Alternative Dispute Resolution for Homeowners' Associations

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Background

A. Introduction

This study addresses concerns raised by Senator Justice and Representative Ambler regarding the alternative dispute resolution procedures that are available to homeowners' associations. Alternative dispute resolution procedures help adverse parties resolve disputes through arbitration and mediation. According to Senator Justice there is a need to provide Floridians with an inexpensive, expedient, and simplified court procedure for deed-restricted communities to resolve disputes.

The provisions relating to homeowners' associations were adopted in 1992.[1] The original provisions created ss. 617.301-306, F.S. These provisions were later transferred to ch. 720, F.S., by ch. 2000-258, L.O.F.[2] The dispute resolution provisions were originally adopted in 1995 to read:

> 617.311 Dispute Resolution.—The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and offering a more efficient, cost-effective option to litigation. At any time after the filing in a court of competent jurisdiction of a complaint relating to a dispute under ss. 617.301-617.312, the court may order the parties enter mediation or arbitration procedures.[3]

B. 2007 Legislation

During the 2007 Regular Session, ch. 2007-173, L.O.F.,[4] was enacted to repeal the alternative dispute resolution program for homeowners' associations and their members administered by the Department of Business and Professional Regulation (department or DBPR). This program provided for mediation conducted by the division. 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.

Also during the 2007 Regular Session, CS/SB 1444 by the Judiciary Committee and Senator Justice would have created a one-year Court Advantage Pilot Program in Hillsborough and Pinellas counties for the mandatory arbitration of

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[1] *See* ss. 22-40, ch. 92-49, L.O.F.
[2] *See* ss. 44-51.
[3] Section 61, ch. 95-274, L.O.F.
[4] CS/CS/SB 902 by the Judiciary Committee, the Regulated Industries Committee, and Senator Jones.

community association disputes.[5] 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 staff analysis for the Judiciary Committee addressed several constitutional concerns with this bill.[6] 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.

C. Limited State Regulation

Homeowners' associations are governed by ch. 720, F.S., but are not regulated by a state agency. Regarding state regulation of homeowners' associations, s. 720.302(2), F.S., provides:

> The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.312 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

The number of homeowners' associations or persons living in homeowners' associations in Florida is unknown. Although homeowners' associations are required to file articles of incorporation with the Division of Corporations (DOC) in the Department of State, the DOC cannot identify corporations that are homeowners' associations under ch. 720, F.S.[7]

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.[8] These association governed communities included homeowners' associations, condominiums, cooperatives

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[5] 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.

[6] *See* discussion *infra* regarding Pilot Program Options.

[7] Homeowners' Association Task Force, *Final Report of the Homeowners' Association Task Force*, February 2004, page 5. A copy of the report is available on the internet at http://www.myflorida.com/dbpr/os/hot_topics/hoa_taskforce (Last visited on March 20, 2004.)

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

and other planned communities. Homeowners' associations and other planned communities accounted for between 52-55 percent of the total, condominiums accounted for 38-42 percent, and cooperatives accounted for 5-7 percent.[9] The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes (division), 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.

Professor Peter M. Dunbar has estimated that between four to six million residents are governed by mandatory homeowners' associations. He indicated that there have been virtually no significant housing developments created since mid-1980 in Florida that are not governed by condominium or homeowners' associations. He further indicated that:

> The mandatory membership association, whether in a condominium form of ownership or a homeowners' association setting, has become a tool of choice for two primary reasons.
>
> It permits the delivery of residential housing with a community-based concept of recreational amenities and other benefits that are shared among the owners–making properties more desirable and marketable; and it is a tool under Florida's growth management laws to provide and maintain essential services for new developments. These include: recreational amenities, drainage and storm water management systems, street lighting systems, and the preservation of wetlands, open space and conservation areas. All or each of these items are to be done at the expense of the home owners or condominium unit owners and not at the expense of the general tax base of the city or county permit the project. [10]

The formation of associations is, in almost all cases, required by local ordinances or by the rules of the Water Management district. All are a direct result of state's growth management initiatives.[11]

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[9] 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.

[10] E-mail correspondence from Peter M. Dunbar, Pennington, Moore Wilkerson, Bell & Dunbar, P.A., Tallahassee, Florida, Adjunct Professor of Condominium and Mandatory Housing Law at The Florida State University College of Law. Professor Dunbar also represents the Real Property, Probate and Trust Law Section of The Florida Bar before the Florida Legislature. (A copy is on file with the Senate Committee on Regulated Industries.)

