

COMMUNITY COUNSEL

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Recent Cases

- ◆ **Condo didn't deny access to official records when owner declined to continue inspection a second day and demanded that next inspection occur at office of owner's attorney.**
- ◆ **5th DCA following Coral Lakes precedent, rules that application of Sec. 720.3085, Fla. Stat. To existing mortgage unconstitutionally impairs an existing contract.**

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DEREGULATION – PANACEA OR POISON

As many now know, the predominately one-party Florida legislature has tried to channel the policies of its new Governor and proposed some bold “new” initiatives designed to (1) contract the size of state government, (2) provide some relief for state taxpayers and (3) encourage business growth in this state. The changes relevant to community associations were embodied in a single bill, called HB 5005. In its original form it exceeded 200 pages.

While this bill proposed to deregulate many professions and portions of Florida's economy, for community associations it including trashing state licensing and regulation of association managers, abolishing the condominium arbitration program and doing away with the Division of Florida Condominiums, Mobile Homes and Timeshares.

It doesn't take much research, experience or even general awareness to engender head scratching and amazement at the naivety and singlemindedness of these proposals. Briton Edmund Burke reminded us in the 1700s that “Those who do not know history are destined to repeat it.” These proposals indicate that the same can even be said about the failure to observe recent events.

For example, state regulation of association managers came into being because of a series of high profile thefts and cons perpetrated on both Florida and out-of-state consumers in the early 1980s, continuing a long series of land-related swindles dating back to the 1920s for which Florida is justifiably infamous. How removal of the requirement for manager licensure would help the business climate in Florida is not clear, unless the state's intention is to officially foster a wide-open, anything-goes climate last seen in California in the 1840s. The wisdom of such a move seems negligible at best.



The same is true for the condo arbitration program, which faced a second serious attempt in less than a decade to decommission it. Yet without this program, many more disputes between associations and owners – now diverted into a system handling them quickly, cheaply and professionally – would flood into a court system already straining under budget cuts and inadequate staffing. How this would help accomplish the three objectives hailed by the bill's sponsors is, again, unclear.

So can Florida associations breathe easier and have more confidence in their state government now that HB 5005 has passed through committee and been trimmed to just over 60 pages in length? We think not.

The irony here is that it probably was not the loud public outcry that caused cooler heads to prevail. Rather, it appears to this observer that it was big business that saved the day this time. Specifically, businesses like Disney's timeshare operations and their lobbyists, were out front and very vocal in their opposition to the proposed deregulation, perhaps perceiving (rightly) that this would cause chaos in their industry and subject them up to competition from any number of unqualified and possibly shady get-rich-quickers.

State government has turned its back on the Florida consumer, making plans to leave injured consumers with little governmental protection in the name of kick-starting the economy; with little recourse but to the courts, the power of which it is also proposing to emasculate. Since when does a business-friendly climate have to be mutually exclusive from basic fairness and protection of rank-and-file citizens? Didn't this country fight an industrial revolution as well as a political one, and didn't we learn anything from it?

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RECENT CASE SUMMARIES

In **In re: Petition for Arbitration: Dowty vs. Bayside Condominiums Association of Brevard, Inc.**, (Whitsitt, Summary Final Order, January 24, 2011), Owner filed an arbitration petition alleging that Association failed to timely permit an inspection of Association's official records. Owner sent a letter to Association dated August 27, 2010, asking to inspect and copy 34 categories of Association records. Association received the letter on August 31, 2010. The parties scheduled a records review to take place on September 14, 2010. Both parties attended the September 14 records review. However, Owner asserted that the records made available for inspection and copying were only a portion of the records requested. Association offered to extend the records inspection to the following day. Owner refused to return the following day, stating that it was pointless to do so because Association would not be able to make available on the following day the remaining documents. Subsequently, Owner sent another letter dated September 28, 2010 which sought similar records to the earlier request. However, the letter also demanded that Association produce the documents at the offices of Owner's attorney, at Association's sole expense, and with an option to view the original documents upon request. In granting summary judgment for Association, the arbitrator noted that the official records must be made available within 10 "working days" from receipt of the request. September 14 was the 9th "working day" and the following day was the 10th "working day" due to the Labor Day Holiday falling between the receipt of the request and the date of the inspection. Owner's refusal to return on the second day did not demonstrate a "willful failure to comply" on the part of Association. Furthermore, Owners second demand to inspect was not in accord with the applicable statutory language that records must be made available on the condominium

In **Ecoventure WGV, Ltd., vs. Saint Johns Northwest Residential Association, Inc.**, 36 Fla. L. Weekly D530a (Fla. 5th DCA, March 11, 2011), Association sought to collect unpaid assessments from a mortgagee who purchased the unit at a foreclosure sale. In 2001, Mortgagee sold the real property in Association to a Purchaser, and took back a purchase money first mortgage. Purchaser defaulted on the loan and in 2008, Mortgagee was issued title after being the high bidder at the foreclosure sale. Subsequently, Association demanded Mortgagee pay more than two year's worth of assessments incurred by defaulting Purchaser. Association asserted that its Declaration and Section 720.3085, Fla. Stat., imposed an obligation on Mortgagee to pay the delinquent assessments. The trial court found that section 720.3085, Fla. Stat. operated "outside of the declaration" and imposed "an additional requirement on a certain class of property owners over and above what the declaration may require." Because Mortgagee was a parcel owner as defined by section 720.3085(1), Fla. Stat., the trial court concluded it was jointly and severally liable for the unpaid assessments. The trial court rejected Mortgagee's argument that imposing such liability was a retroactive application of the statute because liability only attached for unpaid assessments that were due at the time title was transferred and Mortgagee obtained title after the statute's effective date. The trial court also found that applying the statute did not impair Mortgagee's rights under its mortgage because the statute permitted it to seek recovery from the defaulting Purchaser for any amounts it paid. On appeal to the Fifth District Court of Appeal, the appellate court found dispositive the argument that applying section 720.3085, Fla. Stat. impaired Mortgagee's contract rights. The trial court had concluded the statute could be applied because it did not impair Mortgagee's rights under its mortgage with defaulting Purchaser. However, the appellate court found that this was not the appropriate contract upon which to focus. Specifically, Association made two promises by and through its Declaration to induce lenders to extend mortgages on property subject to the Declaration. First, it promised that any lien for unpaid assessments was subordinate to any mortgage that was "perfected by recording" before its claim of lien was recorded. Second, it promised that any mortgagee who subsequently obtained title to the property "by deed in lieu of foreclosure. . . ." would not be entirely responsible for the unpaid assessments. The appellate court found that when Mortgagee extended its mortgage to defaulting Purchaser in 2001, its rights under the Declaration vested. Imposing section 720.3085, Fla. Stat., which was enacted after the mortgage was extended, completely alters Mortgagee's vested rights by making it jointly and severally liable with the "previous parcel owner for all unpaid assessments that came due up to the time of transfer of title." Accordingly, the appellate court reversed