



## Report Says State Condo Laws Work

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As has been explored at length in previous editions of this column, the last several Sessions of the Florida Legislature have seen pitched battles regarding community association laws. Although the specific proposals for change have varied widely, the basic theme has been the same, the role which government should play in controlling affairs within a neighborhood.

One of the most significant differences between condominium associations and homeowners associations in Florida is government regulation. Condominiums have been heavily regulated by the State for some forty years. Conversely, there is no state agency which regulates HOAs, except for administration of a pre-suit mediation program.

In 2004, Governor Jeb Bush appointed a Task Force on Homeowners' Associations, which specifically considered whether homeowners' associations should be subject to government regulation. The Task Force overwhelmingly voted against regulation.

During the same time-frame, the effectiveness of existing condominium regulation was also debated. Some unit owners who were apparently having problems with their association, prevailed upon the Legislature to commission its Office of Program Policy Analysis & Government Accountability (OPPAGA) to review the effectiveness of the Division of Florida Land Sales, Condominiums, and Mobile Homes.

OPPAGA issued its report a year later, releasing it in early May of 2005. OPPAGA Report No. 05-24 can be viewed on the Internet at [www.oppaga.state.fl.us/](http://www.oppaga.state.fl.us/).

Unfortunately for those who cry that the sky is falling on condominiums, there is no smoking gun to be found anywhere in the eleven page Report. In fact, the Report reveals some noteworthy information about the "condominium crisis" in Florida. Among the items I found most interesting were the following:

- **Volume of Problems:** Although some claim that every association is "one board away from dictatorship", the statistics show a surprisingly low level of unit owner complaints against associations. During the fiscal year 2003-2004 (the time frame subject to the study), 1,822 unit owner complaints were filed against associations. According to Division statistics, there is a population of "repeat complainants", comprising of 54 people who have filed 833 cases against their association. Therefore, discounting the "frequent fliers", something in the neighborhood of 1,500 unit owner complaints are filed against associations each year. According to the most recent Division statistics, there are 1.2 million condominium units in this State. Therefore, conservatively, there are at least 1.5 million

unit owners in the State of Florida. Stated otherwise, only .001 percent of owners have been unhappy enough with the governance of their condominium to file formal complaints against their board.

- **Public Interest:** Although various “reform” groups loudly and persistently solicited people to make complaints to OPPAGA about the Division’s effectiveness, only 90 comments were received by OPPAGA, including many from so-called “stakeholder” groups.
- **Effectiveness of Arbitration:** In 1992, the Legislature found that condominium disputes were clogging the courts, and required most document violation cases to be referred to mandatory, non-binding arbitration, before the case could head to court. According to the OPPAGA Report, 610 arbitration disputes were processed by the Division in the 2003-2004 fiscal year. Since 137 of those cases were attorney fee disputes arising from prior cases, the actual number of disputes subject to arbitration is about 500 per year. In a state of some seventeen million people, with well over a million condominium owners, one has to question frequent suggestions of rampant litigation in condominium associations. Remarkably, some two-thirds of filed arbitration cases were closed within a four-month period, demonstrating that the program does provide a more speedy (and presumably cost-effective) alternative to circuit court litigation, which can often drag on for years.

- **Do Punishments Fit the Crimes?:**

According to OPPAGA, only five percent of complaints filed against associations resulted in formal enforcement action, which resulted in 46 separate cases involving the levy of fines totaling \$230,176.00. As part of the fining guidelines adopted by the Division in 1998, fines are to be levied against unit owner-controlled associations only as a last resort. According to the Division’s response to the OPPAGA Report, the Division issued 727 warning letters during the two-year period preceding the Report, with only 23 associations having been cited for repeat violations. Proponents of the status quo can certainly argue that a recidivism rate of .03 percent shows that the current system works.

Every condominium unit owner pays a four dollar yearly fee for the services provided by the Division. This includes a 49 member Bureau of Compliance, including 28 staff investigators. Clearly, no state in the nation places such resources at the disposal of an individual who has a beef with their association, and all for four bucks.

Perhaps the looming threat of fines keeps rogue boards in check.

Perhaps the tail has been allowed to wag the dog.

Check out the OPPAGA Report for yourself and reach your own conclusions. ■

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**Question:** I have been recently elected as my homeowner's association's secretary. Who should I contact to confirm whether the articles of incorporation or the bylaws are recorded and where I can get a copy of the recorded documents? Also, is there some order of precedence with regard to the statutes and our governing documents? L.Y. (via e-mail)

**Answer:** The Articles of Incorporation, and any amendments thereto, must be filed with the Florida Department of State, Division of Corporations. A copy of the articles of incorporation, and amendments, can be obtained by writing to the Department of State, Certification Department, P.O. Box 6327, Tallahassee, FL 32314. The cost is \$10.00. The bylaws do not have to be filed with the Secretary of State.