[11] *Id.*

D. Statutory Recognition and Requirements

Homeowners' associations are governed under ch. 720, F.S., which provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.[12]

Section 720.301(9), F.S., defines a "homeowners' association" as a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not for profit corporations.[13]

Homeowners' associations are administered by a board of directors whose members are elected.[14] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.[15] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[16]

Section 720.301(3), F.S., defines the term "community" to mean:

> the real property that is or will be subject to a *declaration of covenants* which is recorded in the county where the property is located. The term "community" includes all real property, including undeveloped phases, that is or was the subject of a development-of-regional-impact development order, together with any approved modification thereto. (emphasis supplied)

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

> a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community

[12] *See* s. 720.302, F.S.
[13] Section 720.302(5), F.S.
[14] *See* ss. 720.303 and 720.307, F.S.
[15] *See* ss. 720.301 and 720.303, F.S.
[16] Section 720.303, F.S.

> to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Section 720.301(10), F.S., defines the term "member" to mean "a member of an association, and may include, but is not limited to, a parcel owner or an association representing parcel owners or a combination thereof." Section 720.301(12), F.S., defines the term "parcel owner" to mean the record owner of legal title to a parcel. Section 720.301(13), F.S., defines the term "voting interest" to mean "the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents."

E. 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.[17]

Section 44.1011(2), F.S., defines the term "mediation" to mean, in pertinent part:

> A process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. *In mediation, decision making authority rests with the parties.* The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. "Mediation" includes:
>
> (a) "Appellate court mediation," which means mediation that occurs during the pendency of an appeal of a civil case.
>
> (b) "Circuit court mediation," which means mediation of civil cases, other than family matters, in circuit court. If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.
>
> (c) "County court mediation," which means mediation of civil cases within the jurisdiction of county courts, including small claims. Negotiations in county court mediation are primarily

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

> conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.

(Emphasis supplied.)

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.

Section 44.1011(1), F.S., defines the term "arbitration" to mean:

> A process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding as provided in this chapter.

Generally, the arbitrator participates in the proceedings to a greater degree than trial judges participate in court proceedings. Arbitrators often ask questions and can require the production of documents. Arbitrators typically have a level of expertise in the subject of the dispute and are expected to apply their knowledge and experience.[18]

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. [19]

F. Alternative Dispute Resolution for Homeowners' Associations

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, or a tenant, guest, or invitee occupying a parcel or using the common areas. The prevailing party in the action is entitled to reasonable attorney's fees and costs.[20] 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

[18] The Florida Bar, *Business Litigation in Florida, Fifth Edition*, 2007
[19] Rule 1.700, Fla.R.Civ.P., permits judges to refer cases to mediation or arbitration.
[20] Section 720.305(1), F.S.

to reasonable attorney's fees and costs.[21] Chapter 720, F.S., also provides an option to litigation.

The Legislature has recognized the role of alternative dispute resolution in reducing court dockets and trials and offering a more efficient, cost effective alternative to litigation.[22] 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.

1. Mandatory Binding Arbitration

Current law requires that election recall disputes must be resolved by binding arbitration conducted by the division. Any recall dispute filed with the division must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors and dispute resolution procedures for condominiums.[23] Section 718.112(2)(j), F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S.,[24] and provides that, if the condominium association fails to comply with the final order of arbitration, DBPR may take action pursuant to s. 718.501, F.S.[25]

Section 720.311(1), F.S., also requires that the division conduct mandatory binding arbitration for election disputes in accordance with s. 718.1255, F.S.[26] A $200 filing fee is required for the arbitration 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.

2. Presuit Mandatory Mediation

Section 720.311(2), F.S., provides that the following disputes between an association and a parcel owner are subject to presuit mediation before the dispute can be filed in court:

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[21] Section 720.305(2), F.S.
[22] Section 720.311, F.S.
[23] Sections 720.303(10)(d), F.S., and 720.311(1), F.S.
[24] Section 718.1255, F.S., provides for alternative dispute resolution, voluntary mediation, and mandatory nonbinding arbitration and mediation of disputes.
[25] Section 718.501, F.S., establishes the powers and duties of DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.
[26] Section 720.311(1), F.S., provides that election and recall disputes are not eligible for mediation.

