COMMUNITY COUNSEL

November, 2005 A Publication of Wean & Malchow, P.A. Volume 9, Issue 11

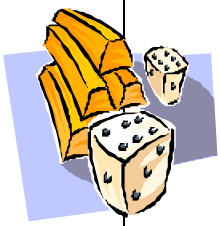
RECENT CASES

- **Determination of who could vote to amend documents is made by review and construction of entire set of documents.**
- **Association seeking prevailing party's attorney's fees must affirmatively and timely move for an award, or be barred from recovery.**

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.

Gambling in Community Associations

We live at a time when gambling is a growing American pastime. Unfortunately for those who enjoy this pursuit, much of the private gambling activity that is going on in Florida likely is illegal. Florida historically is very strict in its gambling laws, allowing very few forms of gambling, and strictly regulating what few forms of gambling are permitted. Many officers and directors of associations are retirees from other states with less restrictive gambling laws.



Ch. 849, Fla. Stat. is the criminal gambling statute in Florida. The basic rule is that using any real property as a gambling facility is a third-degree felony. There are exceptions to the basic rule, the most significant of which are discussed below, but any association contemplating allowing gambling activity must find an exception to apply. If an association allows its facilities to be used for illegal gambling, the association, its officers, directors, managers and employees all could be subject to personal and criminal liability.

Careful when holding gaming Activities – criminal liability is possible.

Under Sec. 849.085, Fla. Stat., card and other games involving gambling are illegal except for poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg in which the winnings of any player in a single round, hand, or game do not exceed $10 in value. In addition, to be legal such "penny ante" games must be played in a "dwelling," which by statute is defined to include the common areas of a condominium, cooperative or homeowners' association, but only if one of the players is a unit owner. It is illegal to directly or indirectly charge admission to the game. This appears to limit the Association to allowing residents to use the common area facilities at no charge. The game may not be advertised in any form. No one under age 18 can participate, which puts compliance with the gambling statute at odds with the familial status discrimination provisions of the Fair Housing Act. It is possible that only communities offering housing for older persons can legally conduct penny ante games in their common areas under Section 849.085, Fla. Stat.

Although the state of Florida may run a lottery, under Sec. 849.09, Fla. Stat., private entities such as associations are not allowed to run a lottery. Nor can associations allow residents to use association facilities to operate a lottery.

Under Sec. 849.14, Fla. Stat., gambling on a golf, tennis, shuffleboard or any other type of athletic game or game of skill is illegal, regardless of the amount involved. However, according to a Florida attorney general's opinion, it is permissible to have a tournament with entry fees and the opportunity to win prizes, provided the entry fees do not specifically make up the prize or prizes. Because this exception is via an attorney general's opinion and is not in the Florida Statutes, an association should consult with counsel before setting up such a tournament.

Sec. 849.0391, Fla. Stat. does allow bingo to be played on association property. However, this statute provides fairly detailed rules to be followed in conducting bingo games. Though the rules are too extensive to discuss here in full, a few highlights are presented: (1) The bingo game organizers must be residents in the community. (2) The net proceeds from bingo games must be returned to the players for prizes, holding back only the actual business expenses in offering the games. (3) Associations are not permitted to hold bingo games more than two times per week and the jackpot may not exceed $250.

Some local governments impose more restrictions on gambling. An association contemplating gambling activity should take into account both state and local law. Given the serious consequence of conducting illegal gambling, an association should always consult with counsel before allowing any form of gambling or related activity on association common property.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM

RECENT CASE SUMMARIES

In **Landmark at Hillsboro Condominium Association, Inc., vs. Candelora**, 30 Fla. L. W. D2362 (Fla. 4th DCA 10/5/2005), Association brought an appeal from the denial of its motion for award of attorneys' fees, pursuant to Section 718.303(1), Fla. Stat. In the trial court, Association prevailed when owners' claims against Association were dismissed by the trial court. Forty-six days later, Association filed its motion for prevailing party attorneys' fees. The trial court denied the motion on the basis that Rule 1.525 of the Florida Rules of Civil Procedure requires that any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after the filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. The appellate court noted that the purpose of this rule is to eliminate the reasonable time rule and establish a time requirement to serve motions for costs and attorneys' fees. On appeal, Association argued that each of its previously filed motions to dismiss included a claim for attorneys' fees and therefore the previously filed motions for fees were timely. The appellate court rejected this argument. In Association's first motion to dismiss, it sought fees under section 607.07401(5), Fla. Stat. However, the appellate court noted that Association's fee motion which was the subject of this appeal was not based upon this statutory provision and was therefore inapplicable. Association's second motion to dismiss sought to dismiss the amended complaint. However, the appellate court noted that this motion was seeking the dismissal of the amended complaint, and did not try to secure the dismissal of claims dropped by owners between the original complaint and the amended complaint, which was the subject of the instant appeal. As such, the claim for fees in this motion was inapplicable to the instant action. The appellate court noted that the rule creates a new hoop for attorneys to jump through to be entitled to attorney's fees. Based upon the foregoing, the appellate court affirmed the decision of the trial court to deny Association's motion for fees.

In **Whitley vs. Royal Trails Property Owners Association, Inc.**, 30 Fla. L. W. D2207 (Fla. 5th DCA 9/16/2005), there are about 110 "living unit" owners and 752 "lot" owners in the subdivision. Owners are the owners of a lot in the association. Owners alleged in their complaint for declaratory judgment that Association acted improperly in allowing a vote of two-thirds of the "living unit" owners to amend certain provisions of the governing documents, including those concerning the minimum size requirement for single family residences and interest rate charges for late payments. The critical disagreement concerns Association's interpretation of the declaration and whether it requires a two-thirds vote of all members of both classes or either class to amend or repeal the restrictive covenants. The trial judge ruled that there are two categories of membership under Association's governing documents. Because the lots and living units are described disjunctively, the owners of "living units" may act to amend the governing documents without the participation or consent of the "lot" owners. Based upon this determination, the trial judge entered a final judgment stating that majorities of ***either*** class of owners in such percentages as required by the governing documents of Association may, without regard to members of the other class, act independently to amend corporate documents or otherwise conduct corporate business affairs, including the sale, transfer or other disposition of common property. On appeal, the Fifth District Court of appeal noted that the developer of the subdivision desired to establish a deed-restricted community and thus created Association. In so doing, developer recorded the declaration, the articles of incorporation, and the bylaws. The declaration grants each owner of a lot or living unit membership status in association. The declaration provides that members' voting rights shall be established and defined in the articles and bylaws. To interpret one provision, the court must compare and construe that provision with reference to the substance of the whole set of agreements. The declaration provided that it could be amended by ". . . .an instrument signed by the Owners of two-thirds of the lots or living units. . . ." The appellate court noted that the disjunctive use of the word "or" should not produce a result contrary to the voting rights established in the articles and bylaws. After reviewing the articles and bylaws, the court concluded that each record owner of a lot or living unit has one vote under the articles. The bylaws guarantee that every member is entitled to vote upon every proposal properly submitted to any meeting of the membership. The appellate court noted that the implementation of the trial court's judgment in this case will bring about an impractical and unreasonable result. It is not hard to foresee that a majority of one class of owner could implement changes in the restrictions that would be unduly onerous on the other class of owner. Based upon its review of the entirety of the governing documents, the appellate court reversed the decision of the trial court and remanded the case to the lower court for entry of a judgment consistent with the findings of the appellate court.

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