COMMUNITY COUNSEL

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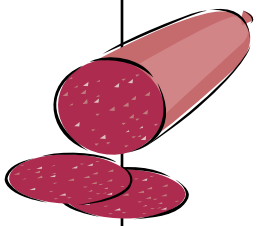
FLORIDA LEGISLATURE SLICES AND DICES

The Florida Legislature laid out more than its usual load of sliced and processed meat stuffs this year, providing nothing of needed substance to help typical community associations while adding much to their burdens, including a heaping plateful of ineptly worded statutes and conduct that becomes gratuitously regulated. Most grievous in this regard is HB 7119, which passed both houses and awaits action by the Governor. There is no real suspense here, though. So far, this Governor has a 100% record of signing bills that hurt community associations unless they are opposed by the heaviest hitters in the state, i.e. the Disneys and the Marriots. There appears to be little chance of such opposition in this instance so this statute is certain to become law. So what does it do, or rather, to whom does it do what?



For managers, it makes ***any*** violation of ***any*** community association statute while performing a management contract a disciplinary offense. By this impossible standard, I'm sorry to say that I haven't yet met a manager who is free of a disciplinary violation.

For associations, it first allows owners to inspect and copy records at no charge by use of a "*... smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records...*" Unfortunately the language fails to specify that the device in question must belong to the inspecting owner. So how long will it be before an owner demands use of such a device owned or controlled by the association? 3…2...1...?

Most insidiously, the bill adds a reporting requirement for HOAs, mandating that they identify and report themselves and a lot of information about themselves to the Division no later than November 22, 2013, the 50th anniversary of the assassination of JFK. This is a classic nose under the tent flap tactic, and a compromise from the text of the original bill, SB 590, which called for full regulation of HOA by the Division. Thus, this reporting requirement, which expires in 2016, three years after the reporting has occurred, "*...unless reenacted by the Legislature*," appears to be a deadline for action. The proponents of state oversight of HOAs have given themselves the next three years to pass full regulation of HOAs or die trying. It should surprise no one that this effort is led by CCFJ or however they have rebranded themselves these days.

The bill goes on to extend to HOAs the need for elected directors to certify that they have actually read their governing documents or have taken a division-approved course for directors within 90 days of taking office. It also includes provisions on transactions in which there may be a conflict of interest, even though the law on those transaction is already in place, and it requires removal of those "charged" with embezzlement or theft (but only felonies, not misdemeanors!). Like condominiums, HOAs must now also carry fidelity bond insurance on those who control or disburse association funds.

Finally, there is some developer regulation based on recent cases, but the regulation seems to slightly favor the developers by limiting the reach of future court cases. One wonders – will we ever learn?

RECENT CASES

- HOA DOCUMENTS MANDATED THAT THE BOARD OF DIRECTORS HAD AN AFFIRMATIVE DUTY TO ACT TO EXTEND COVENANTS BEFORE MRTA COULD EXTINGUISH THEM.
- ASSOCIATION COULD NOT ACT TO ASSIGN ITSELF DEVELOPER'S RIGHTS AFTER THE DEVELOPER HAD PREVIOUSLY ASSIGNED THOSE RIGHTS TO ANOTHER ENTITY, THEREBY LEAVING NOTHING LEFT TO BE ASSIGNED.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

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RECENT CASE SUMMARIES

In **Southfields of Palm Beach Polo and Country Club Homeowners Association, Inc., et al., vs. McCullough**, 38 Fla. L. Weekly D862a (Fla. 4th DCA, April 17, 2013) Owner brought an action to compel Association's board of directors to take the necessary steps to preserve the declaration of restrictions governing the property. Without such board action, the restrictive covenants governing Association would have begun to lapse and ultimately expire pursuant to the Marketable Record Titles to Real Property Act ("MRTA"). In 1981, the declaration was created to impose certain covenants, conditions, and restrictions within Association. The declaration states that its "*provisions …. shall be liberally construed to effectuate the purpose of creating a uniform plan for the development and operation of the Property*." The declaration created a homeowners association whose stated purpose, according to its articles of incorporation, was "to provide for the regulation, maintenance, and preservation of the development." The declaration, intending to preserve the equestrian nature of Association, required that the board exercise its powers to maintain the declaration until and unless ninety-five percent of landowners voted to dissolve the declaration and disband the Association. The trial court granted an injunction and writ of mandamus to compel Association's board of directors to preserve the Declaration. On appeal, the Fourth District Court of Appeal noted that MRTA was enacted in 1963 to simplify and facilitate land transactions. Section 712.03(2), Fla. Stat., furnishes an exception from MRTA for, among other things, any covenant or restriction preserved by the filing of a property notice in accordance with the provisions hereof. Homeowners associations may preserve any covenant or restriction by recording, during the 30-year period immediately following the effective date of the root of title, a proper notice in writing. The appellate court concurred with the trial court and found that it would be problematic for Association to be covered piecemeal, some with restrictions and some without. The trial court also correctly concluded that the language of the declaration itself makes it clear that "the board of directors is mandated to, and has a duty to, protect the restrictive covenants running with the land." Based upon the foregoing, the appellate court affirmed the ruling of the trial court and ordered the board of directors to preserve the covenants and restrictions contained in the declaration.

In **Nieto, et al., vs. Mobile Gardens Association of Englewood, Inc.,** 38 Fla. L. Weekly D835b (Fla. 2nd DCA, April 12, 2013) Association brought suit against a single Unit Owner seeking to remove from the subdivision two minor children residing in their home. Thereafter, other Owners brought suit against Association for declaratory judgment, contending that Association did not have the power to enforce the amended restrictions. The two cases were consolidated for trial. Association is a mobile home subdivision located in Englewood, Florida, and was created in 1960. The developer of the subdivision recorded standard deed restrictions that regulated the construction of buildings and maintenance of the property. The 1960 restrictions did not require membership in a homeowners association, nor did they have an age requirement for residency. In 1963, Mobile Gardens Association of Englewood, Inc. (Mobile Gardens I), was incorporated. Mobile Gardens I homeowners association consisted of property owners who joined voluntarily. In 1972, the developer assigned the administration and enforcement of the deed restrictions to Mobile Gardens I. In 1974, Mobile Gardens I was administratively dissolved. In 1991, the homeowners association formed a new corporation, also under the name Mobile Gardens Association of Englewood, Inc. (Mobile Gardens II). This corporation had a new charter, articles of incorporation, and bylaws. Neither the articles nor the bylaws contained restrictions or suggested that Mobile Gardens II was a continuation of Mobile Gardens I. In forming Mobile Gardens II, no effort was made to revive the previously dissolved corporation. In 2000, Mobile Gardens II recorded a new document purporting to assign to it the developer's right to administer and enforce the deed restrictions. It then began a series of actions designed to revive and amend the 1960 deed restrictions in order to transform Association into an age-restricted community. The amended restrictions also required all owners to become members of the homeowners association, and they gave Association the power to assess fees, levy liens for delinquent assessments, and foreclose on properties with outstanding liens. The trial court ruled in favor of Mobile Gardens II and entered a permanent injunction compelling Owners to remove the minor children and finding that Mobile Gardens II had the power to enforce the covenants. On appeal to the Second District Court of Appeal, the appellate court disagreed and found that Mobile Gardens II had no standing to enforce the covenants and restrictions. Mobile Gardens II argued that by virtue of the 2000 assignment it was the assignee of the developer, but this argument did not take into account the fact that the developer had already assigned those rights to Mobile Gardens I in 1972, leaving it nothing to assign in 2000.

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