COMMUNITY COUNSEL

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HOA Alternate Dispute Resolution – A Bad Bill, Part 1

This year the Florida Legislature will consider HB 27 (Ambler), which contains, for about one-half of its 50+ pages, an extensive re-write of the current HOA alternate dispute resolution process found in Section 720.311, Fla. Stat. This proposal represents a major step backwards for association / owner relations and if passed, it promises to create a far more expensive, time-consuming, contentious process with far less certainty and good will for all concerned.

Citizens would do well to review this bill, found at **http://www.flsenate.gov** by inserting "H27" in the box to specify a bill number. On the bill's webpage, the most recent version of the bill is shown as "H 0027C1" and it is available for viewing or downloading in both html and pdf formats. Start reading on page 26. If you agree with our analysis, please inform your legislators to vote against this bill.

Under the current system, in place since 2007, most non-monetary disputes (involving so-called use restrictions) between owners and HOAs are subject to presuit mediation, which is started by sending the form of demand letter set forth in the statute. Mediation is an informal, non-adversarial process involving use of a trained neutral, acting to facilitate a voluntary negotiated settlement. Most cases that are mediated settle, and the process is well-suited to neighborhood disputes because when each party leaves with a settlement to which that the party agreed "face" is saved and ultimate compliance is more likely. The process is simple, relatively cheap and fast. The downside for failing to mediate also is clear – expect long and costly litigation in which the party who failed to mediate is denied any right to recover attorney's fees, even if that party ultimately wins the lawsuit. (There is no such penalty for a mediation that fails to achieve a settlement, as long as the parties participate in the process.)

PLEASE REVIEW AND COMMENT ON HB 27, A VERY BAD BILL THAT PROMISES TO HELP NO ONE.

In contrast, the system contemplated by HB 27 requires "disputes" to be mediated **or** arbitrated. The latter process is a private adversarial trial with winners and losers, from which a party still can go on to court. To try the case all over again. So there is less certainty of ultimate compliance in arbitration.

Although one party can initially send a demand for mediation, the other party can in turn demand arbitration, and that demand prevails. The process is also expanded to include "disputes" between lot owners and perhaps even between co-owners of the same lot. In addition, while the current system is aimed primarily at compliance with use restrictions, mediation or arbitration would also be required when an association attempts to collect a fine, making the fining process even less useful as a means of resolving disputes, since the mediation or arbitration would have to occur before a small claims suit (with its own required mediation process) could be filed.

Very problematic is a new requirement that before a statutory demand for mediation or arbitration can be made, one party must give the other a "notice of dispute." Aside from probably having to make service by process server, in order to be valid, this first notice must "*… state with specificity the nature of the dispute, including* ***the date, time, and location of each event*** *that is the subject of the dispute and the action requested to resolve the dispute."* If this notice turns out to be inadequate, or is sent before other pertinent violations occur, it creates a defense to the entire presuit mediation/ arbitration process, such that a court – after a full trial – could require that the entire process to be repeated. What is certain under the current system becomes completely uncertain and risky.

The notice of dispute and various other documents are required to be provided to the mediator. This is an unnecessary expense, since a mediator should and will refuse to make any judgment about them.

CONTINUED NEXT MONTH

Recent Cases

- **Acts of God and other uncontrollable events excuse the two year deadline for transfer of title under the Interstate Land Sales Act.**
- **Condo Unit Owner was held to be served with pre-arbitration notice when proof indicated that notice was sent via certified and first class mail to the condo unit and the owner's residence and only the certified notice was returned unclaimed.**

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RECENT CASE SUMMARIES

In **Mailloux vs. Briella Townhomes, LLC, 34 Fla. L. Weekly D269c (Fla. 4th DCA 2009)** Purchasers of a proposed condominium unit executed a contract for the purchase of a condominium in Boynton Beach from Developer. However, Purchasers later sought to revoke and terminate the contact, citing Developer's failure to comply with the Interstate Land Sales Full Disclosure Act ("ILSA") registration and reporting requirements. A developer need not furnish a printed property report to a purchaser of land under a contract obligating the seller to erect a building thereon within a period of two years. However, Purchasers contended that Developer failed to unconditionally obligate itself to complete construction within two years because the contract for sale permitted delays associated with acts of God, impossibility of performance and frustration of purpose. The Department of Housing and Urban Development issued guidelines to assist with interpreting ILSA. The guidelines adopted by HUD stated that "… contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract action in the jurisdiction where the building is being erected." In Florida, acts of God, impossibility of performance, and frustration of purpose are well-recognized defenses to nonperformance of a contract. The trial court granted Developer's motion for summary judgment. On appeal to the Fourth District Court of Appeal, the appellate court held that these exceptions to the performance date, in accordance with the guidelines and Florida contract law, do not render the construction contract illusory within the ILSA context. In the alternative, Purchasers sought to revoke their purchase contract pursuant to Section 689.261, Fla. Stat., which provides that at or before the execution of a contract for sale, either the seller or the contract itself must disclose to the prospective purchaser that the property may be subject to higher property taxes after purchase. Developer admitted failing to provide Purchasers with the tax disclosures required by this statute, but noted that the statute fails to provide for a private cause of action. The appellate court agreed that the Florida Legislature did not include a private cause of action in the statute. Whether a violation of a statute can serve as the basis for a private cause of action is a question of legislative intent. Of note, the appellate court found that a review of the legislative history reveals that a separate purchaser's remedy was contemplated but ultimately removed from the statutory text that was adopted. As such, the appellate court found that it remains for the Legislature to create a private cause of action, and the court will not imply one in this instance. Therefore, the summary judgment entered by the trial court was affirmed.

In **Chateaux du lac Condominium Association, Inc. vs. Brock, In Re: Petition for Arbitration, Case Number 2007-03-6483 (Chavis / Summary Final Order / December 14, 2007)** In 2007 Association filed a mandatory non-binding arbitration petition against Owner. Association alleged that Owner failed to properly maintain his condominium unit by "… failing to repair the shower and/or shower plumbing fixtures resulting in water intrusion into and damage to the common elements and other condominium units in and around respondent's unit." A "Final Demand to Cure" letter was sent by Association to Owner on October 1, 2006. Owner filed an answer to the petition and denied the existence of the violation and further claimed that Association had failed to provide pre-arbitration notice as required by law. By letter dated October 21, 2006, Association's legal counsel notified Owner of the violations of the governing documents. This letter was sent by U.S. Certified Mail and by First Class U.S. Mail to Owner's two addresses, one to Owner's residence and the other to the condominium unit. Both certified letters were returned to Association's counsel. The letter to the unit was returned "forward time exp rtn to sender." The letter to the Owner's residence was not returned to counsel for Association. Owner attempted to make repairs by applying silicone caulk. When this did not resolve the problem, Association had its contractors replace a leaking shower valve assembly. The arbitrator held that notice was given to Owner by mailing the letter to Owner's address because the letter was not returned. The arbitrator further held that Owner was liable for the repairs to the shower valve assembly and awarded Association $1,148.00 in damages.

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