

## Time to let in a Little Sunshine

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I have written this column for ten years and have practiced community association law in Florida for nearly twenty years. I have taught many educational classes to board members and unit owners during that time. Without a doubt, the single question I am asked most frequently involves the so-called “sunshine laws” for associations. Therefore, every year or two, for the benefit of people being elected to association boards, I present a primer, which I think I will dub Community Association Sunshine Law, Course 101.

### Chapter 1: Definitions

First, almost all community associations fall into one of three categories, a condominium association (governed by Chapter 718 of the Florida Statutes); a cooperative association (governed by Chapter 719); or a homeowner’s association (governed by Chapter 720). The law for condominiums and cooperatives is essentially identical, so when I mention the law for condos, it applies to co-ops as well. The law for HOAs is similar to the condominium counterpart, but slightly different in a few key respects, as we will see.

Like any beginners course, we must of course start with the definitions. All of the relevant laws define a “meeting” of the association’s board as any “gathering” of a “quorum” of the board where association business is “conducted.”

The first relevant point is that a quorum must be present. This is different than the sunshine laws for public officials, where two or more public officials cannot meet, even if they are less than a quorum. The association law is more liberal in this regard and two directors can discuss association business (except in the case of a three-member board)

One of the most frequently debated topics is what constitutes the “conduct” of business. I have seen many

associations under the auspices of “executive sessions”, “planning meetings”, or “agenda development workshops”, argue that a quorum of the board could gather out of the sunshine as long as no binding votes were being taken. In my opinion, this is not what the law says, and is certainly not what it means. Although I am not aware of any reported appellate court cases which have come out in the association context, there are a number of cases in the public arena which have held that any interaction contributing to the development of ideas constitutes a “meeting”, without regard to whether or not a formal vote has been taken.

Otherwise, association boards could make all of the tough decisions in “executive session”, with the “public meeting” being simply a rubber-stamp event. While many associations legitimately desire to avoid “airing dirty laundry” in open meetings, it is simply the price that is paid for the owners’ right to know.

Let’s now look at the definition of a “gathering” of a quorum of the board. If you have a five-member board, clearly three of them sitting in the same room constitutes a quorum. Those three are certainly free to get together for social purposes, or other non-association reasons, but once association business is discussed, a weekly golf game could easily turn into a meeting of the board.

Likewise, if a quorum of the members of the board are assembled by telephone, the law considers them to be meeting in person.

One frequent inquiry involves the electronic transmissions which most of us refer to as e-mail. This is definitely a gray area in the law, and one which I think the Legislature needs to take a look at.

In the days of old, if Director A wrote a letter to Directors B, C, D, and E, that letter was not a “meeting” because there was no “gathering” of the board. If Director B replied to Director A and copied Directors C, D, and

E, that letter was likewise not a “meeting”, although the letters would probably be considered “official records” and would need to be retained in the association’s file.

Now, correspondence which used to take a couple of days to be received is received in a couple of seconds. I know that many board members set up e-mail board groups, and items of association business can be debated by e-mail *ab infinitum*, to the point where not only does the development of ideas occur, decisions may actually be made.

To throw a bit more sauce into that mix, there are also situations where an agent or executive officer of the association (such as a board president or community association manager) may already have the authority to do something, but would like to “poll” the other board members for support. If the president already has the

authority to take a specific action (let us say, for example, counseling an employee about perceived problems), does getting e-mail support for that action turn it into a vote?

These are all questions that will either need to be sorted out by the courts, the relevant enforcement agency, or preferably through further guidance in the governing statutes. In my view, until the law is written otherwise, e-mail interactions are not technically “meetings”, although I am aware of at least one case where a condominium association received a stiff fine for conducting all of the association’s business through e-mail, and never holding board meetings. Therefore, discretion is clearly the better part of valor (not to mention legal protection) when in doubt.

Next week, we will move on to Chapter 2, which I think I will call: *The Do’s and Noticing Meetings*. ☺



**Question:** Our condominium association’s board always posts the agenda for upcoming meetings on the association bulletin board. After the regular meeting is adjourned and everyone leaves, the board holds “executive” meetings without the residents present. Is this legal? If not, what can be done to correct the situation? J.H. (via e-mail)

**Answer:** The Florida condominium law defines a “meeting” of the board as any gathering of a quorum of the board where association business is “conducted.” In my opinion, discussing association business is a “meeting”, whether or not votes are taken. There are numerous reported court decisions in the analogous area of public sunshine law to this effect.

The only exception to the rule is if the board is meeting with the association’s legal counsel regarding matters of association business which are subject to an attorney-client privilege.

As to what you can or should do, this is a bit tricky. I would recommend that you privately approach the board

and tell him or her that you are concerned with an apparent violation of the law. You should ask that he or she either cease the practice, or provide a written legal opinion that the meetings are being properly conducted.

You have the right to file a complaint with the State’s enforcement agency if your board is violating the law, although I never recommend that as a step of first resort, but rather one of last resort. Agency complaints are divisive in the community and rarely do anything to solve political problems, they usually become worse.

Accordingly, I would encourage you to try to address this matter within your association directly, but privately, so that all can do the right thing without public humiliation or loss of face.

**Question:** I am a handicapped person who must use a motorized chair to get around in a condo complex. I was informed by the board that condo complexes are considered to be like a single family residence, and are therefore exempt from the Americans with Disabilities Act. Is the board correct, or do they have to follow ADA regulations? J.D. (via e-mail)

**Answer:** An answer regarding the applicability of the Americans with Disabilities Act will depend substantially upon the nature of your condominium. The ADA mandates accommodations for disabled persons in places of public accommodation, and requires

retrofitting in many instances. If there is some type of facility at the condominium that is open to the general public, the area may fall under the ADA as a place of “public accommodation.” If the facilities are restricted to residents and their guests only, then it is likely that the ADA would not apply.

However, there are other sections of law that also relate to disabled individuals. For example, the Fair Housing Amendments Act of 1988 protects handicapped individuals from discriminatory housing practices. Refusal to make reasonable accommodations, when such accommodations are necessary to afford each resident an equal opportunity to use and enjoy a dwelling, constitute unlawful discrimination under the FHAA. This includes the right to make reasonable modifications to the premises.

The main difference between the ADA and FHAA is that ADA requires retrofitting at association expense, whereas FHAA involves premises modification at the disabled individual’s expense.

**Question:** My request for information concerns placing hurricane shutters on the outside of our lanai sliding glass doors. I, along with other unit owners, have made a request to have hurricane shutters installed, but the board expressed concern that the structure of the building may not have been built strong enough for

the weight. They have heard that some condo lanais in Cape Coral have collapsed, and therefore they are being cautious. Do we need to contact an engineer for his opinion? C.M. (via e-mail)

**Answer:** The Florida Condominium Act states that every board must adopt hurricane shutter specifications for each building operated by the association. The association’s specifications may address color, style, and other factors deemed relevant by the board, and must be consistent with the applicable building code. Additionally, the law states that notwithstanding any provision to the contrary in the condominium documents, if approval is required by the documents, a board shall not refuse to approve the installation or replacement of hurricane shutters conforming to the specifications adopted by the board.

If your board has structural concerns, it should consult with an engineer to help to develop the hurricane shutter specifications, and review their concerns regarding the soundness of your buildings. In the unlikely event that the engineer’s professional opinion showed that no hurricane shutters could be installed because of structural problems with the building, that would create a unique problem. In such a case, it is likely that the association would need to address the structural deficiencies to make the building safely habitable, including being able to bear the weight of hurricane shutters. ☺☺

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