



Records Access Set by Statute

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During the past two decades, community associations have proliferated in Florida. In addition to the condo boom, virtually every new housing development includes mandatory membership in a homeowners' association.

There are many reasons for the phenomenon. Local governments greatly benefit from the existence of associations. While the tax base is increased by the creation of more homes, counties and municipalities are typically called upon to provide less services because maintenance costs for streets, street lighting, surface water management, and other functions traditionally performed by government are passed on to the association.

Further, Florida's housing market attracts large number of retirees, seasonal residents, and absentee investor-owners who benefit from centralized amenities and having maintenance functions performed by an association.

As with any form of government, the balance of powers, rights, and responsibilities is a subject of constant debate. Numerous advisory groups and task forces have been empanelled to study the laws and make recommendations for improvement.

Undoubtedly, one of the most frequently debated issues, and one of the greatest sources of contention in associations, involves access to the books and records of a community association. In most corporate settings, a shareholder's rights are rather limited regard-

ing records inspection, and a proper purpose must be shown when shareholders desire to inspect many of the corporate records.

The model for community associations is more akin to government bodies, where the right of inspection is nearly absolute, and no proper purpose needs to be shown when requesting to inspect records. In fact, the association member does not even need to tell the association why they wish to inspect the records, simply that they wish to do so.

During the next several installments of this column, we will be looking at the details of records access. As always, we need to start with the governing law and definitions.

For condominiums, records access is governed by Section 718.111(12) of Florida's statutes. For homeowners' associations, Section 720.303(4) and (5) applies. Both statutes contain a laundry list of association "official records" including the association governing documents, minutes, and financial records.

For many years, Florida's condominium law has contained a "catch-all" provision stating that "all other records of the association" are also "official records." The law for homeowners' associations was amended in 2004 to similarly broaden that law. The HOA law now also states that official records include "all other written records of the association" that are not included in those specifically listed in the statute.

The catch-all phrase in the condo law refers to all “records”, while the HOA law refers to “written records.” Is that a distinction with a difference? When we explore inspection of tape recordings, computer records, and other non-written records, this may become a key point. For today’s segment, it is enough to know that all records of both types of associations are considered “official records.”

As will also be explored in more detail in future segments, official records must be made available for inspection and copying. As with most things in the law, there are exceptions to the rules.

For condominiums, attorney-client privileged documents are not accessible to unit owners. In addition to attorney-client privileged documents, there are documents protected by the “work-product” privilege, which might encompass items such as an engineering report prepared in connection with a warranty claim.

Further exempted from the definition of condo “official records” is information obtained by an association in connection with the approval of a lease, sale, or other transfer of a unit. For example, many associations ask for sensitive information in connection with reviewing a lease or transfer application, and the law has come down on the side of privacy.

Finally, medical records of condominium unit owners are not accessible to unit owners. For example, an association may have granted a handicapped owner with some type of accommodation, and may have had to obtain medical diagnosis information in order to determine whether the unit owner was indeed handicapped. For obvious privacy reasons, such records are not part of the “open book” of association official records.

For homeowners’ associations, the same four exceptions (attorney-client privileged documents, work-product privileged documents, sales and rental records, and medical information) apply. Further, there is a fifth exemption not found in the condo law, that being “disciplinary, health, insurance, and personnel records of the association’s employees.” This was an added area of privacy included by the 2004 amendments to the homeowner’s association law, which in my opinion would be wise to incorporate into the condominium laws as well.

Next week, we will take a look at the owners’ inspection rights, copying of association records, and a board’s ability to place reasonable limits on the exercise of inspection rights. ■

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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.

Question: Our condominium association has set a precedent on how hurricane shutters are installed at our condominium. Can that precedent be changed by the board because one owner doesn't like the looks of the shutters? C.S. (via e-mail)

Answer: This question involves two potentially conflicting statutes. On the one hand, Section 718.113(2)(a) of the condominium statute states that there shall be no "material alteration" of the common elements except as permitted in the declaration of condominium or, if not provided for in the declaration, by a vote of 75% of the owners. A change in the color or style of the shutters would likely be a "material alteration" to the common elements, and this law would apply.

However, Section 718.113(5) of the same law states that installation, replacement, operation, repair and maintenance of shutters, in accordance with specifications adopted by the board of directors will not be considered a "material alteration." The law also says that the board is obligated by law to adopt hurricane shutters that comply with the building code, and may also specify the aesthetics of the shutters (such as color). In general, any action which a board can take, a board can amend. On this basis, the board could change the specifications, including solely aesthetic issues.

There are no cases addressing this issue, so the answer to your question is not clear. The conservative approach would be to get owner approval to amend the specifications, since the appearance of the building will change. If the owners properly approve a change in specifications, the new specifications will be valid regardless of the effect on the appearance of the condominium.

