

## Committees Sometimes in Sunshine

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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 fifth 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; Shedding more light on laws of sunshine, January 27, 2005; Sunshine laws apply to condo boards, February 3, 2005, and Minutes bring order to conduct of board, February 10, 2005).

### Chapter 5: Sunshine Laws for Committees

As we have learned by now, the sunshine laws for condominium associations and homeowners' associations contain many similarities, but also some important differences.

For both condos and HOAs, there are certain committees which must always operate in the sunshine, which means they must post notice of meetings, permit all association members to attend committee meetings, keep minutes, and permit the meetings to be videotaped or recorded with audio equipment. For condominiums, operating in the sunshine also means the committee must permit other unit owners to speak to designated agenda items.

The sunshine laws for homeowners' associations apply to committees which can make final decisions regarding the expenditure of association funds, or committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. I call these HOA Statutory Committees.

The sunshine laws for condos apply to committees which are empowered to take final action on behalf of the board, or

committees which make recommendations to the board regarding the association budget. I call these Condo Statutory Committees.

Regardless of what the bylaws say, the sunshine requirements always apply to Condo Statutory Committees and HOA Statutory Committees. All other committees might be called "nonstatutory committees." Here, there is a big difference between the condo law and the law for HOAs.

For homeowners' associations, nonstatutory committees are not subject to sunshine requirements.

Conversely, the condominium statute provides that nonstatutory committees are subject to sunshine requirements unless the bylaws for the association specifically exempt those committees from the sunshine laws. In my experience, very few bylaws for condominium associations exempt nonstatutory committees, and in such cases the sunshine rules apply to all condominium association committees.

Confused yet? If so, you are not alone. There is no compelling reason why the law treats these two types of associations differently, but it does.

In short-hand, the architectural review board (sometimes called architectural control committee) for a homeowners' association, and any HOA committee which is authorized to spend money must operate in the sunshine. Other HOA committee need not do so.

For condos, the budget committee, and any committee empowered to take final action on behalf of the association, must always operate in the sunshine. All other committees are exempt from sunshine laws, but only if the bylaws contain a direct exemption, otherwise the sunshine laws apply to those committees as well.

Next week, we will wrap up with a discussion of exceptions to the sunshine rules. ☺



**Question:** Our association is comprised of fourteen separate buildings, each of which has its own condominium association. There is also a master association that administers the common areas for the entire community. Our master association has a “grievance committee.” There is a debate within our community as whether members of the board may also sit on the grievance committee. What is your opinion? A.G. (via e-mail)

**Answer:** Based upon the information you have supplied, it appears that your “master association” is what is known as a “condominium master association.” If that is the case, then the operation of the association is governed by Chapter 718 of the Florida Statutes, commonly called the Florida Condominium Act.

You do not say what your “grievance committee” does. If it is empanelled to deal with disputes between unit owners and the board, there is no problem with members of the board also sitting on the committee.

If, however, the “grievance committee” is also serving as the “fining committee”, a different answer probably applies. Section 718.303(3) of the Act states that a condominium association may levy fines of up to \$100.00 per violation, and up to \$1,000.00 for “continuing” violations, provided that the authority for the fines is contained in the declaration of condominium or association bylaws.

However, before a fine can be levied, the association must afford the accused with the opportunity for a hearing. The hearing must be held “before a committee of other unit owners.” If the committee does not agree with the fine, the fine may not be levied.

I have heard many arguments on the issue of what “other unit owners” means. Some argue that the reference to “other” means unit owners other than the accused. Some argue that “other” unit owners means “fellow” unit owners. My interpretation is that “other” means people other than members of the board.

The idea is due process. The board should not be the judge, jury, and executioner.

Back in the 1990’s, the Division of Florida Land Sales, Condominiums, and Mobile Homes had a specific written rule which stated that the fining committee could not include board members. However, that rule, Rule 61B-23.005 of the Florida Administrative Code, was repealed on January 19, 1997, as part of an effort by the Division and all governmental agencies to streamline government regulation.

