



GERSTIN & ASSOCIATES
ATTORNEYS & COUNSELORS AT LAW

&

The Alliance of Delray Residential Associations

proudly present:

*2019 Community Association
Legislative & Case Law Year in Review*

How to Maximize Today's Presentation

- Nobody can remember everything.
- Take notes directly on this handout.
- Be an issue spotter and delegate.
- Spotting a potential issue and knowing who to ask is a crucial characteristic of a successful community association director.
- Use this handout to assist you in spotting issues.
- Go to gerstin.com to download PDF and click on links to obtain the cited cases.

Enjoyed the presentation? Please write a review.

- Was the presentation useful and informative? If so, let us know by giving us five stars on Google.
- Please take the time to give us five stars on Google by going to:

<https://goo.gl/xMYcbc>

Thank you!

2019 Year in Review-

Legislation

[HB 1159 – Tree Trimming](#). Other than mangrove trees, local governments cannot require a permit for pruning, trimming and removal of vegetation and trees, if the tree or vegetation is certified as presenting a danger by the International Society of Arboriculture. Local governments are also forbidden from requiring the removed trees or vegetation to be replanted. A property owner year-round can request an electric utility maintain vegetation on property adjacent to the electric utility’s right-of-way without notice or permission from the local government. This would only apply to situations when it is necessary for power restoration or when the vegetation is threatening to cause a power outage.

[SB 82 – Vegetable Garden Preemption](#). Local governments are prohibited from regulating vegetable gardens on residential property. This prohibition does not apply to general regulations that are not specific to vegetable gardens, such as ordinances regulating fertilizer, water use and invasive species.

[HB 7103 – Sprinkler Retrofitting](#). Allows condominium associations to continue to vote to waive fire sprinkler system retrofitting requirements until January 1, 2024, at which time local authorities may require a condominium association to retrofit fire sprinkler systems or install an engineered life safety system.

2019 Year in Review-

Legislation, continued

HB 369 – Sober Homes. The bill continues to tighten up sober home standards and address unintended consequences of previously passed legislation. The bill exempts “Oxford Homes” from certification requirements, strengthens patient brokering and deceptive practices statutes, provides for certification and background checks of peer specialists, expands background check requirements for recovery residence administrative personnel and expands violations eligible for exemption, and covers residences that have day/night treatment centers.

SB- 182 Medical Marijuana. If it’s for medical purposes, does it fall under the ADA? If so, does your community association have to allow marijuana smoking where cigarette smoking is permitted? The legislation permits the use of smokable medical marijuana. The bill allows minors to smoke medical marijuana if they are terminally ill and smoking marijuana is approved by a second physician. Patients are limited to 2.5 ounces every 35 days, unless the Department of Health approves an increase at a patient’s request.

HB-311 Autonomous Vehicles. Is your community association “drone and autonomous vehicle ready”? The new law requires seeks to have Florida lead the country in autonomous vehicle technology by establishing: minimum insurance thresholds, a prohibition on levying of fines or fees by local entities (with the exception of seaports and airports), minimum driving conditions for the use of any automatic driving systems and on-demand autonomous networks.

2019 Year in Review-

Legislation, continued

The Federal Housing Administration has issued [new guidelines](#) aimed at increasing affordable and sustainable condominium ownership by making the approval process for condominium projects easier. Prior to the new guidelines, in order to purchase a condominium with an FHA loan, a buyer had to purchase within an FHA approved condominium community. The revised guidelines allow for a single unit approval process.

The changes became effective October 15, 2019. Below are some of the important changes:

Single-unit approvals: Approval process for individual condo units to be eligible for FHA financing.

Commercial condo approvals: Restrictions for mixed-use projects are eased allowing more commercial condominiums to be eligible for FHA financing.

Extended Approvals: FHA approvals for condominium projects extended from two to three years.

Streamlined recertification: Condominium projects are only required to update new information instead of a seeking full recertification.

Occupancy rates lowered: Condominium project owner occupancy rates lowered as low as 35% from 50%.

Concentration rate increased: FHA will insure up to 75% of condominium unit mortgages in a condo project.

The changes will increase affordable housing to first-time homebuyers just when Millennials are coming into home buying age. However, community associations need to confirm rental or sale restrictions do not disqualify them before they tout their FHA loan prowess.

