



Corporate Procedure

Recording Rental Restrictions

by Michael J. Gelfand, Esq.

As a Florida community association director, do you know if you are immune from liability for actions taken as a director? As an owner, is a claim against an individual director warranted? A traditional threshold for a director claim, obtaining an improper “personal benefit,” no longer appears sufficient.

“Self-dealing” appears to be necessary for director liability. A recent Florida appellate decision, *Raphael v. Beach Point Cd'm. Ass'n., Inc.*, 34 Fla. L. Weekly D2438 (Fla. 4th DCA, November 25, 2009), examined whether a condominium association director’s alleged improper personal benefit removed a director’s immunity from suit. In 2006, Beach Point Condominium replaced the opaque balcony dividers, which offered privacy from neighboring unit balconies, with transparent dividers.

Desiring to restore their privacy, the Raphaels requested to alter their divider. The request was denied. The Raphaels filed a complaint against the Association and the individual directors alleging a breach of fiduciary duty. The Raphaels argued that the directors gained an improper “personal benefit” through an indirect improvement in their ocean views.

The trial court granted the individual directors’ motion to dismiss the suit against them. The appellate court relied upon several Florida

decisions holding that the improper "personal benefit" exception to director immunity requires "self-dealing." The mere fact the directors were also owners and derived a benefit from the alteration did not rise to the level of "self-dealing" when the benefit was indistinguishable from the benefit obtained by other unit owners.

Though the exact threshold for "self-dealing" is undefined, this decision allows us to conclude that improvements and alterations which merely benefit directors do not by themselves constitute improper "self-dealing" if the same benefit is obtained by all owners. Thus, if there exists no other evidence of "self-dealing," then directors can have some comfort level and owners can save unnecessary legal fees.

Corporate Procedure: Statute Amendment Cannot Alter Voting Arrangements Retroactively

How confident can you be in the association's "documents"? If your declaration specifies a method of voting, will an amendment to the Florida Condominium Act overrule the declaration? As you may suspect, it depends on the type of amendment to the Condominium Act.

Recently, a Florida appellate court in *Cohn v. The Grand Condominium Association, Inc.*, 34 Fla. L. Weekly D2302 (Fla. 3rd DCA, November 12, 2009), ruled that voting arrangements in a condominium association are of great importance; thus, an amendment to the Condominium Act seeking to retroactively change the voting rights was found to

be invalid as an impairment of contract. The Articles of Association and ByLaws for The Grand Condominium, adopted in 1986, provided specific requirements for the election of directors. In 1995, the Condominium Act §718.404 first articulated voting procedures for mixed-use condominiums. A 2007 amendment sought to retroactively change the statute.

Relying on earlier decisions, the appellate court helpfully laid out a three-part test for determining whether a statute, effective after recording of an association's "documents," can be applied retroactively. First, does the new statute deal with a broad economic or social problem? Second, does the statute operate in an area where regulation exists? Third, is the change drastic?

Applying the test, the court noted that associations are highly regulated and that there was no broad economic or social problem which the legislature was championing; therefore, the court determined that change was too drastic.

Thus, while the legislature may change voting procedures for Florida community associations, a line is drawn prohibiting the change of actual voting rights.

Online Auctions

Palm Beach County has joined several other Florida counties in eliminating in-person auctions of foreclosed properties. Foreclosure sales are set to go online in mid-January and aim to maximize the Clerk's efficiency in light of the large number of recent foreclosures. The \$70 Sale Fee, Proof of Publication, and other procedures are still required; however, stay tuned to see if the changes take effect as scheduled and how the new process is working.

Foreclosures: Backing Up and Hauled Away

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contents are unloaded.

What is this? Is it theft?

The property has likely been identified through the public records as in foreclosure. Perhaps the property was cased, a vernacular term for watched, to confirm that no one is living in the property.

Something is not right.

If you knew the property owner, and an unidentified truck pulled up, you would not wait for "proof" of a crime before calling the police. Why wait now?

The call is short and sweet. State the address and what you see occurring. There is no need to embellish or prove a crime. The police have seen this before and know what to do.

Association leaders and managers have been horrified to find what is left behind when the police are not called. Theft of appliances is just the beginning. Looters strip interiors, and many times engage in gratuitous vandalism. An examination may reveal a cracked window pane or door frame just removed. Thus, until repaired, the elements, bugs, and vermin have entry into the building and structure.

The lesson to be learned from association members is, if you suspect something bad is happening, call 911. Do not wait for evidence and "try the case." Delay only results in more damage, and reduction of property values!

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