COMMUNITY COUNSEL

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FIRM NEWS

We are very pleased to welcome attorney DAVID G. SHIELDS to our firm, as of 1/18/05.

David is a very experienced community association attorney who is also a certified mediator. David's initial billing rate for non-mediation work will be $160/hour.

GATED COMMUNITIES BEWARE!

The 3RD DCA recently reinstated a multimillion Dollar judgment against the Lago Grande Homeowners Association and its security company, Centurion Protective Services, Inc. in the case of Vazquez vs. Lago Grande Homeowners Association, Inc., et al, 29 Fla. L. Weekly D2751 (3rd DCA December 8, 2004).

The facts of the case were relatively simple. The Lago Grande complex contains approximately 1,200 units and has approximately 3000 residents. There are three entrances to the community, each containing a guardhouse staffed by Centurion personnel. The developer of Lago Grande advertised the complex based on safety. Furthermore, a specific portion of the assessments paid by owners is earmarked for the safety measures offered by the complex. The president of Lago Grande verified that the security guards were there:

. . . . to protect the safety of residents and guests, and that the residents and guests had a right to expect that the complex would be safe, as promised, and that all visitors, as promised, would be screened.

The morale of this story: be careful what you represent, as you may be creating a contractual duty to provide it.

To that end, Lago Grande created a set of protocols, called Post Orders, which required the guards at all three entrances to stop everyone entering the complex - resident or visitor - in a car or on foot; to check the I.D. cards which all residents were given; and in the case of visitors, to call the resident being visited to obtain permission to let the visitor come in. If the resident said no, the visitor would be turned away.

One night there were two or three guards on duty at the north entrance when a visitor named Frank Valle entered on foot. The Valles were not residents of Lago Grande. However, their former neighbor, Carmen Martin, had moved to Lago Grande because it was "safe, secure and it was gated." Victoria Valle and her two children were visiting Ms. Martin on that day. Frank Valle walked through the north entrance *unimpeded*. He walked into Ms. Martin's house holding a revolver and killed Victoria Valle and shot Carmen Martin in the leg as she tried to flee the unit. Frank Valle then committed suicide in the apartment in the presence of his daughter.

A jury found Centurion to be 90% at fault for the tragedy, the management company to have been 9% at fault, and Lago Grande to have been 1% at fault. Furthermore, the jury awarded damages of $3.15 million to daughter Jaclyn Vale; $1.67 million to son Andrews Valle; $362,500.00 to Carmen Martin; and $25,000.00 to Rolando Martin. Lago Grande and Centurion moved for a judgment in their favor notwithstanding the verdict. The trial court granted these motions and held that neither of these defendants had any duty to prevent the death of Victoria Valle in the absence of prior similar crimes at the condominium complex or any information suggesting that Frank Valle was a dangerous person.

On appeal, the 3rd DCA reversed and reinstated the judgments against both Lago Grande and Centurion. The appellate court noted that in a situation where a duty to prevent harm from criminal activity arises only as an aspect of the *common law* duty to exercise reasonable care to keep premises safe, prior offenses make future incidents foreseeable, and may be deemed indispensable to recovery.

However, in this case the duty to prevent harm did not arise under common law. The duty to prevent harm in this case was essentially a contractual duty. As to a contractual duty to prevent harm, prior-offenses evidence is not necessary. Since Lago Grande and Centurion agreed to exercise reasonable care to prevent *any* criminal incident from occurring, it cannot matter that the deadly incident in question was the first one.

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RECENT CASE SUMMARIES

In **Marco Island Civic Association, Inc., vs Mazzini**, 29 Fla. L. Weekly D 1964 (Fla. 2nd DCA August 27, 2004), Association appealed a final judgment declaring void certain deed restrictions on lots owned by Owner. The deeds to Owner restricted development of each lot to one detached single-family dwelling, not to exceed two stories in height. In 1995 Owner acquired three lots in Association with the intention to construct a medical arts building. At that time the lots were bordered by an office building to the west, and a day care center to the east. Owner's property fronted on State Road 92. To the extent that they are developed, the lots to the rear of Owner's property are either residential or adjoin residential properties. Unfortunately for Owner, even though the deeds put him on constructive notice of the restrictions, Owner did not actually become aware of the limitation on the type of building he was permitted to build until some time after the purchase. Once Owner learned of the restrictions, he instituted procedures to have the zoning applicable to his lots changed from residential to C-1, a type of zoning which buffers residential districts from nearby commercial areas. In 1998 the local governmental authority changed the zoning of Owner's lots. Owner then filed this suit for declaratory relief seeking to void the deed restrictions on the ground that the area surrounding his lots had become commercialized. At trial, Owner testified that the character of the surrounding property had significantly changed since the deed restrictions went into place. However, several nearby residents testified in opposition to Owner. The trial court made several findings of fact, including that the character of the neighborhood had changed and that Owner's lots located on the edge of the subdivision were now on a busy thoroughfare whereas a majority of the other lots in the Association are on residential streets. The trial court concluded that this was a unique situation because Owner's lots were surrounded by commercial properties and that Owner's use of the lots as a medical office would buffer the residential areas from the commercial areas. Thus, the trial court decided to cancel the restrictive covenants on Owner's lots to the extent necessary to allow him to build and operate his medical arts building as proposed. The appellate court noted that the equities are stacked against one seeking to void a restrictive covenant if he or she has purchased the property with actual or constructive notice of the existence of the restrictions. In order for Owner to prevail he must present evidence that the area has so changed in character from the time that he bought his property that construction of single-family homes on his lots would no longer be of substantial value to the subdivision. Furthermore, the appellate court noted that the focus in cases such as this must be on the dominant estate rather than the servient estate. Although the highest and best use of Owner's property might well be as a medical arts building, that consideration, under the present state of the law, is of little consequence. As such, the appellate court reversed the trial court by holding that such restrictions cannot equitably be removed as long as the restriction is for the benefit of and remain of any substantial value to the dominant estate, i.e. the remaining residential properties.

In **Vanderbilt Shores Condominium Association, Inc., et al., vs. Collier County, Florida**, 29 Fla. L. Weekly D2776, (Fla. 2nd DCA December 10, 2004) Association and seven other neighboring associations filed an action for declaratory relief and mandamus to challenge a building permit issued by county. This appeal followed a dismissal of Association's lawsuit by the trial court. For the most part the facts of the case were undisputed. County issued a permit for the construction of a fifteen-unit condominium. In its elevation the proposed condominium building is shaped like an inverted "T" with the lower tier approximately thirty feet high and the middle column approximately ninety-five feet high. The project has side yard setbacks extending approximately thirty feet from the exterior walls of the lower tier. Association contended that the side yard setbacks were insufficient under the Collier County Land Development Code and requested that the circuit court reach this conclusion by interpreting the applicable code provisions. County offered a contrary interpretation of the land development code and contended that the project met the side yard setback standard. The trial court dismissed the suit and held that county's longstanding interpretation of its land development code was not unreasonable or clearly erroneous. Furthermore, the trial court held that Association failed to exhaust its administrative remedies prior to seeking judicial relief. On appeal, the Second District Court of Appeal disagreed with the trial court and determined that county's interpretation of the land development code was in fact erroneous. However, the appellate court affirmed the dismissal of the lawsuit because Association failed to exhaust its administrative remedies before suing in court. Ordinarily, the failure to exhaust administrative remedies means only that the case was prematurely filed. However, in this case dismissal with prejudice was appropriate because the entire project was completed and Association failed to seek a temporary injunction. As such, association's action was permanently barred.

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