COMMUNITY COUNSEL

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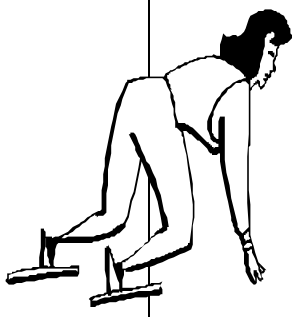
Where to Start? Part II

The second major bill for consideration is SB 2984 . At this time there is no House version, but that is not expected to stop serious consideration of this bill, which is the work product of a Task Force created by the Governor.

After a series of hearings across the state and a final report, the lengthy 42 page bill would create HOA regulation in a number of new areas and would make HOA law more similar to current condominium regulation. Many of the changes are not troublesome, but several are, and these issues may be enough to doom the bill. Interestingly, the more extreme elements on the task force voted against the final form of the bill and have threatened to seek its veto because, in their opinion, the proposal doesn't go far enough in hamstringing associations.



Some issues in the bill may doom its passage unless the bill is first amended.

Among many other things, the bill would:

1. Permit owners to speak at all meetings, in two different contexts. The first would allow any member to speak on any agenda item or on any item "opened for discussion" (a phrase that is simply too vague), and any owner would be allowed to speak on any subject at all (with no relevancy requirement) for at least three minutes. This latter provision, in particular, raises the specter of organized member filibusters.

2. Prevent fines levied by the Association from becoming a lien on the owner's property if unpaid. This has the distinct potential to sharply reduce the effectiveness of fining by removing the coercive threat of foreclosure. This change may be the most controversial in balancing the powers of associations and the protection of owners.

3. The bill contains a prohibition against "SLAPP" (strategic suits against public participation). Its presence in an HOA bill is both puzzling and potentially sinister. The provision seeks to protect persons who "instruct their representatives" and "petition for redress of grievances" from government for from infringement on that constitutional right. This has nothing in particular to do with HOA's, and hence does not belong in Chapter 720. However, one can easily envision a scenario where an owner - upon received notice from the Association of a threatened suit - immediately complains to someone in government. Then, upon filing of the suit, the owner brings a responsive claim for violation of this provision (a civil rights claim alleging that the suit was motivated by the governmental complaint) against the Board, its manager and its attorneys. Such a claim would not be covered by most insurance policies, and upon a successful defense of such a claim, no attorney's fees would be available.

The bill has many other provisions that are worth reviewing on line. Then let your legislator know how you feel about it.

Recent Cases

- **Association not liable in drowning in pond with steep drop-off.**
- **Condo recall fails if challenge is based on misrepresentations made to owners.**
- **Condo recall succeeds if invalid power of attorney given to voter carrying swing votes.**

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RECENT CASE SUMMARIES

In **Longmore vs. Saga Bay Property Owners Association, Inc., et al.,** 29 Fla. L. W. D698a (Fla. 3rd DCA 3/24/2004) parents of a drowning victim brought suit against Association for damages. While attending an after-school function, the child drowned in Saga Bay Lake, a man-made lake located behind the home of another student. Parents alleged that Association knew that its lake had a precipitous drop-off, yet negligently failed to warn or provide life-guards to protect children from this "exceptionally dangerous concealed peril." The trial court dismissed the action against Association and the parents appealed. Coincidentally, Association had previously been sued as the result of another drowning in Sage Bay Lake. In the appeal of that first case, the appellate court held that there was no liability for a child's drowning in a body of water, natural or artificial, unless there is some unusual danger not generally existing in similar bodies of water, or the water contains a dangerous condition constituting a trap. In the instant appeal the Third District Court of Appeal affirmed the general rule in Florida, which is that the owner of an artificial body of water is not guilty of actionable negligence for a drowning unless it is constructed so as to constitute a trap or unless there is some unusual element of danger lurking about it not existing in ponds generally. The parents further argued that the first drowning and the lawsuit arising therefrom put Association on notice of the dangerous condition and therefore Association had a greater duty to warn of the potential danger. In upholding the trial court's dismissal of the claim, the District Court of Appeal held that the sharp change in water's depth was not a concealed dangerous condition and was therefore not a condition that involved an unreasonable risk of harm which would impose a duty to warn upon Association.

In **Petition for Arbitration of: Carriage Homes at Terramar Condominium Association, Inc., vs Unit Owners Voting for Recall**, Case No.: 03-6131 (Mnookin, Summary Final Order, March 12, 2003), Association challenged the recall of two (2) of the five (5) members of the board of directors. Initially, the recall meeting was scheduled for January 7, 2003. However, when a quorum of members failed to attend the meeting, the meeting was adjourned and rescheduled for January 21, 2003. At this rescheduled meeting, 110 of 136 voting interests were in attendance, either in person or by proxy. At this rescheduled meeting, sufficient votes were cast for the recall of the directors. The board of directors then voted 3-2 not to certify the recall. The primary basis for refusing to certify the recall was a fear ". . . . that members were improperly swayed before casting their votes or that they were unduly influenced or were forced to cast votes against their free will." The only support for this position was the unsworn testimony of one of the recalled board members. In upholding and affirming the recall, the arbitrator held that the recalled board member's feelings, standing alone, were insufficient to support the allegation or the non-certification of the recall effort. The arbitrator held that ". . . . unit owners are presumed to be capable of making their own decisions in the face of misinformation or ambiguous information." Additionally, the arbitrator ruled against Association on the remaining alleged procedural irregularities related to the adjournment of the first meeting and upheld the recall of the two directors.

In **Petition for Arbitration of: Arlington Park Condominium Association, Inc., vs. Unit Owners Voting for Recall,** Case No.: 2003-05-4942 (Mnookin, Summary Final Order, June 5, 2003), Association challenged the recall of all three members of the board of directors. A meeting was held on April 7, 2003, to vote on the recall of the board of directors. At this meeting, 31 of a total of 60 votes were cast in favor of the recall. The board of directors refused to certify the recall on the alleged basis that several of the recall votes were invalid. Association alleged that 7 votes signed by "Luis Ospina" were invalid because the record owner of the units was "Felix M. Ospina." In response, Unit Owners asserted that Felix Ospina executed a power of attorney to his mother, Luz M. Ospina, who in turn executed a power of attorney to her other son, Luis E. Ospina. As such, the Unit Owners allege that the votes cast by Luis E. Ospina are valid. Even Assuming that this type of "piggy-back" transferability was permitted with power of attorney agreements, the arbitrator ruled that the second power of attorney was not signed by Luz Ospina. Without Ms. Ospina's signature there could be no power of attorney. Additionally, a power of attorney creates the relationship of principal and agent between the one who gives the power and the one who holds it. Powers of attorney are strictly construed. Since the first power of attorney did not specifically permit the powers therein to be transferred to another individual, those rights granted via the second power of attorney cannot be honored. Additionally, the Unit Owners attempted to file two new recall ballots with their answer. Ballots cannot be added or withdrawn after the recall agreements have been served on the board of directors. However, Unit Owners are permitted to re-use validly executed recall votes from this recall attempt in a subsequent recall attempt. Therefore, this recall was not certified because the votes cast by Luis Ospina were invalid, and therefore less than a majority of owners voted for the recall of the board of directors.

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