The Florida Senate

Interim Project Summary 2008-148 *October 2007*

Committee on Regulated Industries

ALTERNATIVE DISPUTE RESOLUTION FOR HOMEOWNERS' ASSOCIATIONS

SUMMARY

This report addresses concerns raised by Senator Justice and Representative Ambler regarding the alternative dispute resolution procedures that are available to homeowners' associations.

The report recommends that the Legislature could maintain the process of private mediation of homeowners' association disputes provided in s. 6, ch. 2004-345, L.O.F., in order to determine its long-term efficacy. To improve this process, the report recommends that the Legislature could provide that the Division of Land Sales, Condominiums, and Mobile Homes, the Office of the State Courts Administrator, or the clerks of the circuit courts maintain a list of mediators and arbitrators who are willing to mediate and/or arbitrate homeowners' association disputes.

Alternatively, the report recommends that the Legislature could create a state-wide arbitration program for homeowners' associations within the Division of Land Sales, Condominiums, and Mobile Homes to provide mandatory, nonbinding, presuit arbitration of these disputes in the same manner that is currently required for condominium disputes under ch. 718, F.S. The division estimates that a fee of at least $573 per petition would be necessary for an arbitration program to be self sufficient.

The report also recommends that s. 720.311(2)(d), F.S., should be amended to delete the reference to certified arbitrator and arbitration because arbitrators are not certified by the Supreme Court.

BACKGROUND

2007 Legislation. During the 2007 Regular Session, ch. 2007-173, L.O.F.,[1] repealed the alternative dispute resolution program for homeowners' associations and their members that was administered by the Department of Business and Professional Regulation. It also provided for the division's training and certification of arbitrators and mediators. Homeowners' association disputes are now mediated by private mediators subject to the notice and procedural requirements set forth in ch. 2007-173, L.O.F.

During the 2007 Regular Session, CS/SB 1444 by the Judiciary Committee and Senator Justice would have created a one-year Home Court Advantage Pilot Program in Hillsborough and Pinellas counties for the mandatory arbitration of homeowners' association disputes.[2] This pilot program would have been implemented and administered by the chief judges of the Sixth and Thirteenth Judicial Circuits in Pinellas and Hillsborough Counties, respectively. The bill was temporarily postponed by the Regulated Industries Committee and the Chair of the committee, Senator Dennis L. Jones, agreed to request an interim study on this issue which was subsequently approved by the Senate President, Senator Ken Pruitt.

Homeowners Associations. Homeowners associations are governed under ch. 720, F.S., but are not regulated by a state agency.[3] According to the Community Associations Institute, in 2006, there were 286,000 communities governed by associations which included 23.1 million housing units and 57 million residents in the United States.[4] These association governed communities included homeowners' associations, condominiums, cooperatives and other planned communities. Homeowners' associations and other

[1] CS/CS/SB 902 by the Judiciary Committee, the Regulated Industries Committee, and Senator Jones.

[2] Representative Ambler (who introduced the companion bill, CS/HB 923) indicated that the primary focus of the Home Court Advantage Pilot Program was homeowners' associations even though CS/SB 1444 included condominiums, cooperatives, and timeshare units.

[3] *See* Legislative intent regarding regulation of homeowners' associations in s. 720.302(2), F.S.

[4] *See* http://www.caionline.org/about/facts.cfm (Last visited September 13, 2007).

planned communities account for between 52-55 percent of the total, condominiums account for 38-42 percent, and cooperatives account for 5-7 percent.[5] The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business and Professional Regulation, indicated that there are more than 20,000 condominium associations in Florida. Applying the national percentages to Florida, it is estimated that there are more than 27,000 homeowner's associations in Florida.

