

Sunshine Laws Apply to Condo Boards

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Florida's courts have referred to community associations as "democratic sub-societies." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the third installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005 and Shedding more light on laws of sunshine, January 27, 2005).

Chapter 3: Owners' Rights at Board Meetings

One common thread in our discussion of community association sunshine laws is the fact that the law for condominium associations is very similar to the law for homeowners' associations, but with subtle and occasionally significant differences between the two.

First, let us look at the condo law. Section 718.112(2)(c) of the condominium statute provides that meetings of the board shall be open to all unit owners. The law states that the right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. A condominium association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

For HOAs, if 20 percent of the total voting interests petition the board to address an item of business, the board shall at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

Chapter 720 goes on to provide that members have the right to attend meetings of the board and to speak on any matter

placed on the agenda by petition of the voting interests for at least 3 minutes. The HOA may also adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak.

The following are the highlights of members' (homeowners') rights for both types of associations:

- **Requiring The Board To Meet.** For condominium associations, unit owners do not have the right to demand that a board meeting be called. That prerogative is typically vested in either a majority of the board or the association's president, through the bylaws. Conversely, for HOAs, twenty percent of the members can petition the board to call a meeting to consider a particular item. There is no requirement in the law that the board of the homeowner's association act favorably on the requested item, only that it be appropriately considered.
- **Right To Speak At Board Meetings.** For HOAs, the statute does not confer a general right to speak at meetings of the board, although some governing documents for homeowners' associations do so. Members of homeowners' associations do have the right to speak at board meetings which have been called by petition of the association membership. Conversely, condominium unit owners have the right to speak at all meetings of the board of directors with respect to items which have been placed on the agenda for the meeting. This does not mean that every unit owner serves as a member of the board and is entitled to debate motions, but it does mean that they are entitled to be heard regarding matters the board intends to consider at the meeting. Therefore, I believe that unit owner statements should be taken either at the beginning of the meeting, or at a set time in connection with a specific agenda item. Allowing owners to speak after the board has voted does not, in my opinion, fulfil the requirement allowing participation by members.

• **The Board's Right To Establish Meeting Rules.** Both laws permit a board to establish reasonable regulations regarding the procedures for speaking at meetings of the board. For example, I think it is reasonable to require those who wish to speak to turn in a form at the beginning of the meeting, indicating which agenda item or items they would like to address. I also believe that an association may impose reasonable time limits. Three minutes per topic, per speaker, is typically considered a reasonable time limit.

Next week, we will move on to Chapter 4, entitled "Everything you wanted to know about minutes of meetings, but were afraid to ask."



Question: We read your recent column about the new laws for homeowners' associations. Our HOA is quite large, has annual income over four hundred thousand dollars, and will fall into the new requirement for an annual audit. We understand that the audit can be waived by a majority vote. Our fiscal year ended December 31, 2004. Since our bylaws do not require an audit, are we required to get an audit for 2004? Can we still take the waiver vote? L.F. (via e-mail)

Answer: Unfortunately, the new law, which became effective October 1, 2004, did not specify whether or not it was intended to reach retroactively into an association's fiscal year.

Recently, the Department of Business and Professional Regulation issued a letter enunciating the Department's position on this question. The Department stated that it did not feel that the law was intended to apply retroactively, and that an HOA whose fiscal year was January 1 – December 31, would not need to begin complying until the fiscal year starting January 1, 2005.

I agree with the Department's interpretation of the statute, since associations which may now be required to have audits would not have had the ability to make budget provision for an audit for a fiscal year ending December 31, 2004.

With respect to the waiver vote, the law does not say when it must be taken. The law for condominiums specifically requires the waiver vote to be taken before the end of the relevant fiscal year. Presumably, for HOAs, the vote could be taken at any time up until the audit's due date.

Do Not Forget Trade Show Today

The South Gulfcoast Chapter of Community Associations Institute will be hosting its annual Trade Show today, at the Seven Lakes Condominium Complex (across from the Bell Tower Shops). The program starts at 10:00 a.m.

There are a variety of free educational opportunities available, as well as exhibitions from various vendors of goods and services to community associations.

Walk-in registration is permitted for the educational programs. ☺

Question: I purchased a condo unit in December, 2002 with the intention to rent it out to cover the costs. In December of 2002 the association, with a two-thirds majority, voted to prohibit all rentals effective immediately. While I voted against the measure, I believe it obtained the required vote to pass. Does the recent change regarding rental amendments, which you have discussed in this column, provide me with relief? S. J. (via e-mail)

Answer: In my opinion, the recent change to the law would not apply to your situation.

The so-called "rental grandfathering amendment" to Chapter 718 was effective October 1, 2004. Laws cannot be retroactively applied, except in limited situations. Therefore, if the association properly amended the documents in 2002 regarding rentals, I believe the amendment would stand up.

Question: I attended a recent seminar involving condominium law. One of the topics was the condominium law's new requirement for a "Q&A Sheet." I did not understand what was involved. Could you explain? J.S. (via e-mail)

Answer: Back in 1992, the Florida Legislature implemented substantial changes to the Florida condominium laws. Much of the focus of the new law was to provide more "disclosure" and "consumer protection". The 1992 amendments required both developer-controlled associations and unit-owner controlled associations to prepare (and annually update) the Q&A Sheet that was required to inform prospective purchasers regarding their voting rights and unit use restrictions, including restrictions on the leasing of a unit; indicate whether and in what amount the unit owners or the association is obligated to pay rent or land use fees for recreational or other commonly used facilities; contain a statement identifying that amount of assessment which, pursuant to the budget, would be levied upon each unit type,

exclusive of any special assessments, and which identifies the basis upon which assessments are levied, whether monthly, quarterly, or otherwise; state and identify any court cases in which the association is currently a party of record in which the association may face liability in excess of \$100,000; and state whether membership in a recreational facilities association is mandatory and, if so, identify the fees currently charged per unit type.

Florida law permits a right of rescission (right to back out of a contract) in condominium unit sales. There is a 15 day right of rescission in developer sales and a 3 day right of rescission in resales. The right of rescission is triggered by the buyer's receipt of a number of disclosure documents, including the Q&A Sheet.

Apparently, what began to happen was that condominium buyers looking for "loopholes" to get out of contracts would find that the Association had not updated its Q&A Sheet within the previous year, as required by law, and then void the

contract. The annual update of the Q&A Sheet is something that "falls through the cracks" with many associations.

In 2001, one legislator (who is also a real estate attorney) successfully led an effort to eliminate the Q&A Sheet from the rescission-triggering documents required to be provided by a unit owner controlled association. Stated otherwise, the change in the law several years ago did not eliminate the requirement that an association keep a Q&A (nor the requirement that it be updated annually) but did remove it as a required disclosure document tied to the right of rescission in resales.

The 2004 Legislature again changed the law. The new change to the statute re-institutes the Q&A Sheet as a document keyed to the right of rescission. Therefore, it is especially important for associations to keep a Q&A Sheet on hand, and update it at least annually. Otherwise, a buyer could theoretically seek to get out of a contract, citing the lack of a Q&A Sheet, and the seller (unit owner) might seek relief from the association. ⚖️

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.