Question: Our condominium association has a long-standing rule that dogs must be under 20 inches at the shoulder. This rule has not been enforced and there are a handful of dogs in the condominium that exceed this size limit. The board has recently enacted a fine of \$50 per month for all current owners of dogs that exceed this size limit. Is this legal? K.G. (via e-mail)

Answer: It is legal for a board to enact reasonable pet rules as long as the board is granted rule-making au-

thority and those rules do not conflict with other provisions of the condominium documents. However, if an association has not enforced an existing rule in the past, any attempt to enforce the rule now would likely be met with claims by the members that the association has either waived its right to enforce the rule or that the association is selectively enforcing the rule. Therefore, the board most likely will not succeed in enforcing the rule and the new fine against current violators, but can begin to enforce the rule against future members or future pet owners by taking corrective action. Specifically, the board can republish the rules, reaffirm its intention to enforce the rule in the future in a written notice to all members, and actually enforce the rules, including the imposition of a fine if fines are permitted by the condominium documents.

If the association has not waived the pet restriction, and it is enforceable, a fine is one way to do so. The recorded condominium documents must permit the levy of fines. Fines for ongoing violations are permissible, if authorized by the documents, but cannot exceed one thousand dollars in the aggregate.

No fine may be levied until the unit owner is given notice and an opportunity for a hearing before a committee of unit owners who are not board members. If the committee does not agree with a fine proposed by the board, the fine cannot be levied.

Question: I have a question about the replacement responsibility of doors that lead out to an open patio on the second floor of a condominium. I believe the association is responsible for replacing the doors, but one of the board members says that the association is only responsible for replacing the front doors on units. I recently saw a new statute regarding repairs for condominiums that sets forth what associations throughout Florida are responsible for, and what the unit owners are responsible for. Would you please clarify this law? P.L. (via e-mail)

Answer: I am not sure which "law" you are referring to, however I believe you may be confusing this with new insurance provisions that are found in the Condominium Act. Those provisions set forth insurance obli-

gations of both associations and unit owners. However, insurance obligations are often different from repair and maintenance obligations. For example, an item that is the maintenance obligation of an owner may be the insurance obligation of the association.

Regarding the maintenance, repair and replacement responsibility of the sliding doors on the lanai, you will need to refer to your declaration of condominium to determine whose responsibility that is. Typically, you must first determine the boundaries of your unit, and then look at the maintenance, repair and replacement provisions in the declaration. Generally, a unit owner will have the maintenance, repair and replacement responsibility for the “unit”, and the association will have that responsibility for the “common elements.” There are instances, however, when certain portions of a unit may be designated as the maintenance, repair and replacement responsibility of the association, and where owners can be required to maintain “limited” common elements. Since condominium documents can vary greatly, each will need to be looked at on a case-by-case basis.

If the need to replace the doors was caused by some insurable event, you will also need to look at the insurance and casualty repair provisions contained in the declaration of condominium. You also need to look at the insurance sections of the Condominium Act. Even if the doors turn out to be the maintenance, repair or replacement responsibility of an owner, they are most likely the insurance responsibility of the association, assuming they were originally installed by the developer.

Question: I live in a homeowner’s association comprised of “quad” unit buildings, with individual open patios that are only several feet apart from each other. After last year’s hurricane, our homes had no electrical power for several days and therefore we kept our

windows open because of the heat in the homes. One of the owners brought in a portable generator and ran it from her patio. The generator was very noisy and exuded dreadful fumes. The residents in our association are mainly elderly, with fragile health. We have a documented rule that inordinate noise from any unit is not permitted after 10:00 p.m. I would like to know what the legal status is for generators, with their attendant dangers, in a situation such as ours, and would appreciate any suggestions that you might have. B.W. (via e-mail)

Answer: I am not aware of any specific laws that regulate the use of power generators. Certainly, one must exercise caution when using these generators, and should follow all safety guidelines such as proper ventilation. After last year’s hurricanes, many people purchased generators to compensate for the loss of electricity so they could continue to run such electrical items as refrigerators, air conditioners, televisions, etc.

Many associations have “nuisance” and “quiet hour” provisions in their documents that might come into play based upon the noise generators make (regardless of the time of day) as well as the fumes that they exude. In many situations in life, including the enforcement of association restrictions, common sense may serve as the only guidepost in dealing with unusual circumstances. I believe the association could enforce safety standards (for example, prohibiting generators in un-vented common areas) and could also impose some reasonable time limits on the operation of generators to ensure that the neighbors could get some sleep at night. I doubt a court would uphold an outright ban, given the extreme conditions created by the storm.

Your inquiry presents an interesting question, certainly a close call, and one I hope we do not have to think about again for a long time to come. ■

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