



Board Meetings Must Be Posted, Open To Members

Votes Can Be Taken On Posted Items Only

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Q: Our association recently had a workshop meeting. There was no agenda posted but the notice of the meeting posted. The intention of the meeting was for a majority of the board to simply listen to input from our shareholders, so that we might know their concerns in shaping the agenda for future board actions. We were challenged by one of our shareholders that this was a violation of the sunshine law. Are ³workshop meetings legal?

J.C. (via e-mail)

A: I assume by your reference to shareholders that your community is a cooperative association, I would speculate a resident-owned park because cooperative governance is the most common form of legal structure in this type of community. The Florida Cooperative Act contains provisions similar to that found in the law for condominiums and homeowners¹ associations. Basically, meetings of the board must be posted at least 48 hours in advance and open to the members of the association. Agendas must be posted in condominiums and cooperatives, not for homeowners¹ associations. Generally speaking, votes can only be taken on items disclosed on the posted agenda. Your inquiry suggests that no votes were taken, and that the entire purpose of the gathering was to receive input from your members. This does not violate applicable law, and in fact seems like a pretty good thing to do for those who

have entrusted their investments to your stewardship, through your election to the board.

Q: Our board of directors passed a motion to ban smoking except in the parking area. The ban includes all of the limited common areas, most of the common area (except the parking area) and within every condominium unit. I understand the danger of second hand smoke and recent national trends, but does the board have the legal authority to ban smoking within the walls of my personal condominiums? **T.S. (via e-mail)**

A: The Florida Clean Indoor Air Act, Section 386.204, Florida Statutes, which is a uniform state-wide code that bans the smoking of all tobacco products in enclosed indoor workplaces, provides the authority for the Board of Directors to prohibit smoking within the indoor common elements. Because “work” is being performed, smoking in all indoor meetings of the board, committees of the board, and meetings of the membership would be prohibited. Furthermore, the simple cleaning or maintenance of an enclosed common element is sufficient to impose a ban on smoking within these areas as well.

As to the outdoor common elements and the limited common elements, assuming that the Board has rule-making authority in the governing

documents, a Board-made rule banning smoking is subject to a test of reasonableness according to Florida law. With the known health risks from secondhand smoke, such as cancer and heart disease, the smoking ban is likely to be considered reasonable, especially since smokers have the parking area as a designated area where they are permitted to smoke.

While a smoking ban within the units is also reasonably related to the health, happiness, and peace of mind of the unit owners, and while there may be arguments to support the validity of a board-made rule, such a restriction is best implemented through an amendment to the declaration of condominium. According to Florida's court, restrictions contained within the declaration are "clothed with a very strong presumption of validity and will be upheld and enforceable so long as they are not wholly arbitrary in their application, in violation of public policy, or abrogate some fundamental constitutional right." Florida's courts have even said that "a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts."

Because the Association seeks to ban a lawful activity (smoking) within the units, an amendment to the declaration has a much better chance of being upheld if challenged. In fact, in 2006, a Colorado court upheld an amendment to a declaration of condominium that banned smoking within the boundaries of its condominium units. While not binding to Florida courts, the Colorado case may be a very strong persuasive precedent.

Q: If our association levies a fine, and the owner does not pay, how do we collect the fine?
R.Z. (via e-mail)

A: The short answer is that you probably have to take the unit owner to Small Claims Court. One obvious question to ask is that if you are going to court, and you are going to hire an attorney, will you spend more in legal fees than you hope to recover from the unit owner?

For condominium associations, the law states that a fine cannot be secured by a claim of lien. Accordingly, assuming a fine has been duly levied, there is a debt owed from the unit owner to the association. As with most other debts, if the debtor fails to pay the creditor, you have to take them to court.

Hopefully, your condominium association's bylaws will provide that the prevailing party in a court action to recover a fine is entitled to recovery of their attorney's fees. The condominium statute does not specifically provide for the recovery of attorney's fees in the collection of fines, although I believe most attorneys would opine that attorney's fees incurred in fine collection are recoverable by virtue of general language in the condominium statutes which permits the recovery of the winner's attorney's fees from the loser in litigation between associations and unit owners.

For homeowners' associations, the law used to permit the filing of liens for unpaid fines, if provided in the governing documents. That right was amended out of the law in 2004. You might be interested in knowing that there is currently a Bill pending before the Florida Legislature which would reinstate the right of an HOA to lien for fines, provided that the fine exceeds \$1,000.00. The homeowners' association statute specifically states that in any action between an association and a parcel owner to recover a fine, the prevailing party is entitled to recover their attorney's fees from the non-prevailing party.

Also, it is not necessary to have an attorney in Small Claims Court, and many associations are willing to pursue these actions on their own. The Small Claims Court rules permit any officer or employee of the association to appear on behalf of the association in a Small Claims Court proceeding. A manager is not permitted to appear on behalf of the association unless they are an officer or employee.

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.