COMMUNITY COUNSEL

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MAJOR POLICY SET BY DIVISION ON CONDO EMAIL

We interrupt our series analyzing HB 27, a bad bill, to inform you of a major new policy decision coming from the Division's arbitration section.

A *very* recent arbitration decision in the case of *Humphrey vs. Carriage Park Condominium Association, Inc.,* Case Number 2008-04-0230 (Campbell, Final Order, March 30, 2009), held as follows with respect to **condominium** board emails:

The e-mails requested in this case are those existing, if at all, on the personal computers of individual directors. These are not official records of the condominium association. The property of an individual director does not become the property of the association because of his office on the board.

Just as a statement by an individual director cannot bind the board, an e-mail from or to a director, is not a record of the association. Even if directors communicate among themselves by e-mail strings or chains, about the operation of the association, the status of the electronic communication on their personal computer would not change.

E-mail on private computers of condo directors are NOT official records of the association!

Similarly, an e-mail to an individual director or to all directors as a group, addressed only to their personal computers, is not written communication to the association. This must be so because there is no obligation for a director to turn on personal computer with any regularity, or to open and read e-mails before deleting them.

Because there is no evidence the e-mails requested by Petitioners ever became official records, there can be no penalty for failure to allow inspection of them.

This stunning Final Order from the Division resolves one of the most vexing questions plaguing condo association directors in the electronic age — when do e-mails become official records? Out of an abundance of caution, this firm and most other association practitioners have cautioned boards to carefully handle email communications between board members discussing association business for fear that: 1) the e-mail communications could be considered official records; 2) the destruction or erasure of board emails could expose directors to personal liability under the Florida Statutes (whether they read the emails or not); and 3) utilizing email communications to discuss association business could potentially result in the issuance of subpoenas to inspect the entire contents of the board member's computer, even if not related to association business.

The *Humphrey* decision at least temporarily allays some of these concerns. While condo board members still may not "vote" by email, as voting should only be done at a properly noticed meeting of the board, board members at least now have some protection that their discussions conducted via email are not "official records" available for inspection and copying **unless and until the email communications are delivered to the association.**

While the *Humphrey* decision directly addresses email communications maintained on condo board members' private computers, the decision also suggests (in a footnote) that the outcome of the case would be different if the email communications were contained on a computer owned or operated by the association, or on which management conducts business, or if e-mails are printed up and passed around for discussion at a board meeting.

Technically, the *Humphrey* decision is – as of this printing – subject to motions for rehearing and/or petitions for trial de novo. Therefore, the *Humphrey* decision is by no means "final." As this law firm represents the Respondent Association in the *Humphrey* case, stay tuned to future newsletters for any updates and final resolutions of this case.

Recent Cases

- **Court upholds Division's refusal to rule, in a Declaratory statement, whether a condo association may indirectly employ a lobbyist, since the inquiry requires consideration of constitutional issues.**
- **Division upholds condo association's use of a "Chattel Shipping" letter to cut off rights of unit owners to install enclosures around their balconies and patios.**

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RECENT CASE SUMMARIES

In **Carr vs. Old Port Cove Property Owners Association, Inc.,** 34 Fla. L. Weekly D591c (Fla. 4th DCA, March 18, 2009), Owner petitioned the Department of Business and Professional Regulation for a declaratory statement on the issue of whether Association may engage in lobbying the Florida Legislature to amend the Florida Condominium Act, directly or indirectly through an organization of condominium associations, for a fee or at no cost. Through the petitioner, Owner sought interpretation of chapter 718, Florida Statutes, which defines the statutory powers and duties of a condominium association. Association intervened in the proceedings, arguing that the First Amendment to the United States Constitution, as applied to the states through the Due Process Clause, gives it the right to engage in lobbying activity. It also argued that its governing documents permit it to lobby the Florida Legislature. DBPR denied Owner's petition, stating that the petition sought interpretation of provisions of Association's governing documents and interpretation of a constitutional provision as applied to the facts of the case, both of which are not approved functions of DBPR. In addition, DBPR denied the petition because it involved a disputed issue of material fact concerning Association's membership in a lobbying organization. On appeal to the Fourth District Court of Appeal, Owner argued that DBPR erred in denying the petition for declaratory statement because the constitutional issue, contract interpretation issue, and factual dispute all arose from Association's response to the petition. Owner asserted that DBPR should merely answer the question in his petition as these questions related to chapter 718, Florida Statutes, ignoring all of the issues raised by Association. The appellate court noted that the purpose of a declaratory statement is to answer the petitioner's questions about how the statutes or rules apply to his own circumstances so that he may select a proper course of action. In addition to the statutory limitations on petitions for declaratory statement, the appellate court noted that a declaratory statement may not be used to decide constitutional issues. The appellate court affirmed the decision of DBPR in denying Owner's petition for declaratory statement. The court noted that the questions posed by Owner as raised in the petition implicates the issue of whether Association has the right, under the First Amendment to the United States Constitution, to engage in lobbying, and DBPR is not authorized to resolve this issue.

In In Re: Petition for Arbitration of Killeen vs. S.B. Club Condominium Association, Inc., Case Number 2008-06-4403 (Campbell, Summary Final Order, March 16, 2009), Owners filed a petition for arbitration seeking to be permitted to install a screen enclosure on their limited common element porch. At the time Owners purchased their unit, approximately 66% of the units in Association had screen or glass enclosures of the balconies or porches appurtenant to the units. Owners applied for permission to install a screen enclosure on their porch, but the application was denied by Association. In 2004 Association sought from and received a written legal opinion from its attorneys that screen and/or glass enclosures on the limited common element porches and patios were not and never should have been allowed. As a result, in December 2005 Association sent a letter to all Owners advising that the terms and conditions of the declaration would be strictly enforced, that no new screen or glass enclosures would be permitted in the future, and that an existing enclosures which needed to be removed for any reason, including maintenance of the concrete slabs, would not be permitted to be reconstructed. Owners filed the petition for the purpose of obtaining approval for the construction of a screen or glass enclosure. The arbitrator held that the case was subject to the precedent of Chattel Shipping and Investment, Inc., vs. Brickell Place Condominium Association, Inc., 481 So. 2d 29 (Fla. 3rd DCA 1986). The arbitrator noted that the December 2005 letter from Association to the Owners established that Association adopted and implemented a uniform policy to enforce the declaration on balcony enclosures only prospectively. As such, Owners' request to install a screen enclosure was denied.

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