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings, not including election meetings; and
- Disputes regarding access to the official records of the association.

The following disputes are not subject to presuit mediation:

- The collection of any assessments, fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement; and
- Any dispute where emergency relief is required.

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"[27] and must be substantially followed by the aggrieved party and served on the responding party. 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. The notice also provides notice of the procedure for mediation of disputes, and the rights and obligations of the parties. The notice must include a listing of five mediators. The party receiving the demand may select a mediator from that list. The notice also advises that the Florida Supreme Court can provide a list of certified mediators.[28]

The mediation is conducted under the applicable Florida Rules of Civil Procedure, and the proceeding is privileged and confidential to the same extent as court-ordered mediation. Persons not a party to the suit may not attend the mediation conference without the consent of all parties.

Section 720.311, F.S., also requires that:

- 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;

[27] 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.

[28] 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 September 26, 2007).

- Service of the statutory demand notice is made by sending the form, or a letter that conforms substantially to the statutory form, by certified mail. An additional copy must be sent by regular first-class mail to the address of the responding party as it appears on the books and records of the association;
- A responding party must serve a written response within 20 days from the date the demand is mailed. The response must be served by certified mail, and an additional copy must be sent by regular first-class mail to the address shown on the demand;
- The mediator may require advance payment of fees and costs;
- If presuit mediation cannot be conducted within 90 days after the offer to participate, impasse will be deemed, unless both parties agree to extend the deadline;
- 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 costs and fees associated with mediation; and
- 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.

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 or enter the disputes into binding or nonbinding arbitration to be conducted by the division or private arbitrator pursuant to the procedures set forth in s. 718.1255, F.S. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for a trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the arbitration order. These presuit mediation procedures may be used by non-mandatory homeowners' associations.[29] 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.[30]

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.[31] Rather, arbitrators are made eligible by placement on a list by the chief judge of the circuit in which the arbitrator will practice.[32] A petition for mediation or arbitration tolls

[29] Section 720.311(2)(e), F.S.
[30] Section 720.311(2)(c), F.S.
[31] *See* Florida Rules for Court-Appointed Arbitrators, http://www.flcourts.org/gen_public/adr/index.shtml (last visited April 14, 2007).
[32] *Id*.; *see also* FLA. R. CIV. P. 1.810(a).

the applicable statute of limitations.[33] As noted above, these procedures were adopted during the 2007 Regular Session.[34]

G. 2006 Veto of HB 391 (CS/SB 2358)

During the 2006 Regular Session, HB 391 (CS/SB 2358 by Regulated Industries Committee and Senator Bennett), relating to community associations, amended many of the same provisions in condominiums and homeowner's associations in chs. 718 and 720, F.S., as did ch. 2007-173, L.O.F. The bill passed both houses but was vetoed by Governor Bush. The Governor's veto of HB 391 was based on his objections to these two provisions in that bill:

- The extension of the date after which local authorities may require the retrofit of applicable residential condominium common areas with a fire sprinkler system from 2014 until 2025 in s. 718.112, F.S.;[35] and
- The bill repealed the provisions of s. 720.311, F.S., relating to mandatory mediation of disputes between associations and a parcel owner, and repealed the mediation of such disputes by the Department of Business and Professional Regulation.

Regarding the repeal of the division's mandatory dispute mediation program, the Governor stated in his veto message that, under the bill's voluntary mediation scheme, disputes could be filed in the courts without the requirement for mediation. The Governor stated that the return to voluntary mediation reduces the benefits of time and money that mandatory mediation saves over protracted court proceedings for typical owner-association disputes.

The Governor's veto message stated that he was directing the Department of Business and Professional Regulation to initiate a project to study and make recommendations on:

- Ways to improve and/or expand existing alternative dispute mediation and education programs to accommodate stricter association requirements;
- The extent to which the protections afforded to members of mandatory homeowner's associations can approach parity with the protection afforded condominium owners while maintaining the legislative intent that homeowner's associations not be regulated; and
- Whether the state should move toward establishing a comprehensive common interest realty law by using the Uniform Common Interest

[33] Section 720.311(1), F.S.
[34] Chapter 2007-173, L.O.F.
[35] This provision was not included in ch. 2007-173, L.O.F.

> Ownership Act[36] as a starting point and analyzing the laws of other states.

