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ROSS EARLE BONAN ENSOR & CARRIGAN, P.A.

REB LAW REVIEW

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ROSS EARLE BONAN ENSOR & CARRIGAN, P.A. NEWS

Greetings to all of our clients, friends, and colleagues. This year has been another busy year for all of our community associations, with many engaging in roof and concrete restoration projects both to meet the new structural integrity requirements imposed upon residential condominiums that are three (3) stories or higher and to qualify for insurance coverage in a tight and expensive insurance market. We continue to monitor these economic conditions and remain available to all our clients for guidance on the potential impacts to community associations.

In other news, at the beginning of 2023 we welcomed two new associates, Kate Bradford and Kurt McDavid to our firm. Mrs. Bradford is an associate attorney who has been a member of the Florida Bar since 2006. Mrs. Bradford began her career at the Office of the Public Defender and practiced criminal defense on both the west and east coasts of Florida. In her free time, Mrs. Bradford can be found spending time with her kids, Ruby, Olivia, Beau, and Lucy, and her husband, David. Kurt McDavid has been a been a member of The Florida Bar since 2020. After graduating law school in 2019, Kurt moved from his hometown in Orlando to the Treasure Coast to work as a Public Defender. He joined the firm in March and currently practices community association law and civil litigation support.

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The Florida Legislature was busy this year. Below is a summary of the new laws impacting community associations:

HB 437 - *Property Owners' Right to Install, Display, and Store Items* (Chapter 2023-64, *Laws of Florida*). This bill amends both the Condominium Act (Chapter 718, Florida Statutes, and the Homeowners Association Act (Chapter 720, Florida Statutes) as follows:

§718.113, F.S., is amended to add **Patriot Day** as a day when a unit owner may display armed forces flags.

§720.304, F.S., is amended to expand the types of flags that homeowners may display to include First Responder Flags and afford homeowners the right to display up to **two (2)** of the statutorily permitted flags. Section §720.3075 is amended to provide that homeowners association documents may not include provisions that preclude such displays but all flags must be displayed in a respectful way per U.S. Code.

A new §720.3045, F.S., which prohibits a homeowners association from restricting parcel owners or their tenants from installing, displaying, or storing any items which are not visible from the parcel's frontage or an adjacent parcel, regardless of any HOA covenants, restrictions, bylaws, rules, or requirements. Such items include, but are not limited to, artificial turf, boats, flags, and recreational vehicles. This new statute is significant and requires homeowner associations to evaluate issues such as the definition of a "parcel", the definition of "visible", and whether the law is applicable to its community based upon the language of the homeowner association's underlying covenants as to the incorporation of amendment to Chapter 720, Florida Statutes into same.

The law is effective as of July 1, 2023.

HB 799 - Property Insurance (Chapter 2023-175, *Laws of Florida*)

As it relates to community associations, this law amends Chapter 627, Florida Statutes, to add additional discounts for wind mitigation, and significantly provides that for residential and commercial property insurance policies issued or renewed on or after October 1, 2023, the bill establishes that if the insurer requires an insured or applicant to have flood coverage when the insurer issues a policy containing wind coverage, the insurer must verify that the insured or applicant has flood coverage at the time of policy issuance or renewal. If the insurer fails to verify that the insured or applicant has flood coverage, the insurer may not issue a policy containing wind coverage.

Prior to issuing a policy containing wind coverage, but after verifying that the insured or applicant has flood coverage, the insurer must obtain a written acknowledgment from the insured or applicant that he or she understands that the policy containing wind coverage requires that the insured or applicant maintain flood coverage.

In addition to flood coverage directly obtained by the insured or applicant, the bill establishes that a master flood policy issued to someone other than the insured or applicant, but that covers the insured or applicant as an intended third-party beneficiary is acceptable proof of flood coverage.

HB 919 - Homeowners Associations "Homeowners' Associations Bill of Rights." (Chapter 2023-228, *Laws of Florida)*

This Bill amends the Homeowners Association Act as follows:

§720.303(2): ***Board Meeting Notices.*** Notices of all HOA Board meetings **<u>must now specifically identify all agenda items for the meetings.</u> This is a major change.**

§720.303(4): ***Official Records.*** HOA official records must include designated mailing addresses for all members (which is the parcel address unless the owner designates otherwise in writing).

§720.303(8)(d): ***Commingling.*** This is a new provision that provides that if an HOA collects a deposit from a member to pay for expenses that may be incurred as a result of construction on a member's parcel, or other reason for such deposit, **<u>such funds must not be comingled with any other HOA funds</u>**. The member may request an accounting of such funds. The association has seven days to provide the accounting. The association must remit payment of unused funds within 30 days of the completion of the project.

