COMMUNITY COUNSEL

November, 2007 | A Publication of Wean & Malchow, P.A. | Volume 11, Issue 11

Recent Cases

- **Chapter 197, Fla. Stat. requires notice of tax sale to be given to each time-share title holder, not just the Association as agent for all owners.**
- **The failure of a condominium association to discover a noise problem caused by a hard tile floor within five years of installation creates a defense based on the statute of limitations to an action to have the floor removed.**

A House Divided Against Itself …..

The Division of Florida Land Sales, Condominiums and Mobile Homes is an arm of the State of Florida's executive branch. It is responsible for regulating the state's abundant supply of condominiums, cooperatives, and to a limited but increasing extent, homeowner associations. As part of its structure the Division includes an Arbitration Section where, for over fifteen years, a group of hardworking and knowledgeable attorneys has been rendering high quality written opinions and decisions on a wide gamut of issues important to Associations. Several years ago the Section survived a misguided attempt to disassemble it, and last year the Section's longtime head abruptly left the State to enter private practice.

The Division also is charged with rendering Declaratory Statements, which are advisory opinions based on unique sets of facts presented to it by the interested public.

The Division overrules its own arbitration decision.

In a Declaratory Statement issued in October, 2007 the Division took the rare step of overruling an arbitration opinion handed down by its former head arbitrator. *In re Petition for Declaratory Statement of Venture Out at Cudjoe Cay, Inc.* #DS-2007-028, the question presented was how to fill a vacancy on the Board of Directors when a person who is not properly qualified to serve on the Board of an association is nevertheless elected by the members. Relying not on the election process itself, but on the provisions of Section 718.112(2)(d)8, Fla. Stat., the Division overruled an earlier arbitration decision and held that the unqualified director is removed and the vacancy thus created is filled by appointment of the remaining directors.

This sharply contrasts with the decision in *Warren v. Springwood Vill. Condo. Ass'n. of Longwood*, Arb. Case No. 00-0177 (9/21/2000 Scheureman arb.). In that case the arbitrator decided that the election of a person who could not legally hold the office of director was a nullity and the person receiving the next highest vote total in the election should automatically take the vacant seat without need of further Board action.

Perhaps the case merely presents a public display of the vestiges of an old internal split in the Division. However, the retrenchment is troubling in a more practical way. If the regulators can't agree within their own house on how to address a situation that is neither that complex nor uncommon in the real world, their uncertainty will spread to the operational aspects of community associations, organizations that – because they are run by un- or partially- informed volunteers – typically operate with a higher degree of uncertainty than other institutions. What is needed most in the realm of community associations is certainty, and that is what the Division is now withholding.

In this case, either result is appropriate. Regardless of whether the next candidate takes the seat or the Board fills the vacancy, the Division does the public a disservice when it flip-flops on its own regulatory policy, promoting greater dissention in an area that is already hypersensitive to uncertainty.

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

RECENT CASE SUMMARIES

In **Luke Investments, Inc. vs. Camelot Condominium Owners Association, Inc., et al.,** Association was a timeshare condominium which consisted of more than 900 timeshare units. Pursuant to the Florida Statutes, the Pinellas County tax collector considered Association to be the property's taxpayer – as agent for the individual timeshare titleholders - for the purposes of assessing and collecting the ad valorem taxes. Association failed to pay the condominium's ad valorem taxes for the years 2003, 2004, and 2005. The failure to pay the taxes resulted in the impending sale of the property pursuant to Chapter 197, Florida Statutes, for which the tax collector provided notice only to Association. At the tax sale, Luke Investments was the successful bidder and became the owner of the entire condominium and the clerk of court issued a deed for the property to Luke Investments, which immediately recorded the deed and took possession of the property. Association, on behalf of the individual timeshare titleholders, filed a quiet title action against Luke Investments, the Pinellas County Tax Appraiser, the Pinellas County Clerk of Court, and Pinellas County itself. In that action, Association challenged the issuance of the tax deed, alleging that the clerk of court's notice of sale and deed issuance was insufficient because it was not provided to each of the 900 individual timeshare unit owners. Association thus asked that title to the condominium be quieted in the names of the individual timeshare period titleholders. The trial court granted partial summary judgment, concluding that as a matter of law the individual titleholders were entitled to notice of the sale and that because such notice was not provided, the tax deed to the property was void. The order further required Luke Investments to vacate the property immediately. On appeal to the Second District Court of Appeal, Luke Investments argued that in order to reduce the workloads of the property appraiser and tax collector, the legislature devised a statutory scheme for handling the taxing of timeshare units such as this one. Chapter 192 of the Florida Statutes provides that the property shall be assessed as a whole and in the name of the Association. It also provides that the Association shall serve as the single tax paying entity for the property as a whole. There is no question that such a plan is within the province of the legislature. However, the issue presented in this case is whether the legislature intended this "agency plan" to apply to the procedures prescribed by the statute for a tax sale of property and the issuing of a tax deed following such a sale. As such, the appellate court was required to resolve whether the statute required that notice be given to each of the individual titleholders prior to the sale. The appellate court noted that Section 192.037(9), Fla. Stat., begins with the recognition that the Association is treated as the agent for the timeshare period titleholders for the purposes of "enforcement and collection of delinquent taxes." The plain reading of the remainder of the statute, however, indicates that the legislature has altered that agency representation in certain circumstances. Once the provisions of Section 197.502 are implicated, the individual titleholders are entitled to the "protections afforded by chapter 197." The statute specifically provides that the timeshare titleholders are to received the protection of chapter 197. This statement is in contrast with the clause which speaks of the titleholders' agent. Although the statute designates Association as the "taxpayer" and the "agent of the timeshare period titleholders", it does not designate Association as the "titleholder of record." Since the statute requires notice be given to the "titleholder of record", the appellate court concluded that the plain reading of the statute required that in order for a sale of property for failure to satisfy delinquent ad valorem taxes to be valid, each individual timeshare period titleholder must be provided the statutorily required notice.

In **The Gardens at Pembroke Lakes Condominium Association, Inc. vs. Placide**, Case # 2006-06-7816 (Campbell, April 11, 2007), Owner acquired a unit in the condominium in the year 2000, from previous owners who had installed tile flooring. In its petition filed December 7, 2006, Association sought an order requiring Owner to seek approval for the tile flooring. The arbitrator noted that arbitrators have historically and consistently applied a statute of limitations of five years to such claims. Application of a statute of limitations is appropriate when contract records or construction receipts are likely lost in the distant past. Although the petition alleged that Association did not know the previous owners had installed tile flooring, it is inherently unbelievable that Owner lived in the unit for more than a year before the tile floor became noticeable. That is, by December 2001, Association should have known about the tile floor. If it was not known by that time, it must be concluded that the alleged noise problem was not caused by the tile flooring, per se, or by Owner's activities during this extended period. Therefore, the arbitrator denied Association's request to require Owner to remove the tile flooring. However, the arbitrator left open the issue of whether Owner's more recent activities could constitute a nuisance.

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