

Board 'Working Sessions' Must be Held in the Open

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In less than two weeks, people across Southwest Florida will be heading to the polls to vote for everything from who runs the local hospital, to who runs the country. In selecting our nation's leader, we can form our opinions and make our choice based on televised debates, daily newspaper reporting, and unending discussion in every local beauty parlor or coffee shop about who is best for the job.

Choosing the best candidate for lower profile races is often based on less identifiable factors. After all, how many voters really know anything about the candidates who are running for judge, property appraiser, or a local fire district board?

Apparently, many suitors for those offices feel that the more signs they have adorning local streets and yards, the better their chance for the grail of office. Political yard signs are as much a staple of local elections as straw hats and funny-looking buttons at the conventions for the national seats.

There is no inalienable right that is more ingrained in our national psyche than the importance of free elections, and every person's right to support the candidate of their choice. Many have died, and die as we speak, to preserve this freedom. The First Amendment to our Constitution also guarantees us freedom of political speech.

So what happens when the Constitution clashes with the rules of a condominium or homeowners' association? If I live in a high rise condo building, should I be able to drape a "John Doe For Mosquito Control Board" banner over the railing? If I live in a single family neighborhood whose deed restrictions prohibit signs in the yards, can they really make me take my "Sally Jones for School District" sign down?

When you move into an association-regulated neighborhood, are you checking your constitutional rights at the gate?

When it comes to political signs, most consider the landmark case to be *City of Ladue (Missouri) vs. Gillelo*. A 24 by 36 inch sign which read: "Say No to War in the Persian Gulf, Call Congress Now" was at issue (this involved the first Gulf War). The City advised the homeowner that the sign violated the city's ordinances, which it justified by signs' potential to obstruct views, distract motorists, and create an eyesore. The U.S. Supreme Court ruled that the homeowners' constitutional speech rights trumped the city's regulatory interest.

While a governmental entity clearly cannot regulate political speech to the degree of banning it, do the same rules apply to a community association? That remains a question that is widely debated, but as of this point in time, not definitely resolved by the courts. Most legal experts agree that the legal principles that apply to governmental regulation are less likely to be imposed by the courts in the association context. The main reason is that violation of constitutional rights requires "state action", which means involvement by an actor of the government. The United States Supreme Court has ruled that enforcing racially restrictive private covenants in a court constitutes state action. However, the enforcement of sign restrictions has apparently not presented equally weighty constitutional principles.

In a Florida decision that arose from a Naples neighborhood, a homeowners' association sued an owner who refused to remove a "For Sale" sign, which violated the restrictive covenants, from their front yard. The judge ruled in favor of the homeowner, finding the association's rule to be an abridgment of free speech. Up on appeal, the appeals court sided

with the association, finding that the association was not an arm of government, that there was therefore no “state action, and enforcement of the no-sign-in-the-yard rule did not violate free speech rights. *Quail Creek Homeowners’ Association vs. Hunter*.

Since the *Quail Creek* case involved what is called “commercial speech”, which is afforded less protection than pure “political speech”, it is perhaps debatable whether the same result would have happened if the test case was a political yard sign.

In my opinion, condominiums have a legitimate interest in severely limiting (or prohibiting) political signs, since the only outdoors property is owned by all of the owners as tenants in common. A candidate acceptable to one may be abhorrent to another.

In subdivisions and other types of single family developments, I believe political signs should be permitted by the covenants, subject to reasonable controls on how long before the election they can be put up (and how long after they have to be taken down), and perhaps restrictions on size, numbers and the like.



Question: I am a director from a mobile home cooperative association in North Fort Myers. My question is whether we can have working sessions of the board, such start preparing next year’s budget, without posting notice of the meeting? I know that no votes could be taken. **J.U. (via e-mail)**

Answer: Yours is probably the most frequently asked question from readers of this column.

The law is basically the same for condominium associations, cooperative associations, and homeowners associations. All of the relevant statutes say that a “meeting” of the board of the association occurs whenever a quorum of the board is together and they “conduct” association business. Although what is “conducting business” is subject to debate, it is clear that votes need not be taken in order for business to be conducted.

Otherwise, the board could make all of the tough decisions out of the “sunshine” and the public board meetings would be nothing but a “rubber stamp” event.

Therefore, while there is no problem with having workshop meetings, the board is required to post notice of the meeting (along with an agenda) at least 48 hours in advance. Unit owners from the co-op are permitted to attend and, subject to reasonable rules the board may impose, speak.

Question: We just took over the management of our homeowners’ association from our developer and our new board has several questions. First, our board does not want to give our homeowners a list of the association members, citing privacy. Second, our board has not produced minutes from its previous meeting, which was four months ago. Are there any guidelines on this? Finally, if a member of our association requests records by email, is that considered an official written request to inspect records? **K.W. (via e-mail)**

Answer: The membership list is part of the official records of the association and must be made available to any member who requests it. While the boards’ desire to protect owners’ privacy is laudable, the information can be obtained in most counties by reviewing the local property records on the internet.

There is no requirement in the law as to how long the board has to reduce minutes of past meetings to writing. Obviously, the memory of the person preparing the minutes is freshest right after the meeting. There used to be a rule in the condominium laws that the board had 30 days to put the minutes in writing, although that rule was repealed. I would say that 30 days is a reasonable target to shoot for.

The courts have not addressed whether an email request is a proper written request to inspect official records, so as to invoke the penalties in the law for noncompliance. In my opinion, it is not sufficient.

Question: I was recently elected to the board of our homeowners’ association. From what I can gather, the association used to be very active, but has been in a slump for the past few years, although it was never disbanded. There is a dispute as to whether our board

can raise the homeowners' fees and what the current version of our bylaws is. We could not find them at the courthouse and the Division of Corporations in Tallahassee didn't have them either. Do you have any suggestions?

Answer: Prior to 1995, Florida law did not require that HOA bylaws be recorded at the local courthouse, and your dilemma is not all that unusual. That is one of the reasons the law was changed.

I would start by having an attorney hire a title company to do a title search. While you did not find the bylaws in your personal trip to the courthouse, title companies search public records every day. The cost is usually less than a hundred dollars.

If that fails, I would look at all the minutes of past meetings of the board and membership (assuming you can find the minute book). Look to see if the association had a past relationship with a local law firm or management company. They may still have a file that they would make available for review.

If that fails, you can contact the Division of Corporations and obtain the yearly corporate reports filed since the association was started. You can look at who the registered agents have been for clues on past attorneys, or see if someone who still lives in the neighborhood was on the board during its active phase. They may have some personal records that could lead to the information you are seeking. Good luck.

Question: I was told they changed the condo law so owners can rent out their units no matter what the rules say. What is the status of that? **K.G. (via email)**

Answer: As mentioned in last weeks column, the new law took affect October 1. It only applies to amendments to a declaration of condominium enacted after that date.

Any rental rule in place prior to October 1, assuming it was validly enacted in the first place, still has to be followed. ☺☺

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.