HOAs Need Better Legislation

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For the past forty years, condominiums have been a staple of Florida's development landscape. Sharing the cost of amenities that few could afford individually, and promises of no more grass-cutting or house-painting have attracted retirees, seasonal residents, busy working folk, and families on-the-go alike. With the benefits of condominium living come the less pleasant side of communal living, such as disputes about how the money should be spent or how strictly rules should be enforced.

Although certainly not perfect, the condominium regime of ownership has been generally successful in Florida. There is certainly no shortage of new condo development which continues to attract those seeking their slice of paradise. In no small part, the overall success of Florida's condo boom can be tied to faith that most have in an intricate legal system of checks and balances. Of highest importance in this regard is a fair, secret, and rational system for electing directors of condominium associations.

Well over a decade ago, the Florida Legislature identified potential abuses in an election procedure that relied heavily on the use of proxies, and which enabled incumbent boards to be re-elected, even with opposition, because of the high rate of absentee ownership in many condominium developments in Florida. Reforms that were set into motion in 1991 outlawed proxy elections, provided a means for everyone wishing to run for the Board to have their name placed on the ballot, eliminated quorum requirements in elections, and mandated secret elections for condominium directors.

At about the same time, it became evident that other forms of mandatory membership communities were being developed all around the state. These primarily involve so-called "homeowners' associations", which many refer to as HOA's. While most single family development in the 60's and 70's did not involve mandatory membership HOA's, virtually all multi-tract housing developments in the past thirty years have required a mandatory membership association.

For better or worse, there has been resistance to creating the same type of regulatory regime for HOA's that exist in the condominium counterpart.

Nonetheless, various task forces have been empanelled over the past decade or so to look at whether homeowners' associations need the same operational codes that exist for condominiums.

Having been involved in some of these efforts myself, I think there is no doubt that residents in communities operated by homeowners' associations, just like their condo-cousins, place a fair election of directors at the top of their list of expectations. Unfortunately, due to the vagaries of the political process, the law lacks sufficient guidance in how to conduct HOA elections.

First, in contrast to condominium procedures, there is no process for pre-qualification/self-nomination to the board. Rather, most HOA bylaws still mandate nominating committees, which is exacerbated by the fact that many associations whose bylaws require nominating committees fail to empanel them.

Second, while the condominium law long ago eliminated quorum requirements for elections, the election of an HOA board must be done at an annual meeting, requiring the establishment of a quorum.

Third, Chapter 720 of the Florida Statutes, the law applicable to HOA's does not authorize the use of absentee ballots in elections. This leaves a large void in determining how those who cannot attend the annual meeting can vote. Many associations use proxies, either general proxies or "limited" proxies for elections, and this is authorized in most HOA governing documents. However, some documents require the use of secret ballots, which is virtually impossible for absentee owners when there is no pre-qualified slate of candidates for the board. Finally, and what I see as the most significant glitch in the law for homeowners' associations is the provision in Chapter 720 which provides that any member of the association (parcel owner) may nominate themselves to run for the board from the floor, at the annual meeting. While this seems egalitarian at first blush, the process of floor nominations basically disenfranchises absentee voters, and can wreak havoc at an annual meeting.

In my opinion, this is a prime area for correction by the Florida Legislature. Unfortunately, if the past several years are a sign of things to come, it is likely that the Legislature's view of needed legislative reforms for community associations will be enshrouded in the fog created by the petty insults and trumped-up drama which has overshadowed meaningful discussion of legislative reforms for the past several years. ■

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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****.*

Board Meetings Should be Open to All Unit Owners

Question: I live in a community comprised of a number of condominium units, also some single-family homes. There is a condominium association, a homeowners association, and we also have a "recreation association", which manages all the common properties, including the golf course, pool, tennis courts, clubhouse, etc. My question concerns the "sunshine law" and whether it applies to our associations to require open board meetings. I believe that it does, but some members of my community believe that it does not since we are a not-for-profit corporation. Some board members have taken votes via phone call and email, and it is my feeling that this is illegal. I would appreciate your opinion. P.A. (via e-mail)

Answer: First, almost all community associations fall into one of three categories, a condominium association (governed by Chapter 718 of the Florida Statutes); a cooperative association (governed by Chapter 719); or a homeowner's association (governed by Chapter 720).

