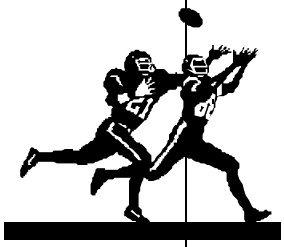
COMMUNITY COUNSEL

November, 2010 | A Publication of Wean & Malchow, P.A. | Volume 14, Issue 11

CONDO DILEMMA – NO CANDIDATES, NO ELECTION

Over the past several years Florida legislators have been tinkering with the Condominium election statute, nipping destructively at the edges of a system that has worked well, more or less, since first being adopted in 1991.

Starting in 2008 South Florida interests have decided that it should be harder for members to serve on condominium boards, and that persons also should not be permitted to serve for extended periods of time. As a result, a series of limiting measures were adopted. Among them:



- All staggered terms provided for in existing condominium documents were tossed out unless affirmatively readopted, and then the maximum term could not exceed two years.

- Co-owners of units could not serve as directors at the same time, although as of 2010 this no longer applies in small condominiums of ten or fewer units, or if no other persons volunteer to serve.

- The terms of directors expire at the next annual meeting and no longer automatically extend until their successors are elected and qualified.

This latter provision in particular has been problematic and evidences a serious lack of forethought by its drafters. Consider the following scenarios, neither of which are too unusual. In the first, there are no candidates for the Board. No one has bothered to place his or her name in nomination. In the second, although there are sufficient candidates to warrant an election, less than twenty (20%) percent of the members cast ballots in the election. Prior to 2008 neither scenario presented a problem because the Condominium Act tracked the not-for-profit corporation act (Chapter 617, Fla. Stat.) by simply extending the terms of the sitting directors until such time as their successors were elected and qualified.

However, with the recent revisions to the statute that now end each director's term at the next annual meeting, many Florida condominium associations face the prospect of having no Board at all. In that event the Condominium Act now contemplates that the Association could be put into receivership, a very expensive and wholly unnecessary remedy that is not warranted simply because of unit owner apathy.

In a receivership the court appoints someone to operate the Association and to exercise all of the Board's powers and authority under court supervision and at a high hourly rate. It is not uncommon for receivers to hire their own legal counsel and CPA, each of whom gets paid by the Association. The cost of a receivership can be akin to the salary commanded by an elite wide receiver on a football team.

To avoid this unnecessary expense, at least until the statute can be corrected to better deal with these scenarios, it is recommended that the annual meeting and election be adjourned or recessed to another date and time, to allow candidates to be solicited and enough votes obtained to have a valid election.

Recent Cases

- **Court holds that installation of an electronic gate with remote control does not interfere with free and unencumbered access over the land on which the gate sits.**
- **Creditor claiming ownership of HOA common areas enjoined from taking control of the common areas until a court can determine the value of betterments made by HOA.**

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RECENT CASE SUMMARIES

In **Gilliand vs. Heiderich**, 35 Fla. L. Weekly D2460a (Fla. 5th DCA, November 5, 2010), the legal issue involved the language of an easement over property located in rural Marion County. In 2003, Gilliand purchased a five-acre parcel of land that was landlocked and required an easement over property owned by Heiderich's successor in title. A fifty-foot wide easement for ingress to and egress from State Road 19 was created for "free and unencumbered access to the Gilliand's property." Heiderich purchased the property subject to Gilliand's easement. Not long after her purchase, Heiderich discussed with Gilliand her plan to erect an electronically controlled gate across the shared common driveway to insure that horses being kept on the property would not wander onto the adjacent roadway. The gate would be activated by a remote control and would have a keypad or manual override. A plate beneath the keypad displayed the entry code for visitors and delivery personnel. The gate's remote control was solar-powered with a battery backup and featured a manual override. The trial court entered summary judgment in favor of Heiderich and declared that the language of the easement did not prevent the erecting of the gate and that the gate was not an unreasonable interference with Gilliand's access easement. On appeal to the Fifth District Court of Appeal, the appellate court noted that the issue on appeal was whether the language of the easement providing for "free and unencumbered access" precluded construction of a gate. The appellate court held that the language of the easement did not preclude erection of a gate so long as the gate does not interfere unreasonably with the right of way. The appellate court further noted that parties who want to keep an easement free of gates or other obstacles can specifically express that intention in the document creating the easement.

In **Centennial Homeowners Association, Inc., vs. Dolomite Co., Inc.**, 35 Fla. L. Weekly D2271b (Fla. 3rd DCA, October 13, 2010) Association appealed the trial court's denial of its motion to stay certain provisions of a summary final judgment entered in favor of Creditor. The judgment ejected Association from real property and required Association to remove "any and all structures and appurtenances." Association is a homeowners association operating in Dade County. The developer of Association abandoned the community before it was completed and liquidated its assets in bankruptcy, with the exception of the common areas claimed by – but not deeded to – Creditor. Unpaid construction contractors filed suit against developer and won default judgments. In partial satisfaction of the judgments, the common areas were sold at auction. Four years later, Creditor brought an ejectment action seeking to have Association vacate the property and remove its gates, fences, and structures. Creditor obtained a summary judgment in its favor, which Association appealed. The order of ejectment was stayed pending the resolution in the first appeal. Two months after an adverse judgment was entered against Association in the first appeal, Association filed a betterment action in the trial court. Association then filed a motion to extend the stay pending a resolution of the betterment petition. The trial court denied that motion and issued a writ of possession in favor of Creditor expressly enjoining any further action by Association to impede Creditor's exclusive possession, and required Association to remove the improvements delineated in the summary final judgment within thirty days. On appeal to the Third District Court of Appeal, the appellate court noted that the betterment cause of action was created to prevent unjust enrichment by compensating a party that has lost an ejectment case for any value of improvements that were made by the losing party and are received by the successful party along with the land. The appellate court noted that it is axiomatic that the permanent improvements must exist and be in place in order for Association to exercise its right to utilize the betterment statute. The clear provisions of the statute make the trier of fact in the betterment case responsible for assessing the present value of the permanent improvements. If the improvements have already been removed prior to the betterment proceeding reaching the valuation phase, no such assessment can reasonably be made. As such, the appellate court noted that Association would suffer irreparable harm if the stay were not granted and the structures were removed. The appellate court further noted that Creditor would not suffer harm if the walls, gates, fences, guardhouses, sidewalks, storm drains, speed bumps, fountains, security systems, landscaping, lighting, electrical fixtures, and roadway surfacing were allowed to remain during the pendency of the betterment action. Therefore, the appellate court reversed the trial court and granted a stay pending resolution of the betterment action.

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