

Let Bylaws Control Board Details

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For the past couple of months, this column has been exploring issues often tackled by associations when updating the community's governing documents. Today's topic, the board of directors.

In my opinion, it is best to leave the details of board issues to the bylaws, with only brief mention in the declaration of condominium (or for homeowners' associations, the declaration of covenants) and the articles of incorporation.

Most association bylaws have an entire section devoted to the details of seating the board. Among the issues typically addressed include the following:

Qualifications for Service: Contrary to popular belief, one does not need to own property in a community to serve on its board. Most associations do establish ownership as a criteria for board service through the bylaws. There may be some exceptions to be considered, such as permitting non-titled spouses to serve, since many families own property in the name of one spouse for estate or tax reasons. Most other qualifications on board service, such as residency requirements, are inconsistent with the statutes for condominiums and HOAs, and would likely be stricken if challenged. It appears that term limits are okay.

Size of Board: I typically recommend that the board be set at a fixed size in the bylaws. In fact, for condominiums, unless the bylaws set a fixed size for the board, the statute will impose a five member board. I have found that five or seven member boards are the most efficient. There are exceptions on both ends of the spectrum. Three member boards may be appropriate for smaller communities or those where there are historically insufficient candidates to fill a large member board. Likewise, while a board of more than seven is often unwieldy, larger boards may be desirable in large communities, in master associations, and in other cases.

Term of Service: Although there are some exceptions, most developer-drafted documents simply provide for one year terms. I have found that most associations like "staggered" terms, so that there is not turnover on the board every year. This seems to work best by establishing two year terms. For example, if there is a five member board, the bylaws could provide that two seats are up for election in even-numbered years and three seats in odd-numbered years.

Vacancies: Especially when the directors serve multi-year terms, the bylaws should be clear on how vacancies caused by resignation are filled. In most modern documents, the board of directors is given the authority to fill the vacancy for the unexpired term of the director leaving office.

Board Meetings: A well written set of bylaws will determine how meetings of the board are to be called, by whom, and how the agenda is established. For example, many bylaws provide that either the President or any two directors (perhaps more with a larger board) can call for a board meeting.

Notice: Notice for the benefit of the unit owners is set by state statute, and in most instances is posted notice forty-eight hours in advance of the meeting. The bylaws should also address how notice is given to each of the directors when a meeting is being called, such as whether telephone notice is sufficient. There should also be a provision ensuring that each member of the board receives reasonable notice before the board's meeting.

There are many other issues pertaining to details of the board's operation, such as the procedure for recall (removal) of directors. Some of these issues are mainly governed by state statute, and some can be "customized" to suit the community's particular needs. It is usually most cost effective to have a "wish list" ready for your association attorney, so he or she can help with the language drafting in an efficient manner. ☺

Board Should be able to Limit Firearms at Meetings

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QUESTION: What are the Florida Statutes regarding individuals carrying firearms to homeowners' association meetings? Our association would like to prohibit firearms at meetings. W.C. (via e-mail)

ANSWER: I always try to answer new and unique questions from column readers, and yours wins this week's prize in that category. Section 790.01, Florida Statutes, makes it illegal to carry a concealed firearm without a license to do so. (There are certain exclusions for law enforcement officers.) Any individual carrying a concealed firearm without a license to do so is guilty of a third degree felony.

Additionally, Section 790.053, Florida Statutes, makes it illegal (subject to certain exceptions, such as when you are hunting) to openly carry a firearm. Any individual openly carrying a firearm is guilty of a second degree misdemeanor.

Therefore, the carrying of a firearm in public is illegal unless the person holds an appropriate permit. I believe that the Board could reasonably adopt a rule prohibiting the carrying of any weapons at association meetings, whether licensed or not, perhaps finding an exception for certain law enforcement personnel to be in order.

QUESTION: I have invested in several high-rise condominium units at pre-construction prices with hopes of selling at higher prices upon completion. Some contracts are assignable, but others are not. Typically for those that are not assignable, I cannot advertise for sale or list with realtors until after closing. Do you have any tips for how to find buyers for these to (hopefully) do a double close? R.S. (via e-mail).

