



## Association Board Election Laws Differ

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Today's column is the seventh installment of a comparative study of Florida's laws applicable to community associations, with an emphasis on the difference between the laws for 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 six 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 past three editions have studied the actual differences between the two laws with an emphasis on the topics of government regulation and consumer protection. Today's discussion begins our focus on procedural differences in the two laws.

One of the most subtle, yet significant differences between the procedural aspects of the two laws involves the annual rite of passage known as the board election. Both laws require the election of the board to occur in connection with the association's annual meeting. That is where the similarities end.

As a consequence of the 1992 election reforms to the condominium laws discussed earlier in this series, condominium association elections are conducted through a secret ballot process, whereby both absentee owners, and those who attend the annual meeting in person, use the same process for choosing their board. The basic hallmarks of the condominium election process include: equal opportunity to stand for election (any unit owner or other qualified person may submit their name to nomination at least forty days in advance of the annual meeting); content-neutral ballots (all candidates must be listed alphabetically, incumbents cannot be so designated); secrecy in elections (proxy votes are generally not permitted); and, no ability to "stack the deck" by the incumbent board (nominating committees are generally forbidden, the sitting board cannot endorse candidates, and proxy solicitations are prohibited).

Conversely, elections in a homeowners' association basically adhere to the pre-1992 version of the condominium laws. Chapter 720 contains little in the way of procedural guidance in the conduct of HOA elections, and rather simply defers to the bylaws of the association. Unfortunately, most homeowners' association bylaws do not contain clear election procedures, which leaves many floundering homeowners' associations when election time rolls around.

Most HOA bylaws generally permit owners to vote in person or by proxy, meaning that the use and

solicitation of proxy votes is entirely appropriate in most HOA elections, arguably required.

The procedure for selecting candidates in homeowners' associations is also more perilous than the condominium process. Some HOA bylaws require the appointment of a nominating committee, which in many cases works fine. However, in some cases the nominating committee is used to hand-pick the current board's successors, thus disenfranchising those with opposing points of view from a fair chance at being elected. On the other end of the spectrum, apathetic associations do not even appoint a nominating committee, leading to confusion when there are no candidates for the new board at election time.

Another wrinkle in the law for homeowners' associations is a provision in Chapter 720 which permits any parcel owner to nominate himself or herself for election to the board, from the floor of the annual meeting. While this sounds good in theory, it only adds confusion to the process. As a practical matter "opposition candidates" whose names are not on the printed proxy/ballot, but who nominate themselves at the meeting will not have a meaningful chance of being elected at a contested election, since many owners vote in abstentia, and will not have an opportunity to vote for that candidate. Further, particularly in larger associations, tremendous

confusion routinely ensues when some type of ballot or proxy form has been prepared in advance, and floor candidates need to have their names added to voluminous paperwork passed back and forth during the course of the meeting.

In my opinion, this is one area where the condominium law has a definite leg up on the law for homeowners' associations. In fact, while Chapter 718 permits condominium associations, by majority vote, to "opt out" of the statutory election procedures and specify some other procedure in their bylaws (including proxy voting), very few associations actually do so. On the other hand, notwithstanding the lack of a clear legal basis to do so, many HOAs follow the condo election procedure, including a first meeting notice (soliciting candidates), and a second notice with self-nominated candidates being included on a ballot a la the condominium laws.

It is clear (at least to me) that one area where Florida's community associations would benefit from a unified law is in the area of board elections. In my opinion, the democratic principles underlying the condominium election concept far outweigh old-school proxy elections affiliated with homeowners' associations.

Next week, we will continue venturing into the different procedures contained in the two laws, and whether one set of rules makes better set than the other. ■

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*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto: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](http://www.becker-poliakoff.com).*

## Suspension of Voting Rights Not Likely to be Upheld

**Question:** Our homeowners' association has an election coming up, which is expected to be contested. The Board has cited nearly half of our owners for various alleged rule violations, and has suspended their voting rights. Many of these alleged violations are petty. Can the Board suspend our voting rights over issues other than assessment payment delinquencies? Also, don't we have the right to a hearing? L.P. (via e-mail)

**A:** Chapter 720 of the Florida Statutes, the law applicable to homeowners' associations, permits an association to suspend voting rights for non-payment of regular assessments, when payment is more than 90 days delinquent.

The law also permits fining and suspension of common area use rights (other than ingress and egress) for rule violations, provided the governing documents permit fining or suspension, and an opportunity for hearing is given. The law does not mention suspension of voting rights as a permissible punishment for violation of rules and regulations.

This is one area where the theoretical differences between condominium law and homeowners' association law may be key in answering your question. Florida's courts have held that condominium associations are a "creature of statute", meaning that if the statute does not permit an action to be taken, it is generally forbidden. There is no doubt that this would be illegal in condominiums. Conversely, homeowners' associations are often referred to as a "creature of contract", meaning that your governing documents may impose rights or remedies outside of what is set forth in the governing statute.

Ultimately, a court would have to address this issue, and perhaps this is an argument in favor of a unified community association law in Florida, the topic of discussion in my current column.

In summary, if the governing documents do not permit suspension of voting rights for rule violations, there is no way that the suspension would be upheld. If the governing documents do permit suspension of voting rights for rule violations, a closer question is presented. On balance, I believe that suspension of voting rights for anything other than assessment delinquency is likely to be stricken by a court, if challenged.

**Question:** I was reading one of your articles from several years ago which contained information about the condo law and its "sunshine regulations." I would like to know if these regulations apply to self managed condominiums. Our small association has issues that should be discussed out of the context of a formal meeting where owners are present. Does this law apply to us? Doesn't this inhibit the board from operating in an efficient manner. Is there any move afoot to modify the application of these laws? J.N. (via e-mail)

**A:** The so-called "sunshine" provisions of the Florida condominium laws generally require posted notice of board meetings, unit owner right of attendance, and unit owners' right to speak at board meetings with regard to designated agenda items. There are a few exceptions to these rules, such as their not applying to attorney-client privileged meetings.

There is no exception for self-managed condominiums, nor is there an exception for condominiums based on size.

While there is certainly business of any group that might best be aired privately, the law clearly favors (and indeed requires) a transparent decision-making process for condominium associations. I am aware of no "move afoot" to relax these regulations, and any effort to do so would likely draw ardent political opposition.

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**Question:** We have 5 member board for our condominium association, all 5 seats are up for election each year. Last year, there were 7 candidates for the 5 seats. Prior to the election, there was a political strategy movement among a group of owners, advising those supporting a certain slate to vote for only 3 members. A review of the ballots cast indicates that a number of unit owners did, indeed, only vote for 3 candidates, although they could have voted for 5. Our bylaws do not touch upon this. Is this legal? J.B. (via e-mail)

**A:** The practice to which you refer, sometimes called “bullet voting”, is not illegal in association

elections for either condominiums or homeowners’ associations. While some may consider the practice to be manipulative, if not unfair, one could also argue that a unit owner should not be forced to vote for people they may not wish to see on the board, and if only 3 of 7 candidates are to their liking, they should be entitled to vote for whom they please.

I am not aware of any association which has ever amended its bylaws to prohibit “bullet voting”, nor is it clear that such an amendment would be legal. ■

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