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SELECTIVE ENFORCEMENT AND WAIVER; COURT LIMITS THEIR USE AS A VALID AFFIRMATIVE DEFENSE

BY: CHRISTOPHER J. SHIELDS, ESQ.

In the case entitled *Laguna Tropical, a Condominium Association, Inc. v. Barnave*, Case No. 3D16-1531 (Fla. 3d DCA, January 25, 2017), the Court limits the use of selective enforcement and waiver/estoppel as a viable affirmative defense.

The case involved the enforcement of two restrictions. The declaration of condominium prohibited:

"A unit owner from altering, modifying or replacing the interior of a unit without the prior consent of the Association's Board of Directors."

Another provision specifically applicable to flooring captioned "noise" stated:

"Unless expressly permitted in writing by the Association, no floor covering shall be installed in the units other than any carpeting or other floor covering installed by the Developer. In any event, each unit owner shall have the duty of causing there to be placed underneath such floor covering, so as to be beneath such floor covering and the concrete slab, generally accepted and approved materials for diminution of noise and sound, so that the flooring shall be adequately soundproof."

The second story unit owner replaced her unit carpeting with laminated flooring and within a year, the resident in the unit below of the now laminated floor complained about the noise emanating from the second story unit. The second story unit owner asserted the defenses of selective enforcement and waiver/estoppel.

In its analysis, the court held that unit owner bore the burden of proving the defense of selective enforcement and the defense of waiver or estoppel.

The condominium's unusual floor plan provided an interesting fact pattern. There are 94 units: 11 were only upstairs; 11 were only downstairs; and the remaining 72 units were first and second floor units.

The floor plan was relevant to the selective enforcement defense because owners units which had both a first and second floor who installed hard flooring upstairs would presumably not complain about their own flooring. Similarly, hard flooring installed in units which contained only one level and which were on the ground floor would not generate flooring complaints.

The Court focused on complaints actually made to the Association and the Court concluded that the flooring restriction is plainly intended to avoid noise complaints. The Court found that the Association enforced the noise rule when there was a complaint by a downstairs owner. Because there were no complaints that were not acted upon, the apparent existence of hard flooring in other units that did not generate a complaint did not constitute selective enforcement.

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Concerning the waiver or estoppel argument, the court held that the president's communications to the unit owner could not constitute an alteration of flooring approval. The declaration required written approval by the board of directors, not one of the officers.

Procedurally, this reinforces that owners have to prove their defenses. Substantively, when a restriction is intended to protect neighboring owners from nuisances such as noise, it appears that if there is no complaint, then the Association's failure to enforce a restriction does not automatically create a valid selective enforcement defense. This case is extremely helpful to Associations where they seek to enforce restrictive covenants against units who violate same. Essentially, the fact that other persons have committed the same violation will not preclude the Association from pursuing enforcement action against other owners unless the unit owner can prove that the Association had knowledge of the other violations.

ELECTION DISPUTE

BY: CHRISTOPHER J. SHIELDS, ESQ.

Which board is in control was at the heart of an election dispute addressed by the Fourth District Court of Appeal in *M&M Prop. Mgmt., LLC v. Palm-Aire Country Club Cd'm. Assn No. 2, Inc.* Case No. 4D16-14482 (Fla. 4th DCA, December 14, 2016). The Association's bylaws provided for a members' election meeting "on the first Wednesday in March of each year" which for 2016 was March 2. On February 29, 2016 [2016 was a leap year] the first board alone voted to postpone the election; however, it did not appear that the membership voted to postpone. In spite of the first directors' decision, there was an election on March 2 resulting in the second board being elected.

The first board apparently challenged the election and the manager's disregard of the first board, claiming that the February decision postponed the election. The first board obtained a temporary injunction requiring the management company to "recognize" and allow the first board to control the Association.

The appellate court focused on the Bylaws requiring the election to occur on March 2. Assuming that the members could postpone the election, there still was not vote of the membership.

The Court found the Association's reliance on Florida Administrative Code Rule 61B-23.021 to justify the first board's changing the Bylaws election procedures without merit as the Rule requires an affirmative vote of a majority of the *total voting interests*. The voting interests in this context are the actual unit owner members, not the members of the first board.

This decision reinforces the need for associations to follow election procedures set forth in your Bylaws. One could assume that the first board in this case "read the tea leaves" and assumed that they would not be reelected and attempted to postpone the election, simply to stay in power. However, under this case's holding, the Board would not be able to postpone an election even if there was good cause to delay the election, such as if exigent circumstances existed.