ANSWER: Unfortunately, you are stuck with word or mouth. No-listing / no-advertising provisions have become common in pre-construction real estate sale and purchase contracts.

The purpose of these provisions is so resales will not compete with the developer's sale of units. Developers do not want investors who purchase at pre-construction prices to undercut the appreciated sale prices of new units.

However, if the provisions in your contracts are simply no-listing provisions, you may be able to post your units on websites, bulletin boards, or in the classifieds section of the newspaper. However, if the provisions in your contracts are no-advertising provisions, even using these avenues could open you up to liability for breach of contract. It may be worth having your attorney take a look.

QUESTION: I live in a large community consisting of several smaller neighborhood subdivisions. Currently, some of the neighborhood subdivisions have gates at their entrances, which are operated and maintained by the neighborhood subdivision community associations. However, many residents within the larger community have suggested that gates be constructed at the various entrances to the overall community, so that each neighborhood subdivision can discontinue the operation and maintenance of the gates that currently exist at the neighborhood subdivision entrances. The new gates of course would be operated and maintained by the community master association. Therefore, all residents within the community could share the cost of operation and maintenance of the proposed "main gates." Does the master association have the authority to construct the proposed gates? R.S. (via e-mail.)

ANSWER: First, I would seriously doubt whether your Master Association could eliminate the Neighborhood Association gates, even if it has the authority to construct gates serving the entire development.

The answer to your question really depends on what the governing documents of your community provide. If the documents provide the Master Association with the specific authority to construct a gate at the community's main entrances, then it can likely move forward with the project. If the documents do not grant authority, some type of vote from the property owners is probably required. However, you would also need to look at whether easement rights are being impaired. Further, depending on what municipality is involved, permits for new gates are not always easy to come by.

QUESTION: Our homeowners association does not have a mandatory membership requirement nor do we have the ability to file a lien against members who do not pay dues or assessments. What steps can we take to bring the Association into conformance with Chapter 720 of the Florida statutes? N.L. (via e-mail)

ANSWER: In order to be considered a "homeowners' association" governed by Chapter 720, Florida statutes, an association must meet several criteria. First, it must be a Florida corporation. Second, it must be responsible for the operation of a community. Third, the voting membership must be made up of owners of property within that community (or their agents). Fourth, membership in the association must be a mandatory condition of property ownership within the community. Finally, the association must be authorized to impose assessments that may become a lien

on an owner's property if unpaid. If an association meets all of these criteria, it is a "homeowners' association" governed by Chapter 720, Florida Statutes and the rights and responsibilities set forth therein are bestowed upon the association and its members.

In order to make Association membership mandatory and to subject property owners (and future owners of the property) to assessments that may become a lien if unpaid, the property owners in your community must consent to such and record restrictive covenants, which subject their property to these requirements. These restrictive covenants are usually imposed by developers upon a large parcel of property, which is later developed and sold as individual homesites to consumers. The consumers are then subject to the restrictive covenants recorded by the developer. If you attempt to impose covenants and restrictions after the fact, you either need unanimous approval of the property owners (and possibly mortgage holders), or impose hodge-podge restrictions on those who consent.

QUESTION: Can an association director be denied access to the onsite office of our manager after normal business hours (nights and weekends)? A majority of the directors have voted not to allow any director to have this type of access at the request of the management company. Is there any statutory law or case law on this issue? There is nothing in the condominium declaration about this.

ANSWER: In my opinion, the directors of your association have the right to prohibit access to the onsite office after normal business hours. Section 718.112(3) of the Florida Condominium Act states that association bylaws may grant associations with the authority to promulgate and enforce reasonable rules and restrictions for the use of common elements. Provisions such as these are usually found in association bylaws and the authority to promulgate and enforce such rules is often entrusted to the Board of Directors to exercise at its discretion. The only limitation is that the rule be "reasonable."

The rule you describe seems reasonable enough. ⚖️

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.

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