



## Association Disclosure Rules Differ

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Today's column is the fourth installment of a comparative study of Florida's laws applicable to community associations, with an emphasis on the difference between the laws applicable to condominiums and homeowners' associations. As previously reported, Governor Bush has recommended that the powers-that-be study whether there should be a unified law for all of Florida's community associations.

The first three installments looked at the historical development of both condominiums and non-condo deed restricted communities (generically referred to as homeowners' associations) and the development of the laws applicable to the different types of entities. Succinctly stated, condominiums got a thirty year head start on homeowners' associations, although HOA legislation has become markedly condo-like over the past decade.

The remainder of our discussion in this series will attempt to pin-point the main differences between the laws for condominiums and homeowners' associations in Florida, hopefully with the result of providing affected parties with a bit more information than they had previously, so that they can judge for themselves whether a unified law is the way to go.

Let's kick off the comparisons by looking at government regulation of community associations. This is likely the most significant difference between condominiums and HOAs.

Before condominium units can be sold to the public, the developer must file a lengthy disclosure-oriented document with the state, known as a Prospectus, sometimes called the Offering Circular. The Prospectus must include a copy of the condominium documents (declaration, articles and bylaws) that will be filed, budgetary information, representations regarding recreational facilities that will be built (and estimated completion dates) and a host of other information that will assist a prospective purchaser in deciding whether this unit is the right choice for them. While industry veterans muse that no one ever reads these documents, they are at least available for anyone who wants to do their homework. If a condominium developer makes material changes in the offering documents prior to sale of a unit, a right to back out of the contract (known as a right of rescission) is triggered by the law.

By contrast, there is no pre-sale registration requirement for the sale of homes that will be governed by a homeowner's association. While there are certain federal land sales disclosure laws that apply, they do not provide anything close to the disclosure requirements applicable to condominiums. While some developers see pre-sale state registration as little but a taxing mechanism, consumer advocates argue that disclosure is a key ingredient in protecting purchasers.

Setting aside whether pre-sale registration is good public policy, it could certainly be expected that

any effort to impose registration requirements for homeowners' associations would be fought tooth and nail by the well-financed, well-organized builder/developer lobby in Tallahassee. To conclude this point, if a unified law is to apply to all aspects of community associations in Florida, there are two choices. First, the Legislature could require pre-sale disclosure for homes in HOA-operated communities. Alternatively, the Legislature could repeal the requirement for condominium Prospectus filing prior to sale.

For most condominium associations, the specter of government regulation that is of greater interest is the day-to-day jurisdiction of the state over association operations. Florida's Department of Business and Professional Regulation, through its Division of Florida Land Sales, Condominiums and Mobile Homes, has statutorily-granted jurisdiction over a number of areas applicable to all condominium associations.

As will be explored more fully in dispute resolution comparison, the Division provides an arbitration program, which you might think of as "condo court", where most garden variety condominium disputes are heard before they can head to court. Records access, election disputes, recall issues, common element alterations, and most rule violations (pets, parking, nuisances, etc.) are all heard in arbitration, where a ruling is made by a state-employed arbitrator, whose sole job is to adjudicate these disputes. There is no counterpart available for homeowners' associations, disputes must be resolved in court (although the 2004 Legislature mentioned last week disputes now require pre-suit mediation and election and recall disputes are arbitrated through the Division).

The Division is also mandated, by law, to provide educational opportunities for condominium unit owners and board members. The Division primarily provides education through web-based materials, and a series of classes that are presented through a

contract with Community Associations Institute, an Alexandria, Virginia-based nonprofit organization. Homeowners' association board members and parcel owners must primarily rely on volunteer providers (law firms, accounting firms, management companies, community college courses, and books on the subject) for education regarding association operations.

Perhaps the most significant difference between condominium associations and homeowners' associations with regard to government regulation is the state's ability to take disciplinary action, including the levy of fines, against associations and their board members. Since homeowners' associations are not state-regulated, there is no agency where an owner who is dissatisfied with some aspect of their association's operation can file a complaint and have the government step in. Many see this as a blessing, some as a bane.

Conversely, unit owners in condominiums need but pick up the telephone, fill out a short form, and they can file a complaint against their association which will result in an investigation by the state. A single owner, who may have an axe to grind, can bring the state's police-power to bear on their association, even if the complaint is frivolous, with little down-side consequence. For this reason, the Florida Advisory Council on Condominiums has spent the last year debating the current enforcement-oriented legal model for addressing disputes within condominiums, with discussion of an educational-oriented model.