The moral of the story is that it is not wise for your Bylaws to specifically state the time, date or place when the annual meeting will take place as the Board, under this case's holding, does not have the right to postpone it, and even if there is valid good reasons to postpone the election. Rather, we suggest that any Association's Bylaws simply provide that "the annual meeting will be held at least once each calendar year on a date, time, and place to be determined by the Board from time to time."

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MEDICAL MARIJUANA AND THE WORKPLACE

BY: CHRISTINA HARRIS SCHWINN, ESQ.

In November of 2016, Florida voters overwhelmingly approved the legalization of medical marijuana for certain medical conditions. What does the legalization of marijuana mean for Florida employers? The short answer is not much. The language of the constitutional amendment made it clear that an employer does not have to make an accommodation for an employee who has been legally prescribed a prescription for marijuana.

Florida employers with zero tolerance drug-free workplace policies may continue to enforce them. Legalization of medical marijuana in the state of Florida does not change the fact that marijuana continues to be listed as a Schedule 1 drug under federal law. Because marijuana is illegal under federal law, there is no obligation under the Americans with Disabilities Act for an employer to consider or allow an accommodation that would permit an employee to use medical marijuana to alleviate symptoms of a medical condition.

Because the constitutional amendment is so new, there is no case law interpreting the amendment nor are there any regulations or statutory provisions (yet) implementing the constitutional amendment. May an employer allow an employee to use legally prescribed medical marijuana? The answer is yes. However, the decision to allow an employee to use medical marijuana should not be made lightly, nor should it be made without consulting with employment law counsel. The type of medical marijuana that has now been approved could cause intoxication and impairment during periods of use. As such, not only should you consult with an employment lawyer, but the employee will also need to sign a consent to release medical information so that a determination may be made as to whether allowing an employee to use medical marijuana while continuing to work poses a danger to the employee or other employees in the workplace. This area of the law will continue to evolve. Stay tuned.

A RECALL "HOLE" IN THE FLORIDA STATUTES

BY: MATTHEW G. PETRA, ESQ.

From time-to-time it may be necessary to remove a director (or group of directors) from the Board of your community association. Chapters 718 (i.e. the Condominium Act) and 720 (i.e. the Homeowners' Association Act) of the Florida Statutes provide the parameters within which a recall effort must be orchestrated. And, although, these Chapters provide a considerable amount of material regarding recalls, they leave a "hole." Section 718.112 (2) (j) 8 (*and §720.303 (10) (l)*), Florida Statutes, states, in relevant part, "The division may not accept for filing a recall petition, … regardless of whether the recall was certified, when there are 60 or fewer days until the scheduled reelection of the board member sought to be recalled or when 60 or fewer days have *(not)* elapsed since the election of the board member sought to be recalled."

Pursuant to these two, nearly identical Sections, if a Board decides not to certify a recall, it should file a petition for arbitration with the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation ("Division"). If, however, the Board fails to file a petition with the Division, then the unit owner representative (i.e. the representative of the group seeking the recall) may file a petition challenging the Board's failure to act. Additionally, if the Board does decide to certify a recall, then the director who was recalled may file a petition challenging the validity of the recall. Based on the above-cited statutory language, it is possible for a recall to be certified within the 120-day window. However, the Florida Statutes, along with the Florida Administrative Code, are not clear as to whether or not a recall attempt within the 120-day window is justification enough for the arbitrator to deny a recall certification, if the arbitration petition is filed outside of the 120-day window.

By way of example, suppose that your community held its elections on March 1st, including the election of the director being targeted for recall. Now, further suppose that a recall ballot was served upon your association in late April. If the petition for arbitration

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was then filed in early May (assuming no other deficiencies with the recall effort), should the arbitrator certify the recall or not? Unfortunately, the answer to this question depends on the arbitrator. A strict reading of the Florida Statutes suggests that the arbitrator should certify the recall. Nevertheless, the current wording of the Florida Statutes provides arbitrators with an invitation to "read into the text."

Therefore, if you are orchestrating a recall effort, it is best to work outside of this 120-day window in order to remove the risk that the arbitrator could deny your recall certification due to what he or she might perceive to be a "premature" recall attempt. Considering how much time and effort a recall might entail, this is a risk best avoided.

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 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.

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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 if not, your Bylaws will need to be amended.

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 Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm and also practices in 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 with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner with the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Matthew B. Roepstorff (matthewroepstorff@paveselaw.com) is an Association with the Pavese Law Firm. Matthew G. Petra (matthewpetra@paveselaw.com) is an Associate with the Pavese Law Firm. Matthew P. Gordon (matthewgordon@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 the following:

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