Most homeowners' associations also record the articles of incorporation and bylaws, and any amendments to each, in the public records of the county in which the subdivision is located. However, I have seen some older associations whose articles of incorporation and bylaws are not recorded. In my opinion, the articles of incorporation and bylaws and any properly adopted amendments to those documents should be recorded in the public records if they have not been.

Regarding the order of precedence for the governing documents, the hierarchy is: the declaration of covenants and restrictions; the articles of incorporation; the bylaws; and the rules and regulations. Regarding whether the statute (the Homeowners' Association Act found at Chapter 720, Florida Statutes), will control over any inconsistent provision in the governing documents, the answer may depend on when the declaration of covenants was recorded. The Homeowners' Act was initially adopted by the Florida Legislature in 1992 and has been subsequently amended throughout the years. In general, the Homeowners' Act will apply unless the law substantially changes pre-existing rights contained in the declaration of covenants. Most of the provisions in the Homeowners' Act are considered to be procedur-

al and therefore will apply to governing documents existing prior to the enactment of the Homeowners' Act. There are some provisions in Chapter 720 that may be considered "substantive" which some homeowners' associations may seek to avoid.

**Question:** Three members of my condominium association purchased umbrellas and lounge chairs, which they have placed on our common areas along the beach. Are they permitted to do this? S.L. (via e-mail.)

**Answer:** Had these lounge chairs and umbrellas been purchased by your association for use by all the members, they could likely remain on the common areas without member approval. Since the use of this particular portion of the common area is presumably for lounging, sun-bathing, etc., the purchase and placement of personal property by the association to facilitate that purpose would be permissible without approval from the members.

The fact that these umbrellas and lounge chairs were purchased by individual members creates different issues. The members cannot monopolize a portion of the common areas for their own use. Furthermore, there may be rules in your condominium documents prohibiting members from storing items of personal property upon the common areas.

If these members wish to keep their umbrellas and lounge chairs upon the common areas, they should seek the Board's permission.

**Question:** My husband and I purchased a condominium unit near our home for our children and grandchildren to use when they come to visit us. Our Board recently adopted rules limiting guest usage for relatives to 30 days per year. The new rule requires 10 days notice to the Board. Can the Board do this? G.S. (via e-mail)

**Answer:** The Board can adopt reasonable rules regulating the use of units if your condominium documents

grant them this authority. However, 14 days written notice of any Board meeting at which such a rule would be considered must be given to the unit owners.

If the Board has authority to adopt rules governing the use of units, and the notice requirements were met, then the rules will be deemed valid if they are “reasonable” and not contrary to law or the your Condominium Declaration.

Many condominiums have similar restrictions to prevent transient occupancy. However, if your Condominium Declaration permits guest occupancy for time periods greater than what the new Board rule permits, you may have a valid objection.

**Question:** I have been recently elected as my homeowner’s association’s secretary. As the incoming secretary, what records should be turned over to me from the previous secretary? L.F. (via e-mail)

**Answer:** Your association’s bylaws should describe the duties of the secretary. Typically, the secretary will keep the minutes of all meetings, send notices to the members and directors, and maintain the records of the association. The Homeowners’ Act, in Section 720.303(4), identifies the records that the association must maintain as the official records of the association. These records include a copy of the governing documents and the rules and regulations of the association; the minutes of all meetings of the board of directors and of the members, which minutes must be retained for at least seven years; a current roster of all members and their mailing addresses and parcel identifications; the association’s insurance policies or a copy thereof, which policies must be retained for at least seven years; a current copy of all contracts to which the association is a party; bids received by the association for work to be performed which must

be kept for a period of one year; and a copy of the disclosure summary required by the Homeowners’ Act for prospective purchasers. The financial records needed on a day to day basis are typically maintained by the treasurer, although other financial records can be kept by the secretary. The Homeowners’ Act requires all financial and accounting records to be maintained for a period of at least seven years.

**Question:** What do you see as the pros and cons to a professional management company? We have a relatively small gated community (about 100 homes) with limited amenities, and a modest assessment (\$300 per year) L.Y. (via e-mail)

**Answer:** Many officers of a community association do not want to be responsible for the day-to-day running of the association. Some of these day to day duties include collecting assessments, entering into contracts, maintaining the common areas, supervising maintenance workers, sending out notices of meetings, and enforcing the governing documents. Therefore, many associations hire a professional management company to take care of these day-to-day issues, although there are a number of associations which manage themselves.

The primary “con”, of course, is cost. If your association is considering hiring a management company, you should interview a few different managers to determine what they do and whether it would be beneficial for the association to have professional management. If you do hire a manager, he or she should be licensed as a community association manager through the Department of Business and Professional Regulation. Also make sure the contract has a liberal termination provision. I recommend either party having the right to cancel, with or without cause, on thirty days’ notice.

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