

Two New Entities Involved in Issues

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Today's column continues a review of changes enacted during the 2004 session of the Florida Legislature, most of which became effective October 1, 2004.

In the first four installments of this series (*Law Gives Members More Voice*, July 8, 2004; *Law Denies Developer Fund Access*, July 15, 2004; *Law Calls for Binding Arbitration*, July 22, 2004; *HOA Law Changes Not Perfect*, July 29, 2004), we looked at changes primarily affecting homeowners associations. Subsequent installments have looked at changes to the law involving lender questionnaires (*Lender Surveys are Tricky*, August 5, 2004) and defibrillators (*Liability Changes offer More Coverage*, August 12, 2004). The series was interrupted by Hurricane Charley and several columns devoted to post-disaster legal issues (*Association Can Help After Storm*, August 19, 2004; *Association Should Act Deliberately*, August 26, 2004; *Be Aware of Charley deadlines*, September 2, 2004; *Flood Insurance Sound Idea*, September 9, 2004; *Easy to Stumble into Second Disaster*, September 16, 2004; and *Have Plan Before, After Disaster Hits*, September 23, 2004). The series about the new laws was revised last week with a look at the new requirement for the for the "Q&A Sheet" (*Q&A Sheet again a key document*, September 30, 2004).

Remember, past editions of this column, going back four years, can be retrieved on the internet at http://www.becker-poliakoff.com/attorneys/bios/adams_j.html

Today's column involves two new governmental entities with jurisdiction over condominium issues.

The Advisory Council on Condominiums was initially instituted as a result of the significant changes to Chapter 718 which became effective in 1992. Several years ago, the Council was eliminated by the Legislature, but has now been resurrected as of October 1, 2004. The new Council consists of seven members: two appointed by the President of the Senate; two appointed by the Speaker of the House; and three appointed by the Governor (one of the Governor's appointees must represent time-share condominiums).

The functions of the Advisory Council include receiving public input regarding issues of concern to condominiums and recommending changes in the condominium law. The statute directs the Council to consider, among other issues, rights and responsibilities of unit owners in relation to the rights and responsibilities of associations. The Council is also empowered to advise the Division of Florida Land Sales, Condominiums and Mobile Homes regarding administrative regulations and to recommend improvements, if needed, in educational programs offered by the Division.

One of the more controversial aspects of the 2004 legislation which was passed included the creation of an "Office of the Condominium Ombudsman." The Ombudsman is to be employed by the Division of Florida Land Sales, Condominiums, and Mobile Homes, and is considered a Bureau Chief. The Om-

budsman is to be appointed by the Governor and must be an attorney admitted to practice before the Florida Supreme Court.

The Ombudsman's functions include preparation of reports and recommendations to the Governor, the Department of Business and Professional Regulations, the Division of Florida Land Sales, Condominiums, and Mobile Homes, the Advisory Council on Condominiums, the President of the Senate, and the Speaker of the House of Representatives on matters within the jurisdiction of the Division. The Ombudsman is also charged with acting as a liaison between the Division, unit owners, boards, managers, and other affected parties to assist in understanding their respective rights and responsibilities established by law and the condominium documents.

The Ombudsman is empowered to monitor and review election disputes, and may recommend enforcement action by the Division. The Ombudsman

is also charged with providing resources to assist Board members and officers of the Association in carrying out their powers and duties.

The Ombudsman, whose office is located in Leon County (Tallahassee), is also empowered to encourage and facilitate voluntary meetings with and between unit owners, boards of directors, board members, community association managers, and other affected parties when the meetings may assist in resolving a dispute within a community. The expressed legislative intent is that the Ombudsman act as a neutral resource, with due regard for the rights and responsibilities of all parties involved.

In theory, both the Advisory Council and the Ombudsman will provide a neutral and balanced perspective in addressing the sometimes competing interests in condominium law and regulation. Of course, the proof will be in the pudding.



