



Advisory Council Finds its Footing

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As part of the changes to the condominium laws which took effect October 1, 2004, the Florida Advisory Council on Condominiums was created.

The Council consists of seven members, three appointed by the Governor, two appointed by the President of Florida Senate, and two appointed by the Speaker of the Florida House.

Appointments were finalized at the end of 2004, and the organizational meeting of the Council was held in Tallahassee in January of 2005.

The purposes of the Council are set forth in the legislation that created it, Section 718.50151 of the Florida Statutes. The Council is to receive public input regarding issues of concern with respect to condominiums, and make recommendations for changes in the condominium law. The issues that the Council shall consider include, but are not limited to, the rights and responsibilities of unit owners in relation to the rights and responsibilities of associations. The Council is also supposed to review, evaluate, and advise the Division of Florida Land Sales, Condominiums and Mobile Homes concerning rules affecting condominiums and recommend improvements, if needed, in the education programs.

Three meetings of the Council have been held since its organizational meeting. The first two meetings were held in Tallahassee, and focused upon structural

issues intended to provide a basis for the Council's ongoing operation.

The first "public input" meeting was held in Panama City Beach on May 14, 2005. There was an excellent turnout from members of the public, and a wide range of opinions and recommendations expressed to the Council.

The next meeting planned for public input will be held in Miami, and is scheduled for June 25, 2005. Undoubtedly, the Council will continue to "ride the circuit" around the State, and will presumably make a visit to Southwest Florida in the foreseeable future.

Among the main issues the Council has tackled so far are the following:

- **Education of Board Members:** Although the Council does not appear to support mandatory requirements for board member education, there seems to be unanimous consensus that delivery of education and training to association board members and unit owners will go a long way in reducing problems in association life. The Council is examining the current program offered through Community Associations Institute, and is also exploring other ways to improve the availability of educational opportunities.

• **Role of the Ombudsman:** The same law which created the Council created the Florida Condominium Ombudsman. The Ombudsman is intended to serve as a neutral resource in disputes between unit owners and their boards, and nip problems in the bud before they turn into lawsuits or agency enforcement actions. The Council obtained some basic information from the Ombudsman's Office at the Panama City Beach meeting, and has requested further information from the Ombudsman in order to evaluate the program.

• **Role of the Division of Florida Land Sales, Condominiums, and Mobile Homes:** One of the key issues is whether a state agency with police power is the proper vehicle for resolving problems in associations. Unlike most other regulated industries where fines can be meted out, association operations are largely conducted by unpaid volunteers. If the Division is to retain an enforcement role, the Council is tasked with suggesting how the agency can better do its job.

In the interest of full disclosure, I am a member of the Council, and was privileged to be elected as its current Chair. The other members of the Council include: Community Association Managers Mark Benson (Fort Myers) and Tom Sparks (Panama City Beach); Attorneys Peter Dunbar (Tallahassee) and Michael Andrew (Orlando); Board Member George Geisler (Islamorada); and Consumer Advocate Karen Gottlieb (Dania Beach). The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, Michael Cochran, also serves as an "ex officio" (non-voting) Council Member.

At its last meeting, the Council voted to issue a Report to the Legislature at the end of 2005, for consideration during the 2006 Legislative Session.

Those interested in the workings of the Council can check out its website: www.state.fl.us/dbpr/lsc/condominiums/advisory_council. Those wishing to communicate with the Council can do so by e-mail at Condominium.advisorycouncil@dbpr.state.fl.us. ■

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Question: I live in a “55 and over” mobile home park. We own our lots and an association comprised of all lot owners owns the Park. We elect a board, and the board oversees our employees. For the last four years, our board has given the employees raises and bonuses. The problem is that I have no idea what I am paying my employees. Can you advise people like me about my rights to this information in the State of Florida? D.H. (via e-mail)

Answer: First, I would not characterize the association’s employees as “your employees.” Although you are a member of the association, and have a legitimate interest in employee performance, the Park’s employees do not work for you. They work for the association. It is no different than owning stock in a publicly traded company, the employees answer to their managers and the board, not the shareholders.

Based on the information you have supplied, I am assuming that your Park is operated as a “homeowner’s association” under Chapter 720 of the Florida Statutes. If that is the case, a homeowner’s association must maintain accurate, itemized and detailed financial records of all expenditures and retain those records for seven years. Members of the association may review these financial records after giving ten working days’ written notice to the association. The inspection may take place at reasonable times and subject to reasonable written rules adopted by the association.