Homeowners' Associations Disputes. Any legal action to redress the alleged failure or refusal to comply with the provisions of ch. 720, F.S., may be brought by the association or any member of the association against the association itself, a member, or a director or officer of an association who willfully and knowingly fails to comply with these provisions. The prevailing party in the action is entitled to reasonable attorney's fees and costs.[6] If the governing documents provide that an association may suspend rights to use the common areas or levy fines not to exceed $1,000, fines cannot become a lien against a parcel, but in an action to recover a fine, the prevailing party is entitled to reasonable attorney's fees and costs.[7]

Alternative Dispute Resolution. Chapter 44, F.S., provides for the arbitration and mediation of legal disputes in Florida, i.e, resolving legal disputes outside of the courtroom and without the involvement of a trial judge. Arbitration and mediation are commonly referred to as alternative dispute resolution (ADR). The Florida Supreme Court establishes the minimum standards and procedures for qualifications, certification, professional conduct, and discipline of mediators and arbitrators.[8] According to representatives from the Office of State Courts Administrator and the Supreme Court Dispute Resolution Center, many courts in Florida, especially in the larger counties and circuits, require that disputes be mediated before a filed complaint can proceed.[9] The critical difference between mediation and arbitration is that in the mediation process the parties to the dispute make all the decisions and resolve the disputes. The mediator only facilitates this resolution. Under arbitration, the neutral third-party arbitrator resolves the dispute.[10]

Section 720.311, F.S., establishes ADR procedures for homeowners' associations and their members. It provides for mandatory binding arbitration and presuit mediation of certain disputes.[11]

Section 720.311, F.S., provides a form for the written demand for presuit mediation. The form is entitled "Statutory Offer to Participate in Presuit Mediation"[12] and must be substantially followed by the aggrieved party and served on the responding party. The notice explains the procedure for the mediation of disputes, and the rights and obligations of the parties. The notice also advises that the Florida Supreme Court can provide a list of certified mediators.[13] The notice must include a listing of five mediators. The party receiving the demand may select a mediator from that list. The form gives notice that, if the party receiving the notice fails to agree to presuit mediation, a law suit may be brought without further warning. A petition for mediation or arbitration tolls the applicable statute of limitations.[14]

The division arbitrates all recall and election disputes, neither of which is eligible for mediation. A $200 filing fee is required for the arbitration of the recall elections and election disputes by the division and the division may assess the parties an additional fee in an amount adequate to cover the division's costs and expenses. The non-prevailing party must pay the other side's costs and attorney's fees in an amount found reasonable by the arbitrator. If the dispute is subject to mediation by a private mediator, the mediator may require advance payment of fees and costs.

Failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the

[5] According to the Community Associate Institute, these estimates are based on U.S. Census publications, American Housing Survey (AHS), IRS Statistics of Income Reports, California and Florida state specific information, related association industry trade groups, and collaboration with industry professionals.

[6] Section 720.305(1), F.S.

[7] Section 720.305(2), F.S.

[8] Section 44.106, F.S.; Fla.R.Med. 10.100 *et seq* and Fla.R.Arb 11.010 *et seq*.

[9] Rule 1.700, Fla.R.Civ.P., permits judges to refer cases to mediation or arbitration.

[10] Section 44.1011(2), F.S.

[11] *See* s. 720.311(2), F.S.

[12] The title of the notice uses the term "offer" to characterize the notice. However, the language of the notice repeatedly refers to the "demand" to participate in presuit mediation.

[13] The Supreme Court provides lists of certified mediators through the Florida Dispute Resolution Center. These lists may be accessed via the Internet at http://www.flcourts.org/gen_public/adr/brochure.shtml (last visited April 12, 2007).

[14] Section 720.311(1), F.S.

costs and fees associated with mediation. If the presuit mediation is not successful in resolving all of the issues between the parties, the parties may file any remaining disputes in a court of competent jurisdiction. Regarding any issue or dispute that is not resolved at presuit mediation, the prevailing party is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process in any subsequent arbitration or litigation proceeding. These presuit mediation procedures may be used by non-mandatory homeowners' associations.[15] Persons who fail or refuse to participate in the entire presuit mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute.[16] Section 720.311(2)(c), F.S., provides that the mediator or arbitrator authorized to conduct proceedings under this section must be certified by the Florida Supreme Court. Presently there is no statewide arbitrator certification process.[17] Rather, arbitrators are made eligible by placement on a list by the chief judge of the circuit in which the arbitrator will practice.[18]

METHODOLOGY

Committee staff reviewed relevant statutory provisions relating to ADR in Florida. Staff reviewed the current ADR programs and resources that are available to reduce the costs of litigation. Staff met with representatives of the judicial system, including the Florida Supreme Court's Office of the State Courts Administrator and its Dispute Resolution Center. Staff discussed this issue with personnel from the Division of Florida Land Sales, Condominiums and Mobile Homes (division) in the Department of Business and Professional Regulation. Staff also met with other interested parties. Staff consulted with the staff of the Judiciary Committee.

