



Since 1970s Power of Association has Grown

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Today's column is the second installment of a comparative look at the laws which govern Florida's community associations. Last week, we posed the question of whether a single law should govern all associations in Florida, or whether the current system works better (Florida Condo Act enacted in 1963, August 10, 2006).

The primary emphasis of this discussion involves the differences between the laws applicable to condominium associations and homeowners' associations, the two most common types of community association organizations in Florida. We kicked off the debate by looking at the original purposes of the condominium laws in the 1960's, and the consumer protection reforms that were enacted during the 1970's.

On the single family development side, the 1970's saw a dramatic increase in developers acquiring large tracts of land, and subdividing the tracts into individual lots, which is commonly referred to as platting a subdivision. Some subdivisions included common areas with their subdivisions, although most probably did not. Developers also began to routinely record restrictions governing building and uses within the subdivision, usually called deed restrictions or covenants. In many cases, the developer also created a separate corporation, known as the homeowners' association, which was granted power through the original covenants to enforce the deed restrictions after the developer had sold out.

However, associations created in the 1970's came in all shapes and sizes. Some required mandatory membership in the association by all lot owners, some did not. Some associations could file liens against lots for non-payment of assessments, some could not. Some associations were entrusted with the maintenance of common areas for the benefit of the overall community, some were not.

Since the condo boom predominated the political landscape of the 1970's, it is perhaps not surprising that homeowners' associations remained largely ignored during that decade by the Florida Legislature. Most HOAs were set up as not-for-profit corporations, and were simply governed by Chapter 617 of the Florida Statutes, the Florida Not-For-Profit Corporation Act. Chapter 617 contained some basic corporate procedures, but little attention was given to the unique nature of homeowners' associations.

Fast-forward to the 1980's, the Reagan years, and the beginning of the true land boom in Southwest Florida, which still offered huge tracts of undeveloped land for the taking. The 1980's saw the popularity of "master-planned communities", which basically came in two varieties. The most common scheme was for a single developer to buy a large tract, install significant recreational facilities (golf course, swimming pools, tennis facilities, etc.) and offer different housing product types (villas, traditional condos, single family homes, etc.), all built and sold by the same developer.

The second scheme, more common today than in the 1980's, was for a true "land developer" to lay out the property, and then sell it to sub-developers and individual home builders.

A second phenomenon occurred in the 1980's which also laid the groundwork for the omnipresence of homeowners' associations in Florida's development landscape. Local governments found that they could have their cake and eat it too by requiring developers, as a condition of their approval process, to create a mini-government known as the HOA, which would take over the provision of services traditionally reserved to elected government. Surface water management, trash hauling, road maintenance, and even the protection of people and their property could be performed by an association of property owners.

For these reasons you would be hard-pressed to find any single family development created during the 1980's that does not include mandatory membership in a homeowners' association. In fact, most local governments required the creation of an association as a condition for approval of the development, and that is still today's rule.

Although multi-tract development was here to stay, condominium development also continued at break-neck speed in the 1980's, with some cyclical deviation based on economic factors, and in particular the savings and loan scandals and crisis during the latter part of the decade. In 1977, Chapter 711 of the Florida Statutes had been renumbered to Chapter 718, and was referred to by many in the condominium industry as "The Act." The Act was amended every year during the 1980's, with strident political battles over silly things like bingo games, and many detailed-oriented amendments as to how condo boards were to conduct their business.

During the same decade, the governance of homeowners' associations remained completely unregulated, subject only to the governing documents for the particular community, and the Not-For-Profit Corporation Act.

Next week, we will continue with our history lesson, looking at the 1990's, arguably the most significant decade in the evolution of community association laws. We will take a look at the substantial revisions to the condominium laws in the early 1990's, and the promulgation of Florida's first law geared specifically at homeowners' associations. ■

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.

Condo Association May Mandate Cable TV Bill

Question: I currently have satellite television in my condominium. My association has voted to sign a contract with a local cable company to provide service to our entire association. In the notice the board sent to me, it indicates that I will be responsible to pay for my share of this service even though I already have satellite. Can the association require that I pay for cable when I already have a contract for satellite?
P.W. (via e-mail)

Answer: Most likely, yes. If stated in your association's declaration, the cost of a master antenna television system or duly franchised cable television service obtained pursuant to a bulk contract is deemed a common expense. If not provided for in the declaration, the association can still enter into such a contract, and the cost of service will still be a common expense and will be allocated on a per-unit basis rather than a percentage basis if the declaration provides for anything other than an equal sharing of common expenses.

Any such contract must also provide that any hearing-impaired or legally blind unit owner who does not occupy the unit with a non-hearing-impaired or sighted person, or any unit owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services, may discontinue the service without incurring any disconnect fees, penalties, or subsequent service charges.

You should also note that any such contract may be cancelled by a majority of the voting interests present at the next regular or special meeting of the association. Any member can make a motion at such meeting to cancel the contract, but if no motion is made, or if the motion fails to obtain the required votes then the contract is deemed ratified for the term set forth in the contract.

Question: I live in a condominium association. In May 2005, a special election was held to fill 4 director positions due to resignations. At that time, the board declared a longer term of office for 2 of the directors elected. What recourse do the other directors and/or the owners have to get this corrected? Who can we take our complaint to? C.W. (via e-mail)

Answer: If your bylaws provide for staggered terms for board members, then I believe it is appropriate to allow the directors who received the higher number of votes serve for longer terms so that a staggered directorate may be maintained. If you believe that the board's actions contradict the bylaws, there are a number of ways to try to resolve the issue. The first (and best) is to address your concerns directly with the board and attempt to resolve it amicably.

Another alternative is to propose an amendment to the bylaws providing for staggered terms, which will resolve the matter by incorporating the association's practice in the bylaws. Your bylaws may require circulating a petition to initiate an amendment.

If that does not work, you can also file a petition for arbitration with the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") challenging the election and the longer board terms. You can obtain information regarding petitions for arbitration on the Division's website which can be found at www.myflorida.com/dbpr/. Be aware, however, that if you pursue arbitration and lose the case, you will have to reimburse the association for its attorney's fees, if any, incurred in the arbitration.

Question: I bought my condominium unit two years ago and it came with a carport space. I don't use the space because I can park in a shady "open parking" area closer to my unit. I offered to sell my space to one of my neighbors, but when the management company

heard about this, they told me I cannot sell the carport space. I don't understand why this is a problem if I am selling it to another unit owner in the community?
T.M. (via e-mail)

Answer: Carport spaces in condominium developments, and similar amenities such as storage lockers and cabanas, are typically established and regulated in one of several different ways. As with many condo questions, the answer to your question will be found in your association's declaration of condominium. Most commonly, carport spaces are designated as "limited common elements" that are "appurtenant" (legally attached) to the unit for the exclusive use of that particular unit owner. When this limited common element method is used, some declarations allow members to transfer the carports to other unit owners, and some declarations do not. If the declaration does not permit a transfer of use rights, it cannot legally be done.

Another method of administering carports is to have them designated in the declaration as "general" common elements for the use and enjoyment of all members, and thereby subject to administration by the association. Where the carports are general common elements, some associations lease the carports to members. Where there are enough carports for each unit to have the use of one, the association may elect not to lease the carports, but instead just assign a carport to each unit to establish orderly use of the carports.

Occasionally, carports or parking spaces will, themselves, constitute a unit within the condominium and include voting rights and carry an obligation to pay assessments separate from the residential unit. On these rare occasions, the separate unit carports may be conveyed freely to any person, subject to any provision in the declaration. In summary, your declaration should provide the answer to your question. ■

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