COMMUNITY COUNSEL

December, 2005 | **We wish you a safe and prosperous New Year!!** | **Volume 9, Issue 12**

RECENT CASES

- **Department exercises jurisdiction over an earlier HOA election to correct the number of seats to be filled in current election.**
- **Party to joint use agreement obligated to pay its share when it began accepting benefits of the agreement.**

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Public Streets Parking – the Eternal Debate

This question is one that arises frequently, but has never been answered by the courts of Florida: can members of an association park overnight on public streets where such parking is permitted by ordinance but prohibited by recorded covenants?

There are two obvious positions that could be taken, one diametrically opposed to the other. The first position is that the members, being members of the public, can use the streets in conformity with local ordinances. If overnight parking is permitted by ordinance, then owners and residents, as members of the public, have the same rights.

The other position is that the Declaration is a contract by and between the members, and the terms of the contract are binding and enforceable in the same manner as any other contract. Persons who purchase property within the community agree to be bound by the terms of that contract. Persons who may have rights available to them regularly waive those rights and contractually agree to be held to different standards. It happens every single day and is the essence of a contract. Thus, the second argument posits that by buying a lot the association members have agreed to be bound by the documents and any parking restrictions they contain.

Persons can agree by contract to waive parking rights they might otherwise have.

While no court in Florida has ruled on this issue, at least two courts have, including a recent New Jersey case from July, 2004, Verna V. Links at Valleybrook Neighbor, 371 N.J. Super. 77 (2004), 852 A.2d 202. In that case the court followed the reasoning of an earlier Missouri case and said:

. . . . plaintiff has questioned whether the association could continue to regulate parking on the association's streets once they were dedicated to public use. We are aware of no authorities, other than [the earlier Missouri decision], to have considered the issue. . . . We conclude that the . . . . association may regulate parking, coextensively with Glouces-ter, even though the association's private roads became part of the overall network of public roadways.

We view the association's parking regulation as being similar to a neighborhood scheme created by deed restrictions. Such a neighborhood scheme, like the mutual undertakings contained in the association's governing documents, is a matter of contract . . . . which may, and often does, impose greater limits on an owner's use of property than governmental restrictions . . . . While restrictive covenants cannot lessen or avoid the obligations imposed by ordinance, ... they can restrict the use of property otherwise uninhibited by ordinance . . . .

Since the regulatory conduct pursued by Panther Valley was materially different from the parking regulations which the association seeks to enforce, since there is no statutory authority prohibiting an association from enforcing its own parking regulations, and since the regulation meets all the necessary qualities of an enforceable restrictive covenant, we conclude, as similarly held by the Missouri Court of Appeals . . . . that the association was authorized to enforce its parking regulation . . . . (Citations omitted)

The decisions of the state courts of New Jersey are considered persuasive nationwide, since that state is highly developed and generates a lot of decisions in the community association area.

While these courts may have reached the right result, one that will be persuasive in Florida if and when the issue is presented, there is always a risk that the courts will set out a different course, or find something in this state's law or local ordinance that warrants different treatment. Also, it may take appellate review of a trial court decision to reach the desired result. result.

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 **Hamptons West Condominium Association, Inc., vs. Hamptons South Condominium Association, Inc.**, 30 Fla. L. Weekly D2749 (Fla. 3rd DCA 12/7/2005), West Association brought a declaratory judgment action against South Association for reimbursement of operating and recreation expenses. West is a 342 unit condominium association built in 1984. South is a 250 unit condominium built in 2004. Pursuant to an Accessways, Guardhouse and Security Gate Easement, Use and Maintenance Agreement (the Agreement) between the two associations, West was responsible for the operation and maintenance of the guardhouse and for providing access to all of the recreational facilities for South residents. South residents had an obligation to pay a percentage of the costs once it received a certificate of occupancy. Over one half of the units in South were occupied under temporary certificates of occupancy pending completion and sale of the remaining units. The trial court entered summary judgment in favor of South and its residents and held that South was not obligated to pay its percentage until a final certificate of occupancy was issued for the entire project. The main issue on appeal was whether the term "a certificate of occupancy" encompasses both a temporary certificate of occupancy as well as a final certificate of occupancy or only means a final certificate. Neither the Agreement nor the southern building code differentiate between temporary certificates of occupancy and final certificates of occupancy. In this case, temporary certificates were issued to a majority of the residents of South. It was West's position that the obligation of South residents to contribute to the operational and recreational expenses of their own condominium began on the date of the issuance of the temporary certificates of occupancy. Furthermore, since a majority of the South residents were enjoying the benefits under the Agreement under temporary certificates of occupancy, then the residents of South should be obligated to pay for those benefits. South responded that it was only obligated to contribute to the recreational and operational expenses of the amenities after the issuance of a final certificate of occupancy. The Third District Court of Appeal concluded that under the language of the Agreement, the term "certificate of occupancy" means <u>any</u> certificate of occupancy. Because South residents were in fact using the facilities and receiving the benefits under the Agreement, South residents were therefore obligated to pay for those benefits from and after the issuance of the temporary certificates.

In **Ritchie vs. Spruce Creek Property Owners Association, Inc.,** Arb. Case Number 2005-01-6667, Owners brought an arbitration action against Association alleging defects in the 2003, 2004, and 2005 elections for directors. Association sought to dismiss the complaint on the grounds that the Department of Business and Professional Regulation lacked jurisdiction over matters arising before October, 2004, which was the effective date of the statute empowering the department to arbitrate homeowner association election disputes. The department granted in part and denied in part the motion to dismiss. Specifically, the department held that it did not have jurisdiction over the 2003 election due to the fact that this dispute became moot upon the completion of the 2004 annual meeting. However, the department held that it did have jurisdiction over the 2004 election because the board members have staggered terms and it appears that at least three board seats from the 2004 election were open and not up for election at the 2005 election. As such, the department held that it had jurisdiction over the 2004 and 2005 elections. Having determined that it had jurisdiction, the department then addressed the substantive defects in the elections. Association is comprised of 1606 total voting interests. Of this total, 109 interests were present in person at the 2005 annual meeting and another 435 interests were present by proxy. Thus a total of 544 interest were present, either in person or by proxy, in compliance with the quorum requirements of section 720.306(l), Florida Statutes, which caps a quorum at 30% of the voting interests, unless a lower number is provided in the bylaws. As the bylaws require a higher percentage for a quorum, the statute controlled and 30% is required. All of the 435 interests represented at the 2005 annual meeting were present by limited proxy. Specifically, the proxy form submitted stated that the proxy was solely for the purpose of establishing a quorum at the annual meeting and for no other purpose. The association also permitted these absentee owners to mail in their ballots for the election of directors. Association's bylaws however, provided that the election of directors shall be by a vote of the members in attendance or by proxy at the annual meeting. As such, the department held that it was improper for association to have allowed ballots to be submitted by mail. Association was unable to identify how the members "present in person at the meeting" voted. Therefore, the election was invalid for failure to comply with the specific requirements of the proxy and for failure to comply with the specific requirements of the bylaws. The department therefore ordered a special election for five (5) available seats for the board of directors.

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TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM