COMMUNITY COUNSEL

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Recent Cases

- **Owners in a court challenge of recall were allowed to proceed with suit against their association where it permitted the recall despite the failure of a majority of all owners to approve it.**
- **Association not liable to uninvited non-resident pedestrian who tripped over a piece of metal debris, where Association did nothing of a willful or grossly negligent nature to cause the injury she suffered.**

Recall the Bums – Some Basics

When members are dissatisfied with their community association governance, often the best solution for redress is not to commence traditional litigation, but rather to think more politically and seek the benefits of a decidedly more populist approach – the recall.

A recall is the forced removal of one or more directors from the Board of Directors prior to the expiration of their elected or appointed term, and the replacement of the directors so removed. The law and procedure governing community association recalls in Florida has been made very consistent from one type of community to another, and the law involved – Section 718.112(2)(j), Fla. Stat. for condominiums, Section 719.106(f), Fla. Stat. for cooperatives and Section 720.303(10), Fla. Stat. for HOAs – superceded inconsistent corporate documentary provisions in community documents. Supplemented by administrative rules created by the Division of Florida Land Sales, the process and review procedure work remarkably well to provide a definitive and prompt resolution to recall disputes, which can be as fractious as any community dispute.

A recall supported by the members is a good way to change course.

Some basic principals of recall are:

1. Directors can be removed only with the approval of an absolute majority of voting members. A separate yes/no vote must be taken on each director whose recall is sought.

2. Although there are two ways to run a recall, use of a formal membership meeting is not the best way to accomplish a recall, since that method is a fraught with more procedural requirements, and such requirements can be traps for the unwary and uninformed, because substantial compliance with all procedural requirements is necessary. Therefore, it is best to try to accomplish a recall using the alternate process of seeking written consent of the members, having them execute written consent forms. While this involves more leg work, the process is ultimately simply when the work is divided among severally motivated persons. Ultimately a recall requires popular support, and both the ease of getting helpers to assist in the effort and the comments of members approached one-to-one will give those seeking a recall a good read on the amount of support they have.

3. Be sure to use Division–approved forms and don't misstate the reasons for the recall effort. Although a recall can occur for any reason or for no reason, the subjects of a recall can also seek to have persons who initially consented to the recall rescind that consent in writing, if it is done in a timely fashion. Close doesn't count – be sure to get as many signors as possible. Don't stop at 50% plus one, since the disqualification of only one form (when executed by renters or the non-voting member, for example) will defeat the process.

4. Be sure to know the procedural requirements for recall and pay attention to time limits, although most of those fall on the Association and the subjects of the recall.

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RECENT CASE SUMMARIES

In **Nero, et al., vs. Continental Country Club R.O., Inc., et al.,** 32 Fla. L. Weekly D2951b (Fla. 5th DCA December 14, 2007) Owners were members of Association. Owners were also officers and directors of Association. Owners brought suit against Association alleging that Owners were wrongfully removed from the board. Owners also sued the individuals initiating the recall and alleged that they inappropriately distributed recall petitions which were later used by Association for removal of Owners from their positions on the board. Owners were allegedly recalled by written agreement of the members of Association. The trial court dismissed Owners complaint with prejudice. On appeal to the Fifth District Court of Appeal, Owners alleged that their complaint stated causes of action and should not have been dismissed by the trial court. Owners alleged in count one of the complaint that Association violated section 617.0808, Florida Statutes, by removing owners from their positions on the board without a majority vote or agreement in writing. Section 617.0808, Florida Statutes, addresses the procedure for the removal of directors if such procedure is not contained in the bylaws. The statute provides that a director can be removed with or without cause by a majority of the membership. The statute further requires a separate vote or separate written agreement for each of the directors to be removed. Owners alleged in count one that a majority of all members of Association did not vote or agree in writing to remove Owners as directors. The Fifth District Court of Appeal noted that if a majority vote was not achieved, then the recall procedure was defective, and Association would be liable for ratifying the recall. The appellate court ruled that count one of Owners' complaint stated a cause of action and should not have been dismissed. Count three of Owners' complaint alleged that Association violated its bylaws when it removed Owners from the board. Association's bylaws stated that any director could be removed from the board, with or without cause, by the vote or agreement in writing by a majority of the voting members. Therefore, the bylaws and the Florida Statutes essentially adopt the same requirement for removal of directors. If Association did not obtain the vote of a majority of the voting members to remove owners, then Association violated the bylaws and the removal of owners was defective. The appellate court therefore ruled that count three also stated a cause of action. In count nine of the complaint, Owners alleged a cause of action for statutory damages for Association's alleged failure to allow inspection of the official records. The appellate court noted that if the allegations were true, the complaint stated a cause of action and should not have been dismissed. Similarly, the appellate court ruled that the other counts of the complaint also stated causes of action and should not have been dismissed by the trial court. However, the appellate court upheld the dismissal of the various counts against the individual members who initiated the recall. Although Association was liable for the allegedly wrongful recall, there were no allegations of fraud, criminal activity, self-dealing, or unjust enrichment against the individuals who initiated the recall to support causes of action against them individually. The appellate court therefore remanded the case to the trial court for trial on the causes of action alleged against Association.

In **Porto vs. Carlyle Plaza, Inc.**, 33 Fla. L. Weekly D65a (Fla. 3rd DCA, December 26, 2007), Porto, a non-resident, sued Association for injuries she sustained in a fall on Association's property. Porto was walking her dog on a leash on the public sidewalk. Porto left the sidewalk and went onto a grassy area on the side of Association's driveway for the dog to relieve itself. Porto walked on the grass, across the driveway and was walking back to the sidewalk when she tripped and fell over a piece of metal, adjacent to the public sidewalk and protruding from Association's driveway. The piece of metal was part of a gate that had been removed from that location when another gate was installed closer to the building, several years prior to this incident. Porto sustained injuries and sued Association for negligence. The trial court granted final summary judgment in favor of Association finding that Association did not breach any duty of care owed to Porto. On appeal, the Third District Court of Appeal noted that the duty of care owed by a landowner depends on the status of the entrant on the property. Based on the facts of this case, Porto was an uninvited licensee upon Association's property. Porto's presence on the property was solely for her own convenience without invitation expressed or implied by Association. The duty of care owed by a landowner to an uninvited licensee is to refrain from willful misconduct or wanton negligence, to warn of known dangers not open to ordinary observation, and to refrain from intentionally exposing the uninvited licensee to danger. Association did not breach any duty of care owed to Porto because Association's conduct was neither willful, wantonly negligent, nor intentional in light of the unreasonable probability that a pedestrian such as Porto could cut across the grass and the private driveway of Association, which was next to the public sidewalk, for her own unrelated travel purpose of allowing her dog to relieve itself. Therefore, the appellate court affirmed the summary judgment entered in favor of Association.

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