COMMUNITY COUNSEL

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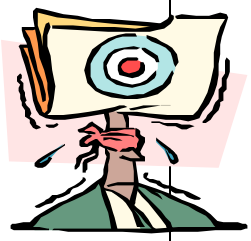
DID THE LEGISLATURE CREATE A RECALL SHORTCUT?

This year the Florida Legislature adopted changes to Chapter 617. That chapter governs so-called Florida corporations not for profit and is the organic authority under which most community associations are formed.



Increasingly, however, provisions in Chapter 617 are (or may be) at odds with provisions of the various community association statutes, and it falls to savvy attorneys and confused association members to determine whether a provision of Chapter 617 still applies to a given association. Many specific sections of Chapter 617 now contain clear admonitions like this:

The term does not include an association organized under chapter 718, chapter 719, chapter 720, or chapter 721, or any corporation where membership in the corporation is required pursuant to a document recorded in county property records.

Do not assume that Chapter 617 governs your community. Get a legal opinion first.

But many provisions contain no such statement. Instead the law leaves us with only this unhelpful general statement found in Section 617.1703, Fla. Stat.:

In the event of any conflict between the provisions of this chapter and chapter 718 regarding condominiums, chapter 719 regarding cooperatives, chapter 720 regarding homeowners' associations, chapter 721 regarding timeshares, or chapter 723 regarding mobile home owners' associations, the provisions of such other chapters shall apply.

This provision provides no real assistance in determining whether a conflict exists, and it is often very tempting to rely on the provisions of Chapter 617.

For example, in 2009 the following was added to Section 617.0808, Fla. Stat., effective October 1st:

A director elected or appointed by the board may be removed without cause by a vote of two-thirds of the directors then in office or such greater number as is set forth in the articles of incorporation or bylaws.

If applicable to community associations, this would present a quick and easy way to remove Board-appointed directors. But many questions arise. Chapter 718, 719 an 720 all have provisions that address the recall of directors. Is there a difference between "recall" and "removal"? Are the recall provisions of those chapters the sole and exclusive way of replacing directors? What are the possible consequences of using the Chapter 617 process?

Arguments can be made both ways, particularly in the case of HOAs. But the better thinking is that this is a case of a conflict between the two statutes and that the community association recall statutes supercede Chapter 617 on the replacement of directors. An incorrect action could result in prolonged confusion over the makeup of community government and could subject the loser to attorney's fees.

Recent Cases

- **That two trial judges in different cases interpreted the same document provision differently, is a good clue that the provision in question is ambiguous, and extrinsic evidence is needed to explain the provision.**
- **Association could not be the prevailing party in a suit that was (erroneously) dismissed for jurisdictional purposes.**

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RECENT CASE SUMMARIES

In **Killearn Homes Association, Inc., vs. The Lamar Company, LLC, et al.,** 34 Fla. L. Weekly D 1904d (Fla. 1st DCA September 17, 2009) Association brought suit against Company to stop the erection of a billboard on a commercial lot in the Association. The declaration of restrictions provided that no ". . . . building shall be erected, placed or altered on said tract until the construction plans and specifications. . . . have been approved by the President of Killearn Properties, Inc. . . ." Company sought to install a billboard on the commercial lot and did not believe that the billboard constituted a "building" that would require the approval of Association or the President of Killearn Properties, Inc. The trial court granted summary judgment in favor of Company and Association appealed. On appeal to the First District Court of Appeal, the court found that the trial court erred by granting final summary judgment in favor of Company. The trial court based its ruling, in part, on the fact that the term "building" as used in the declaration was not ambiguous, in spite of the fact that the term had been susceptible to different interpretations by the courts as well as by the parties in this case. Specifically, in prior litigation over this same provision, another trial judge ruled that the term "building" was sufficiently broad and unambiguous to prevent the construction or erection of a cell phone tower on another of the commercial lots. The appellate court noted that the mere fact that two circuit court judges had interpreted the same covenant terms in two different ways demonstrates that the term in dispute is reasonably susceptible to more than one interpretation. Both parties argued that the term was "clear and unambiguous", but ascribed different meanings to the "unambiguous" language. As such, since the provision was ambiguous, entry of summary judgment was improper. The appellate court further found that the trial court erred when it utilized the definition of "building" in the Tallahassee Land Development Code. The appellate court found that the sole function of the definition of "building" in the land development code was only to demarcate the types of structures controlled by that code and had no application outside of the context of the land development code. However, the appellate court did note that when the terms of a written document are ambiguous and susceptible to different interpretations, extrinsic evidence should be considered by the court to ascertain the intent of the parties or to explain or clarify the ambiguous term. Therefore, the appellate court reversed the entry of summary judgment and remanded the case to the trial court.

In **Mitchell vs. The Beach Club of Hallandale Condominium Association, Inc.,** 34 Fla. L. Weekly D1935 (Fla. 4th DCA September 23, 2009) the trial court dismissed Owner's complaint for injunction to prevent the levy of a condominium special assessment by Association, and entered an award of prevailing party attorneys' fees in favor of Association. Association passed a resolution imposing a special assessment of $1,299,895.00, amounting to $4,194.00 per unit. Owner filed an "ex parte petition for injunctive relief" to prevent the enforcement of the special assessment. Owner alleged that Association failed to give proper notice of the meeting, failed to establish a quorum, used expired proxies, and failed to provide an audited financial statement in violation of Association's bylaws and the Florida Statutes. Despite the "ex parte" title, Association was served and filed a motion to dismiss, claiming that because no permanent injunction was sought, the court could not grant a temporary injunction. Second, Association maintained that the matter was in the exclusive jurisdiction of the Department of Business and Professional Regulation and subject to mandatory non-binding arbitration. Finally, Association claimed that the petition was factually insufficient to show irreparable harm. During the hearing on the motion to dismiss, Association also argued that the assessment against Owner did not reach the monetary threshold for circuit court jurisdiction, i.e. $15,000. The trial court granted Association's motion with leave for Owner to amend and refile in the county court. On appeal to the Fourth District Court of Appeal, the appellate court noted that Owner did not seek monetary relief and instead sought an injunction. County courts and circuit courts have concurrent equitable jurisdiction to enter injunctions. As such, the trial court erred when it applied the monetary jurisdiction limit to dismiss the complaint for lack of jurisdiction. Likewise, the appellate court held that all of the other reasons espoused by Association also failed. Finally, the appellate court reversed the award of fees in favor of Association. Not only was reversal required by the holding in the case, but Association did not "prevail" where the complaint was dismissed on jurisdictional grounds without prejudice to refile.

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