

Controversial Legislation Pending

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving

process.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of issues affecting associations are brought up for consideration each year.

Two weeks ago, we began a review of legislative proposals for 2005, with a look at S.B. 2632, a proposal that would limit an association's right to collect delinquent assessments through lien foreclosure proceedings. Last week we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. Today, we will shift attention to House Bill 1229, one of the more controversial pieces of pending legislation.

H.B. 1229 tackles some of the more contentious issues in condominium living, including the waiver of audits, reserves, and state enforcement against community associations. Because of the number of topics addressed in H.B. 1229, we will look at these proposals in two parts, today and next week. Here's some of the highlights of H.B. 1229:

- **Reserve Funding:** The proposed law would provide that "reserves shall maintain a minimum level of at least ten percent of the yearly operating budget." The apparent intent of this proposal would be to prohibit associations from waiving reserves altogether, which is permitted by current law. It is not clear how this proposal, if made into law, would apply to the currently required formula for funding reserves, and whether it would limit an association from spending existing reserve funds on an appropriate reserve expenditure. Clearly, the extent to which associations should be mandated by law to keep reserves, and the unit owners' right to self determination (through waiver votes) are

public policy issues that have been and will continue to be debated in the Legislature.

- **Mandatory Education for Board Members:** One of the more controversial aspects of H.B. 1229 is a proposal that would mandate education for condominium association board members. This law would mandate "training" for "newly elected board members and members currently serving on a board who have not previously voluntarily attended training." While most who are involved in providing services to community associations preach training for both board members and unit owners, opponents of H.B. 1229 argue that mandatory education will chill volunteerism. Further, the Bill as currently written, does not indicate how much "training" is mandatory, what type of classes are required, nor how the mandate would be funded or enforced.

- **Waiver of Audit Requirements:** Currently, the condominium law requires associations with annual receipts in excess of four hundred thousand dollars to produce an annual audit. The law permits association members, by a majority vote, to waive the audit requirement and have prepared instead a review, a compilation, or a cash report of income and expenditures. The new proposed law would prohibit "an association or board [from] waiv[ing] its audit for more than two consecutive years." Current law does not permit boards to waive audit requirements anyway, so it is unclear why this part of the proposed Bill is necessary. Mandatory audits will presumably offer some increased disclosure to unit owners, but at what price? This proposal, like the reserve proposal, removes the association's self-determination rights, through majority vote, and places those decisions in the hands of government. Also, where financial abuses do exist, they are as often (or more often) found in smaller associations, which are not required to have audits anyway, and which would receive no protection from this Bill.

Next week, we will wrap up our review of H.B. 1229 by looking at proposals to create government enforcement agency for homeowners' associations, expand the role of the Condominium Ombudsman, and address the role of the Division of Florida Land Sales in dealing with complaints against condominium associations and their directors.

Remember, proposed legislation can be viewed on the Internet at the website of the Florida Legislature, www.leg.state.fl.us, where links to both the House and Senate are available.

Whether you are for or against, your Legislator is interested in your opinions. You can contact members of the Southwest Florida delegation as set forth below.

• Sen. Mike Bennett, District 21; 823-5718; bennett.mike.web@flsenate.gov

• Sen. Burt Saunders, District 37; 338-2777 in Lee or 417-6220 in Collier; saunders.burt.web@flsenate.gov

• Rep. Michael Grant, House District 71; 941-764-1100; michael.grant@myfloridahouse.gov

• Rep. Paige Kreegel, House District 72, 941-575-5820; paige.kreegel@myfloridahouse.gov

• Rep. Bruce Kyle, District 73, 335-2411; kyle.bruce@myfloridahouse.gov

• Rep. Jeff Kottkamp, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov

• Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov ☞



Question: I read your recent series regarding sunshine laws for associations. Here is my question, which involves our homeowner's association. We have five board members. Three board members (including two who were recently elected) recently met with the management company so that the manager could explain how our financial statements are prepared, and how the management company authorizes the payment of bills. Questions were asked by the board members present, and minutes were taken. The main issue of contention is whether this was a "meeting of the board", for which notice had to be posted. Also, can the board have an "executive meeting" prior to the board meeting to review and understand the items on the agenda for the public meeting? There are no motions or voting at this time, only discussion. This was done at my association in New Jersey. T.C. (via e-mail)

Answer: Your second question is the easier one, the "executive meeting" described would clearly be a "meeting" of the board and subject to the "sunshine" requirements (posted notice, owner rights of attendance, etc.).