As for the condominiums within your community, they are clearly governed by Chapter 718, and Section 718.112(2)(c) of the Florida Condominium Act provides that meetings of the board of administration at which a quorum of the members of the Board is present shall be open to all unit owners.

As to the homeowner's association and the recreation association, you must first determine whether those associations fall under the coverage of Chapter 720, the statute for HOA's. Section 720.301(9) of that statute provides that a homeowner's association is any corporation responsible for the operation of a "community" in which the voting members are parcel owners, in which membership is mandatory, and which is authorized to impose assessments and record liens on the parcels. If the homeowner's association meets these criteria, then Section 720.303(2)(a) requires that all Board meetings must be open to members, with limited exceptions. Similarly, if the recreation association meets the definition of a homeowner's association under the statute, it too is governed by Chapter 720.

Both of the laws contain an exception to open meeting requirements when the board is meeting with legal counsel to discuss pending and proposed litigation.

Finally, it is clear that a quorum of the Board speaking on a telephone conference call constitutes a "meeting"` and must be preceded by appropriate notice and open to all members. The issue of emails is a gray area that has yet to be settled. However, I do not believe email interactions are technically meetings, although email should never become a substitute for the open meeting process.

Question: May three members of a seven member homeowners' association board hold meetings with the property manager concerning association business without notice of the meeting being given to members? This is happening frequently and is upsetting members of the Association. L.R. (via e-mail)

Answer: Chapter 720.303(2)(a) of the Florida Statutes is the section of the Homeowners' Association Act that requires all Board meetings to be open to all members, with limited exceptions. That same statutory section establishes that a board meeting takes place only when a quorum of the board gathers.

Typically, a quorum is defined as a majority of the board, but this definition may vary as set forth in the bylaws. Therefore, in a typical situation, three members of a seven member board may meet without prior notice to the members. The key factor is that less than a quorum of the board cannot take any official action, so the members will ultimately have an opportunity to address the board and to hear discussion at a duly noticed meeting concerning any matter that requires a vote of the board.

As a practical matter, there must be communications between less than a quorum of board members outside of duly noticed board meetings. Otherwise, board meetings would be required every other day in many associations and would likely last several hours. Having said that, it is important that duly noticed board meetings do not

become mere formalities to "rubber stamp" decisions that have been discussed and considered only outside of the meeting. Such a practice may create suspicion and resentment among the members and is not in the best interests of the association or the board members.

Question: We live in a small condo development and are considering becoming a "55 and over" community. What are the legal issues involved? What are the benefits and drawbacks to such a change? J.F. (via e-mail)

Answer: Due to changes in federal housing laws in 1989, "adults only" housing is no longer legal in the United States. This change to the law had an impact on many communities in retirement-oriented areas, particularly Florida, where housing developments were marketed to retirees, empty-nesters, and those who chose to live in an environment without children.

In enacting the law, Congress tailored an exemption known as the "55 and over" exemption. As applied to condominium associations, you would need to prove (by documented survey) that at least eighty percent of the occupied units are occupied by at least one person age 55 and over. You would also need to amend the declaration of condominium to provide for restrictions on future occupancy to ensure the required eighty percent threshold. There is usually an exemption in the amendment for "hardship" situations (surviving spouses, inheritances, etc.) and existing non-qualifying residents are usually "grandfathered."

The benefit of becoming a "55 and over" community, for those who see it as a benefit, is the ability to prevent children from residing in the community. I do not know if having "55 and over" status increases or decreases property values as related to similar housing, I have heard both sides of the argument made.

The "drawbacks" include the need for the association to engage in ongoing administrative tasks to verify and maintain the exemption. This includes a bi-annual filing with the Florida Commission On Human Relations, requirements to periodically update your census (at least every two years), and keeping track of age-qualification information with respect to all new residents, both buyers and tenants. ■

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