



Membership Rule Must be Disclosed

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Today's column is the sixth 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.

For the past two weeks, we have started to analyze the actual differences between the two laws, starting with a look at the topic of government regulation, specifically the fact that condominiums are subject to direct oversight by a state agency with enforcement and penalty authority, while homeowners' associations are not.

Today's discussion continues where we left off last week regarding the main differences between the two laws in the areas of disclosure and consumer protection. As noted last week, Chapter 718 (the Condominium

Act) confers warranties for new construction, while Chapter 720 (the Homeowners Association Act) does not. Chapter 718 requires post-turnover audits of financial statements by developers, Chapter 720 does not.

Another consumer protection area where homeowners' associations take a back seat to their condo counterpart involves contracts made by the association while still under the developer's control. Chapter 718 provides that any contract made by a condominium association, prior to transition of control, must be "fair and reasonable." Further, the condominium law generally requires association contracts to be in writing, and requires certain minimum terms, including a disclosure as to whether the contracting party is related to the developer. Perhaps most importantly, the Condominium Act permits the association, after transition of control from the developer, to cancel most contracts entered into by the association prior to turnover, by a seventy-five percent of non-developer units.

Conversely, the HOA law, Chapter 720 simply provides that contracts made by the developer-controlled association, prior to turnover must be "fair and reasonable", if the contract has a term of ten years or more. I often wonder whether the Legislature really meant to suggest that a developer-controlled association could enter into a contract of less than ten years that is unfair or unreasonable.

Another huge difference between the two laws involves the area of pre-sale disclosure and “cooling off” rights. The concept of “caveat emptor”, let the buyer beware, was the rule of thumb in regard to purchasing homes within an HOA-operated community for many years. In fact, I am personally aware of many situations where people bought into single family home developments, without ever realizing that they also were required to become a member of an association, until it was too late to change their mind about whether this was the right decision for them. This situation has been addressed, to some degree, by amendments to Chapter 720 over the past several years. F.S. 720.401 provides that the contract for purchase of a home in a community subject to a homeowners’ association must include disclosures regarding basic membership obligations.

Conversely, the condominium laws are much stronger. As noted previously, in connection with the sale of new homes, a condominium developer must file an elaborate disclosure document with the State of Florida, called Offering Circular, or Prospectus. A new unit purchaser has fifteen days after receiving all the required disclosure documents, and signing the purchase contract, to back out of the contract, known as a “right of rescission”, commonly called a “cooling

off period.” In addition to the fifteen day cooling off period affiliated with the purchase of a new condominium unit, there is a three-day cooling off period applicable to resales, where various documents must also be supplied from the seller to the buyer.

Like the issue of common area warranties, the 2004 Task Force on Homeowners’ Associations recommended that the Legislature adopt a cooling off period in the purchase of homes in HOA-operated communities, similar to the condominium laws. That recommendation met a fate similar to the warranty recommendation, and was not part of the law, as finally adopted.

Recognizing that the purchase of a new home is usually the most significant investment one makes during the course of their life, I think it is fair to say that Florida’s condominium laws offer a broad spectrum of protections to both new home purchasers, and purchasers in re-sale situations. The current HOA laws finish a distant second place, at best.

Next week, we will start to look at some of the details of the differences between the two laws in association operations, including record-keeping, financial reporting and owner rights. ■

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.

Majority of Voting Interests Can Recall Board Member

Question: How can the owners remove or unseat a member of the board of directors of a condominium association? J.K. (via e-mail)

Answer: A board member may be recalled and removed from office, with or without cause, by the vote or agreement in writing of a majority of all the voting interests. There is usually one voting interest assigned to each unit. The proposed recall can be either by a vote at a meeting or by written agreement. There are specific procedures that must be followed and these are explained by the administrative rules adopted by the Division of Florida Land Sales, Condominiums and Mobile Homes (“Division”). These rules are Rule 61B-23.0026, .0027, and .0028, Florida Administrative Code, and can be found at Florida Administrative Code Online at <http://election.dos.state.fl.us/fac/index.shtml>.

After the owners vote, the board must hold a meeting to consider whether or not to “certify” or “de-certify” the recall. If the recall is by a vote at a special meeting of the owners, the board must hold a meeting within 5 full business days of the adjournment of the unit owner meeting. If the recall is by written agreement, the recall agreement must be served on the association by certified mail or by personal service, and the board must duly notice and hold a meeting within 5 full business days after receipt of the agreement in writing.

If the board certifies the recall, the recall is effective immediately and the recalled board members must turn over to the board, within 5 full business days, any and all records and property of the association in their possession.

If the board does not certify the recall, the board has 5 full business days to file with the Division a petition for arbitration. The Division will appoint an arbitrator who will make the final decision as to the effectiveness

of the recall. If the arbitrator certifies the recall, the recall is effective when the final order of arbitration is mailed to the association, and any board members recalled have 5 full business days of the effective date to deliver to the board any and all records of the association in their possession.

Question: The board of directors of my condominium association has hired a part-time person to do small maintenance jobs for the association. One of the board members is paid to oversee work done on the building and grounds and serves as the part-time person’s supervisor. It has been discovered that the board member has been having this part-time person do work off-site for him personally and turning in the hours for the association to pay. I am also on the board of directors and I was wondering whether board members (uncompensated) of a condominium association are personally liable for the acts of this other board member? How can we remove this director from the board? J.K. (via e-mail)

Answer: The long standing rule of law on director liability holds that condominium association directors are immune from individual liability absent a crime, fraud, self-dealing or unjust enrichment. Further, individual directors cannot be held liable for negligent actions even if such actions were clearly wrong. Based on the facts you have stated, I believe that the board member would be personally liable for the cost of the work that was performed for him. Although the board cannot remove the director (only owners can recall and remove a board member), the board can change the board member’s duties so that he is no longer supervising the maintenance person or receiving compensation for overseeing maintenance work. If the other board members knowingly permit this situation to continue, someone could argue that the other board members should be personally liable as well, although as noted above, it would have to be shown that the

inaction by the other board members constituted a crime, fraud, self-dealing or unjust enrichment.

Question: I live in a condominium community where one board of directors oversees 8 separate condominiums with a total of several hundred units. The board works very hard to prepare budgets for all 8 condominiums, enforce the documents and generally take care of all the complaints. The directors are unhappy and some want to quit. Some members and I think it would be fair and reasonable to pay the directors for their time and service. Are there any limits on paying Board members? Can the Board members vote on this themselves? A.C.

Answer: Your community is called a multicondominium, and I know that multicondominium directors often have many demands placed upon them in their roles as directors. The Condominium Act provides that the board shall serve without compensation unless otherwise provided in the association's bylaws. This requirement that your bylaws must specifically allow for compensation of directors in order to pay directors gives the members some control in the matter, because members can usually amend the bylaws to allow or prohibit compensation as they wish. Of course, any decision to pay the directors needs to be voted on by the directors, just as any other payments or contracts by the association.

One important issue in paying directors is that, if compensated, a board member may be required to be licensed as a community association manager pursuant to Florida law. Florida Statutes provide that "community association management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 50 units or have an annual budget or budgets in excess of \$100,000: controlling or disbursing funds of a community association; preparing budgets or other financial documents for a community association; assisting in the noticing or conduct of community association meetings; coordinating maintenance for the residential development, and; other day-to-day services involved with the operation of a community association. A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part.

A practical solution to lightening the load for your directors would be to hire a licensed manager to handle most of these tasks for the Board. ■

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