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COMMUNITY ASSOCIATION NEWSLETTER

Spring 2014

CHAPTER 558, FLORIDA STATUTES: RESOLVING CONSTRUCTION DEFECTS FOR COMMUNITY ASSOCIATIONS

BY: CHRISTOPHER L. POPE, ESQ.

Chapter 558 of the Florida Statutes requires that community associations representing more than 20 parcels must serve a contractor with a Notice of Construction Defect referencing Chapter 558 at least 120 days prior to filing a lawsuit against the contractor. Most associations are unaware of this pre-suit notice requirement and exhaust considerable time and effort attempting to persuade the contractor to come back and fix the defect without ever sending the proper notice. Thus, by the time legal counsel gets involved with the dispute, much time has been wasted and the 120 day clock as not even been started. Then, once the attorney prepares and sends the proper Notice of Construction Defect to the contractor, the statute allows him or her 75 days to respond.

Fortunately, community associations can avoid the perils of Chapter 558 by requiring that all construction contracts expressly waive the requirements and procedures of Chapter 558. Absent a waiver, the Chapter 558 requirements and procedures are automatically incorporated into the contract and the contractor knows this. Therefore, before you sign a construction contract on behalf of your association, have competent legal counsel review the contract and draft a provision waiving the requirements of Chapter 558.

CIVIL RIGHTS – FLORIDA SUPREME COURT RULES PREGNANCY IS A PROTECTED CLASS

BY: CHRISTINA HARRIS SCHWINN, ESQ.

On April 12, 2014, the Florida Supreme Court in Delva v. The Continental Group, Inc., No. SC12-2315 (April 17, 2014) ruled that discrimination by an employer against a pregnant employee violates Florida's Civil Rights Act. The issue arose because the current version of Florida's Civil Rights Act does not specifically list pregnancy as a protected class which resulted in different outcomes for women who were discriminated against because they were pregnant depending upon appellate jurisdiction. The Florida Supreme Court's decision clarifies a split of authority that existed between the Florida Appellate Courts. Now, like under the federal civil rights act, women who become pregnant will have protections against discrimination under both federal and state law.

This decision is an important one that employers should know about and covered employers should amend their employment policies accordingly. Do you know if your business is a covered employer? The answer depends upon the number of employees employed by the employer. Generally, an employer that employs 15 or more employees during a 20 week period during the year will be a covered employer under both federal and state laws prohibiting discrimination based upon race, religion, sex, national origin, color, and disability. Employers with 20 or more employees are also prohibited from discriminating against employees who are 40 years of age and older.

DIRECTORS ARE WELL INSULATED FROM PERSONAL LIABILTY BUT SHOULD MAKE SURE THEY ARE ALSO ENTITLED TO A DEFENSE IN THE CASE OF A LAW SUIT

BY: SUSAN M. MCLAUGHLIN, ESQ.

Officers and Directors of any corporation owe a fiduciary duty to the corporation. Board members are shielded from personal liability under the business judgment rule. Poor judgment, in and of itself, will not give rise to personal liability in the context of a condominium or homeowners' association absent self-dealing or some other misconduct that goes far beyond poor judgment. The case of *International Insurance v. Johns,* 874 F.2d 1447, 1458 (11th Cir. 1989), is the standard explanation of the "business judgment rule" and states:

The business judgment rule is "a policy of judicial restraint born of the recognition that directors are, in most cases, more qualified to make business decisions than are judges." *Mills v. Esmark, Inc.,* 544 F. Supp. 1275, 1283 n.3 (N.D. Ill. 1982). The rule's essential premise is that "absent any wrongdoing, the board's business decisions should not be a fodder for in-depth ex post legal scrutiny." *Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 720 (Del. 1971); *Shlensky v. Wrigley,* 95 Ill. App. 2d 173, 183, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968). Raska, 93-030364 at 3.

