



Termination Law Deemed Unworkable

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In 2004, the Florida Legislature created the Advisory Council on Condominiums. The Council was empanelled to listen to concerns expressed by affected parties, primarily condominium unit owners and board members, and to make recommendations for improvement in the existing system.

The Council organized on January 6, 2005 and during 2005, conducted eight public meetings. Three meetings were held in Tallahassee, one in Fort Myers, one in Miami, one in Dania Beach (Fort Lauderdale area) and one in Panama City (Florida Panhandle).

Approximately 200 members of the public appeared before the Council to express concerns, make comments, and suggest improvements to the existing legal framework for resolving disputes between associations and condo dwellers.

The Council issued its Report in December of 2005, summarizing the public testimony which was given and making thirteen specific recommendations. The Council's Report can be found at http://www.myflorida.com/dbpr/lcs/condominiums/advisory_council.

Last week, we looked at the first six of the Council's recommendations. Here's the remaining seven 2005 recommendations from the Florida Advisory Council on Condominiums:

• **Termination Of Condominiums:** The Council concluded that the current laws regarding

“termination” of condominiums is unworkable in many cases, even where termination is imminent or appropriate. Situations involving termination of condominiums fall into two broad categories. First, when a condominium is damaged by calamity (such as fire) or natural catastrophe (such as hurricanes) to the point where it cannot be rebuilt, the sale of the land and re-development for some other purpose is often in the best economic interest of the owners of the property. The second scenario involves cases where a condominium structure reaches the end of its useful life, and re-development of the property may be the “highest and best use”, as opposed to pouring huge amounts of money for maintenance and upkeep. The current laws, read in connection with most condominium documents, usually require unanimous approval of all owners for termination. This is often unworkable since one owner may hold out due to stubbornness, or to get a better price than is being offered to everyone else. The Advisory Council specifically supported proposed legislation which has been pre-filed in the 2006 Florida Legislature, and which has been sponsored by Naples Representative, Dudley Goodlette.

• **Maintenance And Defective Construction:** The Advisory Council heard many complaints about lack of maintenance in condominiums. Problems ranged from older buildings that were “converted” from apartments or hotels to condominium ownership without adequate reserves, to boards who simply would not spend association money for needed maintenance.

Under current law, the Division of Florida Land Sales, Condominiums and Mobile Homes, the state agency with jurisdiction to enforce the condominium laws, has no jurisdiction over complaints involving lack of maintenance. The Council determined that a top order of business for its 2006 term would be to study this issue further and develop meaningful suggestions for recommended legislative changes.

- **Notice Of Liens/Foreclosures:** The Council recommended that a condominium association be required to give some type of notice of delinquency to an owner who has not paid assessments, before a lien can be filed. The purpose of the recommendation is to avoid situations where the first contact from the association which notifies the owner of their delinquency is a lien against the property, and attendant costs and attorney's fees which may equal or exceed the amount of the debt. The Council also adopted a motion to oppose Senate Bill 586, which has been pre-filed for the 2006 Session of the Florida Legislature. SB 586 would prohibit associations from foreclosing most liens against delinquent owners, and would take away an association's right to collect attorney's fees as part of the collection process.

- **Office Of The Ombudsman:** The Advisory Council heard both praise and criticism of the efforts of Florida's new Office of Condominium Ombudsman, which was created by the same law which created the Advisory Council on Condominiums. The Advisory Council concluded that the current statutory structure lacks clarity in specifying the duties of the Ombudsman. The Council further found that there is insufficient due process of law when dealing with the Ombudsman. The Council was also opposed

to the legislative changes recommended by the Ombudsman, which among other things, would eliminate the Advisory Council.

- **Jurisdiction Over Unit Owner Complaints:** The Council concluded that the current model of addressing disputes between unit owners and their boards, which primarily relies on compliance under the threat of fines, is ineffective and needs to be replaced with alternative methods of dispute resolution. The Council learned that there are a tremendous number of state-employed personnel currently assigned to investigate complaints filed by owners against their associations, although the number of owners actually filing complaints is a small fraction of one percent. Educationally-focused dispute resolution has been discussed at the Council, but not acted upon.

