COMMUNITY COUNSEL

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RECENT CASES

- IN AN IMPORTANT CASE, COURT HELD THAT SEC. 720.3085 DOES NOT APPLY IN DEROGATION OF THE PROVISIONS OF THE RECORDED DOCUMENTS, AND 3RD PARTY PURCHASER WAS NOT REQUIRED TO PAY BACK ASSESSMENTS PER THE STATUTE.

- COVENANTS REQUIRING PARCEL TO BE USED ONLY AS A GOLF COURSE AND TO BE SOLD ONLY AS A SINGLE PARCEL, WAS (A) NOT A MANDATE FOR OPERATOR TO STAY OPEN AND (B) AN UNREASONABLE RESTRAINT ON ALIENATION.

2015 NEW LAW ROUND-UP — PART 2

On June 2, 2015, the last date available to act, the Governor signed HB 791 into law. Effective July 1, 2015, this bill amends portions of Chapters 718, 719 and 720, Fla. Stat. While nothing earth shattering is included, the usual tinkering, fixes and experimentation is included.

Most superficially impressive is a set of provisions purporting to allow electronic voting, useable with the prior consent of each participating voter. Inserted into each Chapter as a new section, the language seems to set some very high, if not currently impossible standards to meet in order to implement electronic voting. These obligations include the ability to authenticate the identity of the voter; the ability to ensure that a vote has not been altered; to be able to return a receipt for the vote; to be able to separate the vote from the voter's identity; and to ensure that the voting process conforms to the voting process used in the community's governing documents. Good luck with that.

The rest of this bill is more manageable and contains some helpful fixes and changes. Among these are:

1. The ability to accept copies of signed proxies without need of the original, and

2. A fix to the Condo insurance statute to plug a hole that has existed about the rules that apply when a casualty occurs that isn't insured, and

3. Limiting the catchall definition of condo official records by confining them to all "written" documents. Much discussion has already ensued as to what constitutes a "written" document. It's amazing this issue wasn't obvious to and addressed by the drafter of the change, and

4. Dispensing with the need for bylaw authorization to give meeting notices electronically. Only individual member consent is now needed, and

5. Legislatively overruling the 2014 decision in *St. Croix Lane Trust & M.L. Shapiro, Trustee v. St. Croix at Pelican Marsh* by reasserting the primacy of the various community association statutes' treatment of restrictive endorsements over the accord and satisfaction statute, Sec. 673.3111, Fla. Stat., and

6. Clarifying how the suspension and fining system works and the proper role of the impartial committee in all community associations, and

7. Once and for all correctly wording the statute to give effect to the concept that the number of suspended votes is subtracted from the total number of voting interests, thereby reducing the available pool of votes, and

8. Allowing a suspension of use rights to apply to all units owned by the unit owner in question, and

9. Extending (yet again) the sunset date of the Distressed Condominium Relief Act until 7/1/2018, and

10. Defining the Governing Documents in an HOA to include the adopted rules, as well as formally naming Chapter 720 as the "Florida Homeowner Association Act," and

11. Clarifying that the failure to record an HOA amendment within 30 days does not affect its validity.

12. Determining eligibility of delinquent HOA candidates as of the last day on which they could be nominated.

Until next year this is the sum of the changes to the Florida community association statutes proper. If history is an indicator, next year we certainly will be fixing issues found in the foregoing points.

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RECENT CASE SUMMARIES

In **Pudlit 2 Joint Venture, LLP vs. Westwood Gardens Homeowner's Association, Inc.**, 40 Fla. L. Weekly D1248a (Fla. 4th DCA, May 27, 2015), Owner purchased two properties in Association at a mortgage foreclosure sale. Association claimed that Owner was liable for all unpaid assessments that came due prior to Owner taking title and threatened Owner with lien and foreclosure if the assessments were not paid. Owner paid the assessments "under protest" and with full reservation of rights. Thereafter, Owner filed a lawsuit against Association for damages for breach of the declaration (count I) and declaratory relief (count II), alleging that any liens for past due assessments were extinguished by the mortgage foreclosure judgment, pursuant to the terms of the declaration. Both parties moved for summary judgment and the trial court entered summary judgment in favor of Association. On appeal, Association argued that section 720.3085, Fla. Stat., clearly mandates that Owner is jointly and severally liable with the prior owners for all unpaid assessments on the subject properties. Owner argued that 720.3085, Fla. Stat., did not impose liability upon Owner because the declaration's express terms were not invalidated by the statute nor waived by Owner, and imposition of the statute against the declaration's express terms would unconstitutionally impair Owner's contract rights. Section 720.3085, Fla. Stat., provides in relevant part that *a parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title*. However, the Legislature also recognized that contract rights have been created and the HOA Act was not intended to impair such contract rights. In the instant case, the declaration provided in pertinent part that *the personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them*. The declaration also provided that *a sale or transfer pursuant to a decree of foreclosure thereof, shall extinguish the lien of such assessments as to payments thereof which become due prior to such sale or transfer*. Association argued that the Legislature's adoption of Section 720.3085, Fla. Stat., effectively amended the declaration. The appellate court rejected Association's "amendment" argument, noting that the declaration did not contain any automatic amendment language based upon legislative action. Further, the appellate court noted that Section 720.3085, Fla. Stat., is not required to be adopted by Florida homeowner's associations. The appellate court therefore held that this statutory provision should not be applied to supersede the express terms of the declaration. Thus, the question for the appellate court was whether the statutory provision unconstitutionally impaired Owner's contractual rights under the declaration. In this case, the declaration clearly provided that the personal obligation for delinquent assessments should not pass to successors in title. Thus, the appellate court reversed the trial court and found that the statutory provision unconstitutionally impaired existing contract rights.

In **Vista Golf, LLC vs. Vista Royale Property Owners Association, Inc., et al.,** 40 Fla. L. Weekly D1123a (Fla. 4th DCA, May 13, 2015), Golf Course brought an action for declaratory and injunctive relief against Associations. In 1989, the original developer sold the golf course property to a third party. In connection with the sale, protective covenants were placed on the property "for the purpose of enhancing and protecting the value, desirability and attractiveness of the condominium communities. . . ." The covenants require the property to be operated as a golf course and required the entire golf course to be held, sold, or leased only as a single parcel. On appeal, Golf Course argued that the trial court properly invalidated two covenants, but improperly rewrote one of the covenants and added a restriction that the property could be used only as a golf course. On cross-appeal, Associations argued that the trial court incorrectly invalidated one of the covenants. The appellate court affirmed the trial court in all respects. The appellate court found that the trial court properly interpreted the covenants as restrictive covenants limiting the use of the property, *not* as an affirmative covenant to require Golf Course to operate a golf course business on the property. The appellate court affirmed the trial court's determination that Golf Course could not be affirmatively compelled to operate a golf course business on the property. As for Association's cross-appeal, the appellate court affirmed the trial court's ruling that the covenant requiring the golf course property to be held, sold, or leased only as a single parcel was an unreasonable restraint on alienation under the unique facts of this case.

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