FINDINGS

Property purchased in a deed-restricted homeowners' associations is subject to certain limitations or restrictions on the use or design of the property. Restrictions are often seen as an integral part of a common interest community, used to preserve the stable, planned environment that shared ownership aims to foster.[19] These restrictions are usually described in a declaration of covenants that is agreed upon by the property owners when they purchase property within the deed-restricted community.[20] Often the restrictions lead to disputes that give rise to acrimony between neighbors and simple disputes can escalate to drawn-out, expensive, and ultimately preventable litigation.

For example, in *Bessemer v. Gerstein*,[21] a dispute over a $52.91 assessment led to litigation that ended in the Florida Supreme Court and the court's holding that the association could foreclose a lien against the homeowner for nonpayment of the assessment and that the foreclosure was not barred by the homeowner's homestead right in Art. X, s. 4, Florida Constitution. During the course of this study, other examples were offered of relatively small disputes between homeowners and their associations that escalated into expensive and time-consuming situations.

There is uncertainty regarding the degree to which homeowners' association disputes have burdened the court system. According to representatives for the Office of State Courts Administrator, the court system does not maintain a record of homeowners' association disputes by that category.

Mandatory Mediation Program. The Homeowner's Association Mandatory Mediation Program implemented the division's mandatory mediation responsibilities under s. 720.311, F.S. (2006). This program began on October 1, 2004 and continued until June 30, 2007, when the division's mediation responsibilities were terminated by ch. 2007-173, L.O.F. According to the division, it received 2,383 petitions for mediation during the existence of the program.

Based on information provided by the division, of the 1,606 petitions that proceeded to mediation, only 505 cases resulted in a partial or full resolution of the dispute. Nearly half of the petitions were dismissed for lack of cooperation. That is a success rate of only 32 percent. This number compares unfavorably with the dispute resolution success rate for condominium arbitration in which approximately 95 percent of the

[15] Section 720.311(2)(e), F.S.
[16] Section 720.311(2)(c), F.S.
[17] *See* Florida Rules for Court-Appointed Arbitrators, http://www.flcourts.org/gen_public/adr/index.shtml (last visited April 14, 2007).
[18] *Id*.; *see also* FLA. R. CIV. P. 1.810(a).
[19] Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U.J.L. & POL'Y 663, 671 (2000).
[20] *Id.* at 672.
[21] *Bessemer v. Gerstein*, 381 So.2d 1344 (Fla. 1980); *see also Zerquera v. Centennial Homeowners' Association, Inc.*, 752 So2d 694 (Fla. 3rd DCA 2000).

disputes are resolved.[22] It is unclear why the ADR program for homeowners' associations had such a comparatively poor success rate at resolving disputes.

The repeal of the division's alternative dispute resolution program for homeowners' associations by ch. 2007-173, L.O.F., has led to some confusion from homeowners regarding the process for obtaining the services of a certified mediator. The "statutory offer" notice in s. 720.311, F.S., provides that the Supreme Court can provide a list of certified mediators. The program provides a searchable listing of mediators, but the search criteria does not include the mediators' subjects of expertise or interest.[23] Consequently, according to the Office of State Courts Administrator, the Supreme Court's Dispute Resolution Center has received numerous calls from Floridians who are confused and frustrated in their efforts to find mediators willing or prepared to mediate homeowners' association disputes. The division does not maintain a listing of certified mediators who specialize in mediation of homeowners' association disputes.

ADR for Condominiums. Some experts in community associations with experience in ADR point to the ADR procedures for condominiums as an example of a successful program.[24]

Section 718.1255, F.S., provides ADR procedures for condominium associations and condominium unit owners in Florida through mandatory nonbinding arbitration and mediation of certain defined disputes.[25]

Before instituting court litigation, a party to a dispute must file with the division, along with a $50 filing fee, a petition for nonbinding arbitration. If all parties agree, the arbitrator may then refer the dispute to mediation. The arbitrator may also refer the dispute to mediation at any time without the consent of all the parties.[26]

It is not clear whether the greater number of homeowners' associations equates to more disputes. As noted before, the division received 2,383 petitions for mediation during the two and half year existence of the homeowners' associations mediation program. During the previous two fiscal years (2005-2006 and 2006-2007), the division's condominium arbitration program received approximately 1,400 arbitration petitions. The condominium arbitration program has demonstrated a drastically better ability to resolve disputes than that offered by the process available for homeowners' associations.