- **Fining Guidelines:** The Advisory Council recommended that the Division undertake further review of its "resolution" (fining) guidelines, and other guidelines, including election rules.

- **Educational Recommendations:** The Council recommended that the Division prepare educational programs and/or materials on how associations should deal with catastrophic events.

Three new members have been appointed to the Advisory Council for the 2006 term. The next meeting of the Council has tentatively been scheduled for the first quarter of 2006, in the Tampa/St. Petersburg area. The actions of the Council can be monitored at the website of the Division of Florida Land Sales, Condominiums and Mobile Homes, www.state.fl.us/dbpr/lsc/condominiums/advisory_council. ■

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.

Governing Documents Found Contrary to Statutes

Question: Our Homeowner's Association's governing documents have some sections which are contrary to Chapter 720 of the Florida Statutes. We have proposed amendments to comply with the appropriate sections of the statutes, and the changes are on the ballot for approval by the general membership at the next membership meeting. However, any change to our governing documents requires membership approval. What if the amendments do not pass? How can we revise the contrary provisions in our governing documents if the necessary changes are not ratified by the membership at this meeting? J.K. (via e-mail)

Answer: Florida law distinguishes between amendments to statutes that concern "procedural" matters on the one hand, and "substantive" matters on the other. A purely procedural amendment to the homeowners association statute will apply to all associations, regardless of whether those changes are incorporated into the governing documents by express language. For example, the homeowners' association statute requires that actual notice to members of any members' meeting be given at least 14 days prior to the date of the meeting. In my opinion, this notice requirement in the statute supersedes any contrary provision in your governing documents.

However, if a statutory amendment affects substantive rights, it may not be applicable to your association because the retroactive application of a statute amendment that affects substantive rights, such as the contract rights you have in your association documents, is unconstitutional. Your association's legal counsel should be able to advise which changes in the law affect substantive rights.

Question: In reviewing your recent column from December 29th, 2005, I was alarmed by your statement that the residents can waive the financial audit requirement. Our condominium association documents require a yearly audit. Am I not entitled to a report on the association's finances? R.T. (via e-mail)

Answer: The Florida Condominium Act requires an association with total annual revenues of \$400,000.00

or more to prepare audited financial statements on an annual basis. The audit requirement does not apply to an association which operates less than fifty units. Where applicable, the statutory audit requirement can be "waived" by a majority of the voting interests who are present at a properly called meeting of the association. The waiver vote must take place prior to the end of the fiscal year for which the waiver is applicable.

Waiving the statutory audit requirement does not mean that there are no financial reporting requirements. In lieu of the audit, the association must prepare either a report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement. In other words, every condominium association must produce some type of written year-end financial report.

The ability to vote for a "waiver" applies to the statutory audit requirement. If a condominium association's governing documents require an audit, the audit would need to be performed, unless the condominium documents also provide a method to waive the audit requirement, or unless the documents are amended.

Question: When does the term of an association president expire? A new board is elected at the annual meeting. Does the outgoing president have the authority to officiate the first meeting of the new board? Can the outgoing president vote in the selection of the new president? S.A. (via e-mail)

Answer: It depends on whether the president has or has not been re-elected to the board, or else has retained his or her seat on the board at the annual meeting in question (i.e., was not up for re-election). Most governing documents provide that the president of the association must be a board member. In such cases, it is axiomatic that the outgoing president cannot continue to serve as president if he or she is no longer a member of the board.

Conversely, if the outgoing president remains a board member, it is my opinion that he or she should officiate

the organizational meeting of the board held after the annual membership meeting. Section 617.0840(1) of Florida's Not-For-Profit Corporation Statute states that unless otherwise provided in the articles of incorporation or bylaws, officers shall be elected or appointed by the board of directors annually. Therefore, an incumbent director who is also president would have his or her term expire at the board's organizational meeting (the annual

anniversary upon which he or she was appointed) and not the membership's annual general meeting.

If the outgoing president remains a member of the board, he or she can vote for the new slate of officers, including cases where he or she may seek election as president. If the outgoing president is no longer on the board, he or she would have no voting rights in the board's election of new officers. ■

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