

Law Denies Developer Fund Access

FORT MYERS THE NEWS-PRESS, JULY 15, 2004



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Today's column is the third part of a series reviewing Governor Bush's Task Force on Homeowners Associations and the 2004 amendments to Florida law that affect homeowners' associations (see HOA Reform Proves To Be A Tough Nut and Law Gives Members More Voice). These changes were signed by the Governor on June 23, 2004. Parts of the new legislation are effective immediately, while others are effective October 1.

Limitation on Expenditures During Developer Control, F.S. 720.303(8)(c): The law has been changed to state that association funds may not be used by a developer to defend legal proceedings filed against the developer; or directors appointed to the board by the developer; even when the subject of action or proceedings concerns the operation of a developer-controlled association. This provision is effective on October 1, 2004.

Recall, F.S. 720.303(10): The new regulations for recall (removal) of directors in homeowners' associations largely mirrors the provisions found in the Condominium Act. The law clarifies that HOA directors may be removed, with or without cause, by a majority of the entire voting interests. Unlike the condominium counterpart which provides equal deference to both procedures, the HOA law seems to favor recalls by written agreement over the petition/meeting process. However, the HOA law does permit the use of petition by ten percent of the members for the call of a recall meeting, however authority for this procedure must be contained in the governing documents. Recall by written agree-

ment is permitted regardless of enabling authority in the governing documents. Like the condominium law, there is a requirement that when more than one director is being subject to recall, separate votes be taken for each. There is also a procedure for service of recall agreement on the board by certified mail or formal service of process. As in condominiums, the board has five full business days after receipt of recall papers to call a board meeting to certify or de-certify the recall. Recall contests are handled through arbitration proceedings. Unlike the condominium statute (although now subject of a proposed rule for condos), written recall agreements or ballots used in one recall effort may be reused in a second recall effort, if the first recall effort is stricken for any reason. However, in no event is a written agreement or ballot for recall valid for more than 120 days after it has been signed by the member. Consistent with condominium regulations, rescission or revocation of a written recall ballot or agreement must be in writing and must be delivered to the association before the association is served with recall papers. When more than a majority of the board is being subject to recall, the recall agreement or ballot must list at least as many possible replacement candidates as there are directors subject to recall. If less than a majority of the board is recalled, the remaining directors can fill vacancies created by the recall. This provision is effective October 1, 2004.

Flags, F.S. 720.304(2): The right to file the American flag in HOA-operated communities has been expanded to mirror the condominium statute

which permits the flying of various armed service flags on certain enumerated holidays. The new HOA law also permits a homeowner to display one portable, removable official flag of the State of Florida, a right not conferred by the condominium law.

Securing HOA Fines by Liens, F.S. 720.305(2): The statute has been changed to specifically state that a fine may not become a lien against a parcel, which is the law for condominiums, but which has not been the law for HOAs (where appellate court cases have recognized the right to secure fines by liens if authorized by the governing documents). It is debatable whether the new statute can be retroactively applied to existing associations whose governing documents permit the securing of fines by liens, based upon constitutional considerations. The new law also provides that in any action to recover a fine, the prevailing party is entitled to collect its reasonable attorney's fees and costs from the non-prevailing party, as determined by the court.

Competitive Bidding, F.S. 720.3055: This change is also very similar to the law for condominiums. However, the threshold where competitive bidding is triggered is ten percent of the association's total annual budget (including reserves), as compared to the five percent threshold in condominiums. The bidding requirements apply to any contract that cannot be performed within one year for the purchase, lease, or renting of materials or equipment to be used by an association, and all contracts for services. These contracts must also be in writing. Like condominiums, the association is not required to accept the lowest bid. Further, contracts with employees of the association, attorneys, accountants, architects, community association managers, engineers, and landscape architects are not subject to competitive bidding. Certain existing contracts are also exempt from bidding, as are contracts procured on an emergency basis or from a sole supplier of the goods or services involved.

