



Member Wants to Change Ballot

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Q: Our master association is organized under Chapter 617 of the Florida Statutes. During the most recent election of directors, a question came up whether a member who has turned in his ballot and proxy in a sealed envelope can have the ballot and proxy back to make a change when the ballots have not yet been counted. I have checked Chapter 617 and it does not address this issue. Our association documents do not address this either. Should we allow a member to take back and resubmit their ballot or not? **M.D. (via e-mail)**

A: Chapter 617, Florida Statutes, is the Florida Not-for-Profit Corporations Act, which is the entity of choice for most Florida condominium and homeowners' associations. Your association is likely also governed by one of Florida's housing statutes. It is not clear from your question whether your association is a "homeowners' association" governed by Chapter 720, or a "condominium association" governed by Chapter 718. The answer to your question depends on whether, and which of, these two statutes applies to your association.

As you may know from your review of Chapter 617, that law does not provide specific guidance on election procedures, but instead states that the articles of incorporation and bylaws of the corporation shall establish the method of voting. Likewise, Chapter 720 provides that the governing

documents of a homeowners' association, which include the declaration of covenants, articles of incorporation and bylaws, shall set forth the method and procedure for voting for directors. In a homeowners' association governed by Chapter 720, it is permissible for the governing documents to allow for directors to be elected in any manner, including by ballot or by general proxy. A proxy is revocable at any time at the pleasure of the person who executes it, and I would advise that the association insist upon a written or personal revocation of any proxy of which it has taken possession.

With respect to ballots for electing directors that have been cast in a homeowners' association, it would obviously be preferable for the governing documents of the association to contain specific provisions addressing the ability to revoke or change the ballot after it has been submitted to the association. In the absence of any clear provisions on this point, it is my advice that the homeowners' association permit members to rescind and change ballot votes up until the time that the presiding officer of the election meeting has called for all votes and closes the balloting. The association should be certain to employ safeguards to be sure that any ballots that are rescinded be returned to the correct member.

With respect to condominium associations governed by Chapter 718, the rules are different. Proxies may be revoked at any time by the person executing it. However, as you may know, all votes for electing directors, unless the association has “opted out” of the statutory election requirements, must be cast by secret ballot by the member directly, and not by proxy. The Florida Administrative Code provides that upon receipt by the condominium association, a ballot may not be rescinded or changed.

Q: Our condominium is managed by an outside company. Many of my fellow unit owners are not happy with their performance. We would like to manage our own building. We have several unit owners who have a background in construction and we would like to pay them to manage the condominium. I was told this would not be legal because a license is required to manage a condo. Is this correct? **J.L. (via e-mail)**

A: Except in unusual circumstances, the decision of whether or not to employ a professional management company (or on-site manager) is a decision of the board of directors, not the membership. While Florida’s law does not require an association to have a “community association manager”, as discussed below, if there is a manager, they will need to have a state license in most instances. While there are certainly some examples of condominium associations who fare well in self-management, I would say that most associations do find the services of a management company or manager to be helpful in attending to the myriad of details involved in operating a community association.

Chapter 468, Part VIII, Florida Statutes governs community association management. Under this statute, a “community association” includes a residential homeowner’s association where membership is a condition of ownership of a unit in a planned unit development, or of a lot for a home or a mobile home, or of a townhouse, villa, condominium, cooperative, or other residential unit which is part of a residential development scheme and which is authorized to impose a fee

which may become a lien on the parcel. Your condominium is regulated by this statute.

If anyone is going to be paid to manage your association, if the community contains more than 50 units, or has an annual budget in excess of \$100,000.00, the manager would have to be licensed if he or she provides any of the following services: controlling or disbursing funds of the association; preparing budgets or other financial documents for the association; assisting in the noticing or conduct of the association’s meetings; or coordinating the maintenance for the residential development and other day-to-day services involved with the operation of the association. A person who only performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance work, and who does not assist in any of the management services described above is not required to be licensed. Conversely, an association can “self-manage”, so long as the above-listed services are performed without charge.

Someone who wants to obtain a license as a community association manager must apply to the Department of Business and Professional Regulation to take the licensure examination. An applicant must be at least eighteen years old, and have successfully completed all required pre-licensure education requirements. Additionally, the applicant must pass an examination demonstrating that he or she has a fundamental knowledge of state and federal laws relating to the operation of all types of community associations and state laws relating to corporations and non-profit corporations, proper preparation of community association budgets, proper procedures for noticing and conducting community association meetings, insurance matters relating to community associations, and management skills. Once someone is licensed as a community association manager, he or she must complete the requisite hours of continuing education before the license can be renewed.

If your association desires to pay unit owners to manage the condominium, those owners would have to become licensed community association managers if they provide the services referenced above, unless your association is less than 50 units and does not exceed \$100,000.00 in annual revenues.

As you may know, a board of directors of a condominium association owes a fiduciary duty to the unit owners. The Florida Administrative Code specifically provides that in furtherance of its fiduciary duty, the board will only employ a licensed community association manager where such licensure is required by law.

Q: Our condominium association board has resolved to include in the maintenance fee the cleaning of the dryer vents every two years. Until now, the responsibility for this has fallen on the unit owner. Is it legal for the board to add this to the budget and to pass the cost onto the unit owner? What does the Florida Condominium Act say regarding mandatory dryer vent cleaning on a scheduled basis and adding the cost to the budget?
R.C. (via e-mail)

A: The Florida Condominium Act does not address specific issues such as the responsibility for dryer vent cleaning. Issues such as this are typically addressed in the declaration of condominium. That being said, a number of declarations of condominium are poorly written making it difficult to identify the maintenance, repair and replacement responsibility for certain items.

In general, the association is responsible for the maintenance, repair and replacement of the common elements, and unit owners are responsible for their units. However, the declaration of condominium will oftentimes address specific items that are to be maintained by a specific party. For instance, even though a load-bearing wall might be located inside of the unit boundaries, a declaration of condominium might specifically require the association to maintain, repair and replace such a wall. On the other hand, there may be pipes, ductwork, etc. that are located in the common elements but serve only one unit, and the declaration of condominium might assign the maintenance, repair and replacement of those items to the individual unit owners. Therefore, you will need to review your condominium documents to determine the demarcation between the unit and the common elements, and review the maintenance provisions to see if the maintenance, repair and replacement of the dryer vents are specifically delegated to the association or the individual owners.

It appears that your association has traditionally required individual unit owners to pay the cost of dryer vent cleaning. However, what has been done traditionally is not always correct. Your board of directors might want to consult with legal counsel to obtain a determination of who pays for the dryer vent cleaning, either the association or the individual owners. If it turns out that the association is, in fact, responsible for the dryer vent cleaning as a common expense, then adding that expense to the budget would be proper.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, cooperative, 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.

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