§720.3033(3): ***Crimes and Kickbacks:*** **<u>This new provision creates criminal penalties for soliciting, offers to accept, or accepting "kickbacks."</u>** If the kickback amount is less than $1,000 the crime is a misdemeanor of the first degree. If the kickback amount is over $1,000 the crime is a felony of the third degree. Any officer or director who solicits, offers to accept, or accepts any such kickback could be personally liable for monetary damages under Florida Statute 617.0834 (Officers and Directors of certain corporations and associations not for profit; immune from civil liability).

§720.3033(4): ***Crimes.*** Association officers and directors charged with enumerated crimes of dishonesty i.e., fraud, theft, embezzlement, etc., related to the association, must immediately be removed from office. Any person with any such charges pending may not be appointed or elected to any position within the HOA.

§720.3033(6): ***Conflicts of Interest*** this is a new provision which provides that directors and officers who are appointed by a developer must disclose their relationship with the developer to the association each year. This disclosure must include any activities that may reasonably be construed as a conflict of interest. There is a rebuttable presumption that a conflict of interest exists where: (1) a director or officer or relative of director appointed by a developer enters into a contract for goods and services with the association; (2) a director or officer appointed by a developer holds an interest in a business entity that conducts business with the association.

§720.305(2): ***Fines and Suspensions.*** **<u>This statutory amendment clarifies that before a fine or suspension levied by the Board may be imposed, the parcel owner must first be provided with a notice of hearing which must be sent to the unit owner at least fourteen days before the hearing, and such notice must include a description of the alleged violation, the specific</u>**

action required to cure the violation, and the date and location of the hearing. The owner has the right to attend the hearing by telephone or other electronic means. After any such hearing, the hearing committee must provide notice to the unit owner (and any other occupant, etc., if applicable), of the committee's findings regarding the violation, including any applicable fines or suspensions that the committee approved or rejected (approval of a fine or suspension must be by majority vote), and how the parcel owner may cure the violation

§720.3065: ***Election Fraud.*** **This is a new provision which provides that it is a criminal misdemeanor to engage in fraudulent voting activities, which include:**

- Willfully and falsely swearing to or affirming an oath or affirmation, or willfully procuring another person to falsely swear to or affirm an oath or affirmation, in connection with or arising out of voting activities.
- Perpetrating or attempting to perpetrate, or aiding in the perpetration of, fraud in connection with a vote cast, to be cast, or attempted to be cast.
- Preventing a member from voting, or preventing a member from voting as he or she intended, by fraudulently changing or attempting to change a ballot, ballot envelope, vote, or voting certificate of the member.
- Menacing, threatening, or using bribery or any other corruption to attempt, directly or indirectly, to influence, deceive, or deter a member when voting.
- Giving or promising, directly, or indirectly, anything of value to another member with the intent to buy the vote of that member or another member or to corruptly influence that member or another member in casting his or her vote. This paragraph does not apply to any food served which is to be consumed at an election rally or a meeting or to any item of nominal value which is used as an election advertisement, including a campaign message designed to be worn by a member.
- Using or threatening to use, either directly or indirectly, force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel a member to vote or refrain from voting in an election or on any particular ballot measure.

The law is effective as of October 1, 2023.

HB 1185 - Consumer Protection (Chapter 2023-130, *Laws of Florida*) Effective July 1, 2023.

§627.714: ***Loss Assessment Statute of Limitations:*** **This bill creates a three-year timeframe for providing notice of a condominium or homeowners' association related loss assessment claim to an insurer.** Prior to July 1, 2023, no specific time limit applied for loss assessment claims. Loss assessments are a unit owners share of a fee to cover a loss for a community association if the association does not have sufficient insurance to cover all the damage from an insurance claim or if the association's deductible is higher than the cost of the damage.

SB 154 - ***Condominium and Cooperative Associations*** **(Chapter 2023-203, *Laws of Florida*)**

Multiple changes were made to the statute (**§553.899**) governing milestone inspections and structural integrity reserve studies. The following is a summary of pertinent changes:

Milestone Inspections

1. The statute was amended to clarify which condominium and cooperate associations must complete milestone inspections. The statute now states that a building that is 3 stories or more in height, as determined by the Florida Building Code, and that is subject, in whole or in part, to the condominium or cooperative form of ownership as residential housing must have a milestone inspection performed by December 31 of the year in which the building reaches 30 years of age, based on the date the certificate of occupancy for the building was issued and every 10 years thereafter.

2. The Statute was amended to clarify the deadline for completing milestone inspections for buildings reaching 30 years of age before July 1, 2022, and buildings reaching 30 years of age on or after July 1, 2022, and before December 31, 2024. The statute now provides:

    a. If a building reached 30 years of age before July 1, 2022, the initial milestone inspection must be performed before December 31, 2024.

    b. If a building reaches 30 years of age on or after July 1, 2022, and before December 31, 2024, the milestone inspection must be performed before December 31, 2025.