Emerging Lawsuit Threats- *Association Websites and the FHA*

1. Similar to the ADA in its application, the Fair Housing Act is a federal law prohibiting the making, printing or publishing regarding the sale or rental of a dwelling that indicates a preference, limitation or discrimination based on a handicap.
2. By extension, Plaintiff's attorneys are making the argument community association websites that provide information regarding sales or rentals must comply with the FHA.
3. Association websites must be able to be "listened to" by the blind.
4. Most community association websites are not programmed to allow for blind people to listen to the content on the website.
5. Similar to the ADA, there is no required warning. The first notice of a problem is typically a lawsuit.

Emerging Lawsuit Threats-

Association Websites and the FHA, continued.

6. Agreeing to make the changes to a website after being sued will result in demands for attorneys' fees.
7. Fighting the lawsuit is ultimately more expensive than paying the attorney's fees.
8. A discrimination lawsuit is one of the few areas in which directors may be exposed to personal liability.
9. Most insurance policies do not cover discrimination lawsuits. Review and update your insurance policies, if necessary. Look for Cyber related coverage
10. Review your contract with your web designer or property management company, to shift the burden.
11. There are no industry or legal standards for website compliance, yet. In the meantime, visit <https://userway.org/> for widget solutions if your website is not compliant.

Emerging Lawsuit Threats- *Shooting Iguanas!*

- According to state law and the Florida Fish and Wildlife Commission, killing of iguanas is legal and does not require a permit if done on one's private property. Depending on an association's rules and regulations, residents might be legally entitled to kill iguanas on their private property, but it becomes much more complex in the common areas such as shared courtyards, pool areas and parking lots.
- The law stipulates that an iguana must be killed in a humane manner and the carcass properly disposed. Legal methods of iguana removal include shooting them with a pellet gun, stabbing them in the brain or even decapitating them as long as they don't suffer. Freezing, drowning and poisoning iguanas is illegal. Cruelty to an iguana is a misdemeanor of the first degree, which can be punished with a year in prison and/or a fine of \$5,000.
- It is a huge liability for a community association if residents are firing guns, bb guns, sling shots or swinging shovels in an attempt to kill iguanas.
- Associations should consider adopting reasonable rules and regulations regarding the firing of pellet guns and use of other weapons within the community. In addition, rules should be considered prohibiting residents from killing iguanas within the community altogether. Instead, community associations should consider hiring a licensed professional for such purposes.

Emerging Lawsuit Threats- *Golf Carts.*

- *Golf Cart or Low Speed Vehicle?*

- Is it a golf cart or a Low Speed Vehicle? While the question appears a simple one, the answer might not be so easy to determine. Florida law has carved out a classification of vehicles that look similar to golf carts in nearly every way, but are actually “Low Speed Vehicles” afforded certain protections due to being environmentally friendly “neighborhood electric vehicles.” 49 C.F.R. s. 571.500 and s. 316.2122; [Fla. Stat. § 320.01\(41\)](#).

- Florida also has a statute that defines “golf carts”. [Fla. Stat. § 320.01\(22\)](#).

- An association may have a rule that states, “The operation of golf carts is strictly prohibited on all streets, roadways, common areas and sidewalks.” If the association levies a fine and suspension on an owner due to a golf cart violation, but that cart actually meets the legal definition of a Low Speed Vehicle the owner might have a legal claim against the association for improper violations. It may look like a golf cart, but the association might need to investigate further to know for sure before levying fines and suspensions.

Case Law Review

- **Condominium Board Member Term Limits.**
 - Is the 8 year directorship limit retroactive?
 - Only one arbitration case so far on this issue involving a community association. In the arbitration case, the association's governing documents *did not* contain the "Kaufmann Language".
 - According to the arbitration case of [Glantz v. Hidden Lake, Case No.: 2019-01-5048](#), without Kaufmann Language the term limits count starts from the date the legislation passed forward.
 - With Kaufmann Language, one can assume the opposite result.

Case Law Review

Continued.

