



Turnover Changes Developer's Rights

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Q: Our condominium association recently had our turnover meeting. The developer's representative showed up at the meeting and put some ballots in the box. I thought that the developer could not vote for the board once the association was turned over. What is the rule on this? **F.L. (via e-mail)**

A: The Florida Condominium Act states that when transition of control (commonly called "turnover") occurs, unit owners other than the developer are entitled to elect a majority of the board of directors. It is important to note that the law does not state that the developer loses all voting rights, only the right to cast its votes (for the remaining units it owns) toward the election of a majority of the board of directors.

It is also important to note that a developer retains the right to appoint one member of the board so long as the developer is holding at least five percent of the units for sale in the ordinary course of business (or two percent for condominiums of more than 500 units).

An example using some easy arithmetic may demonstrate how this works. Let us say that your condominium consists of 100 units. The developer calls for the turnover meeting. Your bylaws provide for a five member board. The developer is still entitled to appoint one director because it is

holding more than five percent of the units for sale in the ordinary course of business, leaving four seats open for election.

Let us further assume that five people put their name into nomination for these four seats, so an election needs to be held. In this scenario, the developer would have to use a special ballot and could vote for one of the four candidates. In other words, by having the right to cast its votes toward one candidate, and appoint a second candidate, the developer is exercising its voting/appointment rights as to a minority of the board of directors, but not the majority. In our hypothetical, unit owners other than the developer would each be entitled to vote for the four candidates of their choice. The developer votes and non-developer votes would be aggregated, and the four highest vote recipients seated to the board, along with the developer's appointee.

As a practical matter, when developers turn over control of condominiums they develop, many (perhaps most) waive the right to appoint a board member. In fact, many developers also choose to forego the exercise of their minority voting rights, for a variety of reasons, including the fact that a developer vote cannot really be secret since the developer would be the only unit owner casting a different number of votes on their election ballot than all the other unit owners.

Q: Our homeowners' association operates a subdivision with about 70 single family homes. The association has a rather limited area of responsibilities, primarily taking care of a road, an unmanned entry gate, and a couple of ponds. The association is also responsible for architectural review, but all of the homes have been built and there is never much activity on that front. For years we have had a management company, but are thinking of going to self-management. However, we were told that because we are over 50 units, we must have a licensed manager. Is that correct?

C.M. (via e-mail)

A: Yes and no.

If you have a manager, they must be licensed. However, you are not legally obligated to have a manager. Setting aside the merits of professional management versus "self-management", this seems to be an area of constant confusion regarding what the law actually requires.

Part IV of Chapter 468 of the Florida Statutes defines certain functions as the practice of "community association management." In general, these include: controlling or disbursing association funds; assisting in the noticing or conduct of board or membership meetings; coordinating maintenance for a community; and preparing budgets or other financial documents for an association.

Any person who performs any of the aforementioned tasks for remuneration must be licensed as a Community Association Manager (CAM). There is a "de minimis" exception for someone who manages a community of less than 10 units. The de minimis exception used to be 50 units, and that is perhaps the source of the misinformation which you have been given.

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Management companies are also now required to be licensed.

So, if your association does have a CAM or management company, they must be licensed. However, if the above-listed tasks are performed by the board of directors or others, and no pay or other consideration passes to the board or others, then there is no licensure requirement for the board members or other volunteers.

Q: Our homeowners' association has been beleaguered by delinquencies. Many of them end up in a mortgage foreclosure. Since most of these owners are "under water", the association has only been getting twelve months of unpaid assessments from the banks after the bank completes its foreclosure. We are now being told that we may not even be getting the twelve months of assessments anymore. What is happening with this? **C.S. (via e-mail)**

A: I would refer your attention to my column entitled "Court Ruling In Coral Lakes Foreclosure Discussed" which was published on February 28, 2010. All of my past columns are posted both on my Law Firm's website, and on the News-Press' website.

In short, a bad situation just got worse by virtue of the Coral Lakes decision. Basically, if your HOA documents provide greater "safe harbor" to a foreclosing lender than state law, your documents will control. Accordingly, it is important for every HOA to take a look at the relevant provisions of their governing documents and discuss with their legal advisors whether amendments to their governing documents may improve their collection rights in mortgage foreclosures.

