Sunshine Rules Also Have Some Exceptions

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Florida's courts have referred to community associations as "democratic subsocieties." 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 sixth 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; Minutes bring order to conduct of board, February 10, 2005); and Committees sometimes in sunshine (February 17, 2005).

Chapter 6: Exceptions to the Sunshine Law

Every rule has its exceptions. Today, we will look at the exceptions to the sunshine rules for condominium and homeowners' associations.

As noted previously, there are no exceptions to the sunshine rules for "executive sessions", "planning sessions", "fact finding missions", "personnel meetings", or for any other gathering of a quorum of the board (or, where applicable, committees) for the purpose of conducting association business. Remember, votes need not be taken for association business to be conducted.

As we have learned by now, there are subtle differences between the law for condominium associations and the requirements for a homeowners' association. Generally speaking, the HOA law tends to be a bit more liberal, and is indeed a bit more flexible (although only slightly so) regarding closed meetings.

First, let's take a look at the law for condominiums. Section 718.112(2)(c) of the Florida Condominium Act provides the requirement that board meetings and committee meetings be open to the unit owners is inapplicable to meetings between the board or a committee and the association's attorney, with respect to "proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice."

Therefore, condominium association boards (or committees) may hold closed meetings when they are meeting with legal counsel to discuss pending litigation. The rationale for the exemption is obvious. For example, if an association is involved in litigation with a member, it would be unfair to the association to permit the member to attend meetings with the association's attorney to discuss the strengths and weaknesses of the case, strategic issues, and the like.

The statute also permits closed meetings with legal counsel regarding "proposed" litigation. Here, the law is open to greater interpretation. Theoretically speaking, any legal matter in which an association is involved presents the specter of "potential" litigation, but by whom must it be "proposed"?

The law for HOAs contains a nearly identical exclusion for meetings with legal counsel regarding pending or "proposed" litigation. This exclusion is found in Section 720.303(2)(a) of the statute applicable to homeowners' associations. However, the HOA law also contains a second exemption, which is found at Section 720.303(2)(b) of the statute. This law provides that meetings between a quorum of the board (or a committee) and legal counsel may be closed when "personnel matters" are under discussion, there is no requirement that pending or proposed litigation be involved. There is no similar provision in the condominium law, although there probably should be, and many "personnel matters" also involve "proposed litigation."

A question often posed is whether notice of closed meetings needs to be posted in the community. Public governmental entities are also entitled to have closed meetings with attorneys, and they are obligated by law to post notices of those meetings. Neither the condominium law nor the law for homeowners' associations specifically address this

point, and I have heard both sides of the coin argued.As a practical matter, the purpose of posting notice is to let owners know that the board is meeting and to permit them to attend, observe, and address the topic when permitted by law. Posting notice for a closed meeting often throws fuel on a community's political fires, particularly when the litigation involves a high profile or contentious issue in the neighborhood.

Nonetheless, I am of the belief that associations are wise to post notice of these meetings, and quite likely legally obligated to do so, since the posting requirements in both statutes refer to "all" meetings, while the exemptions only specifically apply to unit owner or parcel owner attendance rights.

Boards should also keep minutes of attorney-client privileged meetings, particularly if a vote is taken at the meeting. The minutes should never reflect attorney-client privileged information, but only who attended the meeting and proper documentation of any vote which was taken.

This concludes Community Association Sunshine Law, Course 101. To make sure the students have been paying attention, next week's column will be the final exam. Study hard. ⚖

Question: Our condominium has assigned parking spaces, which were granted by the original developer, and which are recited on our deeds. I chose my unit, in part, because the parking space is close to the apartment's front door. Because we have a number of elderly and disabled residents, the board has been discussing assigning handicapped parking spaces close to the building. Can they take away my parking space and make it a handicapped space? L. J. (via e-mail)

Answer: In my opinion, no.

Although the Fair Housing Amendments Act of 1988 and parallel state statutes require associations to make "reasonable accommodations" for disabled individuals, I do not think it is reasonable to take away another unit owners' property.

While making reasonable accommodations often involves parking issues, I am assuming that your parking spaces are what are called "limited common elements." This means that the exclusive right to use that parking space passes with the title to your unit, and cannot be separated from it.

Question: When a holiday bonus is given to an employee by an association, is it proper to give the bonus in the form of a check and deduct taxes? In the past, our association has given the manager cash bonuses, with no deductions. V. B. (via e-mail)

Answer: In my opinion, bonuses from the association should be paid by check, so there is a record of the amount of payment. All appropriate taxes and other withholdings should also be deducted from the bonus. The required deduction should, of course, be taken into account when the gross bonus amount is set.

If unit owners wish to give cash gifts to the manager, then the interests of the association are not implicated (unless the association has a policy against such gifts). The manager will need to check with his or her own tax advisor as to whether or not these gifts are considered taxable as tips or otherwise.

Question: Our condominium complex is about twenty years old. Our bylaws were written at that time. We need to change our laws on a few matters. We are told that it takes one hundred percent to change our documents, is this correct? J.T. (via e-mail)

Answer: The procedure for amending your condominium documents (declaration of condominium, articles of incorporation, and bylaws) will be contained in those documents themselves. The law provides that if the documents are silent on the required vote for amendment, it takes two-thirds of all voting interests for amendment. There is usually one voting interest per unit.

Most documents require some type of super-majority approval for amendment, usually two-thirds or seventy-five percent. Some are based upon the entire voting interests, some are based upon only those who actually vote.

With the exception of some very old condominium documents I have seen, very few documents require unanimous approval for amendment. There are, however, a few areas where Florida law requires unanimous approval for change. This includes changing the size of units, granting or taking away certain property rights, and amendments having to do with the allocation of costs and ownership.

Question: We have a 7 unit condo with ants. One owner refuses to let our pest control contractor in. Do we have a remedy? D.B. (via e-mail)

Answer: Section 718.111(5) of the Florida Condominium Act provides that the association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.

In addition to this section of the Condominium Act, it is very common for a condominium association to have a provision contained within the condominium documents requiring unit owners to provide the association a key to their units so the association can properly exercise this right of access to units. You should review your condominium documents to see if owners are required to provide a key to their units.

With this background in mind, the arbitration case of *The Beaches of Longboat Key – South Owners Association, Inc. v. Goldreyer*, dealt with the issue of owners who denied the association access to their unit to provide pest control services. In that case, the arbitrator concluded that the provision of pest control services for the entire condominium was a necessary form of maintenance. Further, the arbitrator concluded that while the unit owners had the right to have as much peace in their unit as possible, when this right conflicts with the right of the association to access the unit during reasonable times when necessary to provide maintenance, the unit owner's right gives way to the association's irrevocable right to access units under the Condominium Act. The arbitrator ordered the owner to grant access to the association.

Therefore, an association generally has the right of entry to the units within the condominium to allow for pest control. Associations do have to be careful with pest control issues, however, including dealing with owners who have peculiar sensitivities, and reviewing the documents to determine whether certain types of pest control are a proper common expense.

In terms of a remedy, there is no quick and easy solution in the law. In all likelihood, you would need to file a petition for arbitration with the State of Florida, at which point the arbitrator would review the matter and order the unit owner to provide reasonable access, of course assuming that the arbitrator agreed with your case in the first instance. If the unit owner did not comply with the arbitrator's order, or if they wished to appeal, the matter would go to court. The winning side would be able to collect their attorney's fees from the losing side.

Some associations use "self help" (such as a locksmith) to gain entry to units. In general, I recommend against forced entry, with perhaps the limited exception of an extreme emergency situation, such as the recent hurricanes. ⚖

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.

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