



Bill Covers Parking Provisions for Disabled

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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 controversial issues affecting associations are brought up for consideration each year.

Five weeks ago, we began a review of pending legislation for 2005 with a look at S.B. 2632, a proposal that would severely limit an association's right to collect delinquent assessments through lien foreclosure proceedings. As of this date, that Bill seems to be dead.

In the second installment 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. This one is still hanging on.

In the third, fourth and fifth week, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation. The first installment focused on reserve waivers, mandatory education for board members, and audit waivers. Next, we looked at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman. Last week's column touched on unit owner complaints, reserves, board terms, and husbands and wives simultaneously serving on a board.

Today, the rest of H.B. 1229:

- ♦ **Handicapped Parking:** H.B. 1229 would require associations to make "reasonable provisions" for persons with "severe mobility disabilities" to obtain parking spaces that would allow the use of a vehicle lift or ramp. The Bill goes on to say that the association must permit a disabled person to "transfer the use rights to a limited common element parking space that does not accommodate their vehicle for common area parking space that will." The law seems to be saying that if the association is going to assign a handicapped person a "better" parking space to use for their vehicle lift, then the person needs to give up their limited common element space, if they have one. If that is the case, then that is what it should say. The proposal goes on to provide that if a parking space must be altered to bring it in compliance with Section 553.5041 of the Florida Statutes (which regulates handicapped parking), the modification would be at the expense of the person making the modification. That part seems reasonable.
- ♦ **Elimination of "Opt Out" Rights:** The Florida Condominium Act was amended in 1992 to implement a system for electing directors requiring the use of secret balloting. In general, the 1992 law was a substantial improvement over the old law, which permitted the use of proxies in electing directors, which were occasionally subject to abuse by boards seeking self-perpetuation. However, the new condominium election laws are very technical,

and somewhat complicated. For example, the state has promulgated a very lengthy rule about how envelopes are to be filled out and processed. Strict adherence to the rules often results in many ballots being thrown out. Several years ago, the law was amended to permit owners to vote to “opt out” of the detailed election system, in lieu of something that works for the particular condominium. Most associations that I have worked with still prefer the secret ballot system, but elect to “opt out” of all the technicalities to avoid ballots being disqualified. H.B. 1229 would eliminate an association’s ability to “opt out” of the complicated election procedures, and in my opinion is a large step backwards for condominium associations.

- ♦ **Developer Waiver of Reserves:** The current Florida Condominium Act permits the developer during the first two fiscal years to vote to waive reserves. This change would prohibit developers from waiving reserves. Good if you are a condominium purchaser, bad if you are a developer.
- ♦ **Catastrophic Reserves:** H.B. 1229 would permit an association to use reserve funds for non-scheduled purposes after a catastrophic event, such as a hurricane. This seems reasonable.
- ♦ **Hurricane Shutters:** H.B. 1229 would amend Section 718.113(5) of the Florida Condominium Act to permit a board, with approval of a majority of the

voting interests, to install “hurricane protection.” The current law only mentions “hurricane shutters.” Presumably, the new law would apply to items like hurricane glass.

- ♦ **Grandfathered Rentals for Cooperatives:** In 2004, in a legislative case study in how the tail can wag the dog, the Florida Condominium Act was amended to severely limit condominium associations in amending condominium documents regarding rental rights. H.B. 1229 would impose the same burden on cooperative associations.

Remember, whether you are for or against, your Legislator wants to hear from you. Members of the Southwest Florida delegation can be contacted as follows:

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;
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Rep. Jeff Kottkamp, District 74, 344-4900;
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Rep. Trudi Williams, District 75, 433-6775;
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Question: Does the board of directors of a homeowner's association have the right to refuse to disclose communications between the board and the association's attorney? As a homeowner, I believe I am "the client", as well as the board of directors, and should be able to view legal communications. I understand that there may be some exceptions to this, such as pending litigation. B.T. (via e-mail)

Answer: When an attorney represents a homeowner's association, the "client" is the organization, not the board, and not the individual homeowners. It is similar to an attorney representing a publicly-traded corporation. The attorney does not represent everyone who owns a share of stock.

