



## Dispute Regulation Discussion Continues

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By Joe Adams

[jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com)

TEL (239) 433-7707

FAX (239) 433-5933

Today's column is the thirteenth 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, collection of delinquent assessments, and dispute resolution.

Today, we will continue our comparison of procedural similarities and dissimilarities between the laws by completing the dispute regulation discussion we began last week:

As referenced in last week's column, the laws for both condominium associations and homeowners' associations use similar definitions to describe what a "dispute" is. Both laws attempt to prevent internal association disputes from being addressed in the first instance by the courts. However, the two laws use entirely different approaches to pre-suit alternative dispute resolution, mediation versus arbitration.

In homeowners' associations, before a dispute can be heard by a court, the parties must agree to submit their disagreement to mediation, through a program administered by Florida's Department of Business and Professional Regulation (DBPR). Mediation is a process where a trained third party, known as a mediator, sits down with the parties to determine if a mutually agreeable solution for their problem can be reached.

A mediator does not "take sides" nor rule who wins or loses. Rather, a mediator is more in the nature of a facilitator. A good mediator will help both sides see potential weaknesses in their case, remind them of the economic consequences of protracted litigation, and help reduce the effect of ego and past personality conflicts.

An agreement reached during mediation is not subject to further review by the courts, unless a party breaches the mediation agreement, in which case a court would have jurisdiction to enforce the agreement, without need for having a trial about the underlying dispute all over again.

Conversely, condominium associations use mandatory, non-binding arbitration, rather than mediation to resolve disputes. The mediation is mandatory because it must be pursued before a lawsuit can be filed, and is non-binding (as is mediation) because the Florida Constitution guarantees all persons, including corporations, the right of access to the

courts. Arbitration is more like a stream-lined trial, the arbitrator sits as judge and jury, and pronounces one side the winner, one the loser.

One of the advantages of arbitration is that there is limited discovery permitted (depositions, written interrogatories, etc.) and the cases can be heard more quickly and cheaply than happens with court litigation.

Unlike homeowners' association mediation, the winning party in an arbitration is also entitled to collect their attorney's fees from the losing party. Condominium arbitrators are employed by the DBPR, and have the authority to attempt to force the parties into mediation as well.

It should also be noted that for HOAs, arbitration (instead of mediation) is prescribed by statute for the resolution of disputes involving elections and the recall (removal) of directors.

Although the condominium arbitration program has historically been well respected by legal practitioners in terms of the quality of decisions rendered, it is still a winner versus loser situation. In my opinion, mediation (where both parties give a little) is often more effective at settling disputes, and perhaps more importantly, preserving relationships between the owner and the association that are necessary to deal with issues beyond the disagreement at hand. In my opinion, this is another area where there should be similarity in the two laws, with an emphasis on mediation as a first step in resolving disputes.

Next week, we will conclude this series by a review of the DBPR's report on whether a unified law for Florida's community associations should be considered by the Legislature. You may find the conclusions interesting. ■

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*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](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).*

## Majority of Voting Interests Can Recall Board Member

**Question:** I serve on my homeowners' association board of directors. The president of our association concludes each meeting of the board by allowing any member to address the board on any issue. Is this required by law. L.B. (via e-mail)

**Answer:** Although members have the right to attend all board meetings, the right to speak is not automatic. The Homeowners Association Act allows members to speak, for at least three minutes, on any matter that is placed on the meeting agenda by petition of the voting interests. This differs from a condominium association where owners are entitled to speak on any agenda item at a board meeting.

The Homeowners Association Act also provides that the association may adopt written reasonable rules expanding the right of members to speak, and governing the frequency, duration, and other manner of member statements, and may include a sign-up sheet for members wishing to speak. If your association has adopted rules expanding the legal right of members to speak, those rules should be followed, but there is no automatic statutory right that provides for this.

**Question:** Is it legal for 3 members of a 5 member homeowners' association board to meet and discuss a voting topic and make a decision before the meeting? This has happened twice and both times it was the same 3 members who had made the decision. If this is not legal, what can be done about it? If this is legal, then in my opinion 2 of the 5 are not needed on the board. M.J. (via e-mail)

**Answer:** First, a meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Some associations have argued that "executive sessions", "planning meetings", or "agenda development workshops" are not meetings.

In my opinion, any interaction contributing to the development of ideas constitutes a "meeting" without regard to whether or not a formal vote has been taken. Otherwise, association boards can make all the tough decisions in executive sessions with the public meeting being simply a rubber stamp event. If you have a five-member board, three board members constitute a quorum. Although those three board members are certainly free to get together for social purposes or for other non-association related reasons, once association business is discussed it has probably turned into a meeting of the board, which meetings require proper notice and must be open to all members.

If this is happening in your association, you should certainly raise the issue with the board and ask that such action no longer be taken. Most board members want to do the right thing and if the law is explained to them they might conform their conduct accordingly.

**Question:** I am serving on a generator committee. For various reasons, the committee would like to adopt a rule prohibiting the use of generators after a hurricane. Is this permissible?

**Answer:** If a board adopts a rule prohibiting post-hurricane generators, it is subject to a "reasonableness" test. A blanket prohibition against the use of generators, through a board-made rule, is likely suspect. If, however, circumstances are such that permitting the use of generators would create an abnormally dangerous condition, this may justify the rule and the ban could potentially be upheld.

If the ban is enacted through an amendment to the declaration, the restriction need not meet the same "reasonableness" test. In this instance, the amendment cannot be either arbitrary or contrary

to the law. Accordingly, an amendment to the declaration has a far greater likelihood of being upheld if challenged.

In either event, it is imperative that the board adopt the rule, or pass an amendment, in a procedurally correct manner to avoid enforcement problems. Please note that even if the Association successfully regulates generators, if an owner has a medical condition which requires him or her to have electricity in order to operate medical equipment, refrigerate medicine, etc., such a condition would have to be taken into account and an accommodation would possibly need to be made for such an owner.

**Question:** I am told that I have to give a key to my unit to the board. Is there anything in the law that requires me to comply with this? K.S. (via e-mail)

**Answer:** The Condominium Act contains no provision requiring an owner to provide the association with a key to his or her unit. The association does, however, have the irrevocable right of access to each unit during reasonable hours when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit that is maintained by the association, or as necessary to prevent damage to the common elements or to another unit or units. Oftentimes, an association's condominium documents will provide that owners must provide keys to their units to the association, which is based upon this irrevocable right of access to units. Such provisions have been continuously upheld. Therefore, you will need to review your condominium documents, and if they require a key to be provided to the association then you will need to comply. ■

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