Notwithstanding, the Division has continued to express the position that the reference to “other” unit owners, means unit owners other than members of the board of directors. One arbitrator from the Division has specifically so ruled in a case called ORA at Melbourne Beach, Inc. v. Mashke, DBPR Case No. 98-2737.

Therefore, unless the law is interpreted differently by the courts, or amended by the Legislature to clarify its intent, I continue to espouse the position that board members can not serve on the fining committee.

**Question:** Our condominium association is in the process of refurbishing our condominium and the Board plans to change the color of our condominium from gray to beige. They also want to change our landscape. Does the board have the right to make those changes without a vote of the owners? I believe that our condominium documents say that the condominium must remain the same as originally built, including color and landscaping. However, I cannot find my condominium documents. R.W. (via e-mail)

**Answer:** Section 718.113(2)(a) of the Florida Condominium Act provides that there shall be no material alteration or substantial addition to the common elements except in the manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration, as originally recorded or as amended, does not specify the procedure for approval of material alterations or substantial additions, seventy-five percent of the total voting interest of the association must approve the alterations or additions. There is usually one voting interest assigned to each unit.

There has been appellate court case law in Florida holding that a change in the color scheme of a condominium is a material alteration of the common elements, requiring a vote of the owners. Likewise, there have been numerous condominium arbitration decisions decided by the State’s arbitration program which have held that a color change is a material alteration to the common elements requiring a vote of the owners.

Therefore, it is important to look at your condominium documents to determine the procedure for approving material alterations and substantial additions. If you have lost your set of documents, the association is obligated by law to have extra sets available. They can charge you for copies. In many condominium documents, the board is authorized to make material alterations and substantial additions up to a certain dollar amount. If your condominium documents do not address this issue, then seventy-five percent of all owners would need to approve the color change.

Regarding landscaping changes, while the tendency of the arbitrators is to find many changes to condominium property to be “material alterations”, the arbitrators have exhibited more latitude toward boards with respect to landscaping decisions. Obviously, landscape is always in a changing condition (it grows, it dies, etc.). Unless the board determines to radically remove or change the landscaping scheme of the common elements, most landscaping changes would not be considered a material alteration or substantial addition to the common elements requiring a vote of the owners.

**Question:** The board of directors of our condominium association is confused as to the permitted duration of contracts for services such as landscaping, elevator maintenance, etc. Is our board allowed to negotiate multi-year agreements? One unfortunate and related problem that we have is that we inherited several contracts from the developer in February 2004, such as our five year, non-bid elevator maintenance agreement, that has left us vulnerable to huge price increases. Do we have any options to get out of this agreement? We also have several contracts that have roll-over provisions that automatically renewed for an additional year because they were not canceled with 90 days of the contract expiration. We would really appreciate your response. C.B. (via e-mail)

**Answer:** Section 718.3026 of the Florida Condominium Act requires most contracts of the association to be in writing. This includes service contracts, contracts for the purchase or lease of materials or equipment, and any contract that is not to be performed within one year.

There is no maximum duration for association contracts specified by the law. I recommend that, where possible, the associations seek arrangements that are terminable upon reasonable notice, such as thirty days or sixty days, with or without cause. This is especially important for agreements with employees and management companies.

However, certain industries are typically unwilling to enter into contracts that are terminable at will. Examples include cable television agreements, elevator maintenance agreements, and sometimes landscaping contracts. Such contracts should be reviewed on a case-by-case basis.

Regarding the contract inherited from the developer, Section 718.3025 of the Florida Statutes permits associations, after transition of control from the developer (commonly called “turnover”) to cancel certain types of agreements. A vote of seventy-five percent of the entire voting interests is usually required (there is typically one voting interest assigned to each unit). Some contracts must be cancelled within eighteen months of the turnover date, others can be cancelled after that time.

In terms of “automatic renewal” clauses, I am aware of no law which would make such contracts illegal or unenforceable. I am extremely hesitant to recommend automatically renewing contracts for condominium associations, especially when they have lengthy initial terms. Timely cancellation often “falls through the cracks” with boards.

The association’s attorney should be able to assist in navigating through these issues. ⚖️

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