



Owners Have a Right to Copies

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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.

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. Today's column is the third part of our review of this issue. (See, Records Access Set by Statute, June 16, 2005, Records Laws Have Some Similarity, June 23, 2005, Homeowner groups face troubling requests, June 30, 2005). Today's focus, copying of records by owners.

The condominium law provides that the right to inspect records "includes the right to make or obtain copies, at the reasonable expense, if any, of the association member." As noted in previous columns, the board may adopt reasonable rules about how copies of association records are obtained. The state condominium agency used to have a rule which provided limitations on board-made rules, including a provision that a condominium association could

not charge more than 25 cents per page for photocopies, and only "actual costs" for copies of the condominium documents. This rule was repealed several years ago, as part of the agency's stream-lining of its regulations.

For homeowners' associations, the law is a bit different, and more detailed. The HOA law provides that if the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than twenty-five pages. The law for homeowners' associations goes on to provide that an association may charge up to 50 cents per page for copies made on the association's photocopier, and if the association does not have a photocopy machine available where the records are kept, or in cases where copies exceed twenty-five pages in length and are sent out for copying, the actual costs charged by an outside vendor for copying.

It is important to note that both laws contemplate that copies can be requested by the owner in connection with his or her inspection of the records. Stated otherwise, the law does not give owners in either condominium or homeowners' associations the right to call the association and have records copied and mailed to them, nor made available for their pick-up. Rather, the intent of the law is that if an owner inspects a record and wants to retain a copy, they have the right to do so.

An issue constantly confronted by associations involves an owner's right to inspect or copy audio tapes of board meetings. Many associations keep audio tapes of board meetings for assistance in the preparation of minutes. The administrative regulation for condominiums is very clear on this point. The condo rule provides that if recordings are made of board meetings, the tapes must be maintained as official records at least until the minutes of the meeting which was the subject of the recording are approved. After recording, the tapes may be discarded, but if the association keeps the tapes, they remain an official record. The intent of the rule is not that recordings have to be made, but if they are made, that they be maintained as official records.

The HOA law arguably does not include audio tapes within the definition of official records, since that law only refers to "written records" as part of the "official records." Nonetheless, it is certainly a safe harbor for a homeowner's association to follow the condominium procedure. I also recommend that if tape recordings of board meetings are kept, that they be discarded or destroyed after the minutes for the subject board meeting have been approved.

Another challenge involves computer records. Again, since the HOA law only applies to "written records", it could be argued that there is no right of a parcel owner in a homeowner's association to inspect computer records. For condominiums, the catch-all provision in Chapter 718 states that "all other records" of the association are included within the definition of "official records." In a 2004 arbitration case, the state agency responsible for enforcing the condominium laws ruled that an association could not avoid compliance with statutory access requirements by maintaining records in a cryptic format. The arbitrator ruled that requiring an owner to hack into the association's computer or otherwise figure out how to operate the programs does not make the records available within the meaning of the law. In other words, the association would have to make records that are available in computer format available in a printed format, assuming that the records can be printed.

Associations have been described by the courts as "democratic sub-societies." Thus, like our other elected levels of government, there is little tolerance in the law for secrecy in association affairs, and the law clearly favors the rights of the owner. ■

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.

Question: I read your June 9 article regarding no smoking rules in the condominium setting. Can the developer of a new condominium provide for a one hundred percent non-smoking building, and will that pass muster with the courts? Can violations be punished by fines? V.W. (via e-mail)

Answer: The column on smoking generated an unusual number of additional questions and responses, some of which I will share today.

In my opinion, a provision contained in an original declaration of condominium providing for a smoke-free building would be upheld by the courts. Restrictions contained in the original condominium documents are afforded a presumption of validity, and do not even have to be reasonable. A court would only strike down a restriction found in original documents if it was arbitrary, capricious, or violated some law or fundamental right, which I do not believe is the case here.

Of course, the board of directors and the association's management will need to enforce the rule which might prove as difficult as high school teachers trying to stop kids from smoking on the school campus.

Violations of restrictions found in condominium documents can be enforced in a number of ways. A fine is permissible if authorized by the documents. However, fines are limited to one hundred dollars per violation, and up to a maximum of one thousand dollars for an "ongoing" violation. Arguably, each incident of smoking would be a separate violation, and subject to a separate one hundred dollar fine. Fines can only be levied after notice and opportunity for a hearing.

It is certainly an interesting idea for a developer to create and market a "smoke-free building." As a practical matter, this concept might attract non-smokers, and dissuade smokers from purchasing in the development. Good luck.

Question: I read your recent article regarding smoking, and it is becoming a hot topic. I wanted to give your readers some information regarding a very helpful individual I have dealt with, as I am currently having to deal with a rude and inconsiderate neighbor, who feels it is perfectly appropriate to blow their nasty tobacco smoke directly into my condo. Sonja Bradwell works for the Florida Department of Health and is an advocate of clean air. She can provide you with a great deal of medical research showing how detrimental second-hand smoke can be. Thank you very much and keep in mind "cancer cures smoking." L.K. (via e-mail)

Answer: So noted.

Question: Great article about smoking, you might add "that there are no rights without responsibility." W.C. (via e-mail)

Answer: So added.

Question: I serve on the board of a condominium in Naples which has received two complaints about smoke from one unit wafting into a co-joined unit. Do you have any case authorities on the nuisance regulations? M.K. (via e-mail)

Answer: As noted in the column, I am not aware of any cases in Florida which have tackled this tough question. The Boston Housing Court case I reported on was said to be one of the first of its kind in the nation. If you are interested in more in-depth research, there are several scholarly articles including *Get Your Ashes Out of My Living Room!*; *Controlling Tobacco Smoke in Multi-Unit Residential Housing* written by David V. Ezra, published in Volume 54 of the *Rutgers Law Review* (2001); and an article written by Mark Hanson entitled "Smoke Gets In Your High-Rise; Tobacco Sensitive Tenants Increasingly Sue Over Neighbor's Nicotine Habits," which was published in 1998 in Volume 84 of the *American Bar Association's Law Journal*.

Question: I read your June 9 article regarding cigarette smoking, which has become a source of contention in our condominium. I thought this was covered by the new Clean Indoor Air Act, but your article seems to say something else. Could you clarify this issue? B.H. (via e-mail)

Answer: The Florida Indoor Clean Air Act, contained at Chapter 386 of the Florida Statutes, provides a uniform state-wide code to keep “work places” free from smoke. The former version of the law specifically dealt

with condominium common areas, the new law contains a blanket wide prohibition on smoking in an “enclosed indoor work place.” In many cases, this will apply to the common areas of a condominium.

The focus of my previous column, and most of the challenges in condominiums, involve smoking on private property, either within the “unit” (apartment) or a designated “limited common element”, such as a lanai or patio. The Clean Indoor Air Act does not apply to regulations within one’s home. ■

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