The department's study resulted in the following recommendations:

> 1. The division's existing alternative dispute resolution program can be expanded. Greater utilization of private mediators can be expanded, and more in-house mediators could be employed by the division. The division's website and education program should be expanded to assist board members in homeowner and condominium associations in better understanding their responsibilities with the goal of minimizing complaints.
>
> 2. The protections afforded to members of mandatory homeowners' associations can approach parity with those afforded to members of condominium associations in some ways. This should be done by enacting laws that:
>
> a. Define the use of reserve funds.
> b. Define the use of developer guarantees.
> c. Establish purchaser warrantees.
> d. Enhance the voting rights of members.
> e. Adopt a similar election method to that provided for condominiums.
> f. Restrict the use of general proxies.
> g. Clarify the financial reporting requirements and due dates to those found in the condominium laws.
> h. Restrict the use of association funds to legitimate association expenses.
> i. Require that expenses be apportioned in a manner that limits the circumstances in which a parcel may pay a different proportionate share of expenses to those based on stages of development.
> j. Remove the current restrictions on the right of an association to bring legal action.
>
> 3. Florida should not adopt the [Uniform Common Interest Ownership Act][37] because the existing common interest realty laws in Florida are more comprehensive than those of other states and have a greater emphasis on consumer protection than UCIOA.

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[36] This model act was originally promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws. The Uniform Common Interest Ownership Act (UCIOA) is a comprehensive model act that governs the formation, management, and termination of a common interest community, including condominiums, planned communities, and real estate cooperatives. This model act is intended to supersede the earlier Uniform Condominium Act (1977) (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981).

[37] *Id.*

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

A. The Sources and Costs of Homeowners' Association Disputes

The growth in the number of residential associations in the United States has been "explosive" since 1962.[38] Florida has also experienced this rise in residential associations, and many of these condominiums, cooperatives, residential neighborhoods, and community development districts are in deed-restricted communities. Property purchased in a deed-restricted community 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.[39] These restrictions are usually described in a declaration of covenants (for example, the declaration of condominium) that is agreed upon by the property owners when they purchase property within the deed-restricted community.[40]

Disputes between property owners and their associations are common, and usually rise out of the violation of a deed restriction, the penalty imposed for the violation, or an allegation that the association is selectively enforcing a restriction or covenant.[41] According to interested parties, the number of homeowners' association disputes, evidenced by a growing number of complaints to the division and litigation, has grown as the number of deed-restricted residential communities has grown.

According to the persons consulted for this study, litigation typically relates to disputes between associations and their members over community rules or restrictions and the willingness or ability of community members to comply with those rules or restrictions. Often the disputes give rise to acrimony between neighbors and simple disputes can escalate to drawn-out, expensive, and ultimately preventable litigation.

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[38] David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 764-65 (1995).
[39] Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U.J.L. & POL'Y 663, 671 (2000).
[40] *Id.* at 672.
[41] *See generally,* Kennedy, *supra* note 38, at 761 ("As the number of residential associations has increased, the consequent litigation has arisen largely in the context of disputes between residential associations and their members over the content of frequently intrusive rules and regulations"); *see also,* James L. Winokur, *Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 63-64 (1989).

There are two reported appellate cases that demonstrate how a relatively small dispute can escalate into prolonged and expensive litigation. In *Bessemer v. Gerstein,*[42] 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. In *Zerquera v. Centennial Homeowners' Association, Inc.*,[43] a dispute over a $200 fine against the homeowner for keeping a boat and parking his truck on his property resulted in a foreclosure judgment against the homeowner for $31,023.79, which included the $200 fine and the attorney's fees and costs.[44] During the course of this study, other examples were offered of relatively small disputes between homeowners and their homeowners' 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. They stress the importance ADR, generally, as an effective means of reducing court costs for all potential litigants and of reducing the overall burden on the busy court system.

B. Homeowners' Association Mandatory Mediation Program

The Homeowner's Association Mandatory Mediation Program implemented the division's ADR mandatory mediation responsibilities under s. 720.311, F.S. (2006). This program began on October 1, 2004 and continued until June 30, 2007 (a two and a half year period), 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. These petitions resulted in the following dispositions:

Cases Settled at Mediation	501
Cases settled before mediation	549
Cases partially settled at mediation	5
Impasse at mediation	286
Dismissed for non-conformance	815

[42] *Bessemer v. Gerstein*, 381 So.2d 1344 (Fla. 1980).
[43] *Zerquera v. Centennial Homeowners' Association, Inc.*, 752 So2d 694 (Fla. 3rd DCA 2000).
[44] Enacted in 2004 by s. 20, ch. 2004-345 and s. 17, ch. 2004-353, L.O.F., s. 720.305(2), F.S., provides that a fine cannot become a lien against the parcel.

