



Rules Different on Access to Records

Fort Myers The News-Press, October 5, 2006

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Today's column is the ninth 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, Gov. Bush has recommended that the powers-that-be study whether there should be a unified law for all of Florida's community associations.

So far, we have looked at the historical and legal development of both condominiums and non-condo deed restricted communities (generically referred to as homeowners' associations), the differences between the two laws in the areas of government regulation and consumer protection, and the procedural differences in the two laws, focusing so far on the election process and "sunshine" regulations.

Today, we will continue our comparison of procedural similarities and dissimilarities between the laws in the area of member access to official records.

Definition of official records: Both statutes contain a laundry list of "official records," including governing documents, minutes and financial records. The condominium law contains a "catch-all" provision stating that "all other records of the association" are also official records. The HOA law also includes a "catch-all" clause, but states that official records include "all other written records of the association" not specifically listed in the statute.

The catch-all phrase in the condo law refers to "records," while the HOA law refers to "written records." This creates questions in terms of application to tape recordings, video recordings, computer data and other non-traditional forms of "records" which may not be considered "written" records.

Exemptions: Both laws exempt information obtained in connection with the transfer or lease of units, medical records, and various attorney-client privileged documents. The law for homeowners' associations also contains an exemption not found in the condominium laws, that being "disciplinary, health, insurance, and personnel records of the association's employees."

Time for compliance with a records inspection request: There is a slight difference between the two laws. The condominium law requires that the association make the records available for inspection within five working days after receipt of a written request. After 10 working days, a presumption arises that the condominium association has willfully failed to comply with the unit owner's request. For homeowners' associations, there is simply a deadline of 10 working days provided for compliance with a member's records inspection request.

Copying records: The condominium law provides that the right to inspect records "includes the right to make or obtain copies, at the reasonable expense, if any, of the association member." The state agency which regulates condominiums used

to have a rule that provided that an association could not charge more than 25 cents per page for photocopies, although that rule was repealed several years ago as part of the agency's streamlining of its regulations.

For homeowners' associations, the law is a bit different, and more detailed. Chapter 720 provides that if the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies, on request, during the inspection, if the entire request is limited to no more than 25 pages.

The HOA laws go on to provide that an association may charge up to 50 cents per page for copies made on the association's photocopier, and if the association does not have a copy machine, or if copying requests in excess of 25 pages are sent to an outside copy company, the actual copying costs charged by the outside vendor.

Community associations have been described by Florida's courts as "democratic sub-societies." Thus, like our other elected levels of government, there is little tolerance in the law for secrecy in association affairs, and the law clearly favors a transparent decision-making process, including full access to corporate documentation.

This seems to be an area where the condominium laws and homeowners' associations laws have developed on an ad-hoc basis, with little purpose served by the technical differences between the two laws. In my book, this is another area where consistency between the two laws would well serve all of Florida's community association residents.

Next week, we will continue exploring procedural differences between the two laws, with an emphasis on penalties and remedies, including fining, suspension of common area use rights and suspension of voting 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.

Suspension of Voting Rights Not Likely to be Upheld

Question: The board of my condominium signed a one year contract with a landscape maintenance company. The company they hired also takes care of the condominium next door, and that is why they hired them. As far as I know, the board did not talk to any other companies before hiring this one. One director said that the company does a good job and came highly recommended, and that based on the contract with our old landscape company, the board decided this new contract was a good deal. I think the contract price is way too high. We could have gotten a much better deal if the board investigated this more. Doesn't the board have an obligation to the members to find the best deal? R.O. (via e-mail)

Answer: The Florida Condominium Act provides that if a contract for the purchase, lease, or renting of materials or equipment or for services requires payment exceeding 5% of the total annual budget of the association, including reserve amounts, the association must obtain competitive bids. Exceptions to this rule include contracts for attorney, accountant, architect, community association manager, timeshare management firm, engineering and landscape architect services. Also, associations with less than 100 units may opt out of the bid requirements if two-thirds of the unit owners vote to do so.

Therefore, you first must determine if the landscape maintenance contract exceeds the 5% threshold. If it does, I agree that the board should have sought at least one additional bid to satisfy the competitive bid requirement. Boards can be excused from the competitive bid requirement in an emergency or if there is only one company in the county that can do the work needed, but those facts are not present in this case.

However, even when the board gets competitive bids, it is not required to accept the lowest bid,

but can take into account other factors like reputation and references. The bid requirement is not in place to force the board to sign the least expensive contract.

Question: Can two people who belong to the board discuss association business among themselves without residents knowing about it. It happened here and the finance committee was fired without anyone in the association knowing about it until it happened! There was a meeting among themselves. Is this legal? Does the sunshine act work here? L.G. (via e-mail)

Answer: Technically speaking, the Government In Sunshine Laws, Chapters 119 and 286 of the Florida Statutes, do not apply to condominium or homeowners' associations, since community associations are not governmental entities.

However, all community association statutes have their own "sunshine" regulations, which generally require meetings of the association's board to be held in an open forum, with property owners having the right to attend. In condominiums, unit owners also have the right to address the board with respect to any designated agenda items, there is no similar law in HOA's, unless required by the bylaws, and in certain cases where the owners petition the board to call a special meeting.

Both laws define a "meeting" as any gathering of a quorum of the board where association business is conducted. Accordingly, if your association has a three-member board, two members getting together to conduct association business would constitute a "meeting", if there is no quorum, no "meeting" takes place.

However, the appointment and removal of committee members is vested in the board of directors pursuant to Chapter 617 of the Florida Statutes, the Florida Not-For-Profit Corporation Act. Therefore, removal

of members from a committee should take place at a duly noticed meeting of the board.

For a detailed discussion of the “sunshine” laws applicable to community associations, you can review a pamphlet I put together called “Community Association Sunshine Law Course 101.” You can download a copy on the internet at:

http://www.becker-poliakoff.com/publications/article_archive/pdf/sunshine_laws_web.pdf

Question: If our condominium documents do not specify the percentage of rentals allowed in our building, is there a rule regarding this issue especially when it comes to obtaining mortgages? D.L. (via e-mail).

Answer: Subject to the local zoning laws, if the condominium documents do not contain restrictions on the leasing of units, any unit within the condominium may be leased, and there is no “cap” on the number of units that may be leased at a condominium at any given time.

I am not aware of any other legal authority that “caps” the number of units that may be leased in a condominium at any given time. However, I am aware that some mortgage lenders, as a matter of practice, may not provide financing of a unit that is located in a condominium community that has an excessive number of units available for rent. ■

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