According to the division, approximately 71 percent of the disputes filed with the program went through the arbitration process with a dispute resolution success rate of approximately 95 percent. The division also reported that only 0.6 percent of adversely affected parties appealed the arbitration decision by filing a petition with a circuit court for a trial de novo. All of the division's arbitration orders were approved by the reviewing court. The division also reported that 55 percent of the condominium disputes that were submitted to mediation were resolved.

The default ADR procedure for all condominium disputes is nonbinding arbitration with mediation as a secondary option. This differs from the ADR procedure for homeowners' associations under ch. 720, F.S., which delineates the disputes that must be arbitrated and mediated.

The funding of the former ADR program for homeowners' associations also differs from the funding mechanism for the condominium arbitration program. In addition to the $50 dollar fee for the arbitration, the condominiums arbitration program is also funded by an annual fee of $4 for each condominium unit operated by the association.[27] Under s. 720.311, F.S., arbitration of election disputes for homeowners' associations requires a $200 filing fee. The costs of mediating other disputes are funded through "reasonable fees and costs" paid directly and equally by the parties to the mediator.[28]

Chapter 718, F.S., creates the condominium form of ownership and sets forth broader and more detailed requirements and protections relating to their operation, their powers and duties, and what provisions must be included in their declarations and bylaws.[29]

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[22] Interview with representatives from the division's condominium arbitration program.
[23] *See* the Dispute Resolution Center Mediator Reporting System "mediator search" option at http://www.flcourts.org/gen_public/adr/index.shtml (Last visited September 4, 2007).
[24] Cooperatives established under ch. 719, F.S., have ADR requirements that mirror the ADR requirements in ch. 718, F.S.
[25] *See* s. 718.1255(1), F.S.
[26] *See* 718.112(4)(e), F.S.
[27] Section 718.501(2)(a), F.S.
[28] Section 720.311(2)(b), F.S.
[29] "Condominiums and the forms of ownership created therein are strict creatures of statute." *Woodside Village*

Homeowners' associations are not regulated to the same degree and operate to a greater level of autonomy from the state. According to the division, the greater number of statutory directives for condominiums gives the division more guidance when arbitrating condominium disputes.

Pilot Program Options. CS/SB 1444 by the Judiciary Committee and Senator Justice proposed several components intended to foster a more effective and cost efficient dispute resolution process for homeowners' associations than that provided in ch. 720, F.S., or by civil court legal proceeding. The following proposed ADR options are based upon a review of this proposed legislation and discussions with Representative Ambler.

Mandatory binding arbitration. Under mandatory binding arbitration, the parties must present their dispute to an arbitrator who decides the dispute for the parties with no involvement by the court system in the decision making process. According to ADR experts, binding arbitration is often included as the remedy in contracts.

In *Delta Casualty Company v. Pinnacle Medical, Inc.*,[30] the Fifth District Court of Appeals held that a statutory requirement that contract disputes between a medical provider or assignee and an insurer must be resolved by binding arbitration was unconstitutional. The court held that, absent a contractual agreement between the parties to resolve a dispute by binding arbitration, the mandated statutory requirement was an unconstitutional violation of the access to courts right in Art. I, s. 21, Florida Constitution, and the right to substantive due process.[31] The legislature may abrogate or restrict a person's access to the courts if it provides 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right *and* finds that there is no alternative method of meeting such public necessity.[32]

Therefore, to be constitutional, an ADR procedure for homeowners' associations that requires presuit arbitration must afford the parties an opportunity to appeal the decision before it becomes final. The constitutional right to access to courts and to due process is preserved if the parties have the right to appeal the arbitrator's decision by petitioning the court for a trial de novo.[33] This right of appeal maintains a person's right to have the ultimate decision in a case made by a court. The ADR procedure for condominiums preserves the parties' constitutional access to courts right by permitting the parties to appeal the arbitrator's decision by filing a complaint in circuit court for a trial de novo.[34]

Agency Arbitration of Homeowners' Association Disputes. While s. 6, ch. 2004-345, L.O.F., decreased the division's involvement in homeowners' associations disputes by eliminating the mediation program, the CS/SB 1444 would have expanded the division's role by providing for the division's implementation and administration of the Home Court Advantage arbitration program. The bill required a $150 filing fee, payable to the division, to defray the costs of administering the program.