- ***Former Owner Awarded Attorneys' Fees Against Community Association.***
 - After an association filed a lawsuit against the two title owners of a unit to recover unpaid assessments, the unit owners denied the allegations and asserted their right to recover attorneys fees and costs.
 - The two unit owners sold the unit to a third party.
 - Over a year passed without any activity in the case. This typically happens with an inattentive attorney or unengaged board of directors.
 - Judge dismisses the association lawsuit for “lack of prosecution”. One of the former unit owners then filed a motion for prevailing party attorneys fees pursuant to the Declaration of Condominium and Florida Statute §718.106 and won.
 - Don't ignore old case you might consider moot, close out the cases properly or face the possible expensive consequences.
 - [*Tison v. Clairmont Condo. F Ass'n*, No. 4D19-117, 2019 Fla. App.](#) LEXIS 16769 (4th DCA Nov. 6, 2019).

Case Law Review

Continued.

- ***Developer allowed to use working fund contributions for operating expenses.***
- Working fund contributions used to be considered as benefitting the association, not its a developer. That sentiment recently changed in a recent case decided by Florida’s Fourth District Court of Appeal involving Valencia Reserve, a residential community of single-family homes in Palm Beach County.
- While still in control of the association, the developer used Working Fund Contributions collected at each closing to satisfy the Association’s operating deficit.
- After turnover, the HOA sued the developer claiming the HOA Act prohibited the developer’s use of working fund contributions to satisfy the deficit.
- Florida’s Fourth District Court of Appeals affirmed the lower court’s ruling finding that the developer’s use of the working fund contributions was permitted by both the Declaration and the HOA since they were not budgeted for designated “capital contributions”.
- [*Valencia Reserve Homeowners Ass’n v. Boynton Beach Assocs., XIX, LLLP, 44 Fla. L. Weekly D2208*](#) (Fla. 4th DCA August 28, 2019)

Case Law Review

Continued.

- ***Associations Must Comply with the ADA and Florida's Accessibility Code.***
- An elderly patient visiting a medical facility in a strip mall fell near a curb in the parking lot and sued the medical facility, the manager of the mall and the owner of the mall based on a premises liability negligence claim. In support of his claim, the injured patient relied up a provision in the Florida Accessibility Code of Building Construction requiring the shortest accessible route between the handicapped parking space where he parked and the entrance to the medical facility. This requirement is ***not*** in the ADA.
- Florida's Second Court of Appeals held the jury should hear both codes and determine the appropriate level of care.
- All common areas should be surveyed by a profession in the ADA and Florida's accessibility code.
- Personal liability for directors and possibly no insurance coverage for any such lawsuits.
- [*Krueger v. Quest Diagnostics, Inc., MPN, Ltd. Liab. Co., 44 Fla. L. Weekly D2318 \(Fla. 2d DCA September 13, 2019\).*](#)

Case Law Review

Continued.

- ***Beware of Mandatory Arbitration Provisions in Governing Documents.***
- The Declaration of Covenants, Conditions and Restrictions for the Ellingsworth Community contain a mandatory arbitration provision which requires that disputes be subject to negotiation in good faith, mediation, and a demand for arbitration within thirty days after termination of the mediation proceeding. If this procedure is not followed, the dispute is waived.
- When a homeowner modified the landscaping surrounding her home without authorization, the homeowners association demanded restoration to its previous condition. The homeowner refused, and she and the association proceeded to negotiation and mediation. The mediation resulted in an impasse. Rather than initiating arbitration, the homeowners association filed suit in state circuit court where it argued that despite the clear terms of the governing Declaration, Florida Statute § 720.311 allowed for a legal filing, rather than arbitration.
- The Court found that the Declaration and § 720.311 both provided for arbitration, but that the Statute did not supersede the Declaration's mandatory arbitration provision and allow for filing of a lawsuit. Since the Association failed to submit the dispute to arbitration within thirty days of the mediation impasse, it waived its claim against the homeowner. The Association's claim was dismissed with prejudice and judgment entered in favor of the homeowner.
- The Court found the Statute did not supersede the Declaration's mandatory arbitration provision and allow for filing of a lawsuit. Since the Association failed to submit the dispute to arbitration within thirty days of the mediation impasse, it waived its claim against the homeowner. The Association's claim was dismissed with prejudice and judgment entered in favor of the homeowner.
- Have an attorney review your governing documents and propose amendments to remove antiquated and expensive provisions.
- [Guan v. Ellingsworth Residential Cmty. Ass'n](#), No. 5D18-3633, 2019 Fla. App. LEXIS 12940, at *1 (5th DCA Aug. 23, 2019).

Case Law Review

Continued.

