COMMUNITY COUNSEL

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Recent Cases

- **While deference is given to County's reading of its own ordinances, County can not give ordinance an unreasonable reading. but challenger must exhaust administrative appeals before going to court.**
- **County can't assess units as timeshares until state approves the timeshare regime.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

Legislature Concludes Tough Session

As we have noted in our past two issues, the legislative session just ended was a wild one. Not one, but two bills passed both houses and are on their way to the Governor.

SB 2984 and SB 1184 each make extensive changes to the face of community association law in Florida. The two bills are nearly identical, although SB 1184 also contains a condo ombudsman and a condo advisory council. If the Governors should veto SB 1184 and sign SB 2984 (or otherwise allow it to become law), those extra provisions will fail.

But if SB 1184 becomes law, regardless of what happens to SB 2984, the condo ombudsman and advisory counsel will come into existence. However, both provisions have undergone extensive re-writes in the past month, and they have little resemblance to the horrible language first proposed in HB 1223 (Robaina). These provisions, which the Governor is not likely to approve, are all that remains from the mean-spirited bill that was HB 1223.

HOAs will see much more condo-type regulation this year. Get prepared.

Much of the HOA Task Force proposals will become law and HOAs will see far more condo-style regulation in the coming year. Get prepared and see last month's issue of '*Community Counsel*" for some of the highlights. Most HOA disputes and enforcement actions will be subject to mediation or, with the agreement of the parties, to arbitration under the existing *condominium* arbitration program before or in lieu of going to court.

For condos, one troublesome provision, demanded by the Senate president, provides:

Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

The vagueness of this language is a problem. Does a limitation on the number of occupants in a unit or a minimum rental length violate this provision? It could have been worse – the original provision had similar language regarding pets and parking. There may be unresolved constitutional issues as well.

New Section 720.404 would create a complicated method to revive lapsed restrictions under the oversight of the Department of Community Affairs.

HOAs will see more ability by the owners – on written request of 20% of the members – to require that the Board address an issue. Like condos, all HOA books and records will be available for inspection and copying, except for a few narrow exceptions. There are many other changes and concerns which we will address next month, hopefully with a report on what the Governor has done with these bills.

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RECENT CASE SUMMARIES

In **Vanderbilt Shores Condominium Association, Inc., et al., vs. Collier County, Florida,** 29 Fla. L. Weekly D951 (Fla. 2nd DCA 4/14/2004), Association filed an action for declaratory relief and mandamus to challenge a building permit issued by County. County issued a permit for the construction of a new condominium building with an elevation which was shaped like an inverted "T" with the lower tier approximately thirty feet high, and a middle column approximately ninety-five feet high. The side yard set-backs extended approximately thirty feet from the exterior walls of the lower tier. Association complained that the side yard setbacks were insufficient under the Collier County Land Development Code. County offered a contrary interpretation, contending that the project met the standard for side yard setbacks. The circuit court rejected the suit, deferring to County's longstanding interpretation of its Land Development Code and held that County's interpretation was not unreasonable. The circuit court also noted that there were administrative procedures available to Association which it had failed to pursue. On appeal to the Second District Court of Appeal, the appellate court reversed the trial court's determination that the project complied with the Land Development Code. The appellate court noted that great weight must be given to the administrative construction of a statute by the officials charged with its administration. However, when an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. In this case, County's interpretation of its Land Development Code and its requirements for side yard setbacks was clearly erroneous. As such, the appellate court reversed the trial court on this issue. However, the Second District Court of Appeal also affirmed the dismissal of the case due to Association's failure to exhaust its administrative remedies. The Land Development Code provides an administrative procedure for the purpose of challenging the issuance of this building permit and for the interpretation of the Code by the planning services director. The appellate court noted that Association had prevailed in a previous challenge to a development order for the same property, so there was no basis to conclude that the administrative process would have been futile. Therefore, dismissal of the case was proper due to Association's failure to exhaust its administrative remedies.

In **Gilbreath vs. Westgate Daytona, Ltd.,** 29 Fla. L. Weekly D819 (Fla. 5th DCA 4/2/2004), Property Appraiser for Volusia County, Florida, appealed a judgment rendered by the trial court that quashed Property Appraiser's 1998 and 1999 ad valorem tax assessments of condominium units owned by Westgate. The trial court held that the condominium units were improperly assessed by the Property Appraiser as timeshare units. The issue before the Fifth District Court of Appeal was whether County, pursuant to the taxing authority bestowed upon it by the State of Florida, may assess a condominium for purposes of ad valorem taxes as a timeshare prior to it becoming a timeshare under Florida Law. The appellate court noted that the Florida Legislature enacted a rather complex statutory scheme that must be complied with in order to convert a condominium into a timeshare. Unless and until these requirements are met, a condominium cannot become a timeshare. The Legislature also enacted a specific statute that governs how timeshare estates must be assessed for purposes of ad valorem taxation, which clearly requires that the real property be a timeshare under Florida Law in order to be assessed and taxed as such. In this case, Westgate purchased 24 condominium units in 1995, and in 1997 began to market 16 units as timeshares. However, the initial public offering statement was not approved by the State of Florida until November, 1998. Because the conversion to timeshare units had not been formally accomplished, Westgate held all contracts and deposits in escrow. Furthermore, each contract contained a provision that the contract could be canceled within ten days of delivery of an approved public offering statement. If the public offering statement was not approved, Westgate would have to refund all deposits. In 1998, Property Appraiser initially assessed the units as condominiums at an average assessment of $55,052 per unit. However, Property Appraiser ultimately assessed all units as timeshare units and sent out final tax bills assessing each unit as a timeshare at an average of $129,166 per unit. In 1999 Property Appraiser assessed 20 units as timeshares and 4 units as condominiums. Westgate challenged the assessments on the basis that the condominium units could not be assessed as timeshare units until the approval of the public offering statement and all other statutory requirements for the establishment of timeshare units had been complied with. The appellate court ruled that the units could not be taxed as timeshare units unless and until all statutory requirements for the establishment of timeshares had been accomplished. The appellate court noted that the Legislature intended to place strict statutory prohibitions on the use and sale of his or her condominium units as timeshares before approval, and thus the court would not allow it to be taxed as a timeshare until it actually becomes a timeshare under Florida Law.

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