Chapter 617, F.S., governs not for profit corporations and codified therein this is the business judgment rule concept. Section 617.834(1), *Florida Statutes,* provides in part:

> An officer or director of a nonprofit organization... is not personally liable for monetary damages to any person for any statement, vote, decision, or failure to take an action, regarding organizational management or policy by an officer or director, unless:
>
> (a) The officer or director breached or failed to perform his or her duties as an officer or director; and
>
> (b) The officer's or director's breach of, or failure to perform, his or her duties constitutes:
>
> 1. A violation of the criminal law, unless the officer or director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against an officer or director in any criminal proceeding for violation of the criminal law estops that officer or director from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the officer or director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;
> 2. A transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or
> 3. Recklessness or an act or omission, which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Even though the business judgment rule may provide protections against personal liability, directors should still be concerned about the cost of defending against a law suit. We strongly encourage clients to make sure that the governing documents require the association to defend its directors and officers. Further, the association should also maintain directors' and officers' liability insurance. Law suits are rare because of the high hurdles involved, but the expense of defending a case can be crippling to an association.

A BOARD IS NOT BOUND TO ENFORCE RESTRICTIONS IN ALL CASES

BY: SUSAN M. MCLAUGHLIN, ESQ.

The general rule is that an association can and should exercise business judgment in determining whether it is in the best interest of the association to litigate a use restriction issue with an owner. Considerations include the likelihood of success, costs and other factors including whether the violation is causing major harm to the common interests. Therefore, the Board need not and should not get involved in disputes between neighbors concerning excessive noise and similar issues.

Section 718. 303, F.S. governing condominiums provides:

> Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association… (Emphasis added.)

Section 720.305, F.S. governing homeowners' associations has the same language as do the governing documents of most associations.

In the case of *Bronhard v. Opal Towers Condominium, Inc.*, Arbitration Case No. 94.0407, the Arbitrator explained:

> The legislature has determined that unit owners may petition for arbitration in cases where a board of directors fails to act in four cases, which include a board's failure to: 1) properly conduct elections; 2) give adequate notice of meetings; 3) properly conduct meetings; and 4) allow unit owners to inspect the association books and records. The failure to enforce a restrictive covenant is not among these types of disputes.

Also, as a general rule a Court will find that the Board has fulfilled its obligation under the business judgment rule when it relies on the opinion of an expert accountant or engineer, or in legal matters, an attorney.

HOMEOWNERS ASSOCIATIONS: AN ELECTION PROCEDURE PITFALL

BY: CHRISTOPHER J. SHIELDS, ESQ.

One of the most common mistakes we see in homeowners association elections is the assumption that the condominium election procedures can be used, when the Bylaws do not authorize the use of that procedure. Unlike condominiums where the election procedure is completely dictated by Florida Statutes (i.e. Section 718.112(2)(d) and Rule 61B-23.0021, Florida Administrative Code), with homeowners associations, the election procedure is simply dictated by the association's own governing documents and Section 720.306, Florida Statutes.

One of the major problems which could cause a legal challenge for homeowners associations using the condominium election process without having the authority to do so in their Bylaws, is determining the deadline for acceptance of candidates for the Board of Directors. The Florida Condominium Act (Chapter 718, Florida Statutes) sets forth strict procedures for when advance notice must be given to all members (i.e. the first 60 day notice) so that anyone who wants to run for the Board has an opportunity to do so, and imposes a cutoff date for nominations (i.e. not less than 40 days prior to the annual meeting) so condominium associations know whether they have enough candidates to require an election. As such, in condominiums, the nomination process for candidates running for the Board is closed well in advance of the date of the annual meeting.

While Section 720.306(9)(a), Florida Statutes, now provides that nominations from the floor are not required if the election process allows candidates to be nominated in advance of the meeting, the very same statute further provides that "elections of directors must be conducted in accordance with the procedures set forth in the governing documents..."As such, homeowners associations cannot simply use and employ a condominium-like election process unless

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the HOA Bylaws permit same. However, in contrast to the condominium statute, the homeowners association statute allows any member to nominate himself or herself as a candidate for the Board at the meeting where the election is held. This means that, unless the Bylaws specifically provide otherwise, nominations from the floor must be accepted from the floor and the homeowners association has no right to close the nomination of candidates to the Board before the election meeting.

