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PRACTICE FOCUS / REAL ESTATE

Homeowner recourse limited on implied warranty claims

Commentary by Cynthia Spall and Thomas M. Jenks

Florida has a new law that prohibits some claims related to alleged defects in new construction. The issue has divided courts and practitioners.


Spall


Jenks

The Florida Legislature passed HB 1013 in early 2012. It will prohibit a cause of action by homeowners or a homeowners association based on what is called "the doctrine of implied warranty of fitness and merchantability or habitability" for certain off-site improvements — such as roads and drainage areas — within a subdivision. The new law, which was signed on April 27 means that, without common law implied warranties, defects in common areas may expose individual homeowners to significant liability, unless other recovery is available.

In most planned communities, owners are automatically made members of the homeowners association. If there are defects in the common areas, then the association has an affirmative obligation to fix the defects and will necessarily incur repair costs. The association's only revenue source is the assessments paid by its members. Absent a viable claim based upon an alternative legal theory, the costs to fix any defects in the common areas will be borne by the individual homeowners in the community.

When a leaking underground drainage system pitted roads and driveways and created sinkholes in lawns within a Winter Garden subdivision, homeowners sued the builder/developer to cover the damage and repair costs. In the case known as *Lakeview Reserve Homeowners v. Maronda Homes*, Florida's Fifth District Court of Appeal found that a homeowners association had a claim for breach of common law implied warranties of fitness and merchantability against the builder/developer for defects in the roadways, drainage systems, retention ponds and underground pipes. This ruling conflicted with a 1985 ruling by the Fourth DCA. The Fifth DCA case was appealed and the Florida Supreme Court heard oral argument on Dec. 6, 2011. But before the justices issued a ruling, the Legislature passed HB 1013 during this year's session, which invalidated the legal basis behind the homeown-

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BOARD: Proponents of bill say it departs from 40 years of law on common law

ers association's lawsuit. Proponents of the legislation characterize *Lakeview Reserve* as a departure from 40 years of law on common law implied warranties and an unnecessary expansion of such warranties. They believe the legislation is necessary to prevent significant and unwarranted liability exposure caused by the ruling in that case.

They argue that, unlike condominiums, large projects run by homeowners associations are often developed by a "master developer" who has nothing to do with the construction of any of the homes therein. In such cases, the homes are built by builders who likewise had nothing to do with the construction of the project roads, drainage systems, etc.

They contend those builders should not and cannot be exposed to liability for roads and infrastructure they did not construct.

They believe the *Lakeview Reserve* ruling was counterproductive to the economic growth in our state and that the legislation is necessary to stimulate such growth.

And they argue that other available remedies, such as claims against contractors for failure to comply with applicable building codes, are adequate.

But those who oppose the legislation note that the legislation eliminates all common law implied warranties for common areas of all communities in the state and is therefore harmful to consumers. They believe that although the expressed rationale for eliminating developer responsibility is to spur more construction, that makes no economic sense, as adding to existing inventories will simply further depress the values and marketability of homes and nonresidential properties alike, the recovery of which is essential for the recovery of our broader economy. They also believe that it makes no sense to think that eliminating constraints will spur developers to build because they will do so when the market for their product returns, and not before, whether controls are kept or not.

Opponents argue that it is a question of whether a developer should be responsible for the cost of correcting any defects in essential common facilities built by that developer to serve a subdivision and that as a matter of good public policy the developer should be responsible rather than effectively immune from legal recourse.

Cynthia Spall is a shareholder in Gunster's West Palm Beach office. She practices real estate law and focuses onleisure and resorts, master planned communities and condominium developments. Thomas M. Jenks is a shareholder in Gunster's Jacksonville office. He practices real estate law with an emphasis on commercial transactions, acquisitions and construction financing.

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Homeowners sued the builder/developer to cover the damage and repair costs when a leaking underground drainage system created sinkholes in a Winter Garden subdivision.