



Two Vetoes Will Impact Associations

Fort Myers The News-Press, July 13, 2006

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In a rather unusual occurrence in the world of community association legislation, Florida's Governor has vetoed two pieces of legislation adopted during the 2006 Session of the Legislature. The bills, affecting condominium and homeowners' associations, had both been unanimously approved in both the Senate and House of Representatives.

Senate Bill 1556 was the first of the two measures to fall to the Governor's axe. SB 1556 dealt with the termination of condominiums. Under the current law, a condominium can usually only be terminated by one hundred percent approval of all unit owners. This can present complications when a single person might be able to thwart the desires of the rest of the community, perhaps to hold out for a better price, or just because the owner does not want to sell. The bill adopted by the legislature would have adopted an eighty percent threshold for the voluntary termination of condominiums, a majority threshold when termination occurred due to economic waste or impossibility, and was intended to have retroactive application.

In June of 2005, the United States Supreme Court issued its decision in *Kelo vs. City Of New London*, Connecticut, holding that the town could condemn homes for private development. Since *Kelo*, many politicians in the executive and legislative branches of government have rallied to protect "private property rights". SB 1556 seems to have fallen victim to the anti-*Kelo* groundswell. In his veto message, Governor Jeb Bush expressed reservations that the law could

have "unintended consequences" and could have the effect of "diminishing security in ownership of private property."

Bush also expressed the view that the current law was in need of review, particularly in the area of termination of condominiums in the wake of a catastrophe, such as a hurricane. The Governor ordered the Department of Business and Professional Regulation, through its Division of Florida Land Sales, Condominiums and Mobile Homes to conduct town hall meetings and issue a report by October 1, 2006. Such a meeting will be held in Southwest Florida on August 3, 2006 from 4:00 P.M. to 8:00 P.M. at the Lee County Commission Chambers, 2120 North Main Street, Fort Myers, Florida.

The second bill that was vetoed, House Bill 391, covered a much broader range of topics, and would have had more day-to-day impact on both condominium and homeowners' associations. HB 391 addressed HOA financial issues (including mandatory turnover audits for developers, developer guarantees, and reserve requirements for all homeowners' associations), limitations on architectural review authority of homeowners' associations, and the revitalization of covenants extinguished by the Marketable Record Title Act. HB 391 also would have made it easier for condominium associations, whose documents require lender consent for amendments, to contact mortgage holders, and make it incumbent on the lender to respond.

While Bush stated in his veto message that he supported certain aspects of the Bill, two areas appear to have poisoned the well. First, HB 391 would have extended the deadline for certain high rise condominium buildings to retrofit fire sprinklers (or take a vote to opt out of retrofitting) from 2014 to 2025. The Governor stated that the “arbitrary postponement of an already distant timeframe” presented an “unacceptable safety risk.”

Secondly, the Governor expressed displeasure at a measure in HB 391 that would have discontinued the use of the DBPR as a clearinghouse for mediation of homeowners’ association disputes, and would have required associations to offer homeowners a list of certified mediators who could hear a dispute prior to the matter heading to court. Although the bill appeared to be aimed at streamlining a mediation process that some claim is bogged down, Bush apparently interpreted the law to reduce the opportunity for mediation of HOA disputes. The

letter accompanying Bush’s veto stated: “ a return to civil litigation for typical owner-association disputes reduces the benefits in time and money that mediation saves over protracted court proceedings.”

Bush again ordered the DBPR to issue a report by October, 2006, and specifically mandated that the Department review whether a unified law for all community associations in the state of Florida would better serve the needs of the citizens of the State, as opposed to the current framework where each type of association has its own governing statute.

Gubernatorial vetoes can be overridden by a supermajority vote of the Legislature. By all reports, the chances of a legislative override of these vetoes is slim to none. I guess when the framers of our Constitutions came up with the notion of separation of powers, they wanted to make sure that things could be shaken up from any different number of angles. A couple of hundred years later, the idea still works. ■

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.

