COMMUNITY COUNSEL

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THE PROPER AND IMPROPER USE OF E-MAIL

A question that frequently arises in our community association law practice involves the lawful and proper use of e-mail. In many ways the availability of e-mail is like a rich dessert: directors are free to indulge, but all too often they overdo it and trouble results. As with anything else in life what is permissible can easily become impermissible; the only distinction is a question of degree. After years of on-and-off trouble in this area, a proposal is now in bill drafting in the Florida Legislature which would add the following language to the Florida Condominium Act:

Members of the board of administration may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail.

We feel that this language is intended to clarify existing law, not to change it. If adopted, the provision would provide some necessary guidance to associations. But does it adequately explain when the proper use of e-mail becomes an improper use? We suggest not.

A robust democracy, including the local one that runs a community association, works best when there is a free and unrestricted flow of ideas and information. That exchange also is consistent with the fiduciary duty that attaches to the conduct of an association's affairs in that the fiduciary is supposed to operate on the best available information. In that regard, e-mail is a fast and convenient vehicle for the swift dissemination of facts and arguments. Accordingly, we strongly recommend that board members use e-mail between meetings to communicate among themselves. In doing so the directors are free to inform, argue, suggest, speculate, brainstorm, persuade, propose and educate the other directors. However, the very bright line that we urge all clients to observe is this: after all is written and sent, no director should ever commit to a particular position. In our opinion when a director firmly commits to a position, that is tantamount to voting for it, even if no formal email vote is taken. The standard action for every director should be to reserve judgment for a formal board meeting.

All of the three of Florida's major community association laws are in part consumer protection laws that protect the membership from their governing boards. Among the protections in Chapters 718, 719 and 720 is the members' right to attend board meetings, to comment upon agenda issues, and to observe the Board's decision making process. Prior commitments made in emails — whether expressly stated or hinted at — are completely inconsistent with these rights because they rob the members of the ability to observe the decision making process. At minimum, no director should make a decision on any issue without first hearing from the interested membership. Thus, while e-mail is a useful tool to enlighten all directors, the content of emails should never be the basis for a final decision until a formal vote of the board, sitting as a committee of the whole is called at a duly noticed meeting. The takeaway is this: when using email always reserve your judgment.

Note that the proposed language contains a complete prohibition on email voting, without an "emergency" exception. This indicates that email is never intended to be a substitute for other ways of attending a meeting, including by such methods as speaker phone, video conference or in person attendance.

RECENT CASES

- COURT ISN'T IMPRESSED AND REFUSES TO OVERTURN FORECLOSURE BASED ON CLAIM THAT OWNER'S NEIGHBOR TOLD HIM TO IGNORE THE ACTION.
- COURT CLARIFIES THAT THERE IS A FIVE (5) YEAR WINDOW TO CHALLENGE AN AMENDMENT, STARTING FROM THE DATE OF RECORDING. HOWEVER, CLAIM BY OWNER WHO PURCHASED LATER WAS TIMELY TO RESOLVE CONFLICT BETWEEN AMENDMENTS.

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 **Chase Financial Services, LLC vs. Edelsberg, et al.,** 39 Fla. L. W. D26a (Fla. 3d DCA, 12/26/2013) Bank was the purchaser of a home at a foreclosure sale which also foreclosed a lien for non-payment of Association fees. Owner and Association entered into a consent judgment which provided Owner a right of redemption but expressly limited that right until the filing of a certificate of sale. The property was sold to Bank at a public sale on February 8, 2013. A certificate of sale was recorded by the clerk. Seven days later Owner filed a sworn objection to the clerk's sale in which he requested that the sale be set aside because he had tendered payment and had been assured there would be no sale. The objection was ultimately set for an evidentiary hearing. Owner's testimony revealed that he had the ability to satisfy Association's lien, but as of the date of the hearing Owner had not tendered payment, as represented in his "sworn" objection and he had not done so purportedly because a neighbor had told him not to worry about it, that such sales never go through. The property manager confirmed that no tender of payment had ever been offered by Owner. The neighbor denied ever telling Owner not to worry about the foreclosure sale. The trial court, after hearing all the testimony, granted Owner until 4:30 on the day of the hearing to tender payment in full. The trial court also set a hearing for the following Monday to review whether tender was paid. Upon being advised that payment in full was timely paid, the trial court granted the motion and entered an order setting aside the sale. Bank, the purchaser at the sale, appealed the decision to the Third District Court of Appeal. On appeal, the appellate court noted that case law consistently requires litigants to allege one or more adequate equitable factors and make a proper showing to the trial court in order to successfully obtain an order that sets aside a judicial foreclosure sale. Owner alleged two grounds in support of his motion. The first, that he tendered payment, was proven to be untrue. The second, that he was told by some unidentified person not to worry about the sale, amounted to little more than a failure of Owner to act diligently. Thus, the appellate court reversed the judgment of the trial court.

In **Harris vs. Aberdeen Property Owners Association, Inc., et al.,** 39 Fla. L. W. D193a (Fla. 4th DCA, 1/22/2014) Owner took title to her property in 2006. Owner's property was subject to both a Master Association and a sub-Homeowner's Association. At the time Owner took title to her property, the governing documents of Homeowner's Association, as amended in November 2004 and recorded in December of 2004, **did not** require membership in a golf and country club. However, Master Association's governing documents, as amended and recorded in June 2004, **did** require mandatory club membership. Because of this conflict, Homeowner's Association sued Master Association in 2005. In 2010, Homeowner's Association and Master Association entered into a settlement agreement which provided for non-fee, non-privileges membership by Homeowner's Association members. It also contained a provision that appeared to require homeowners who took title after October 30, 2004 and who had not joined the golf club or paid club dues to retroactively join the golf club as of the date they took title and to pay, in increments, fees that had accrued from the date they took title to the date of the settlement agreement. In 2010 Owner brought suit against Master Association and Homeowner's Association seeking declaratory relief regarding membership in the golf club. Count I of Owner's complaint sought declaratory relief, and requests clarification as to whether Owner is required to join the golf club and pay all fees and dues from 2006 onward. Count I also asks the trial court to "declare the mandatory membership amendment improperly enacted. . . ." Count II alleged that Homeowner's Association breached its fiduciary duty by entering into the settlement. Count III sought injunctive relief. In its answer, Master Association raised the affirmative defense of statute of limitations. The trial court entered final summary judgment against Owner and found that a five-year limitations period applied and that the cause of action began to accrue in 2004 when Master Association's amendments were recorded. On appeal to the Fourth District Court of Appeal, Owner argued that the limitations period started to run in 2006 when she purchased her property, not in 2004 when the amendments were recorded. The appellate court affirmed in part and reversed in part the trial court. Specifically, the appellate court affirmed the trial court's holding that the statute of limitations with respect to a challenge to the validity and the enactment of amendments is five (5) years and begins to run from the date the amendment was recorded. However, as to Owner's request for relief regarding the conflicting 2004 Master Association and Homeowner's Association amendments, her claim did not accrue until she purchased her home in 2006, and thus her action for declaratory relief filed in 2010 was timely.

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