



Here's Overview of Association Voting Instruments

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Q: Our homeowners' association bylaws allow for voting in person or by proxy. Can we amend the bylaws to allow voting by absentee ballots? **E.M. (via e-mail)**

A: I believe it would be helpful to provide a general overview of the written voting instruments typically used by associations.

First, a "ballot" generally refers to a written instrument used by a member to directly cast a vote. In my experience, "ballots" for voting on items other than the election of directors are typically used when the member is physically present at a meeting. A ballot can also refer to a written instrument used to elect directors in an association. Pursuant to the Florida Condominium Act, and many homeowners' associations' documents, election ballots may be submitted to the association and are valid to count the election vote of a member who is not physically present at the election meeting. Therefore, in the case of election of condominium association board members, and in many homeowners' association elections, the ballots which are cast are what most people typically understand to be "absentee ballots".

Next, there are proxies. A proxy is a written, signed instrument that gives one person the power to vote on behalf of the legal holder of the voting

right. There are two kinds of proxies. The first is a general proxy which gives the person empowered to vote, or "proxy holder", all of the authority to act on behalf of the member who gave the proxy. In other words, with a general proxy, the proxy holder completely steps into the shoes of the member. A limited proxy empowers a proxy holder to attend the meeting on behalf of a member, but specifically limits the proxy holder to vote a certain way on specific agenda items.

Pursuant to the Condominium Act, limited proxies must be used for any vote taken to waive or reduce reserve funds, to waive the financial reporting requirements under the statute, to amend any of the governing documents of the association, and for any other matter described in the Act which requires or permits a vote of the unit owners. In the condominium setting, no proxies, limited or general, shall be used in the election of board members. However, the Homeowners' Association Act contains no limitation on the use of general proxies, and unless the governing documents of a homeowners' association provide otherwise, members have the ability and right to utilize a general proxy.

Since your association is a homeowners association, it is my view of the law that your association may properly adopt amendments which set forth the manner in which votes shall be cast,

and that procedure could permit absentee ballots. I would also note that the commonly-used limited proxy is, effectively, an absentee ballot when used to vote on issues that require member approval. The main difference between a “absentee ballot” and a “limited proxy” is typically that an absentee ballot is used when secrecy in voting is desired.

For condominiums, I view the law differently. Condominium voting is governed by Chapter 617.0721 of Florida’s Not for Profit Corporation Act, which states that members of the corporation, if entitled to vote, “may vote in person... or by proxy executed in writing by the member.” As noted above, the Condominium Act states that limited proxies must be used for various types of unit owner votes. The condominium statute used to permit association’s to “opt out” of limited proxy voting procedures, but the ability to “opt out” was removed by amendment to the Condominium Act effective October 1, 2008. Accordingly, I do not believe that “absentee ballots” are legally proper in the condominium setting, except in connection with electing directors.

Q: You previously wrote an article on condominium rentals and you said that the rental policy depended on the provisions of the condominium documents. You also cited a Florida Supreme Court ruling and a 2004 law. It seemed clear to me that unless a unit owner votes in favor of an amendment imposing rental restrictions, the unit owner could continue to rent their unit, assuming they purchased their unit before the amendment was adopted. My question is whether a condominium association can amend the documents to limit the duration of a lease, or to limit the number of times each year a unit is rented?

A: The short answer to your question is yes, a condominium association may amend the condominium documents to limit the duration of leases or how many times a unit can be rented during the course of a year. The real question is whether such amendments are enforceable against existing owners who do not consent to such amendments. The answer to that question is no.

I receive many inquiries to this column about the 2004 amendment to the Florida Condominium Act, which I refer to as the “Rental Amendment Grandfathering Law.” The enactment of the Rental Amendment Grandfathering Law essentially changed a 2002 ruling of the Florida Supreme Court in a case called *Woodside v. Jahren*. In that case, the Court held that a proper amendment to the declaration could eliminate leasing rights altogether, on the theory that an owner buys into a condominium with knowledge that the rights conferred by a declaration of condominium are amendable.

The Rental Amendment Grandfathering Law provides that any amendment restricting unit owners’ rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of the amendment. Therefore, any amendment that changes the minimum lease term, or the number of times a unit may be rented in a year, is not be applicable to an existing owner who does not consent to the amendment, and the existing owner is “grandfathered” under the old provision.

In 2008, the Division of Florida Condominiums, Timeshares and Mobile Homes, the state agency that regulates condominiums, ruled in a proceeding known as a “Declaratory Statement” that an association, at least in some circumstances, may impose procedural rental restrictions, even against an existing owner who does not consent to the amendment. In that decision, the Division ruled that the association could impose transfer fees, require all owners to submit a rental application, and require all prospective tenants to go through the association’s approval process. While Declaratory Statements do not have the binding force of law, there appears to be room to argue that some rental amendments are enforceable against all owners, whether they consent to the change or not.

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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