Hurricane Shutter Restrictions Likely to be Upheld

Question: The board in my homeowners association has recently enacted additional rules and regulations regarding the use of hurricane shutters. I live up north during the summer months and want to keep my shutters up while I'm away. The Board says I can't do that and that I have to keep them off unless a storm is coming. Is this allowed? A.M. (via e-mail)

Answer: Many homeowners association documents grant the board of directors authority to adopt and enforce rules and regulations concerning many aspects of association living. Hurricane shutters certainly fall into that category. Unlike the Condominium Act (Chapter 718, Florida Statutes), Chapter 720, Florida Statutes, which governs homeowners associations, does not specifically address hurricane shutters. Restrictions regarding hurricane shutters in a homeowners association are necessarily governed by the association's governing documents and the powers granted to the board therein. If your association documents grant the board of directors the authority to make rules for the use of your home, the board may adopt and implement restrictions regarding hurricane shutters that are reasonable and uniformly enforced. Your community has apparently implemented a restriction as to the use of hurricane shutters and, unless unreasonable or arbitrary on its face, the restriction would likely be upheld.

Question: I own a condominium unit. I have rented my unit to a young couple after submitting an application to the association. The application was approved. Then, the president of the association called a meeting with my tenants and me and suggested that they should not live in the community because they are young and have a pet. There is no prohibition on pets at the condominium. Also, I have owned the unit for more than a year and the association has never, to my knowledge,

entered my unit. Now, the association entered my unit supposedly to check on the sliding door. What right does the association have to treat my tenants like this after the tenants were already approved? M.D. (via e-mail)

Answer: Tenants in a condominium unit generally enjoy all of the same benefits, rights and obligations as owners who occupy their unit. You should know that some condominium documents do distinguish between tenants and owners on some issues, including pets. It is not unusual to have a provision in a declaration of condominium prohibiting tenants and guests from having pets, but allowing owners to have pets. However, you indicate that no such restriction exists in your condominium documents. In addition, an association may only restrict occupancy based on age if the community meets all of the requirements of the Housing for Older Persons Act. I presume your association is not such a "55 and over" community since your young tenants were approved. Finally, an association may only enter a condominium unit in good faith, for an authorized purpose, at reasonable times and, if possible, upon reasonable advance notice. There are many legitimate reasons for an association to access a unit, so you should be sure to determine why the Association entered the unit on this occasion. However, misuse of the right to enter the unit will likely give rise to a cause of action against the Association.

Question: Prior to our condominium association "turnover", the developer used office space located within the clubhouse as a real estate office. For the convenience of our unit owners, the board of directors has no objection to the developer's continued use of the Clubhouse for a real estate sales office after "turnover". The Developer is presently offering units within our community and single family homes in other communities for sale and/or rental.

Are developers allowed to use clubhouses for real estate offices and if so, under what circumstances? R.L. (via e-mail)

Answer: It is a common practice for developers to set up a real estate office in a condominium or homeowners' community clubhouse and offer units in the community for sale. In fact, association's declarations sometimes prohibit commercial uses within the property, but allow the developer to have a real estate sales office in the clubhouse. Even so, the local zoning regulations must also be evaluated. Local zoning regulations vary from jurisdiction to jurisdiction and even from community to community within one jurisdiction. More often than not, local zoning regulations allow a developer to operate a real estate office, but limit such real estate offerings to the first sales of property located within the community.

If this is the case and the governing documents allow real estate sales from the clubhouse, a developer cannot offer second sales of property located within the community, sales of property not located within the community, or offer any property for lease.

The local government's zoning or planning department may be willing to review the local zoning regulations and advise an association as to whether the real estate office is allowed. However, it is important to mention that your inquiry could trigger an investigation by a local code enforcement department that could result in a violation notice being issued to the association. Any association concerned about this as a possibility is well advised to contact their attorney to discuss their options in advance of contacting the local zoning or planning department. ■

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