No Jurisdiction	67
Moot	8[45]
Administratively closed	152+[46]

The division noted that petitions for mediation were dismissed for non-conformance if a party failed to appear at the mediation, ignored the entire process, and/or refused to cooperate in the process. Division mediators could not compel compliance because a mediator is not able to enforce cooperation in the process. Successful mediation is dependent on the parties' good faith and cooperation in resolving the dispute. Apart from the good faith, cooperation in the process also depends on the legal consequences of any non-cooperation. For example, in the case of court-ordered mediation, the court could assess costs to a non-cooperative party.

Based on the 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 those 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 (see discussion below) in which approximately 95 percent of the disputes are resolved.[47] 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., states that the Supreme Court can provide a list of certified mediators. The Supreme Court provides a searchable listing of mediators on its Internet site, but the search criteria does not include the mediators' subjects of expertise or interest. For example, when searching for a mediator, the parties may search for a mediator by name, judicial circuit or county, the type of mediation performed, i.e., county, family, circuit, or dependency, or the mediator's language, gender, ethnicity, or occupation.[48] 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

[45] According to the division, these cases were settled before mediation early in the program's history. During this early period, the "moot" classification was used by the department's license/case managements program "LicenseEase" to classify settled cases.

[46] Also according to the division, "administratively closed" cases are cases that were received before July 1, 2007 and were issued an order referring them to mediation. However, due to the termination of the division's mediation program pursuant to ch. 2007-173, L.O.F., the mediation of these disputes will now continue outside the purview of the division's jurisdiction.

[47] Interview with representatives from the division's condominium arbitration program.

[48] *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).

maintain a listing of certified mediators who specialize in homeowners' association disputes.

However, the Florida Circuit-Civil Mediators Society (FCCMS) maintains an Internet site which permits persons to search for a mediator by county and by area of expertise, including expertise in matters relating to community associations.[49] According to the representative for the FCCMS, the society added the category of expertise in community associations early this year because of the high number of inquires they were receiving on the subject matter.

C. 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.[50]

Section 718.1255, F.S., provides ADR procedures for condominium associations and condominium unit owners in Florida. Although s. 718.1255(2), F.S., encourages voluntary mediation through the Citizens Dispute Settlement Centers provided under s. 44.201, F.S., it provides for mandatory nonbinding arbitration and mediation by the division of certain defined disputes.

The following types of disagreements between two or more parties in a condominium dispute are subject to the mediation and arbitration provisions of s. 718.1255, F.S.:

> (a) The authority of the board of directors, under [ch. 718, F.S.] or association document to:
> 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
> 2. Alter or add to a common area or element.
>
> (b) The failure of a governing body, when required by this chapter or an association document, to:
> 1. Properly conduct elections.
> 2. Give adequate notice of meetings or other actions.
> 3. Properly conduct meetings.
> 4. Allow inspection of books and records. [51]

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[49] *See* http://www.floridamediators.org (Last visited September 20, 2007). According to the representative for the Florida Circuit-Civil Mediators Society, the society is selective in its membership and has approximately 150 members and intends to limit its membership to approximately 200 arbitrators and mediators. See membership qualifications at: http://www.floridamediators.org/index.php?rollid=AboutADRWEB (Last visited September 20, 2007).

[50] Cooperatives established under ch. 719, F.S., have ADR requirements that mirror the ADR requirements in ch. 718, F.S.

[51] *See* s. 718.1255(1), F.S., defining the term "dispute."

Disagreements that primarily involve the following types of disputes are not subject to resolution under s. 718.1255, F.S.:

- Title to any unit or common element;
- The interpretation or enforcement of any warranty;
- The levy of a fee or assessment, or the collection of an assessment levied against a party;
- The eviction or other removal of a tenant from a unit;
- Alleged breaches of fiduciary duty by one or more directors; or
- Claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.

