

Employees Deserve Protection

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

America's unique system of law and government involves principles which occasionally conflict with each other. A classic conflict for community associations is the inalienable right to use one's property freely, versus the extent to which that right can be controlled through a contract with your neighbors and your association.

Another point where values collide in associations involves expectations of privacy versus the right (or perceived right) to information.

One common question involves the extent to which a member of a community association (such as a condominium association or homeowner's association) can look at the employment records of an employee of the association. On the one hand, all association members help pay the employees' salaries, and have a legitimate interest in how they do their job. On the other hand, most of us feel that certain parts of our lives are entitled to some degree of privacy, including salary information, medical insurance records, and the like.

The Florida Legislature, in its recent amendments to the statute applicable to HOA's (Chapter 720), appears to have resolved this debate in favor of the employee. Specifically, the new law provides that "disciplinary, health, insurance, and personnel records" of HOA employees are exempt from member/parcel owner inspection.

Unfortunately, this is one area where the condo law is not as clear. The state agency with jurisdiction over condominiums has ruled that all payroll and personnel records of a condominium association are included as part of the "official records" of the association. Therefore, it is easy to see how an unhappy association member, perhaps without regard to legal consequences for

the association, could misuse information that most of us would not want to have shared with others.

There are, however, some "privacy laws" which may provide a shield for condo associations. For example, employee drug testing information must be kept confidential by state law. Likewise, child support collection information involving employee deductions also enjoys a legal privilege.

Along the same lines, Florida law provides that a health care provider may not provide medical records to anyone other than its patient, and certain other authorized agents. Therefore, if a condominium association employee has not authorized the release of his or her medical records, I believe associations should shield these documents as well.

One issue that seems to get a fair amount of play in the press lately is one's privacy expectation in their social security number. Florida's courts have recognized that employees' social security numbers, as may be contained in personnel records, are highly confidential, and not subject to disclosure. Most of the case law involves Article I, Section 23 of the Florida Constitution, which primarily applies to privacy rights and governmental agencies.

Taking laws that apply to public entities and applying them to condominium associations is not necessarily the best way to protect the association from members with a curious mind.

I believe that with the exception of certain basic information (such as the annual salary or hourly wage of a particular class of employee), that expectations of privacy outweigh the "right to know" in associations. Of course, balancing competing interests always results in laws that will make someone unhappy, but I believe it is high time for the law for condominium associations to catch up with modern times. ☺



Question: Our condominium association has a sizeable population of non-U.S. citizen people. Some of these owners have expressed an interest in being on the board or holding an office. Is there any statute to prohibit this? E.S. (via e-mail)

Answer: There are no citizenship requirements in the Condominium Act for persons who wish to serve on the board. Any unit owner who is age eighteen or older is eligible to serve on the board. The only exception is if the person has been convicted of a felony by any court of record in the United States and has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence. In fact, amendment to your bylaws requiring board members to be U.S. citizens would be invalid.

Question: The Deed of Restrictions for our community expired in the early 90's due to MRTA (the Marketable Record Title Act). In my opinion, since the restrictions are expired, I am not an association member. Since I am not a member, I cannot vote on installing new restrictions. Do you agree? Also, not all of the homeowners in the area are being mailed information about the possible upcoming vote. Do we have to be notified by certified mail? If I am opposed to the new restrictions, do I have to vote, or will my lack of support constitute a negative vote? A.G. (via e-mail)

Answer: If the Deed of Restrictions are in fact expired (and you should have an attorney review your Deed of Restrictions to confirm that they are expired), the only way to "revive" them is through the new procedures set forth in Sections 720.403 – 720.407, Florida Statutes. You can find these provisions by going to the following website: www.flsenate.gov. This new law sets forth detailed procedures regarding the vote needed to revive expired covenants and restrictions. In short, it requires initiation of the process by an "organizing committee." The revived declaration cannot include amendments, except for certain designated amendments described in the statute. A majority of the affected parcel owners must agree in writing to the revived declaration or approve the revived declaration by a vote at a meeting. In

addition, the revived declaration must be submitted to the Department of Community Affairs ("DCA") for review and approval. An association should not attempt to revive extinguished covenants without the assistance of an attorney.

As your lot was previously governed by the expired Restrictions, you (and the other parcel owners in your community) are the persons who will vote on the revived Deed of Restrictions. I do not agree that because the Restrictions are expired, you cannot vote. The statute requires that a copy of the complete text of the proposed declaration of covenants (or restrictions), the proposed articles of incorporation and bylaws of the homeowners' association, and a graphic depiction of the property to be governed by the revived declaration, shall be presented to the affected parcel owners by mail or hand delivery not less than 14 days prior to the meeting at which the consent of the affected parcel owners will be sought. The mailing does not have to be by certified mail. You are correct that the vote needed is a majority of the affected parcel owners. Therefore, if you do not vote, your vote would be considered a "no" vote.

Question: Our condominium association is considering changing its rental policy. I thought I read in one of your recent articles that existing owners would be grandfathered. Is that correct? C.L. (via e-mail)

Answer: Not exactly.

In what I believe was one of the most ill-conceived amendments to the condominium law that the Florida Legislature ever adopted, a new Section 718.110(13) was added to the law effective October 1, 2004. The new law reads as follows:

Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

Therefore, an amendment to a declaration of condominium "restricting" rentals (whatever that means) would apply to owners who vote for the amendment, but not those who do not. The change would only apply to the successors in title of those who do not approve the amendment.

Obviously, there is an extreme element of unfairness in “punishing” owners who support what may be a much-needed amendment to the declaration of condominium to stem rental problems. I think that many associations will attempt to address this problem by adopting amendments which contain their own “grandfathering” language, although that is not required by the law.

Hopefully, enough condominium associations and their boards will let the Legislature know how this new law hurts associations, and the law will be changed back to the way it was before.

Question: I live in what is called a “resident-owned” mobile home park. It was originally set up as a rental park. About five years ago, approximately one-half of the residents pooled their money and purchased the park. We now have two boards of directors, one for the renters and one for the shareholders who own the park. This has continually reinforced an “us versus them” attitude. I would like to see one board. What is your opinion? E.K (via e-mail)

Answer: Most “resident-owned” manufactured home communities are structured through a corporation which acquires the Park from the owner. Usually, these are set up as not-for-profit corporations (often cooperative associations). As such, the entity which now owns the Park must, by law, maintain a separate board. I would assume that only those who have contributed toward the purchase are considered members of that corporation.

For those who did not purchase in the Park’s buy-out, they are still subject to Section 723 of the Florida Statutes, the Florida Mobile Home Act. In general, the non-shareholders/tenants still enjoy the rights from Chapter 723, including the right to set up their own “homeowner’s association” to address issues involving the non-shareholder/tenants (who are still renters).

Therefore, it is likely that your Park will always have two “associations” unless either (a) everyone eventually buys a share and there is no further need for a tenants’ association, or (b) the tenants decide that they no longer need to have their own association (although they will not become members of the governing association unless they buy a share). ⚖️

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.