraged to 'catch up' with their maintenance payments, either in full or through an agreed-upon payment plan.

Lancaster Condominium has also benefited in one situation where, in the context of a mortgage foreclosure, a third-party bidder outbid the bank and was awarded title to a condominium unit. This resulted in the new owner's obligation to pay all delinquent maintenance assessments to the association, including attorney's fees, costs and late charges. It is interesting to note that the limited liability enjoyed by banks for delinquent assessments in a bank foreclosure is not available to third-party bidders who purchase a foreclosed unit.

Finally, in one situation, Lancaster Condominium was able to save significant legal fees by avoiding the time and expense involved with a lien foreclosure by procuring a quit-claim deed in favor of the association from a delinquent unit owner who had vacated his unit. This particular legal strategy enables an association to maintain ownership and recoup its assessment losses through rental income, until such time as the bank ultimately forecloses. As of today's date, Lancaster still maintains ownership of this particular unit and is reaping the benefits of the rental income.