As noted above, the costs of mediation of homeowners' associations disputes are funded through "reasonable fees and costs" paid directly and equally by the parties to the mediator.[35] Parties to a condominium dispute pay a $50 fee, but the program is primarily funded by the $4 annual fee imposed on all condominium units. According to the division, during FY 2006-2007, the $50 per petition filing fee produced approximately $36,150 of the estimated $414,149 cost of the program.[36] Absent the subsidy provided by the annual condominium fee, the program would have required a fee of $573 per petition in order to sustain the program.

Condominium Association, Inc., v. Jahren, 806 So.2d 452, 455 (Fla. 2002).

[30] *Delta Casualty Company v. Pinnacle Medical, Inc*., 721 So.2d 321 (Fla. 5th DCA 1998).

[31] Article I, s. 9, Florida Constitution, provides:

> Due Process. -No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

Article I, s. 21, Florida Constitution, provides:

> Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

[32] *Psychiatric Associates v. Siegel*, 610 So.2d 419 (Fla. 1992).

[33] *See Chrysler v. Pitsirelos*, 721 So.2d 710 (Fla. 1998), relating the presuit arbitration provisions for the Lemon Law in s. 681.1095, F.S.

[34] See s. 718.1255(4)(k), F.S.

[35] Section 720.311(2)(b), F.S.

[36] According to the division, the $4.00 filing fee generates approximately $4,000,000 per year for the division's trust fund.

Because homeowners' associations are not regulated by the division and ,therefore, do not have a regulatory trust fund from which to support a more active division involvement in disputes, homeowners' associations disputes must necessarily be supported exclusively through fees paid by the parties to the dispute. If homeowners' association disputes were subject to arbitration by the division, the parties to the dispute would have to assume that cost.

It is unclear what the appropriate fee should be for division arbitration of homeowners' association disputes, which may also necessitate that the division hire additional arbitrators to accommodate the added workload. However, based on the number of mediation petitions the division received during the existence of the mediation program for homeowners' associations, the division estimates that it would need a filing fee of approximately $573 per petition in order to replicate the condominium arbitration program for homeowners' association disputes.[37] However, the division also advises that it would need additional undetermined funding for extra office space to accommodate the additional arbitrators, and that the fee may need to be greater than this estimated amount.

Without a fee to subsidize an ADR program, arbitration and mediation can be an expensive process for the participants. Mediators in Florida charge approximately $250 an hour for their services. Arbitrators typically charge a little more, $275 to $300 an hour. More experienced and better credentialed arbitrators/mediators typically charge more than this. According to an arbitrator with experience in community association disputes, although the difference in hourly cost between arbitration and mediation is not great, there is a significant difference in the amount of time needed to complete each process. Arbitration requires a more time consuming process. Mediation of a homeowners' association dispute typically involves a two to four hour process. Arbitration may require four to eight hours if the dispute is settled before a final hearing. However, if a final hearing is required, the process may require 18 or more hours of the arbitrator's time. Consequently, arbitration of a homeowners' association dispute may cost the parties (these costs are typically shared) as little as $500 or as much as $6,000 or more for the arbitrator's services. Parties represented by an attorney would also have to assume that cost.[38]

However, litigation also has its costs, especially in terms of attorney's fees, and, as noted previously, many courts in this state require mediation before a filed complaint can proceed. Therefore, the cost of mediation is a cost that the parties may not be able to avoid.

Mandatory arbitration may also not be appropriate for all homeowners' association disputes. Mandatory arbitration may impose additional costs on disputes that could be settled through a less extensive and expensive mediation process. This concern may be lessened if the parties are permitted to opt-out of the arbitration process for a mediation proceeding. For example, s. 718.1255, F.S., permits any party in a condominium dispute to petition the arbitrator to refer the dispute to mediation if both parties agree to mediation. Notwithstanding the lack of agreement, the arbitrator may also refer the dispute to mediation at any time.[39] According to an arbitrator consulted for this report, it is not advisable to permit a party to decide unilaterally to refer a dispute from arbitration to mediation because this would permit parties who act in bad faith to exploit the system by unilaterally referring the dispute to meditation, not cooperating in the mediation process, and avoiding a potentially final and/or adverse arbitrator's decision.