Notice of Membership Meetings, F.S. 720.306(5): The bylaws of the homeowners' association shall provide, and if they do not so provide, are deemed to provide certain requirements regarding notice of membership meetings. An association must give all parcel owners actual notice of all membership meetings, which shall be mailed, delivered, or electronically transmitted to members not less than fourteen days prior to the meeting. This notice must also be posted or broadcast on closed circuit cable television fourteen days in advance. When electronic transmission is used as an alternative for mail or delivery of notice, or where broadcast television is used an alternative for physical posting, the authority for these alternatives should be contained in the bylaws. The new law applies not only to annual meetings of the homeowner's association, but special meetings as well. Proof of compliance is required to be given through affidavit.

Right of Members to Speak at HOA Meetings, F.S. 720.306(6): As distinguished from meetings of the homeowner's association board, where the right to speak is limited to "petition" meetings, parcel owners are given an unfettered right to speak at all membership meetings with reference to all items "open for discussion or included on the agenda." The reference to items "open for discussion" appears to be a bit broad, and it is not clear whether a parcel owner has an individual right to "open an item for discussion." The board may adopt rules regulating member statements, provided that each parcel owner has the right to speak for at least three minutes "on any item." However, the member must submit a written request to speak prior to the meeting, and the association may adopt additional rules regulating owner statements at membership meetings.

Next week we will look at the new law's provisions regarding mediation of HOA disputes and a prohibition against "SLAPP" suits. ☺

Withholding Assessment Payment Likely to Backfire

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Question: We purchased a condominium apartment in a building that contains five units. At the time we bought, the same person owned all five units. He said he was going to sell all of them, but only ended up selling two, so he owns three out of five units, therefore controlling a majority. This person still makes all decisions like he owns all of the units. We have been denied financial information. He will not set a meeting even though we have requested one. We have stopped paying assessments until we get some response. What can we do? S.B. (via e-mail)

Answer: First, you should not withhold paying your assessments. You expose your property to a lien and foreclosure, which is not protected by homestead laws. This strategy usually backfires.

Unless you were promised in writing that all of the units would be sold, or unless there was an intent to commit fraud, you are likely stuck with your minority ownership status. This is one of the few situations where I would recommend filing complaints with the State's condominium agency as a means of addressing your concerns. Normally, I consider administrative complaints to be a last resort. However, in your case, you will not be able to change things politically (through recall, or at the annual election), so help from the regulatory agency may be your only choice.

You can file a complaint with the Department of Business Regulation, through its Division of Florida Land Sales, Condominiums and Mobile Homes, by email. Go to www.state.fl.us/dbpr/ and follow the instructions on the website.

Question: We recently bought a condominium unit and found out that we are near a "rotten neighbor," who has caused many people to move. This person has a long documented history of alienating all of his neighbors, trouble with the association, intervention of the police, etc. Could this be considered an "undisclosed defect?" K.G. (via e-mail)

Answer: Interesting question. Undoubtedly, a nasty neighbor can make life miserable. I suppose in an extreme case, owning property close to certain personality types could have an effect on property values.

The law requires disclosure of conditions which will have a material effect on the value of property. So far, all of the reported case law has dealt with construction related problems.

However, I would not be shocked to find a court to extend Florida's disclosure laws to a bad apple neighbor.

Question: Our association recently voted to amend our condominium documents to outlaw certain breeds of "vicious" animals, including rottweillers and dobermans. Our board has now given "vicious" pet owners one month to get rid of their animals. How can the board do this? Don't they have to grandfather these pets? C.A. (via e-mail)

Answer: In my opinion, the board does not have the authority to implement the new rule unless existing pets are grandfathered.

I would reach a different conclusion if any particular animal ("vicious breed" or otherwise) has bitten anyone, or engaged in other behavior suggesting a threat to safety. In such cases, I believe that the board has the right, if not the duty, to see that the animal is removed from the community.

Question: When our cooperative association sends out the proposed annual budget to the shareholders, does it also have to send the reserve schedule? Is it up to the board or the shareholders how to fund the reserves? J.F. (via e-mail)

Answer: The proposed annual budget that is sent out to the shareholders (or, in the case of condominium associations, the unit own-

ers) must include a reserve schedule of “fully funded” reserves. The full funding formula must be presented using straight line depiction, unless the members have voted to switch over to “pooled” (or sometimes called “cash flow”) funding of reserves.

The board may, but is not obligated to, permit the shareholders to vote on the reduction or waiver of fully funded reserves. If the board does not present a reserve funding choice with the annual statement, the shareholders are permitted to petition for a vote on the issue. ⚖️

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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