Instead, the statute requires an HOA to conduct elections according to the procedures in the homeowners association's governing documents. Complicating matters further is the fact that Section 720.306(8)(b), Florida Statutes, now requires an HOA to use a condominium-like election balloting process with ballots "…placed in an inner envelope with no identifying markings and mailed or delivered… in an outer envelope…", but only "if the governing documents permit voting by secret ballot by members who are not in attendance…" (Please note that the statute refers to "secret" ballot and doesn't refer to an "absentee" ballot.")

Unfortunately, most HOA Bylaws allow elections to be conducted from the floor at the annual meeting, which means that nominations from the floor would need to be permitted and there would be no right to close the nominating process prior to the meeting. Moreover, members not in attendance at the meeting could still appoint a proxy to cast the absentee member's ballot at the meeting.

If your homeowners association is using an election process similar to that used by condominiums without any support in its Bylaws and is preventing nominations from the floor at the election meeting, then your association's election could be considered invalid and subject to legal challenge. Therefore, if your homeowners association plans on using the condominium election process and does not have the necessary authority in its Bylaws, you will need to amend the election procedures in the Bylaws to follow the condominium election process. If you are on the Board of an HOA or manage an HOA, and if you do nothing else this summer, it is imperative that you review your Bylaws and determine whether or not you are conducting elections correctly and whether your Bylaws need to be amended.

SUCCESSOR LIABILITY UNDER THE FAIR HOUSING ACT

BY: CHRISTINA HARRIS SCHWINN, ESQ.

The Eleventh Circuit Court of Appeals ruled in *Harding v. Orlando Apartments, LLC, et al.*, 2014 WL 1408634 (C.A.11 (Fla.)), that a successor owner in an apartment complex is not liable for a developer's failure to comply with the disability accessibility design and construction standards under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq. The Court based its decision on both practical considerations and the fact that the legislative history supported Congress' intent that the design and construction guidelines for disability accessibility apply during the construction phase.

INCORRECT DATE IN NOTICE OF ANNUAL MEETING: FATAL ERROR OR FULL STEAM AHEAD?

BY: MATTHEW P. GORDON

Often an association will use the prior year's annual meeting notice as a form for drafting the new notice for the current year's annual meeting. We have had cases where associations inadvertently dated the notice with that of the prior year's meeting and the mistake was not caught until after the fact. Is this mistake an inadvertent scrivener's error or a legally significant error rendering the notice defective?

The arbitration case of *Roduner v. Roll's Landing Condominium Association, Inc.*, Arbitration Case 2008-02-6960, is regularly cited for the proposition that scrivener's errors and immaterial objections do not invalidate meetings. In *Roduner,* a Board member whose recall was certified asserted that the association should not have counted certain votes. The Arbitrator rejected several challenges, including a ballot having the wrong unit number and the wrong date, and another ballot that had the wrong date (2009 instead of 2008), which the Arbitrator found to be immaterial and elected instead to certify the recall petition.

The bottom line is that the materiality of the error will determine whether the meeting notice is defective and would not withstand a legal challenge. However, this will depend on the facts and circumstances of each case. For example, is the error present in all of the meeting notices, including those mailed to the members and posted on association property or is the error only found in the second meeting notice? If the only claim of invalidity is that the prior year was used for the date, a court would likely find the error to be nonmaterial. However, if the meeting notice also contains other errors, such as incorrectly stating the wrong day of the meeting, a court would be more likely to rule that the error was material and that the notice should have been resent to all of its members.

If your annual meeting notice contains any errors, we recommend that the Association have its legal counsel review the error to determine whether a legal challenge may have merit or whether your association may move forward with its annual meeting as planned.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Association Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also practices Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner in the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Partner in the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is an Associate with the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including but not limited to governing document interpretation, covenant enforcement, collection of assessments, lien foreclosures, and general litigation matters. Please feel free to contact them via the e-mail addresses listed above.

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