Association employee personnel records are not open for inspection by members, but you should be able to get the answer to your question from the financial records.

Question: Our association is getting ready to review our documents to determine if any changes are needed. You were a guest speaker at a semi-

nar I attended in which you briefly mentioned whether documents should have what you called “Kaufman language.” I believe it meant that as the statutes change, so do the documents. I have been unable to find any details on that subject. Can you provide me with some direction. C.M. (via e-mail)

Answer: Generally, the Florida courts have held that the “substantive” law that exists when a declaration of condominium is created is “as though engrafted onto the condominium documents.” Conversely, “procedural” and “remedial” changes in the law can be applied to pre-existing associations. There are exceptions to both rules, however.

There is also a parallel concept, involving provisions of the Florida Constitution, which prohibits the Legislature from enacting legislation which impairs vested contract rights. The courts have held that a declaration of condominium constitutes a contract, and thus may create contract rights.

The phrase “Kaufman language” comes from the 1977 court case called Kaufman v. Schere. In the 1970’s, consumer price index escalators in recreation leases were outlawed by the Legislature. For the reasons listed above, the courts continued to apply such escalators to condominiums that pre-dated the new legislation. In the Kaufman case, the association’s declaration of condominium specifically incorporated future amendments to the Condominium Act, and therefore the court struck down a recreation lease escalator in that case, even though it was entered into prior to the change in the law. Such “amended from time to time” language has come to be known as “Kaufman language.”

While there are instances where an association might wish to preserve the right to claim exemption from changes in the Florida statutes, in my experience

many associations place as one of their highest priorities the certainty of their operations by not having to debate “which law applies.”

Ultimately, it is a business decision for an association’s board of directors in determining whether or not to include “Kaufman language” in the proposed new condominium documents. Some of the changes considered during the past couple of legislative sessions have caused me to rethink my position on the issue. Further, certain clauses in documents cannot be changed without unanimous approval of owners, regardless of the existence or incorporation of “Kaufman language.”

Prior to making such a decision, the association should consult with its attorney to carefully weigh the pros and cons of adding such language, so an informed decision can be made.

Question: I am the secretary in my homeowner’s association. Our governing documents state that when a lot is sold, the new owners have one year to complete plans for the new home, including having the plans approved by the association’s design and review committee. One year after the purchase date, construction is supposed to start and be completed one year from then or on a reasonably agreed upon time (the association and the lot owner making that decision). Can we fine the lot owner if they do not follow the governing documents? M.T. (via e-mail)

Answer: The homeowner’s statute (Chapter 720) allows a homeowner’s association to levy a fine if the governing documents so provide. You should review the covenants, the articles of incorporation, and the bylaws, to determine whether any of those documents permit the association or the board of directors to levy a fine for violation of the governing documents. If so, a fine, not to exceed \$100 per violation may be levied. A fine may be levied on the basis of each day

of a continuing violation, with a single notice and opportunity for a hearing, except that no such fine shall exceed \$1,000.00 in the aggregate unless a higher or lower limit is specified in the governing documents.

Question: My wife and I live in a small condo complex. We have a by-law that states that no animals are allowed. Last summer, a couple moved in with a dog. They knew before they moved in about the rule. A few of us went to the board members and told them we did not want the dog and that it was against our by-laws. We told the board members time after time about this and nothing was done. Then, the board members and the dog owner had a meeting with no one else being notified. They passed a rule that would allow this dog until it passed away, but no other pets for anyone else. We told them they violated the Florida Sunshine Law and they were also discriminating against the rest of us. They rescinded their new rule but nothing has been done about the dog. What are our rights? P.O. (via e-mail)

Answer: Based upon the information you have provided, the meeting between the board members and the dog owner probably violated Florida’s open meeting laws for condominiums. Section 718.112(2)(c) of the Florida Condominium Act indicates that board meetings at which a quorum of the members is present shall be open to all unit owners. This requirement is inapplicable only to meetings between the board 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.

If your condominium documents prevent pets, the association has standing to file legal action against the pet owner. Other unit owners may also have the right to file legal action against the pet owner. Section 718.303(1) of the Condominium Act states that actions for damages or for injunctive relief, or both,

for failure to comply with the Condominium Act, the declaration, the documents creating the association, and the association bylaws may be brought by the association or by the unit owners against a unit owner.

If the current board does not enforce your condominium documents, you, and other owners, might consider a recall of that board and elect a board that will enforce your documents. ■

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