Your first inquiry, the "training session" with the management company, presents a closer call. For example, it is my opinion that if a quorum of your board attends a class or seminar about association law no "meeting" occurs, since no business is being conducted.

However, in your "training session", there is focus on your association's particular business, and participation by your board members in addressing governance policies. I would err on the side of caution on that one, and consider it a "meeting" for all appropriate government in the sunshine requirements.

Question: We would like to know if there is anything we can do about a unit owner in our condo complex who constantly violates our rental rules. He has rented out to four different groups so far this year, and has therefore violated our minimum rental term requirements. He also refuses to fill out any paperwork or pay our association's processing fee, claiming that these occupants are his "friends and relatives." However, I know better because one of these "friends" told me they had rented the condo from the Internet. Is there some way we can stop this? R.W. (via e-mail)

Answer: There are always a few in every society, including condominium associations, who believe that rules are meant to be broken, or maybe should be applied to everyone else.

Some associations have addressed similar situations by requiring non-paying guests to also be registered with the association. Others have amended their documents to treat guests the same as tenants, including minimum stay requirements, prior registration, and the like. Unfortunately, policies of this nature tend to limit the rights of those who obey the rules, in order to stop the cheaters.

I would recommend that your board sit down with the association's legal counsel, discuss the potential range of

responses, and tailor a policy that will accommodate your goal with the minimum amount of regulation.

Question: Six of the units in our condominium were damaged by Hurricane Charley. Work is still ongoing in a couple of the units. Two of the units that were damaged belong to our Board's President and Vice-President. We are told that they did not like the work that was done and refused to pay the contractor the full amount. There are now liens on the condominium, and threats of more legal problems. Do they have this authority? Will this stop us from being able to sell our units? J.A. (via e-mail)

Answer: In general, significant decisions of this nature should be made by the Board as a whole, and not just its executive officers. This is especially true when those officers are personally affected by the decision. Even if their decisions were entirely appropriate, there is always the taint of conflict of interest when a director makes association decisions which affect their own financial interests.

Florida law imposes a "fiduciary" duty on board members, which means that decisions must be made without regard to personal interest. Florida's "business judgment rule" also provides protection to board members who make decisions in reliance on the advice of professionals whom they believe to be qualified about the particular issue in controversy.

For example, in your situation, if the board as a whole decided to withhold payment to the contractor after consultation with competent legal counsel, there would be no question that the association's action would be upheld.

If liens have been placed against the condominium, the board should also discuss this with legal counsel. There are ways to mitigate the affects of liens, including "bonding off" the lien, or filing a notice that the lien is being contested. Prior to resolution of the dispute, individual unit owners can still sell their units, although funds may need to be set aside from the closing proceeds (or paid by the association) to pay off a pro-rata share of the lien.

Question: I purchased my condominium unit in 1981. I was given a "document book" from the developer, called the "Offering Circular." One of the attachments in the book was an unrecorded document called the "Declaration of Condominium." I found out much later that before the developer actually recorded the Declaration of Condominium in the Lee County land records, he changed certain clauses, including the formula for sharing common expenses. Which version would control? Was the developer required to give notice of this change? J.M. (via e-mail)

Answer: The recorded Declaration of Condominium is the legal document which establishes the condominium, and in the event of a conflict with the Offering Circular, the recorded Declaration controls.

A developer is required to give every purchaser notice of "material" changes to the Offering Circular, and that certainly would have been a "material" change. Purchasers are then given a right of "rescission" (right to cancel a contract) after receipt of notice of a material change.

I would highly doubt that after twenty-five years, your development company is still in business, and even if it were, you would likely be barred from any relief due to the statute of limitations. ⚖️

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.