COMMUNITY COUNSEL

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RECENT CASES

- COURT CONSTRUED ARC PROVISION AS NOT REQUIRING ASSOCIATION APPROVAL OF LANDSCAPE IMPROVEMENTS WHERE DOCUMENTS DID NOT REFERENCE APPROVAL OF SUCH IMPROVEMENTS.
- COURT STRAINS TO FIND THAT AN AMENDMENT TO ORIGINAL RESTRICTIONS WAS SUFFICIENT TO PREVENT THEM FROM EXPIRING UNDER MRTA.

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.

TWO AREAS *NOT* IN NEED OF REFORM

The 2015 Florida Legislative session kicks off in early March. As usual the Republican party is firmly in control of both houses and the Governor's Mansion and as in years past now begins a ritual in political wonderment, watching the bazaar of political prizes being drafted, paraded, pondered and disposed of for good or ill. The filed bills impacting community associations already range from the sublime to the ridiculous.

Two in particular stand out for their share of scorn. The first is SB1158(Stargel). This bill would reduce the "statute of repose" from its current ten years to seven years. (In 2006 it was cut from 15 to 10 years.) This represents an absolute and unconditional cut-off of all rights to bring claims for construction defects, whether known or unknown, knowable or unknowable seven (7) years after the date of possession by the owner, the date of C.O., the date of completion of the construction contract or the date of abandonment of construction, whichever is latest. Considering that a developer need not turn over control to property owners for seven years, this could operate to prevent construction defect claims entirely.

Obviously intended to stiff the homeowner and bless the condo developer, it will encourage shoddy construction practices. No semblance of good public policy can be seen as coming from this bill, none.

The second piece of preposterous proposals comes from an annual source of such goodies, Senator Hayes. His 2015 offering is SB1308 and it is his annual banana republic-style contradiction: coming from the "less government intrusion/no new taxes" party, it nevertheless seeks to tax all homeowners $2.00 per door and impose a governmental overlord to regulate their communities and solve all their problems for them, even though it is completely unproven that they are incapable of solving their own problems for themselves.

This bill would turn HOA governance topsy turvy, making recall disputes amenable to mediation (without indicating who the mediating parties would be) and to make all other disputes, including collection of assessments, subject to arbitration by the Division. Those disputes that are now subject to mediation could be arbitrated, although the mechanism for selecting one or the other is not stated, nor is the method of determining whether a collection matter goes to court under Section 720.3085, Fla. Stat. (and the governing documents) or under this proposed alternative. Senator Hayes continues to be a shill for a distinct and vocal minority of citizens—those who mistrust and dislike their community associations but nevertheless choose to live in them.

It is odd that such people find comfort in bigger, more impersonal state authority over local, personal neighborhood governance. Perhaps it is indicative of an inability to deal with people one-to-one or a desire to dominate them with outside resources rather than to compromise.

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RECENT CASE SUMMARIES

In **Bendo vs. Silver Woods Community Association, Inc.**, 40 Fla. L. Weekly D358b (Fla. 5th DCA, February 6, 2015) Association filed suit against Owner to enforce Association's declaration of covenants and restrictions. Owner installed a new septic drain field, which all but destroyed the landscaping in his front yard. Owner redesigned the landscape to include "hardscape" features, vegetation, and mulch, but no grass. Owner submitted a plan to the ARC for the hardscape changes, which included a retaining wall. Association approved the hardscape changes. After delays in the progress of the project, Owner submitted a plan for the "soft" aspects of the landscape design, which Association rejected because it did not include a grass lawn. The dispositive issue was whether the covenant in question unambiguously required Association's approval for Owner's non-structural changes to his lawn. The trial court determined that the "plain" language of the covenant required such approval and ordered Owner to submit a new plan for approval. Owner challenged the trial court's ruling in an appeal. On appeal, the Fifth District Court of Appeal noted that covenants which run with the land, as the one in this case, must be strictly construed in favor of the free and unrestricted use of real property. Accordingly, an ambiguous covenant must be construed in favor of the landowner. The covenant at issue here provided with regard to ARC approval that "*no building, fence, wall or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made, unless it is . . . . approved in writing as to harmony of external design and location. . . .*" Association conceded that the soft aspects of Owner's landscape design were not a "*building, fence, wall or other structure.*" However, Association argued that the design constitutes an "*exterior addition to or change or alteration*" to the property. Association urged that the word "*therein*" is intended to refer to the word "*property*", not the phrase "*building, fence, wall or other structure*." Conversely, Owner argued that the word "*therein*" refers not the word "*property*", but instead to the phrase "*building, fence, wall or other structure*." The appellate court agreed with Owner and noted that the subjects of the sentence are "*building, fence, wall or other structure*". It appeared to the appellate court that the word "*property*" in the first part of the sentence was merely a reference to the land upon which the "*building, fence, wall or other structure*" was erected or maintained. It is only when additions or alterations are made to these structural components of the property that approval must be obtained. The appellate court noted that even if its conclusion regarding the construction of the covenant was not correct, it was, at a minimum, a reasonable construction of an ambiguous covenant and thus the court was obligated to construe it most favorably to Owner.

In **Barney vs. Silver Lakes Acres Property Association, Inc., et al.**, 40 Fla. L. Weekly D364a (Fla. 5th DCA, February 6, 2015) Owners brought suit against Association alleging that the Marketable Record Title Act (MRTA) extinguished Association's restrictions. Association's restrictions were recorded on November 4, 1968. Amendment One was recorded on April 7, 1982. Amendment One adopted the original restrictive covenants and provided for an annual maintenance assessment that obligated each property owner to pay $12.00 per year (later raised to $50.00 per year) to maintain the streets, street lights, beaches, marinas, and other purposes authorized by Association. Owners filed suit seeking declaratory relief asserting that Amendment One had been extinguished by MRTA which provides that certain restrictions are extinguished after thirty (30) years. Association argued that the restrictions fell within the statutory exceptions found in the statute. The trial court held that the restrictions were not extinguished. The Fifth District Court of Appeal affirmed the trial court and held that references in the deeds to the restrictive covenants and to assignment of the obligations of the Owners of each lot with regard to payment of Association obligations were sufficient enough to avoid extinguishment of the covenants under MRTA.

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