

Sunshine Restrictions Explained

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Today's column is the second installment of a two-part look at the "Sunshine" laws applicable to Florida's community associations.

Last week we looked at the definition of "meetings," quorum issues, and agenda and posting requirements (see *Sunshine Law Raises Questions*, February 19, 2004).

Today's discussion focuses on the keeping of minutes, committees, and possible consequences of not complying with the law:

Minutes: Both the condominium and homeowners' association statutes require minutes of board meetings to be kept. There is no deadline in any of the statutes as to when minutes must be reduced to writing after a meeting. An old rule from the condo agency required minutes to be put in writing within thirty days of the meeting, although that rule was repealed. I recommend that minutes be reduced to writing as soon as possible after the meeting (no more than a few days) since that is when the memory of the person responsible for the minutes is the freshest.

HOA Committees: The "sunshine" provisions of the law for homeowners' associations does not apply to committees of the association except in two circumstances. First, any committee given architectural review authority is subject to all of the aforementioned laws. Secondly, any committee that is empowered to spend money on behalf of the HOA is bound.

Condominium Association Committees: The law on this topic is downright strange. The budget committee and any committee empowered to take final action on behalf of the board (such as an executive committee) are commonly called "statutory committees." All other committees (typical

examples would include social committee, landscape committee, and personnel committee) are commonly called "non-statutory" committees. Statutory committees must always comply with the sunshine laws. Non-statutory committees must comply with the sunshine laws unless exempted by the bylaws. Many older condominium association bylaws are silent on committees, and in such cases, their non-statutory committees need to comply with the sunshine law.

Exceptions: Contrary to popular belief, there are no exceptions to the sunshine laws for discussing "sensitive" matters, whether personnel-related, sticky "political" issues, or otherwise. I believe that there should be exceptions in some cases, particularly involving employer-employee relations. The only exception that exists, which applies to both condominiums and homeowners' associations, involves meetings with association legal counsel for the purpose of discussing pending or proposed litigation, and when the meeting is sought for the purpose of obtaining legal advice.

Many association board members are used to life in the business world where shareholders elect the board, and the board is entitled to act how and when it pleases in furthering the best interest of the corporation. In community associations, the law is more akin to governmental agencies such as a city council or county commission.

Violation of the sunshine laws in condominiums can result in fines of up to \$5,000.00 per violation. In HOAs, directors guilty of violating the sunshine law are theoretically subject to court action for breach of fiduciary duty or a court order enforcing compliance with the laws, with a successfully complaining homeowner being entitled to compensation for their attorney's fees. ☺

Handicap Accommodation Request Touchy Situation

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Question: Our bylaws state that we must hold an election for our board every year. This year, the candidates ran unopposed. Is there any process by which we can forego the election process and have the candidates declared as elected? P.P. (via e-mail)

Answer: It depends. If your association is governed by the condominium law, then no election needs to be held. Florida Statute Chapter 718 specifically provides that if there are only as many or fewer pre-qualified candidates as open board seats, no election need be held and those who have sought the post are automatically elected.

For homeowners' associations, the law is a bit different. The HOA statute states that self-nominations from the floor must be accepted at the annual meeting. Accordingly, until the meeting is actually called, the election process is not closed, and therefore appropriate voting documents should be prepared for the election.

Question: I am a realtor and am always needing to get copies of covenants for deed restricted communities. Is there a private or government repository which has a current copy of HOA covenants? D.W. (via e-mail)

Answer: There is no central resource for obtaining covenants and restrictions applicable to deed restricted communities. The documents are almost always recorded in the public records of the County where the property is located. In some counties, the documents are available through the Internet. In others, you must go to the courthouse. Of course, the owner should have a copy and is entitled by law to obtain a set of documents from the association.

A realtor who is listing properties in a deed restricted community is well advised to start the listing relationship with a complete set of documents for the community. Since more potential buyers these days are interested in the level of regulation applicable to a particular development, you might wish to have several sets of documents on hand for each of your listings.

Question: Recently you wrote a column about the Governor's Task Force on Homeowners' Association. Were any of the meetings held in Southwest Florida? C.S. (via e-mail)

Answer: Meetings were held in Tallahassee, Miami, Tampa, Orlando, and St. Augustine.

The Department of Business and Professional Regulations has just released the final report of the Task Force, which can be viewed on-line at www.myflorida.com/dbpr, the DBPR's homepage. Click on the report under the segment of the homepage entitled "HOT TOPICS."

Question: I live in a mobile home park which has just gone through a change in management. Previously, employees of the company which own and operate the park were also allowed to perform after-hours services for park residents. For example, one of the employees who works on the grounds crew has done private landscaping work for me, and I have been very satisfied. The new management has told its employees that they can no longer do after-hours work for residents. Does an employer have the right to tell employees what they can or cannot do on their own time? G.C. (via e-mail)

Answer: Subject to certain conditions, yes.

While there may be limits to what an employer can regulate in terms of off-duty conduct, I believe that the policy you have described would be upheld.

Among the reasons an employer may want to limit after-hours employment include avoiding divided loyalties, or the need to debate whether the employee was on company time or working after hours should some mishap, such as an injury, occur.

Question: In your recent article regarding Sunshine laws, you stated that there is an exception regarding agenda posting requirements for "emergency" situations. What are these procedures and what constitutes an "emergency"? R.J. (via e-mail)

Answer: In my opinion, an emergency is an unexpected set of circumstances posing imminent potential harm to the corporation or its assets. Obvious examples would include hurricanes or severe weather events. Other examples might include legal situations where a statute of limitations or other deadline is looming.

Section 718.112(2)(c) of the condominium statute provides that if an item has not been placed on the agenda for a board meeting, it may be taken up on an emergency basis by a vote of a majority of the board, plus one. Therefore, if you had five directors, four would need to agree to take up the item on an emergency basis.

The law also requires that the item then be placed on the agenda for the next meeting of the board and duly ratified at that meeting. An item is clearly not an emergency because the association forgot to place it on the agenda. ⚖️

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.