3. The Statute previously stated that a building located within 3 miles of a coastline must have a milestone inspection by December 31 of the year in which the building reaches 25 years of age. This was removed, and the statute now states that a local enforcement agency may determine that local circumstances, including conditions such as proximity to salt water require a milestone inspection within the 25-year period referenced above.

4. The Statute was amended to provide that a local governing agency may extend the deadline for completing an initial milestone inspection if the owner shows good cause and the owner has entered into a contract with an architect or engineer to perform the milestone inspection and the inspection cannot be reasonably be completed before the deadline or other circumstances to justify an extension.

5. The Statute was amended to provide that if the date of issuance of the building's certificate of occupancy is not available to determine when the milestone inspection must be performed, the date of issuance of the certificate of occupancy is the date of occupancy evidenced in any records of the local building official.

6. The Statute was amended to provide to allow local enforcement agencies to accept an inspection report prepared before July 1, 2022. The statute states that an inspection report prepared by a licensed engineer or architect for a structural integrity and condition inspection of a building performed before July 1, 2022, if the inspection and report substantially comply with the statute. The association must still comply with the unit owner notice requirements of the statute.

7. The Statute was amended to provide that milestone inspections may now be provided by a team of professionals with an architect or engineer acting as a registered design professional in responsible charge with all work and reports signed and sealed by the appropriate qualified team member.

8. The Statute was amended to provide that local enforcement agencies must provide written notice to an association that a milestone inspection is required. The statute now requires the association to notify all unit owners within 14 days after receiving the written notice and provide the date that the milestone inspection must be completed. The notice may be given by electronic submission to unis owners who consent to receive notice by electronic submission or by posting on the association's website.

9. The statute was amended to allow an association to use a milestone inspection or inspection completed for similar local requirements as the visual inspection portion of the structural reserve study if it was performed within the past 5 years.

10. The statute was amended to require the association to send a copy of inspector prepared summary of the inspection report to each unit owner within 45 days after receiving the applicable inspection report.

11. The statute was amended to require the engineer or architect to provide a progress report to the local government agency within 180 days if a phase two inspection is required.

§718.111(12): ***Access to Records.*** **Any person** authorized by any association member **and** the member, has the right to inspect the official records of the association.

§718.112(2)(e)(2)(b) ***Determination of Assessments.*** Any determination of whether assessments exceed 115 percent of assessment for the prior fiscal year, now **excludes insurance premiums**.

§718.112(2)(f)(2) ***Reserves.*** In condominiums that are required to have a structural integrity reserve study, the budget **must** include reserves for the items set forth in §718.112(2)(g), Florida Statutes. **They may not be waived.**

However, condominiums that are required to have a structural integrity reserve study may waive reserves, less than fully fund reserves or approve the use of reserves for a purpose other than for which they were originally reserved, for items other than those required by §718.112(2)(g), Florida Statutes, upon the approval of a majority of the **total voting interests.**

Similarly, **even** condominiums that are **not** required to have a structural integrity reserve study (i.e., those that are less than three (3) stories), now must obtain **the approval of a majority of all voting interests (instead of a majority of those voting interests present at a meeting),** in order to waive reserves, less than fully fund reserves, or to use reserves for a purpose other than for which they were originally reserved. **This is a major change.**

Reserves and Structural Integrity Reserve Study ("SIRS")

The bill amends §718.112(2)(f) for condominiums and §719.106(1)(j) for cooperatives addressing Reserve Funding generally to:

- Distinguish the reserve accounting requirements for associations that are subject to the SIRS requirements (i.e. three stories or more) and those associations that are not subject to SIRS requirements (i.e. under three stories) by:
  - Limiting the prohibition against the waiving of reserves and the use of reserves for other purposes to the associations that must perform the SIRS; and
  - Permitting unit owners that are not required to have a SIRS, to vote to not provide reserves, reduce the funding of reserves, or to use reserves for other than their intended purpose, if approved by a majority vote of all voting interests.
- Require associations that are subject to the SIRS requirement to base a budget adopted on or after January 1, 2025, on the findings and recommendations of the association's most recent SIRS report.
- Permitting multi-condominium associations to waive reserves if an "alternative funding method" has been approved by the DBPR.
- Provides that reserve assessments may be adjusted for inflation.
- Prohibits the uses of reserve funds for the SIRS items for other purposes other than the "replacement or deferred maintenance costs of the SIRS components" instead of "their intended purposes."