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.[52]

1. Comparisons and Contrasts/Condominiums and Homeowners' Associations

The division estimates that there are more than 20,000 condominium associations in Florida with an estimated 1.3 million unit owners. As noted previously, the exact number of homeowners' associations is not known, but is estimated at more than 27,000 homeowners' associations in Florida. There are fewer condominium associations than there are homeowners' associations. It is not clear whether the greater number of homeowners' associations equates to more disputes. As noted above, the division received 2,383 petitions for mediation during the two and half year existence of the homeowners' association mediation program. The condominium ADR program received almost 1,000 fewer arbitration petitions during the last two fiscal years.

The condominium arbitration program has demonstrated a drastically better ability to resolve disputes than that offered by the process available for homeowners' associations. During the previous two fiscal years (2005-2006 and 2006-2007), the division's condominium arbitration program received approximately 1,400 arbitration petitions. According to the division, approximately 15 percent of these petitions related to recall and election disputes and almost all (99.97 percent) of these disputes were fully resolved through the arbitration process.

The division indicated that approximately 71 percent of the disputes filed with the program went through the arbitration process with a dispute resolution success

[52] *See* 718.112(4)(e), F.S.

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. Condominium procedures provide for mandatory *nonbinding* arbitration.[53] However, homeowners' associations and their members are subject to mandatory *binding* arbitration for election and recall disputes. These types of homeowners' association disputes are also specifically excluded from mediation.

The ADR provisions for condominiums in s. 718.1255, F.S., exclude more types of disputes from arbitration than s. 720.311, F.S. excludes for homeowners' associations disputes. The greater number of excluded condominium disputes is primarily due to the character of the condominium form of ownership. For example, the following types of disputes, which are excluded from arbitration under s. 718.1255, F.S., are not present in a homeowners' association:

- Title to any unit or common element.
- Claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.
- The interpretation or enforcement of any warranty.

Both ADR provisions exclude disputes related to assessments, but s. 720.311, F.S., provides a broader exclusion and also excludes "fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement."

Section 718.1255, F.S., also excludes two types of condominium disputes that are not specifically authorized for, or excluded from, ADR proceedings for homeowners' associations. These are:

- Alleged breaches of fiduciary duty by one or more directors.
- The eviction or other removal of a tenant from a unit.

The funding of the former ADR program for homeowners' associations also differed from the funding mechanism for the condominium arbitration program. In addition to the $50 dollar fee for the arbitration, the condominium arbitration program is also funded, in part, by an annual fee of $4 for each condominium unit operated by the association.[54] Under s. 720.311, F.S., arbitration of homeowners'

[53] *See* 718.112(2)(k), F.S.
[54] Section 718.501(2)(a), F.S.

association election disputes require a $200 filing fee. The costs of mediation of the other disputes are funded through "reasonable fees and costs" paid directly and equally by the parties to the mediator.[55]

Another significant distinction between the ADR programs is the greater level regulation of condominiums. 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.[56] Homeowners' associations are not regulated to the same degree and operate to a greater level of autonomy from the state. The division also indicated that the greater number of statutory directives for condominiums gives the division more guidance when arbitrating condominium disputes. According to the division, arbitration of homeowners' association disputes require a greater reliance on the interpretation of homeowners' association governing documents and bylaws. Further, the division noted that the majority of homeowners' association disputes involve issues related to the communities' covenants and restrictions, e.g., placement of the mail box, lawn care, unapproved structures, the proper color of the house, etc.

2. Ombudsman for Condominiums

The Office of the Condominium Ombudsman within the division serves as a liaison between the division, unit owners, boards of directors, board members, community association managers, and other affected parties.[57] The ombudsman is required to:

> Develop policies and procedures to assist unit owners, boards of directors, board members, community association managers, and other affected parties to understand their rights and responsibilities as set forth in [ch. 718, F.S.] and the condominium documents governing their respective association. The ombudsman shall coordinate and assist in the preparation and adoption of educational and reference material, and shall endeavor to coordinate with private or volunteer providers of these services, so that the availability of these resources is made known to the largest possible audience.[58]

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

[56] "Condominiums and the forms of ownership created therein are strict creatures of statute." *Woodside Village Condominium Association, Inc., v. Jahren*, 806 So.2d 452, 455 (Fla. 2002).

[57] The office is created by s. 6, ch. 2004-345, L.O.F., and codified at s. 718.5011, F.S. The Office of the Ombudsman is funded by the Division of Land Sales, Condominiums, and Mobile Homes Trust Fund.

