

Records, Meetings Too Open

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By **Joe Adams**

jadams@becker-poliakoff.com

TEL (941) 433-7707

FAX (941) 433-5933

Each year, the University of Miami School of Law sponsors a seminar known as the Cluster Housing Institute. The Institute draws hundreds of participants, primarily attorneys involved in Florida community association law, from both the developer side and the unit owner-controlled side (usually called post-turn-over associations).

Each year, there seems to be recurrent themes at the Institute, both from the perspective of the lecturers, as well as questions asked from audience participants. One question that surfaced several times in the presentations and audience questions at this year's Institute, which was held on October 30 and 31, is whether the "sunshine" rights of unit owners in condominium associations have gone too far.

The specific area of concern involves access to potentially sensitive information involving employees of the association. If personnel or employee matters are being discussed at a board meeting, unless the meeting involves attorney-client privileged information and takes place directly with the attorney, unit owners are entitled to attend those meetings. Obviously, by discussing sensitive personnel issues at an open meeting, the association opens itself up to a host of potential problems, including exposure to claims for defamation (libel and slander).

Take the following example as an easy illustration: The board receives a letter from a unit owner alleging that one of the men who cuts the lawn smokes marijuana on condominium property every day, and may be creating a danger to himself (or a liability to the association) while operating dangerous equipment under the influence of illegal substances.

Obviously, the board would be ill advised to ignore the situation. However, especially if the allegation is not true, it is easy to envision the types of legal hassles that could arise from a public discussion of the matter.

A similar concern involves official records of the association. Basically, every piece of paper kept by a condominium association is an "official record." The only exceptions are attorney-client privileged documents, medical records of unit owners (if they are kept for any reason) and information obtained in connection with the approval of applications for the sale or lease of a unit.

Let's look at another example: The association's on-site manager confesses to the board president that he has a severe alcohol addiction problem. He wants to know if the association's health insurance will pay for appropriate counseling and treatment. The president says she will check with the health insurance agent. Subsequent paperwork (applications, medical records, etc.) become part of the association's files, documenting the insurer's agreement to pay for the alcohol addiction treatment. By strict definition, all of the documents are "official records" of the association.

In our latter hypothetical, there is no doubt that every business on the face of the earth would find it unwise to allow anyone to review this information unless they were on a strict "need to know" basis. Unfortunately, in the condominium realm, there is no "need to know" qualification. If a unit owner with malicious intent (for example, someone who wanted to have the manager fired because they did not like them) used this information inappropriately, it is again easy to predict legal disaster. In fact, the giving of the information itself could give rise to claims involving state or federal privacy laws, although I am aware of no specific legal precedents directly on point.

I heard several Institute participants state that an amendment to the statute needs to be immediately considered to address this ever-increasing problem. I agree. As always, however, the devil is in the details. There is no doubt that restricting a unit owner's rights to attend board meetings or

review records can be abused, and no doubt will be by the ill-intentioned few. However, I believe the law should serve the interest of those who obey it, and this is definitely an area where a call to change should be pursued by those affected, the associations and their boards.

As to homeowners' associations, the same problem exists regarding open board meetings, although the definition of "official records" in HOA's is more narrow than the condominium counterpart, and personnel records can presumably be withheld from parcel owner inspection requests. ☺

Document Condo Maintenance Concerns

QUESTION: Several years ago I purchased a condo in Southwest Florida. I have lived there on a full time basis since then. Shortly after I moved in, I discovered a flooding problem. I submitted to the association a written request that repairs be made. Shortly thereafter I received a letter stating that the work would be done within the year. To date no work has been done and I have received nothing but promises that repairs on my unit would be scheduled soon. What I would like to know, is there any way that I can withhold my monthly maintenance fee from the Board by depositing it in an escrow account until the work is completed? V.M. (via e-mail)

ANSWER: The old saying "two wrongs do not make a right" is definitely applicable in this case.

In the event that you withhold your assessments, whether in an escrow account or not, most condominium documents provide a penalty for late payment and interest on any outstanding assessments at the highest rate allowed by law. Typically, that would involve interest at 18% per annum, and late fees in the amount of \$25.00 per late payment.

The prevailing view of Florida law is that an association's failure to perform necessary maintenance (even if that allegation is true) does not constitute a valid defense in an assessment foreclosure action.

Although a "rent strike" would no doubt get the Association's attention, it creates too much exposure to losing your home. In addition to the penalties and late fees noted above, you could also be held responsible for attorney's fees incurred by the Association.

Therefore, I would recommend that you pay your assessments in a timely fashion and address your maintenance concerns separately. In many cases, the best thing the owner can do is document their concerns in writing, and send it to the Association by certified mail. The Association then must provide a substantive response within 30 days, or else it is subject to potential penalties under the law.

If the certified letter does not result in the resolution of the problem to your satisfaction, then the only choice is to consult with an attorney about taking the matter to arbitration or court. If you are seeking the recovery of damages, court is your only option.

QUESTION: A quorum of our HOA's board recently met to discuss landscaping issues. They did not post notice of the meeting. They told me that they do not have to post notice when no votes are taken. R.H. (via e-mail)

ANSWER: I disagree. Section 720.303(2) of the statute applicable to HOA's provides that all "meetings" of the board must be open to member observation. There is an exception for attorney-client privileged meetings.

A "meeting" is defined in the statute as any gathering of a quorum of the board where association business is "conducted." Although the law does not define what "conduct" of a meeting is, it is my opinion that formal votes need not be taken in order for a meeting to be held. By reference to decisions arising under the condominium law, and the Sunshine In Government Law, believe that the mere discussion of association matters creates the "meeting." Otherwise, directors could make all of the hard decisions "out of the sunshine," and the posted meetings would be nothing but a "rubber stamp" event. ☺

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.