



Legislative Proposals Reviewed

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Today's column continues our review of proposed legislation pending in the 2006 Session of the Florida Legislature. Last week, we began review of House Bill 1227/Senate Bill 2570. (*Bill Looks To Change Rules For Condos*, March 30, 2006). The first segment looked at proposals in H.B. 1227/S.B. 2570 that would require certified mail notice of proposed amendments, prohibit waiver of financial reporting requirements, address reconstruction of condominium property after casualties such as hurricanes, limit an association's ability to regulate "certified inquiries" from unit owners, and require all actions of a condominium association to be authorized at a duly noticed meeting of the Board. Today, we will continue with a review of other proposals in H.B. 1227/S.B. 2570.

- **Special Assessments:** Section 718.112(2)(c) of the Florida Condominium Act is proposed to be amended regarding a Board's adoption of special assessments. Current law requires that if a board is going to levy a special assessment (assuming that the board is otherwise granted authority by the condominium documents to do so), notice of the board's meeting where the assessment will be considered must be mailed or hand-delivered to each unit owner at least fourteen days in advance of the board's meeting, and the notice must also be posted conspicuously on the condominium property. The current law also requires that the notice include the purpose of the proposed assessment. H.B. 1227/S.B. 2570 would further require that the notice set forth the amount

of proposed assessment and a "breakdown" of the proposed assessment's purposes. While many associations follow this protocol anyway, and it is certainly preferred practice, the board cannot always predict the amount of a proposed assessment until it meets to consider the levy of the assessment. For example, the board may also, at the same meeting, need to choose among competing bids for the work to be financed by the assessment, which may require the board to put the cart before the horse when noticing the assessment meeting.

- **Term Limits:** Section 718.112(2)(d) would be significantly amended regarding board service, specifically by imposing term limits. The proposed law would provide that an owner may not serve on the board as a director for more than two terms or longer than four years. Perhaps more significantly, this Bill would further provide that a member may not serve "as an officer of the corporation for more than one term." For example, no person could serve as a condominium association's president for two years. Arguably, because of the expansive wording of the proposal, a person could not serve as the vice-president one year and as president the following year, since they would be serving "as an officer" for more than one term. The proposal would also prohibit co-owners of a unit from serving on the board simultaneously, such as prohibiting a husband and wife from serving together. The co-ownership provision,

were it limited to co-owners who owned only one unit, would probably be well-received. The four-year term limit for board service could become extremely problematic in smaller associations, which often have significant challenges in finding people willing to serve on the board. The prohibition against serving as an officer for more than one term seems patently unworkable. Since the law permits associations to establish term limits in its own bylaws, the wisdom of imposing mandatory term limits through governmental fiat seems unnecessary.

- **Opting Out Of Election Procedures:** The Florida Condominium Act contains fairly detailed requirements governing the conduct of condominium elections. In recognition of the fact that some associations, particularly smaller associations, may prefer different election procedures, current law allows the association to “opt out” of the statutorily-mandated procedures, and provide a different election procedure in the bylaws. HB 1227/SB 2570 would eliminate an association’s right to opt out.
- **Annual Meetings:** The new law, if adopted, would permit unit owners, by petition signed by twenty percent of the voting interests, to place any item of business on the agenda for the association’s annual meeting. While it seems reasonable to permit the members to be heard about matters of concern, it is unclear how this proposal would require the board to treat issues voted upon by the membership at the annual meeting. For example, if the members petitioned to have a vote on whether

to change property management companies, would that vote be binding on the board? Under most condominium documents, most day-to-day decisions regarding the association are entrusted to the board of directors.

- **Waiver Of Reserves:** Section 718.112(2)(f) of the Florida Condominium Act would be amended by adding new subsections 5 and 6. The law would provide that a vote to provide for no reserves or a percentage of reserves must be taken at the annual meeting, and the vote would have to be conducted on a form promulgated by the state. This section would also permit the use of reserve funds after a catastrophic event, which I think is a good idea. The requirement for voting on reserves at the annual meeting would probably work for most associations, although not for all. Some associations hold their annual meeting well into the first quarter of the year (March or April) and have already addressed reserves by a special financial meeting held prior to the end of the fiscal year. It is unclear under this proposal whether the owners in those situations would be voting on reserves for the fiscal year which has already started, or whether the vote would apply to a fiscal year that may not start for nine or ten months.

