



Alternative Dispute Resolution Considered

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Today's column is the twelfth 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.

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, "sunshine" regulations, access to books and records, sanctions available against errant members, and collection of delinquent assessments.

Today, we will continue our comparison of procedural similarities and dissimilarities between the laws by beginning a discussion on the issue of alternative dispute resolution:

- **Disputes:** Section 718.1255(1), Florida Statutes, a part of the Condominium Act, defines a "dispute" as any disagreement between two or more parties that involves: (a) the authority of the board to require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto, or to alter or add to a common area or element, or; (b) the failure of a governing body, when required by the Condominium Act or an association document,

to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or allow inspection of books and records.

The definition of a "dispute" specifically excludes any disagreement that primarily involves title to any unit or common element, the interpretation or enforcement of any warranty, the levy of a fee or assessment or the collection of an assessment levied against a party, the eviction or other removal of a tenant from a unit, alleged breaches of fiduciary duty by one or more directors, or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.

The alternative dispute resolution provisions in the Homeowners' Association Act, found at Section 720.311, Florida Statutes, apply to disputes between an association and a parcel owner regarding the use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, access to the official records of the association, recall disputes, and election disputes.

- **Recall Disputes:** The Condominium Act provides that if a board does not certify a written agreement to recall a member or members of the board, or does not certify the recall by a vote at a meeting, the board must file a petition for arbitration pursuant

to the alternative dispute resolution procedures in Section 718.1255 of the Condominium Act. Recall disputes are also subject to rules adopted by the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation (the “Division”). The Homeowners’ Association Act states that recall disputes

are conducted by the Department of Business and Professional Regulation (the “Department”) in accordance with the recall provisions set forth in the Condominium Act, and the rules adopted by the Division.

Next week, we will continue the discussion regarding alternative dispute resolution. ■

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: You have previously stated that nothing in Florida law would preclude the spouse of a board member from serving on any committee. I read somewhere that a spouse is not permitted to serve on homeowners' association committees. Would you please clarify this? V.L. via e-mail

Answer: Although the Condominium Act does not contain a prohibition for spouses of a board member to serve on any of the association's committees, homeowners' associations differ from condominium associations in this regard. The Homeowners' Association Act provides that a fine or suspension of use rights may not be imposed without notice of at least fourteen days being provided to the person sought to be fined or suspended, and granting an opportunity for a hearing before a committee of at least three members that are appointed by the board. The members of a homeowners' association fining or suspension committee may not be officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee of the association. Accordingly, a spouse of a board member is prohibited from serving on a fining or suspension committee in a homeowners' association. The fining language in the Condominium Act also requires notice and opportunity for a hearing before a committee, but only states that the committee must be made up of "other unit owners". Unlike in a homeowners' association, there is no explicit prohibition in a condominium setting that a fining committee member can not be the spouse of a board member. Thank you for your keen eye and attention to detail.

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 area closer to my unit. I offered to sell my space to some 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? G.R. via e-mail

Answer: Carport spaces in condominium developments, and other, similar amenities such as storage lockers and cabanas, are usually established and regulated in one of a few different ways. As with many condo questions, the answer will be found in your 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. 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 rare occasions, these separate unit carports may be conveyed freely to any person, even non-unit owners. In summary, your declaration will provide the answer to your question.

Question: What are the time limits that a board has to follow to reply to my requests and to provide all accounting documentation? M.B. via email

Answer: Your question appears to relate to the issues of an owner's right to inspect and copy official records, as well as required responses to an owner's certified inquiries. In the condominium setting, the official records of an association must be made available to a unit owner within five working days after receipt of a written request by the board or its designee. The association's official records are open to inspection by any association member, or the member's authorized representative, at all reasonable times, which right to inspect includes the right to make or obtain copies. The failure of an association to provide the records within ten working days after receipt of the written request creates a rebuttable presumption that the association willfully failed to comply with the relevant provisions of the Condominium Act. An owner who is denied access to official records is entitled to actual damages, or minimum damages (defined as \$50.00 per calendar day, beginning on the eleventh day, up to ten days), for the association's willful failure to provide access to the records. The Homeowners' Association Act similarly provides members the right to inspect and copy official records if they submit a written request to do so. In a homeowners association, however, the official records must be open to inspection and

available for photocopying at reasonable times and places within ten business days after receipt of a written request for access, as opposed to five working days as set forth in the Condominium Act.

With regard to certified inquiries, the Condominium Act provides that when a unit owner files a written inquiry by certified mail with the board, the board must respond to the unit owner, in writing, within thirty days. That response must either give a substantive response, or notify the owner that a legal opinion has been requested, or that advice has been requested from the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes. Where a legal opinion is requested, within 60 days after receiving the certified inquiry the board must provide a substantive written response to the inquiry. If advice is requested from the Division, the board must provide a substantive written response within 10 days of receiving the advice. If an association fails to provide a substantive response, it is precluded from recovering attorneys' fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the certified inquiry. ■

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