[58] *See* s. 718.5012(4), F.S., which also provides that the ombudsman:

Homeowners' associations also do not have access to an ombudsman. Some interested parties have asserted that homeowners' associations would benefit from having an ombudsman dedicated to serving the needs of homeowners' associations and their members. However, the role of the ombudsman for condominium associations is aided by the greater level of regulatory oversight that the division exercises over condominiums.

The Office of the Condominium Ombudsman is funded by the division's trust fund using the current fees for the division. According to the division, its current condominium fees are significantly higher than necessary to fund the regulation and are also used to fund the ombudsman's office. This program began in 2004 with two full time employees (FTE's) for FY 2004-2005 and a budget of $185,769. The program has grown to eight FTE's and a budget of $506,660 for FY 2006-2007. To be effective statewide, an ombudsman program for homeowners' associations may require, at minimum, comparable staffing and funding. It is also not clear how an ombudsman for homeowners' association disputes should be funded, or whether the greater number of homeowners' associations and homeowners' associations disputes would necessitate more staff than the condominium ombudsman.

D. Pilot Program Options

CS/SB 1444 by the Judiciary Committee and Senator Justice (HB/CS 923 by the Safety and Security Council and Representative Ambler) 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.

1. Mandatory binding arbitration

- Monitors and reviews disputes, including election disputes, and makes enforcement recommendations to the division if there is reasonable cause to believe that election misconduct has occurred.
- Makes recommendations to the division for rules and procedure changes for the filing, investigation, and resolution of complaints filed by unit owners, associations, and managers.
- Provide assistance to boards of directors and officers of associations to carry out their powers and duties.
- Encourage and facilitate voluntary meetings with and between unit owners, boards of directors, board members, community association managers, and other affected parties in order to assist in resolving a dispute before the dispute is submitted for a formal or administrative remedy.

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, e.g., the parties agree that if a dispute arises regarding the terms of the contract the dispute will be resolved by binding arbitration.

Binding arbitration is required for disputes involving the amount of the fee in private attorney contracts with the Department of the Legal Affairs,[59] and to resolve disputes between the holder of a slot machine license and the Florida Horseman's Benevolent and Protective Association, Inc., involving the payment of purses in live thoroughbred races.[60] These binding arbitration requirements have not been the subject of any reported constitutional challenges. (See discussion below regarding the constitutionality of mandatory binding arbitration.)

Binding arbitration is also required for disputes between a member and a homeowners' association regarding the election of the board of directors using the procedure for provided by s. 718.1255, F.S, for condominiums.[61] However, the procedure in s. 718.1255, F.S., provides for nonbinding arbitration and permits the parties to elect mediation and to appeal the arbitrator's decision by filing a compliant with the court for a trial de novo. This inconsistent cross reference appears to be of minimal practical consequence. According to the division, although the provisions appear contradictory, no party has presented a constitutional challenge to mandatory binding arbitration, or requested mediation or appealed the arbitrator's decision in a homeowners' association election dispute. According to the division, election disputes and recall elections are necessarily expedited processes because, by the time any additional procedures are completed, the association is likely that the next scheduled election has already occurred or is about to occur.[62]

In *Delta Casualty Company v. Pinnacle Medical, Inc.*,[63] 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 rights in Art. I, s. 21, Florida Constitution, and the right to substantive due process.[64]

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[59] Section 287.059, F.S.
[60] Section 551.104(10)(c)2., F.S.
[61] Section 720.306(9), F.S.
[62] *See* s. 718.1255(5), F.S.
[63] *Delta Casualty Company v. Pinnacle Medical, Inc*., 721 So.2d 321 (Fla. 5th DCA 1998).
[64] 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.

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.[65] (emphasis in original)

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.[66] 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.

2. Agency Arbitration of Homeowners' Association Disputes

As noted above, homeowners' associations mediation is performed by private mediators at the expense of the parties. While s. 6, ch. 2004-345, L.O.F., decreased the division's involvement in homeowners' association disputes by eliminating the mediation program, 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.

The funding mechanism for the condominium ADR and ombudsman programs also presents the primary difference between the ADR programs for homeowners' associations and condominiums. 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.[67] 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

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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.

[65] *Psychiatric Associates v. Siegel*, 610 So.2d 419, 423 (Fla. 1992).

[66] *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.

