COMMUNITY COUNSEL

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RECENT CASES

- **Requests for declaratory relief must determine whether the request states doubt as to the rights of a party under a document, not whether the party's interpretation is likely to prevail.**
- **Rules of construction require document's ambiguous provision to be construed against enforcing owner.**

2006 Legislative Wrap–up – Part III

This article focuses on what might have been, not what is. One bill which passed by both houses of the Florida legislature was vetoed by the Governor on June 27, 2006. HB 391 / SB 2530 contained a lot of useful changes to the law, none of which will become law because the executive branch of state government fundamentally misunderstood the law.

It would have allowed voluntary HOAs that are not normally covered by the provisions of Chapter 720, Fla. Stat. to use Sections 720.401 et seq. to revive their recorded covenants when they expire 30 years after the date of initial recording. Now they need 100% approval to do this.

It would have required condominium lienholders to promptly express their position on proposed amendments to condominium documents, or be presumed to have consented.

It would have corrected and clarified many other issues, including merger of HOAs, the applicability of the Florida Condominium Act to HOAs, the notice requirements for HOA ARB meetings, HOA reserve requirements and developer guarantees.

It also would have sped up the pre-suit mediation process for HOAs and made it both more efficient and cheaper. It did this by requiring the party who is asked to mediate a dispute to decide whether to do so within 20 days of receiving a request to mediate, or be held to have waived this option. Currently, the person wishing to mediate a dispute must to wait up to six months to find out whether the other side is willing to mediate.

On this last point both the Governor and the Secretary of DBPR appear to have misapprehended the idea that speeding up the process does not change the current mandatory system into a voluntary one. Now, if an owner or an HOA refuses a petition to mediate a dispute, or simply ignores the petition, the Division will declare an impasse when time to accept mediation has expired. Under the bill, if a statutory request for mediation is not accepted or is rejected, then mediation is dispensed with. The mandatory nature would have stayed the same, but the time frame and Division involvement (and the cost associated with that involvement) would have been eliminated.

At minimum, the veto of HB 391 calls the attentiveness of the executive branch into question.

It is very disquieting to read both the Governor's draft and final veto messages, as well as other written communications from the executive branch, and realize that good and constructive legislation was vetoed, at least in part, because of a poor understanding of both the current law and the issues addressed by the legislative proposals. This may lead some to call into question the attentiveness of the executive branch to community association matters.

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RECENT CASE SUMMARIES

In **The Meadows Community Association, Inc., vs. Russell-Tutty**, 31 Fla. L. Weekly D1495a (Fla. 2nd DCA May 31, 2006) Association filed an amended complaint against Owner for declaratory and injunctive relief seeking to clarify Association's rights under the governing documents. Association sought to compel Owner to require her adult son to abide by Association's rules and, specifically, to control her adult son's reckless driving on Association's private roads. According to the amended complaint, the adult son resided with Owner in her condominium unit, which is subject to restrictive covenants recorded in the public records. The son repeatedly violated the speed limits and engaged in unsafe and reckless driving, and the local sheriff refused to enforce the alleged traffic violations on Association's private roads. The amended complaint sought declaratory and injunctive relief involving the interpretation and enforcement of the governing documents and whether Owner can be directed to control her son's actions while he is her invitee on Association's property. The trial court dismissed with prejudice the amended complaint for a failure to state a cause of action. On appeal to the Second District Court of Appeal, the appellate court reversed the trial court and held that the amended complaint stated a cause of action. Although not a model of clarity, the amended complaint alleged that Association was in doubt about its rights under the governing documents and about whether Owner could be required to force her son to comply with the governing documents. The appellate court noted that the test for the sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining a decree favoring his or her position, but whether he or she is entitled to a declaration of rights at all. Once a cause of action for declaratory relief is sufficiently pleaded, the plaintiff is entitled to a judicial determination of the rights at issue. The trial court focused on the merits of Association's case rather than the sufficiency of its amended complaint. As such, the appellate court reversed and remanded the case to the trial court.

In **McInerney vs. Klovstad**, 31 Fla. L. Weekly D1462c (Fla. 5th DCA May 26, 2006), both parties were owners of real property in the Silver Lake Subdivision. As such, both owners were subject to the declaration of covenants for the subdivision. McInerney sought and received approval from Association, its architectural review committee and Seminole County to construct a home on their lot adjacent to the lot owned by Klovstad. When Klovstad realized that McInerney's addition would sit 3.45 feet from the side yard line between to their properties, Klovstad, believing that the subdivision restrictions had been violated, instituted an action seeking injunctive and declaratory relief. Association's restrictions provided that "side yard setbacks shall be five (5) feet on one side and five (5) feet on the other side, with a minimum of ten (10) feet between buildings." This same provision also provided that if ". . . . there is any conflict between this section and applicable zoning regulations of the proper governing authority, said zoning regulations shall take precedence." Seminole County ordinances provide for side yard setbacks of no less than seven feet on one side and three feet on the other side of the adjacent lot. Therefore, while the space between homes is ten feet under both regimes, it is divided differently, creating the dispute presented in this case. The trial court concluded that the subdivision's restriction, mandating a five-foot side yard setback on both sides of the property line, controlled over Seminole County's three-foot side yard setback on one side and seven-foot setback on the other side of the property line. As a result, the trial court ordered the encroachment removed. On appeal to the Fifth District Court of Appeal, the appellate court noted that language in a governing document is ambiguous when its provisions are fairly susceptible to more than one interpretation. The governing documents state that where there is "any conflict" the zoning regulations will take precedence, but it does not define what "any conflict" means. Based upon its plain language, it was reasonable for McInerney to conclude that the term "any conflict" meant "any difference." McInerney's understanding seemed to be shared by Association and its architectural committee, both of which determined that the Seminole County ordinance prevailed in this instance and approved McInerney's construction plans. The appellate court noted that the restrictions were poorly drafted, causing the difference of opinion between the parties. If the appellate court were free to interpret the restriction, the Klovstad's interpretation would have been more appealing, as it appeared more likely to enhance property values and maintain the neighborhood's aesthetics. However, because the restriction was found to be ambiguous, the rules of construction require that it be construed against Klovstad who seeks to enforce the restriction. As such, the appellate court reversed the summary judgment entered by the trial court.

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