- ***Unit Owners' Defamation Lawsuit, Board Members Beware.***
- A condominium association's attorneys sent a cease and desist letter to a unit owner and provided a copy of the letter to the condominium association client. The unit owner who was the target of the cease and desist letter then sued the association's attorneys in state circuit court for defamation.
- The court dismissed the defamation case because providing a copy of the cease and desist letter to its client did not amount to the publication required under the law of defamation. The court viewed the letter as a statement made by the attorneys to their client as part of the attorney-client relationship and analogous to the situations where there was no publication to a third party because the communication was tantamount to the principal talking to itself.
- It is important that community association directors and managers keep in mind their communications with association counsel are protected by the attorney-client privilege, are confidential, and should not be disclosed to third parties, including non-director unit owners. Disclosing such privileged communications to third parties may result in the waiver of the privilege. In addition, it is also important to take precautions to avoid potential defamation suits whenever possible as these are one of the most filed actions in the community association setting.
- [*Hoch v. Loren*](#), 44 Fla. L. Weekly D1494 (Fla. 4th DCA June 12, 2019) .

Pending Statutes

HB 307 & SB 476 -- Representative LaMarca -- Law Enforcement Vehicles -- Senator Hooper --

Law Enforcement Vehicles; Provides that community associations may not prohibit law enforcement officer from parking his or her law enforcement vehicle in certain areas.

HB 623 -- Representative Jason Shoaf -- Community Associations

Community Associations; Revises & provides requirements relating to community associations, including contracts, documents, records, assessments, fines, liens, improvements, online voting, electronic notice, & prohibited provisions to governing documents.

HB 689 -- Representative Anthony Rodriguez -- Department of Business and Professional Regulation

Department of Business and Professional Regulation; Revises & provides requirements relating to electronic reporting, application fee schedules, weight of boxing gloves, fingerprint processing procedures, proof of occupancy of premises, food service establishment audit schedules, delinquency of payment conditions, rules related to submission of certain complaints, & location of Office of the Condominium Ombudsman.

SB 1154 -- Senator Dennis Baxley -- Community Associations

Community Associations; Exempting certain property association pools from Department of Health regulations; providing that certain provisions in governing documents are void and unenforceable; revising regulations for electric vehicle charging stations; revising provisions related to a quorum and voting rights for members remotely participating in meetings, etc.

Pending Statutes

HB 137 -- Representative Cortes -- Homeowners' Association Recalls.

Homeowners' Association Recalls; Revises process for recalling director of homeowners' association; requires specified percentage of certain parcel owners to initiate recall petition or special meeting to recall director; requires board of directors to duly notice & hold referendum within specified time.

HB 233 -- Representative Cortes -- Homeowners' Associations Dispute Resolution.

Homeowners' Associations Dispute Resolution; Requires nonbinding arbitration in certain homeowners' association disputes; authorizes parties to initiate judicial proceeding; provides procedures for certain homeowners' association disputes which do not require nonbinding arbitration.

HB 235 -- Representative Cortes -- Nonbinding Arbitration Fees.

Nonbinding Arbitration Fees; Requires certain fees to be paid to DBPR; provides for prevailing party in nonbinding arbitration to recover certain costs & fees.

Enjoyed the Presentation? Please write a review.

- Was the presentation useful and informative? If so, let us know by giving us five stars on Google.
- Please take the time to give us five stars on Google by going to:

<https://goo.gl/xMYcbc>

Thank you!

Stay Informed, Subscribe to the Gerstin & Associates Newsletter.

- *Stay one step ahead of new legislation, recent case law and new developments that impact your community association.*

- Name: _____

- Mailing address: _____

- E-mail address: _____

- Community name:

- Position on board, if any: _____

- *Fax this completed page to (561) 750-8185 or email the above information to: joshua@gerstin.com.*

For more information or questions, please contact:



GERSTIN & ASSOCIATES
ATTORNEYS & COUNSELORS AT LAW

40 S.E. 5th St., Suite 610

Boca Raton, FL 33432

Telephone: (561) 750-3456, Facsimile: (561) 750-8185

E-mail: joshua@gerstin.com

Web: www.gerstin.com

Alliance of Delray Residential Associations

10290 W. Atlantic Ave. #480504

Delray Beach, FL 33448

Telephone: (561) 495-9670