COMMUNITY COUNSEL

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RECENT CASES

- SUMMARY JUDGMENT IS NOT THE APPROPRIATE VEHICLE TO RESOLVE QUESTIONS RELATED TO THE INTENT OF PARTIES WHEN DRAFTING DOCUMENTS, WHERE TESTIMONY IS REQUIRED TO DETERMINE THAT INTENT.
- ASSOCIATION HELD TO HAVE WAIVED ITS CLAIM AGAINST BANK FOR MORE THAN SAFE HARBOR AMOUNTS WHEN IT PLEAD ENTITLEMENT TO SAFE HARBOR PAYMENT IN BANK'S FORECLOSURE BUT LATER DEMANDED MORE.

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.

ELECTRONIC VOTING—IS IT REAL??

Among the changes coming out of the 2015 legislative session was the concept of electronic voting for Florida community associations. As is often the case, a new idea must go through several iterations before it becomes a workable system, and we suspect that is the case with this law. A careful review of the statute's provisions (which are the same for condominiums, coops and HOAs), shows the need for improvements and the existence of unaddressed concerns.

Chief among the major issues is the need to verify the identity of the voter while separating the identify of the voter from the vote itself. Both will have to be stored on the computers from which the election is being run, since the computer has to verify that it can communicate with the voter's computer and it must transmit a receipt in return for the ballot cast. While this may occur on the system of a third party vendor, eventually it must wind up back on computers under the control of the association because the statute also requires that the ballot be stored for later inspection and recount. Thus, the association's computers will need to have a list of voters who voted and a series of cast ballots. Both will be official records available for inspection and copying. Whether these can be reconnected is and will be very problematic.

A second issue is why these ballots are permitted to be counted toward a quorum. Particularly in condominiums and coops, this runs counter to the way elections have been conducted since 1991 and it creates a dangerous problem when the name of the members constituting the quorum aren't immediately known to all attendees and those people attending electronically can not also hold proxies for other members just like members who attended meetings in person.

Another problem is liability for errors that occur in the voting process. I would not want to trust any third party vendor to run an election for a client unless that vendor was willing to indemnify my client and agree to be responsible for all costs and expenses involved in or arising from a defective voting process.

The statute allows the board to establish rules governing the electronic voting process. One major rule that will be needed is a deadline for opting in or out of the electronic voting system. It must allow sufficient time to integrate the voter into the "regular" system or into the new electronic system without missing any deadlines. Compatibility of hardware and software will need to be established as well resolving any problems so as to allow enough time to authenticate new voters and establish the necessary security protocols.

We believe that further statutory - and perhaps complementary administrative rules - will be needed before a workable system of electronic voting for community associations becomes a reality in Florida. That day is not today.

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RECENT CASE SUMMARIES

In **Buie, et al., vs. Bluebird Landing Owner's Association, et al.**, 40 Fla. L. Weekly D1856a (Fla. 1st DCA, August 7, 2015) a dispute arose over the language and extent of an easement. Many years ago, H.A. Buie, Sr. (Developer), began developing property in Columbia County into two separate developments, Bluebird Landing and Bluebird Preserve. In 2002 Developer conveyed a twenty-four acre common area parcel in his first development, Bluebird Landing, to the Bluebird Landing Owners Association, Inc. (Landing Association). The parcel included frontage on the Santa Fe River with river access, a pavilion with picnic benches, a cabin, and other amenities. Developer reserved for himself, his heirs, successors and assigns "a perpetual non-exclusive easement and right of ingress and egress over and across all. . . .Common Areas." Developer later transferred this and other property rights to the Buie Family Trust. Developer then began development of the second property, the Bluebird Preserve (Preserve). Developer and the family trust conveyed a perpetual non-exclusive easement and rights "of use and ingress and egress" in the Bluebird Landing common areas to the purchasers of lots in the Preserve. The grant of those rights to owners in the Preserve caused Bluebird Landing to file suit against Developer and Preserve, because Bluebird Landing disputed that any rights of use had been reserved in its common areas. Title Company represented the lot owners in Preserve. Ultimately, Title Company settled with Bluebird Landing by paying $55,000 to quiet the right of Preserve lot owners to use the common area– basically giving Preserve lot owners what they thought they had purchased from Developer in the first place. Title Company then filed a cross-claim against Developer as subrogee of the Preserve's individual lot owners. Title Company later sought summary judgment against Developer, which was granted. On appeal to the First District Court of Appeal, the appellate court closely reviewed the language of the grant of easement and found that the easement itself was not clear in its terms. The appellate court found that the easement was ambiguous because its full scope is not defined, or knowable from the language of the reservation itself. Having determined that the language of the easement was ambiguous, the court reversed the summary judgment on the basis that the intent of Developer was an issue of fact to be tried by a jury, and not resolved on summary

In **Bank of America, N.A., vs. The Enclave at Richmond Place Condominium Association, Inc., et al.**, 40 Fla. L. Weekly D1950b (Fla. 2nd DCA, August 21, 2015) Bank filed an appeal of a trial court order denying Bank's motion to enforce the final judgment of foreclosure. Bank's predecessor in title to the mortgage initiated a foreclosure action naming Association as a defendant. The complaint alleged that Association "may claim some interest in or lien upon the subject property by virtue of any unpaid dues and/or assessments and said interest, if any, is subject and inferior to the lien of Plaintiff's mortgage." Association answered the complaint, admitted it held an interest and denied that its interest was inferior. Association also affirmatively pled that it was entitled to six months of unpaid assessments or one percent of the original principal balance of the mortgage, whichever is less. During the foreclosure, Bank was substituted as party plaintiff. The trial court ultimately entered a foreclosure judgment in favor of Bank and held that Bank's lien was superior to all claims of the defendants, except Association's claim for assessments that are superior pursuant to Sections 718.116 or 720.3085, Florida Statutes. Bank purchased the property at the foreclosure sale. Bank then requested an estoppel letter indicating that Bank owed $1421.34 in assessments. In response, Association claimed Bank owed more than $36,000 in unpaid assessments, interest, and various fees. Bank then filed the motion to enforce the final judgment. Bank argued that pursuant to the final judgment, its liability for unpaid assessments was expressly limited to the safe harbor amounts as specified in the statutes. The trial court found that Bank was not entitled to the safe harbor protections. On appeal to the Second District Court of Appeal, Bank argued that Association was estopped from taking a position contrary to that which it affirmatively took in the underlying foreclosure proceeding. The appellate court reversed the trial court and found that Association's affirmative plea of entitlement to only the safe harbor amounts was a waiver of any claim to a greater assessment figure.

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