Regarding the division's estimate of the fee required to implement an arbitration program for homeowners' associations, it is not clear whether an estimated fee of at least $573 would implicate a constitutional access to courts concern.[40] The imposition of financial burdens to restrict access to courts may be unconstitutional if the precondition constitutes a substantial burden on the litigant's right to have his or her case heard in court.[41]

[37] This estimate includes the personnel costs. According to the division, the $200 filing fee required under s. 720.311, F.S. (2006), was insufficient to fund the mediation program, which is currently at a deficit of $346,086.

[38] Section 720.311(2)(c), F.S., permits the prevailing party in a court action to seek recovery of attorney's fees and costs incurred for any issue or dispute that was not resolved during the presuit mediation process and for any issue that is settled during that process but becomes the subject to an action to enforce that settlement.

[39] Section 718.1255(4)(e), F.S.

[40] Pursuant to s. 28.241, F.S., the filing fee in circuit court for instituting any civil action, suit, or proceeding in cannot exceed $250 in all cases in which there are not more than five defendants and an additional filing fee of up to $2 for each defendant in excess of five.

[41] *See Psychiatric Associates v. Siegel*, 610 So.2d 419, 424 (Fla. 1992).

State conducted arbitration and mediation have distinct advantages and disadvantages compared to using private arbitrators or mediators. According to a proponent of arbitration by a state agency, a state agency process has a few advantages. First, the cost of the process may be lower through agency-conducted arbitration because the cost of the process can be shared through a fee that is based on the average costs of the process for all participants. For example, instead of paying $250 an hour for a private arbitrator, the parties to the dispute could pay the state agency a single, one-time fee. The state agency arbitrator is also likely to have more expertise in homeowners' association issues and could therefore decide the dispute more quickly and inexpensively. Arbitration by a state agency could also provide a centralized index of decided cases that could be used to facilitate consistent and predictable arbitration decisions. However, the principal advantage of private arbitration and mediation is that the process involves less government and does not require the creation of a bureaucratic system for private disputes. It also permits the parties to bear the actual costs of their disputes, which may encourage expedited settlements. It does not require parties with simple and/or expeditiously resolved disputes to bear any portion of the costs created by other persons with more complex and prolonged disputes.

Traffic Court Model. Another proposal is to use the traffic court as a model in which magistrates can provide final binding judgments in homeowners' association disputes. This is the model that was presented in the Home Court Advantage pilot program. This model presented several constitutional concerns.

In addition to the constitutional right of access to courts, a program that provides final decision-making to an arbitrator or magistrate for the final resolution of homeowners' association disputes may also violate Art. II, s. 3, Florida Constitution, which sets forth the constitutional principal of separation of powers. Article II, s. 3, Florida Constitution, prohibits one branch of government from exercising the powers of either of the other two branches. In this instance, an executive branch agency, the arbitrator/Home Court, would be exercising judicial authority.

Article V, s. 1, Florida Constitution, vests the judicial power of the state in:

> a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.

A program similar to Home Court Advantage, which provides final, binding resolution of disputes, could be considered the establishment of a court not authorized by the constitution.

The traffic courts for the disposition of civil traffic violations are specifically authorized by the constitution. In addition to the supreme court, the district courts of appeal, and the circuit and county courts, the constitution also authorizes the legislature to establish by general law a civil traffic hearing officer system for the purpose of hearing civil traffic infractions, and a military court-martial to be conducted by military judges of the Florida National Guard, with direct appeal of a decision to the District Court of Appeal, First District.[42]

It is not clear whether the legislature could create a quasi-judicial agency or program to resolve homeowners' associations disputes. Article V, s. 1, Florida Constitution, section also provides that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices." Quasi-judicial powers can be difficult to distinguish from judicial powers. A quasi-judicial exercise of powers includes an administrative agency's conduct of proceedings "in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as the basis for their official actions"[43] Unlike condominiums, homeowners' associations are not regulated by a state agency. Therefore, it is not evident that any agency would have an official basis for the final binding resolution of homeowners' association disputes, unless the state's role in the regulation of homeowners' associations is greatly enhanced.

