



Homeowner Feels Fenced In By Board Decision

If You Want Change, Get on Board Yourself

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Q: My HOA board consists of five members. Two of them have repeatedly made decisions without input from other board members or residents. To give you an example, they recently decided, and went under contract, with a contractor to install a PVC fence in place of our wooden fence and to make the new fence higher than the current one. It's going to cost \$6,500.00, and residents would rather we simply repair it. Homeowners have voluntarily agreed to repaint the fence. However, the issue never came up for discussion among residents prior to the contract. It came up at the recent meeting, but the board members said there was no reason to discuss it because it was already a done deal.

This happens a lot. And the only response we ever get is, "we're allowed, and if you want to have a say, volunteer for the board." However, we all pay the same amount every month and should have a say no matter what.

Are we able to force a community vote? Are we able, as a community, to impose a new rule stating anything over a certain dollar amount requires a community vote? **T.M. (via e-mail)**

A: You probably will not like my first answer. I agree with the board, the best way to effectuate change in a community is to get on the board yourself. In my opinion, not only as a matter of

civic duty, but to protect your investment, every owner in a mandatory membership association should take a turn at board service. If nothing else, it helps you appreciate the volunteer services performed by your neighbors.

With respect to the fence issue, although I know it is a common occurrence, I have concerns about property owners doing any type of manual labor for their association, including fixing or painting a fence. There are many reasons why volunteer labor is not a good idea. There is only one good reason for it, it is free. At the least, the association should check with its insurance agent to make sure any injury to a property owner, whether stepping on a rusty nail, or falling off a ladder would be covered if a claim is made.

In terms of the board's right to change from a wooden to a PVC fence, the law applicable to homeowners' associations does not limit nor prohibit "material alterations" of common areas, as is the case in the condominium context. However, some HOA governing documents do place limits on a board's authority to alter the property, and some documents include expenditure limits as well. I gather from your question that you have reviewed your community's governing documents and see no such provision. If that is the case, then an amendment to the governing documents would be necessary. Most HOA governing documents

require some type of super-majority approval for change (usually two-thirds or seventy percent), some are based on the entire voting interests, some are keyed only to those who actually vote.

Typically, the board of directors has the authority to initiate proposed amendments. For amendments to be initiated outside of the board (i.e., by the homeowners), there is usually a petition process in the governing documents.

Finally, you state that two of your directors make decisions for the board, but that you have a five-member board. As a general matter, the board of directors must act at open meetings, and notice of board meetings must be posted in the community at least forty-eight hours in advance. The law applicable to homeowners' associations does impose "transparency" requirements in the operation of the association, and board meetings are not intended to be a "rubber stamp" for decisions that have already been made outside of the "sunshine" requirements of the law.

Q: Is it legal for the board of directors of my condominium association to place their recommendation on how unit owners should vote on the issue of directors' terms on the limited proxy? The issue at hand is whether or not the association should keep the staggered two-year board terms or allow the board terms to default to one year terms, as set forth under the Florida Condominium Act. **A.M. (via e-mail)**

A: The issue of board terms is a somewhat controversial change to the law which took effect on October 1, 2008, following the Florida Legislature's amendments to the Florida Condominium Act (Chapter 718 of the Florida Statutes). The new law provides that the terms of all members of the board shall expire at the annual meeting and such board members may stand for re-election unless otherwise provided by the bylaws. In the event that the bylaws permit staggered terms of no more than two years and upon approval of a majority of the total voting interests, the association board members may serve two-year staggered terms.

In my experience, boards will often indicate on the limited proxy how it would recommend that the owners vote, and this is legally permissible. In fact, I have often had association members complain when the board does not include a recommendation on proxy questions. Those who oppose a measure are free to campaign against the recommendation. The limited proxy will contain a specific entry by which the unit owner can either vote "for" or "against" the item in question.

In making its recommendation, the Board may want to provide justification for its position, which can be done in a separate letter to unit owners. For example, the justification most often cited for keeping two-year staggered terms is that staggered terms allow for continuity and experience on the board, as opposed to an election of an entirely new board each year.

Q: I own a condominium unit that I am trying to sell. The condominium association is paid three months in advance. The other day I went to check on the condo. I could not get into the development. The card reader on my car would not give me access. Finally, someone came by and I followed the car to gain access. I went to the office and was told that I did not pay my master association fees for the year. Therefore, the association was blocking me from access to the community. Is this legal? **D.S. (via e-mail)**

A: Your inquiry does not specify whether your "master association" is governed by the condominium law (Chapter 718 of the Florida Statutes) or the law applicable to homeowners' associations (Chapter 720 of the Florida Statutes).

If all of the "subassociations" within the community are condominiums, then the condominium law applies. If all of the "subassociations" are homeowners' associations, or a mix of condominiums and homeowners' associations, then the homeowners' association law applies.

In my opinion, condominium associations cannot suspend the right to use common areas for nonpayment of assessments. The remedies for addressing delinquencies are limited to those set

forth in the Florida Condominium Act, which does not include suspension of use rights.

Conversely, Chapter 720 (the law applicable to homeowners' associations) does permit suspension of the right to use common areas for non-payment of assessments, if authorized by the governing documents. However, that law also provides that suspension of common area use rights "shall not

impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel." Accordingly, if the gate you mentioned is the only means of ingress and egress to your unit, it is not proper for the association to block you out, even if the fees to the master association have not been paid, and even if it is a homeowners' association.

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.

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