A unified law will present much the same question on police power as the issue of developer registration. Should HOAs be regulated, or condominium associations be deregulated?

Next week, we will take a look at some significant differences in the two laws regarding warranty rights, disclosure, and various consumer protections. ■

## Board Documents May Permit Towing of Vehicles

**Question:** Several of my neighbors in my homeowners' association park their vehicles in the street overnight and sometimes even on the front yard. We have very clear Rules and Regulations that prohibit this. I told the Board of Directors they should start towing these cars, but the Board does not believe it has the authority to tow. Can the Board tow these vehicles when they park illegally? R.B. (via e-mail)

**Answer:** All of the authority of an association comes from either a statute or from the governing documents (declaration, articles of incorporation, bylaws, and rules and regulations) of the association. The first step to answer your question is to determine if the governing documents permit the association to tow vehicles. This authority may be found in general language which essentially states that the association has the authority to engage in "self-help" to correct violations, or it may be found in a specific towing provision. If towing authority is found, the association must be very careful to comply with Section 715.07, Florida Statutes.

Section 715.07, F.S. sets forth requirements which, if not precisely met, may result in the association paying the costs of towing and any damages to the owner of the vehicle. The requirements include either detailed signage posted conspicuously in accordance with the statute, or personal notice of the intent to tow delivered to the owner or person legally in control of the vehicle prior to towing. Once the notice requirements are met, the towing company must comply with several other requirements concerning how far the vehicle may be towed, giving notice to public authorities within 30 minutes of completion of the towing, and other statutory requirements. Because there are many opportunities to fail to comply with procedural requirements, the association should require an indemnification agreement from any towing company it hires to gain some legal protection in the event the towing company does not comply with the statute.

In general, self-help remedies, such as towing, can be legally accomplished but are somewhat risky to the association because of the opportunity for a member to claim improper procedure or that damage was caused to the vehicle or other property. Further, self-help remedies tend to be disfavored by the courts.

**Question:** I am a C.P.A. who retired to a small condominium complex on Fort Myers Beach a couple of years ago. I have been trying to get a copy of the financial reports of the association ever since I arrived. I do not even know if they have done a report or if they are required to give me a report. What should I do? R.M. (via e-mail)

**Answer:** The financial reports are included among the "official records" of the association, and must be made available for your inspection and copying within 5 working days after the board, or its designee, receives a written request.

Within 90 days of the end of the fiscal year, or a different date set out in your bylaws, the association is to prepare, or contract for the preparation of, a financial report for the preceding fiscal year. The association must provide the unit owners, whether by mail or hand delivery, a copy of the final financial report within 21 days of its completion, but no later than 120 days after the end of the fiscal year, or other date as provided in the bylaws. Alternatively, the association may mail or hand deliver a notice that a copy of the financial report is available free of charge upon receipt of a written request by the unit owner.

If your association has annual revenues of less than \$100,000, or 50 or fewer units regardless of annual revenues, then it must prepare a report of cash receipts and expenditures. If your association has total annual revenues in excess of \$100,000, but less than \$200,000, then it must prepare compiled financial statements. If the association has total annual revenues of at

least \$200,000, but less than \$400,000, then it must prepare reviewed financial statements. An association with total annual revenues of \$400,000 or more must prepare audited financial statements.

You should also note that the type of financial statements required can be “waived down” to a lower requirement if a proper vote is obtained. For instance, if approved by a majority of the voting interests present at a properly called meeting, the association can prepare a report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement. However, the members cannot vote to waive the preparation of financial reports altogether.

**Question:** I was recently elected onto the board of directors. Quite often we have owners asking for different records and documents. How do I know what I can, and cannot, give them, or are they allowed to see everything? T.L.

**Answer:** The statutes governing both condominium and homeowners’ associations each contain a detailed list of what constitutes an association’s official records. Although these statutes identify specific items as official records, each also contains a “catch-all” provision essentially saying that all records of the association are part of the official records. Therefore, practically any piece of paper or other data which the association keeps amounts to an official record.

However, the Florida Condominium Act states that unit owners do not have access to records protected by the lawyer-client privilege or the work-product privilege, information obtained in connection with the approval of the lease, sale, or other transfer of a unit, or medical records of unit owners. The Florida Homeowners Association Act contains the same exclusions, plus it states that disciplinary, health, insurance, and personnel records of the association’s employees are not accessible to the members. ■

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