Pilot Program for Pinellas and Hillsborough Counties. CS/SB 1444 would have limited the one-year Court Advantage Pilot Program to homeowners' associations disputes in Hillsborough and Pinellas counties. The creation of a county-specific, mandatory arbitration program appears to violate the prohibition against special laws in Art. III, s. 11, Florida Constitution, which provides, in pertinent part:

> (a) There shall be no special law or general law of local application pertaining to:

[42] Article V, s. 1, Florida Constitution.
[43] *See Verdi v. Metropolitan Dade County*, 684 So.2d 870 (Fla. 3rd DCA 1996).

(7) conditions precedent to bringing any civil or criminal proceedings, or limitations of time therefor;

A special law, or "local law," as it is sometimes referred to, does not apply with geographic uniformity across the state. Its effect is limited to designated persons or discrete regions, and bears no reasonable relationship to differences in population or other legitimate criteria.[44]

A general law of local application applies to a distinct region or set of subdivisions within the state. Its classification scheme is based on population or some other reasonable characteristic which distinguishes one locality from another.[45] However, laws which distinguish on the basis of population may be classified as special laws if their objectives bear no reasonable relationship to differences in population.[46]

The pilot program in CS/SB 1444 required participation in arbitration before the dispute could be brought to court in Hillsborough and Pinellas counties. This precondition to court action appears to violate the special act prohibition in Art. III, s. 11, Florida Constitution, against conditions precedent to bringing a civil action. To be constitutional, such a pilot program would have to have statewide application.

Use of Courthouse Facilities. The Home Court Advantage Program in CS/SB 1444 also provided for the use of circuit court courtrooms for the arbitration program. The arbitration process may benefit from the use of a courtroom because the arbitrator would be seen as more of an authority figure. However, it is not clear whether the use of a courtroom in the arbitration process would impart the arbitration proceeding with any greater importance by the participants in a homeowners' association dispute than if the proceeding were to occur in any other location. Additionally, the relatively poor dispute resolution success rate of the mediation program for homeowners' associations may be based more on the ability of the process to resolve the dispute than on the location of the process.

The use of courtrooms for arbitration proceedings carries additional costs, and it is not clear whether the assumption of these extra costs by the parties to the dispute is needed to add greater importance to the arbitration process. For example, Hillsborough County circuit court (13th Judicial Circuit) conducts after-hours night-court. According to the court administrator for the 13th Judicial Circuit, although they would not charge a fee for use of an available courtroom, the courtroom would have to be supervised by a bailiff. The parties would have to bear this cost. It is not clear that all the circuits or counties have similarly available courthouses. A state-wide provision for the use of courthouses would require a state agency to coordinate the availability of these facilities, which would impose an additional cost on the parties. Additionally, the court administrators expressed the concern that the clerks of the court or other court personnel may be needed in these proceedings. If so, their role and any costs related to their role would have to be clarified.

RECOMMENDATIONS

Based on the findings of this report, staff recommends that the Legislature take the following actions:

- The Legislature could maintain the process of private mediation of homeowners' association disputes provided in s. 6, ch. 2004-345, L.O.F., in order to determine its long-term efficacy. To improve this process, the Legislature could provide that the Division of Land Sales, Condominiums, and Mobile Homes, the Office of the State Courts Administrator, or the clerks of the circuit courts maintain a list of mediators and arbitrators who are willing to mediate and/or arbitrate homeowners' association disputes.

- Alternatively, the Legislature could create a state-wide arbitration program for homeowners' associations within the Division of Land Sales, Condominiums, and Mobile Homes to provide mandatory, nonbinding, presuit arbitration of these disputes in the same manner that is currently required for condominium disputes under ch. 718, F.S. The division estimates that a fee of at least $573 per petition would be necessary for an arbitration program to be self sufficient.

- Section 720.311(2)(d), F.S., should be amended to delete the reference to certified arbitrator and arbitration because arbitrators are not certified by the Supreme Court.

[44] *See Housing Authority v. City of St. Petersburg*, 287 So.2d 307, 310 (Fla.1973).
[45] *See City of City of Miami Beach v. Frankel*, 363 So.2d 555 (Fla. 1978).
[46] *See State ex rel. Utilities Operating Co. v. Mason*, 172 So.2d 225 (Fla. 1964).