The bill amends §718.112(2)(g) for condominiums and §719.106(1)(j) for cooperatives addressing SIRS requirement to:

- Limit the SIRS requirement to only residential (or mixed-use) condominiums and cooperatives.
- Clarifies that the three-story building threshold for a SIRS report is determined by specifications within the Florida Building Code as what constitutes a "story".
- Clarifies that the SIRS recommendation must include a reserve funding schedule.
- Removes the term "Floor" from the list of building components that must be visually inspected in for SIRS report.
- Permits the visual inspection portion of the SIRS report to be verified by either:
  - A licensed engineer or architect; **<u>or</u>**
  - A Reserve Specialist, or Professional Reserve Analyst by the Community Associations Institute or the Association of Professional Reserve Analysts.
- Clarifies that the SIRS may recommend that reserves do not need to be maintained for any item for which an estimate of useful life and an estimate of replacement cost or deferred maintenance expense cannot be determined.
- Requires reserves for deferred maintenance for the amount recommended by the SIRS, including for items for which there is no ascertainable estimate of useful life.
- Clarifies that the following are exempt from the SIRS requirement:
  - Buildings less than three stories in height;
  - Single-family, two-family, or three-family dwellings with three or fewer habitable stories above ground; or

- Any portion or component of a building that has not been submitted to the condominium or cooperative form of ownership; or any portion or component of a building that is maintained by a party other than the condominium or cooperative association – such as in a mixed-use condominium, or windows if windows are maintained by the unit owners.

Associations not subject to SIRS studies and associations that are subject to SIRS study that want to waive reserve for non-SIRS items, still can but requires vote of majority of ALL voting interests – not just a majority of those present at the meeting. This applies to waiver of reserves OR use for reserves for a purpose other than for which they were intended.

§718.1255: ***Dispute Resolution*****.** **Effective July 1, 2027, the definition of a "dispute" that must be mediated before it can be litigated, will include actions against a board of an association for its failure to obtain milestone inspections, structural integrity reserve studies, fund reserves for integrity reserve items; and to make or provide necessary maintenance or repairs recommended by a milestone inspection or structural reserve study.**

§718.113: ***Maintenance Obligations of the Association*****.** **The maintenance of common elements are the obligation of condominium associations except for any maintenance responsibility for limited common elements that is assigned to the unit owner by the declaration.** After turnover, the association is responsible for any maintenance identified by the developer in the turnover report until the association develops new maintenance protocols from an authorized professional. Mirroring provisions are created under Florida Statute Ch. 719 for cooperative associations.

§718.112(2)(k) (8): ***Officer Fiduciary Duty***. A duty is imposed on the officers and directors of an association to complete a structural integrity reserve study. A knowing and willful failure to have a structural integrity reserve study completed is a breach of an officer's or director's fiduciary duty to the unit owners.

§718.503: ***Presale Disclosures***. Provides protections for prospective purchasers of units under §718.503 and §719.503, for condominium and cooperative associations respectively, against unit owners and developers. Unit owners selling their property are required to furnish milestone inspection reports, structural integrity reserve studies, or notice that such reports have not yet been completed, within fifteen days prior to the execution of the land sale contract. The land sale contract is voidable up to 15 days after execution upon written notice if the buyer has not been provided with a current copy of the SIRS or the inspector-prepared summary. A mirror requirement is required of developers to prospective purchasers in any similar land sale contract.

SB 360 - *Causes of Action Based on Improvements to Real Property* (Chapter 2023-22, Laws of Florida)

§95.11(3): This provision has been amended to provide that the four (4) year statute of limitations for an action founded on the design, planning or construction of an improvement to real property starts to run at the **earliest** date the authority having jurisdiction issues a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion, or the date of abandonment of construction if not completed.

It also reduces the period for filing a latent construction defect claim from ten (10) years to seven (7) years from the **earliest** of date the authority having jurisdiction issues a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion, or the date of abandonment of construction if not completed. and creates further restrictions on other construction defect claims.

The amendments to §95.11(3)(c), Florida Statutes, made by this act apply to any action commenced on or after the effective date of this act, regardless of when the cause of action accrued, except that any action that would not have been barred under §95.11(3)(c), Florida Statutes, before the amendments made by this act must be commenced on or before July 1, 2024. If the action is not commenced by July 1, 2024, and is barred by the amendments to § 95.11 (3)(c), Florida Statutes, made by this act, then the action is barred.

HB 949 - *Operation of a Golf Cart* (Chapter 2023-67, *Laws of Florida*)

§316.212: *Operation of Golf Carts.* This provision has been amended to change the requirements for the operation of golf carts on **public** roads and streets. This bill changes the law from permitting a golf cart operator to be someone who is at least age 14 to now requiring that golf carts be operated on **public** roads and streets only by those who are either 18 years of age or older with a valid government form of ID (notably a driver's license is not required) or by someone who is under 18 years of age and possesses a valid learner's driver's license or driver's license. Golf carts may only be driven on public roads or roads maintained by water control districts that have been designated for golf cart use.