The law is well settled that a corporation's attorney-client privilege generally rests with the "control group" of the corporation. That typically includes the board of directors, executive employees (such as managers in some instances), and officers.

Florida's statutes applicable to homeowners' associations, Chapter 720, also states that any record protected by the lawyer-privilege is exempt from the "official records." There is no requirement that the privileged document be related to litigation.

Your point of view is not uncommon (after all, the homeowners do pay the attorney's bill), but the law is clear on the subject.

Question: We read your recent article about voting on "material alterations" of common property, and the requirement for a seventy-five percent vote. Our question is whether this vote requires a "secret ballot." R.V. (via e-mail)

Answer: In general, the only vote of a condominium association which must be conducted by secret ballot involves the election of directors.

In fact, when voting on items like "material alterations", the only way that absentee owners can vote is through

use of a "limited proxy", which must be signed. I also recommend the use of signed ballots for those who vote in person. Since those who vote by mail cannot vote secretly, there is too much potential for confusion (and duplicate voting) by allowing those who vote at the meeting to vote secretly. Further, the use of signed ballots enable a "recount" if there is a dispute as to whether the measure passed or failed.

Question: We have several townhouses in our condominium complex that have brown wooden fences around a courtyard in front of each townhouse. The fences are described as "limited common elements", and are maintained by the association. A homeowner has requested permission from the board of directors to change the color of his fence from brown, to a beige color, which would match the exterior paint on his unit. Does the board have the authorization to allow this change, or is a vote of the members required? D.R. (via e-mail)

Answer: It depends.

Even though the fence is a "limited" common element, it is still part of the common elements. Section 718.113(2) of the Florida law applicable to condos states that there shall be no material alteration of the common elements except as authorized by the declaration of condominium. If the declaration of condominium is silent, then seventy-five percent of all unit owners must approve.

Changing the exterior color scheme of a condominium is a "material alteration." Therefore, the declaration of condominium must be examined. If it gives the board of directors the authority to approve the change, then the board has the authority. The declaration may specify some type of vote required, and if it does not, seventy-five percent of all unit owners must approve the change.

Question: Is an association wasting money to hire an engineer to do a study on the remaining life of our roofs, painting, asphalt, etc.? This information seems to be common sense. N.L. (via e-mail)

Answer: The Florida Condominium Act requires condominium associations to set aside reserves for building repainting, pavement resurfacing, roof replacement, and any other item of capital expense or deferred maintenance exceeding \$10,000.00. This “catch-all” category can include many significant items, including windows, plumbing, and recreational amenities.

The board of directors has a fiduciary responsibility to make reasonable efforts to prepare an accurate reserve schedule, which must include the estimated remaining useful life and replacement cost of the reserve components. Further, under Florida’s “Business Judgment Rule”, board members are exonerated from personal liability if they rely on professionals in taking actions on behalf of the association.

Therefore, I do not think that hiring an engineer to perform a reserve study is a “waste of money” in any sense, and indeed is money well spent. There are several com-

panies that specialize in reserve studies, and your association should shop around for the best price and service.

Question: Are telephone calls between board members to discuss pending matters covered by the “sunshine law”? R. B. (via e-mail)

Answer: It depends. If a quorum of the board is on the telephone at the same time, then a “meeting” is taking place. If less than a quorum is involved, the HOA sunshine laws do not apply.

Question: Our association recently had its annual meeting. One item on the agenda was a vote to change the pet rules. It was very controversial, and created some hard feelings. Because of all the controversy, the members voted not to announce the result of the vote at the meeting. My contention is that the vote should have been announced. What do you think? S.S. (via e-mail) ■

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