Question: I own a condominium unit and have a live-in companion. Can my "significant other" be appointed to association committees, even though he is not listed on the title? S.R. (via e-mail)

Answer: There is no requirement in Florida's law that persons appointed to a corporation's committees (including committees of a condominium association) be members of that corporation. Therefore, unless your bylaws limit committee membership to unit owners (which would be rather unusual), the board is free to appoint your companion as a committee member.

Question: If one of our board members hires an unlicensed and uninsured person to work on the common property owned by our homeowners'

association, is he or she personally liable for any fines levied against the association by the code enforcement board, or the contractor's charges? B.H. (via e-mail)

Answer: It depends. In general, directors of community associations are not personally liable for acts or omissions affiliated with the association, as long as they are acting in good faith and provided there is no self-dealing or conflict of interest involved.

Certain members of the board have what is called "apparent authority" to contractually bind the association. For example, the president of an association would have apparent authority to enter into a contract for work on common areas. Of course, if the board feels that the president is overstepping his or her authority, any officer can be removed by the remaining board members (as an officer, not as a director), with or without cause, by a majority vote of the board.

Conversely, if the contract was authorized by a board member who did not have apparent or actual authority, they may well be called upon by the board to answer for any financial consequences to the association. This will depend upon the exact circumstances of your case.

I would also note that if the person doing the work was not properly licensed, most contracts with unlicensed persons, for work requiring licensure, are unenforceable.

Question: I have read your recent article requiring that associations now keep a Q&A Sheet. Is there an exemption for condominiums of less than twenty units. K.D. (via e-mail)

Answer: There is no exemption in the law based upon the number of units in the condominium. As of October 1, 2004, every association should have a Q&A Sheet available for prospective purchasers (and as part of the official records) and should update it annually.

Question: My wife and I live in a deed-restricted community operated by a homeowner's association. We go "up north" for most of the summer, and would like to leave our hurricane shutters down while we are away. The governing documents for our association state that shutters can be put up a few days before a hurricane, and must be taken down after the hurricane threat has passed. We would like to know if there is any Florida law which states that we can keep our shutters down while we are away. J.L. (via e-mail)

Answer: The Florida statute applicable to homeowners' associations does not address hurricane shutters at all. Therefore, I believe that the governing documents would be deemed controlling.

There are obviously two sides to this debate. The devastation wreaked by Florida's four hurricanes in 2004 leaves little doubt that shutters are to be

encouraged. On the other hand, I have heard people who reside year-round in deed-restricted communities say that they do not like the "boarded up" look of a neighborhood when all of the shutters are left in a closed position for extended periods of time.

I guess the debate comes down to aesthetics versus safety, and what is reasonable in a particular community's situation. For example, if all of the homes are equipped with modern rolling-type shutters, different considerations might apply than circumstances where everyone uses the old-fashioned removable metal panels.

Under the new HOA law, twenty percent of the members can petition the board to consider an item of business relevant to the community. I would recommend that you circulate a petition in your community and ask the board to take up the question of whether the governing documents should be amended to liberalize the current shutter rules. Your governing documents may also permit you to initiate an amendment through direct petition, without need for bringing the matter before the board. However, if you approach the situation in a non-confrontational manner (i.e. by involving the board), you may have better luck from a political perspective in reaching your goal.

Question: I am an insurance agent in Fort Myers and wanted to do some marketing to homeowners' associations. Do you know where I can find a listing of homeowners' associations in Lee, Collier, and Charlotte counties? V.P. (via e-mail)

Answer: Because HOA's are not regulated by the state, there is no governmental agency which keeps track of them. Therefore, there is no master list of homeowners' associations in the state, sorted by county or otherwise.

You may wish to consider joining the local chapter of Community Associations Institute (CAI). Many vendors of goods and services market to CAI members, which include associations, board members, and many local management companies. You can obtain membership information from the Chapter's local Executive Director, Bob Podvin, at 239-466-5757. ⚖️

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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