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

petition filing fee produced approximately $36,150 of the estimated $414,149 cost of the program.[68]

Because homeowners' associations are not regulated by the division and do not have a regulatory trust fund from which to support a more active division involvement in disputes, homeowners' associations disputes must 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 necessitate that the division hire additional arbitrators to accommodate the added workload. However, based on the number of mediation petitions that 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.[69] 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 consulted for this report 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.70

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

[69] 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.

[70] 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.

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 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.[71] According to an arbitrator, it is not advisable to permit a party to decide unilaterally to opt-out of arbitration and refer the dispute 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 thereby 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. [72] 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.[73]

Agency 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

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

[72] 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.

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

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.

3. Traffic Court Model

Another proposal is to use the traffic court as a model by using magistrates to create an office in which arbitrators act as magistrates to provide final binding judgments in homeowners' association disputes. This is the model that was presented in the Home Court Advantage pilot program of CS/SB 1444. This model presented several constitutional concerns.

In addition to the constitutional right of access to courts, a program that provides final decision-making authority 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.[74]

It is not clear whether the legislature could create a quasi-judicial agency or program to resolve homeowners' association disputes. Article V, s. 1, Florida Constitution, also provides that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters

[74] Article V, s. 1, Florida Constitution.

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"[75] 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.

4. Pilot Program for Pinellas and Hillsborough Counties

CS/SB 1444 would have created a one-year Home Court Advantage Pilot Program in Hillsborough and Pinellas counties for the mandatory arbitration of homeowners' association disputes in those 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:
>
> (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.[76] Laws which arbitrarily affect one subdivision of the state, but which fail to encompass other similarly situated subdivisions, may be classified as special laws.[77] Even if a bill is enacted as a "general law," courts will treat it as a special law if its effect is more like that of a special law.[78]

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.[79] However, laws which distinguish on the basis of population may be

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[75] *See Verdi v. Metropolitan Dade County*, 684 So.2d 870 (Fla. 3rd DCA 1996).
[76] *See Housing Authority v. City of St. Petersburg*, 287 So.2d 307, 310 (Fla.1973).
[77] *See Department of Business Regulation v. Classic Mile, Inc.*, 541 So.2d 1155 (Fla. 1989).
[78] *See Anderson v. Board of Public Instruction for Hillsborough County*, 136 So. 334 (Fla. 1931).
[79] *See City of City of Miami Beach v. Frankel*, 363 So.2d 555 (Fla. 1978).

classified as special laws if their objectives bear no reasonable relationship to differences in population.[80]

The pilot program in CS/SB 1444, which was limited to Hillsborough and Pinellas counties, required participation in arbitration before the dispute could be brought to court. 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. Alternatively, a pilot program for presuit arbitration of homeowners' association disputes may be constitutional if limited to one or more counties and participation in the arbitration process were voluntary and not a mandated precondition.

5. 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 proceeding. 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 disputes than on the location of the process. For example, the potentially binding nature of the condominium arbitration process, i.e., the arbitrator's decision is final unless timely appealed. The use of a similar process for homeowners' association disputes may obviate any need for using courtrooms to imbue the process with more gravity.

The conduct of arbitration proceedings after regular business hours, including the use of courtrooms for those proceedings, has been urged to help accommodate the needs of working homeowners and+ homeowners' association representatives. However, the use of courtrooms for the conduct of arbitration proceedings carries additional costs, and it is not clear whether the assumption of these extra costs by the parties to the dispute would add greater importance to the arbitration process or facilitate the resolution of disputes.

For example, Hillsborough County circuit court (13th Judicial Circuit) conducts after-hours night-court. These facilities may be available and already open for public access. According to the court administrator for the 13th Judicial Circuit, although they would not charge a fee for use of a courtroom, the courtrooms would have to be under the supervision of a courtroom bailiff. This is an additional cost that would have to be borne by the parties to the arbitration. In Hillsborough County, bailiffs

[80] *See State ex rel. Utilities Operating Co. v. Mason*, 172 So.2d 225 (Fla. 1964).

earn approximately $25 an hour plus time-and-a-half during after-hours sessions. It is not clear that all the circuits or counties have courthouses that are available for use after regular business hours. A state-wide provision for the use of courthouses for an arbitration program would require that a state agency coordinate the availability of these facilities. Such a program would also have costs which would have to be paid by 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.