



ballots are prepared for the election, and if there are less candidates than open seats, no election need be held.

Within the existing legal framework, there are some provisions which both condominium associations and homeowners' associations should include in their bylaws to ensure a smooth election:

- **Eligibility To Run For The Board:** Contrary to popular belief, one does not need to be a property owner within a community association to be eligible to run for the board. Rather, Florida's not-for-profit laws state that any natural person age eighteen years or older may serve on a corporation's board. Many associations are uncomfortable with the notion of non-owners operating the association, and include a provision in the bylaws that board eligibility is limited to record owners of parcels or units. Some associations extend the privilege to spouses of record owners, since many properties may be titled in the name of only one spouse for estate or tax planning reasons. A well-drafted set of association bylaws will also address who is eligible for board service when the property is owned in trust, which is a common form of ownership in Florida.
- **Number Of Directors:** I recommend that the association have a fixed number of board members specifically set forth in the bylaws. "Sliding scale"-sized boards (such as no less than three nor no more than nine directors) is unworkable in condominium elections (since the size of the board has to be set when the ballot is prepared, weeks before the meeting) and also can create confusion in HOA elections. In my experience, five directors

is the most common number. Three directors may be appropriate in smaller associations, and seven directors in larger associations. Very large associations sometimes have nine directors.

- **Term Of Office:** Most associations find it worthwhile to create "staggered" terms for board members, which must be specifically set forth in the bylaws. A common provision for a five member board would involve two year terms, with three directors being up for election one year, two seats open the following year, three being elected the following year, etc. There are other methods that work, but two year terms seem easiest to keep track of, and may encourage more candidates, as some people are unwilling to sign up for a three-year stint.
- **Filling Of Vacancies:** Particularly when terms exceed one year, there should be a clear statement as to how vacancies are filled on the board. I recommend that vacancies be filled through appointment by the remaining directors, for the unexpired term of the person leaving office.

When things heat up in associations, one of the most common means of attacking the actions of the association is to claim that there is an "illegal board" in place. When the association does not have a clear road map for seating its directors, these challenges often have merit.

This series of columns regarding amendment tips will be produced in pamphlet form and will be available at a later time, free of charge, as is our previous series called Community Association Sunshine Law Course 101. ■

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## Group Wants to Keep Hurricane Shutters Hidden

**Question:** I was recently introduced to your articles in The News-Press. They are a wonderful community service. We just took over our association from the builder and I am afraid we are off to a bad start. We have a small group of residents calling themselves the “full-time residents” who dislike the appearance of installed hurricane shutters. They have taken over our new board and now want to restrict the amount of time the hurricane shutters can remain installed. This last hurricane season, some shutters were up the entire season. I am frequently absent from my home and do not want to have restrictions placed on how I protect my home from hurricane damage. It is terribly expensive to hire someone to install the hurricane shutters in my absence if a hurricane threatens, and installers are not always readily available. Is it legal for my association to place limits on shutter use? The shutters are part of the original equipment of the home, which construction was approved by the master association and the builder who ran the developer-controlled board for the sub-association. This issue is potentially very divisive. Too bad the board cannot pass a policy eliminating hurricanes. D.T. (via e-mail)

**Answer:** First, when you refer to “installing” hurricane shutters, I presume you are referring to the erection of what are often referred to as “panel” shutters, which are removable (as opposed to “roll-down” shutters, which are permanently affixed to the building).

In a 1994 condominium arbitration decision, a condominium association’s board enacted a rule that prohibited closing hurricane shutters unless a hurricane watch had been ordered or a hurricane was imminent. The arbitrator determined that the rule was invalid. The arbitrator went on to explain that while the rule may or may not be unreasonable if it also required the association to simultaneously assume the responsibility of closing the shutters upon the approach of a storm, where there is no such responsibility there is no assurance in any given case that the shutters of a non-resident owner can or would be closed in the often limited time available after the issuance of a hurricane watch or warning.

If your association adopted hurricane shutter specifications where the shutters can only be closed at certain times, but also where the Association assumed the responsibility of closing the shutters upon the approach of a storm, it is arguable that such specifications would be valid. In such a case, I believe the Association also needs to consider the additional liability it is taking upon itself to ensure that hurricane shutters are properly closed, and that no damage is caused when closing and opening the shutters.

**Question:** I have a situation where two huge trees fell on my villa, which is in a condominium. One fell on my covered and screened patio roof. The association said the patio is my responsibility. However, we had been complaining about those two trees since we moved in five years ago as their roots had cracked the tile floor of the patio. The association agreed to remove them and some others at the other end of the complex, but they did not remove the trees near me. Can the association be held responsible now since they did not remove the trees? C.S. (via e-mail)

**Answer:** A property owner is generally not liable for damage caused when an otherwise healthy tree located on his property falls as a result of winds of other natural causes and damages neighboring property. However, in the 1998 Florida case of *Vann v. Bailey*, the court held that a landowner in an urban area has a duty to exercise reasonable care to prevent unreasonable risk of damage to adjoining property arising from defective or unsound trees on his or her premises. Therefore, if a landowner has actual knowledge, or should have known, that a tree is defective or unsound, then he has an obligation to take care of that problem and could be liable for any damage caused when the tree falls.

The prior problems caused by the trees roots do not seem to indicate that the tree was unsound and in danger of falling, so I do not believe that fact helps your case.

In any case, if your patio is part of the original construction of the building, the loss should be covered by the condominium association’s master insurance policy.

**Question:** I am trying to figure out whether the community where I live is a homeowner's association or a condominium association? How do we know one way or the other? Is it possible we are a mixed-bag; part homeowners association and part condominium association? B.H. (via e-mail)

**Answer:** Your questions can be answered by reference to specific provisions of the Florida Condominium Act (Chapter 718 of the Florida Statutes) and the Florida Homeowners' Associations Act (Chapter 720 of the Florida Statutes).

The Florida Condominium Act defines a condominium association as "any entity responsible for the operation of Common Elements owned in undivided shares by unit owners [which means a record owner of legal title to a condominium parcel], any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership." In summary, a condominium association governed by Chapter 718, Florida Statutes, is an association that is comprised exclusively of condominium unit owners and in which membership is mandatory. If your development includes any parcels of real property

that are not condominium parcels, then your association is not a condominium association.

The Florida Homeowners Associations' Act defines homeowners' association as "a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments, that if unpaid, may become a lien on the parcel." Therefore, a homeowners' association governed by Chapter 720, Florida Statutes, is any mandatory membership association that operates a community or mobile home subdivision which has the authority to impose assessments and place a lien on the parcel.

It is not possible to have a "mixed-bag" association, which is part homeowners association and part condominium association. It is, however, possible to have a homeowners association (often referred to as a master association or property owners association) that is sort of an "umbrella association" that also governs a condominium within the development. However, all condominiums must be administered by a separate "Condominium Association" in accordance with Chapter 718. ■

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