Next week, we will continue our review of H.B. 1227/S.B. 2570 with a discussion of proposed changes to the law involving the collection of assessments, hurricane shutters, requirements for periodic engineering inspections of condominium buildings, and other items of interest. ■

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.

Nominations from Floor Made Meaningless by Rules

Question: I belong to a master homeowners' association. When we had our last board of directors election, the following process was used: People expressed their interest to run, then ballots were sent out and members were told to return them before the meeting. Proxies were also included. All of this happened before nominations were made and closed at the annual meeting. Nominations were taken from the floor at the meeting, but votes were already in. How could anyone nominated from the floor be included in the election? A lawyer said this was legal, but I have never seen an election like this. Could you please explain the correct procedure that should have been done? D.S. (via e-mail)

Answer: Chapter 720, Florida Statutes, governs homeowners' associations. Section 720.306(9) provides that elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. That section of the law also permits any member to nominate himself or herself as a candidate for the board at the meeting where the election is to be held. These are the only statutory requirements concerning homeowners' association election procedures. Therefore, if the provisions of the governing documents of your association support the procedure that was used, then the election was conducted properly.

I recognize that many homeowners' association election procedures do not meaningfully address the right of a member to nominate himself or herself at the meeting. That right is designed to ensure that all members have a chance to be a candidate, regardless of the procedure set forth in the governing documents. As a practical matter, anyone who is, for whatever reason, not included on the ballot that is sent to members, must take it upon themselves to conduct a campaign and let all of the other members know to hold their votes until the meeting at which he or she will nominate himself or herself, or to write in that candidate's name on the ballot that is sent to and returned by the owner. When I served on the 2004 Task Force on Homeowners' Associations, I recommended that the Homeowners' Act be changed to make homeowners'

association voting similar to the statutory procedure for condominiums, which is generally considered to be more workable and satisfying to the members. My motion was defeated by the Task Force.

Question: My interest is in the area of rules and regulations. They appear to be totally useless since they can be changed at whim at any time by the board.

There are items listed in the condominium documents that have been changed by the board and restated as "rules and regulations". Since "rules and regulations" can be changed by the board at any time, this seems to be an unending vicious circle. Any light you could shed on the situation would be appreciated. K.M. (via e-mail)

Answer: Your question raises several important issues. First, what is the scope of the board's authority to pass rules and regulations? Often, the board is empowered to pass rules and regulations on its own, without any vote of the owners. You should review your Condominium Documents, however, because there may be additional requirements before a board enacted rule becomes enforceable, such as publication to all owners or even a confirming vote of the owners.

The next issue is the validity of the rules and regulations. An association's rules and regulations are at the bottom of the "hierarchy list" which includes, beginning at the top, the Constitution of the State of Florida, Florida Statutes, the Declaration of Condominium, the Articles of Incorporation, the By-laws, and finally the Rules and Regulations. Since the rules and regulations are at the bottom of the list, it will require more to establish their validity as compared to other documents, such as the Declaration. For example, case law has indicated that restrictions contained within a Condominium Declaration are clothed with a strong presumption of validity and will be upheld and enforceable so long as they are not wholly arbitrary in their application, in violation of public policy, or abrogate some fundamental constitutional right. Your rules and regulations, on the other hand, are not

“clothed with a presumption of validity”, and would only be considered valid if they do not contravene either an expressed provision of the Declaration or a right reasonably inferable therefrom. In other words, rules and regulations cannot conflict with the Declaration.

If your condominium association’s board has the authority to unilaterally create rules and regulations, to the extent those rules and regulations do not conflict with expressed and implied provisions in the Declaration they are probably valid and enforceable.

Question: I know that a condominium association has the right, by seventy-five percent vote, to cancel any contract

made under the developer’s control of the association. Does a homeowner’s association have the same right?
B.B. (via e-mail)

Answer: Unfortunately, no.

Section 720.309 of the Florida Statutes simply provides that any contract made by a homeowners’ association prior to transition of control must be “fair and reasonable” if the contract exceeds ten years in length. I often wonder if the Legislature meant to say that contracts of less than ten years can be unfair or unreasonable. This is one area where the consumer protections found in the condominium laws would greatly benefit HOAs. ■

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