



LAW OFFICES

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# Community Up-Date™

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## Words COUNT

By Marc J. Randazza, Esq.

Attorneys are frequently called upon to handle matters for community association clients regarding disputes between the association and rule-breaking unit owners. The majority of these offenses are not the result of a “bad seed” in the community, but rather the result of the “evil twins” of confusion and miscommunication taking root in the community. By using effective communication tools, community associations can minimize the number of conflicts between the association and its membership. If conflict is inevitable, well-crafted pre-conflict communication can place the association in a markedly stronger legal position. This article will address communication tools that can achieve these goals.

### Notice of Meetings

The Condominium, Cooperative and Homeowners’ Association Acts both require that meetings of the membership and the board be preceded by adequate notice to the membership. Any item of business that is not duly noticed may only be addressed on an “emergency basis.” However, failing to notice an agenda item is not an “emergency” and this exception should be reserved for true “emergencies” such as natural disasters.

A problem can arise when these notices are posted, but the specific items to be discussed are not clearly noted. For example, boards of directors sometimes issue notices of meetings including agendas, which simply state “new business,” as an agenda item – but fail to report what that business will be. Boards should be forewarned that taking short cuts around the meeting notice requirements will add ammunition to a dissenting unit owner’s position, if that unit owner wishes to challenge board or membership action at an improperly noticed meeting.

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## TIDBITS Did You Know

*A Water Management District has broad powers that could affect your association long after developer turnover to the association.*

- Developer turnover occurs when the developer relinquishes control of the association in favor of its owners.
- Typically, during the pre-construction stage, a developer submits a surface water management plan to the District. At that stage, the District refers to the Developer as the “permittee” and the association as the “operating entity.” The District requires the permittee to transfer the surface water management plan to the operating entity.
- A time requirement for the transfer of the surface water management system from the permittee (the developer) to the operating entity (the association) does not exist. For example, if your association was created in 1980 and the District just discovered the transfer was not complete, it will look to the association to complete the transfer. Typically, the District discovers the deficiency during an audit of its files. Upon the District’s discovery, it sends the association a “Notice of Noncompliance” letter.
- The Florida Administrative Code requires that before the transfer of the surface water management system can become effective, the system must be certified by a licensed Florida engineer. The certification must establish that the system is substantially in accordance with the approved plans and specifications, and

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Accordingly, if the association intends to take specific action, it should notice that item on the meeting agenda with sufficient specificity that any member who might be interested in the subject could be considered to have had adequate notice that the item was being discussed.

**Meeting Minutes**

Often, volunteer boards do not understand the purpose or function of meeting minutes. Good minutes can make or break a future legal case, as these records may one day need to be read in court. On the lighter side of things, well-drafted minutes can be relied upon by unit owners to recognize the actions of the board, so that all members are on notice of official actions and rule changes.

*Robert's Rules of Order* states that meeting minutes exist to record what is "done" by the board or the membership, and not to memorialize all of what is said at a meeting. Meeting minutes should reflect the type of meeting that occurred (Board, Committee or Membership); the date, time, and place of the meeting; which of the officers or board members of the association were present at the meeting; whether the minutes of the previous meeting were approved; all main motions (but not those that are withdrawn); all points of order and appeals; and the hours of the meeting and adjournment. Generally, the name of the member who makes a motion is recorded and, while not necessary, it is often a good idea to record the name of the member who seconded the motion.

As a matter of great importance – the wording of a motion should be clear at the time the secretary records the motion. When a motion is presented,

often it encounters a number of amendments before its final passage. Failure to accurately record all amendments to a motion can result in the minutes inaccurately reflecting the final motion. Often, minutes do not surface in a dispute until years after their recordation, and at that point, it is possible that nobody will remember what precisely happened.

Despite the importance of taking good minutes, associations should understand that meeting minutes are not intended to be a transcript or a word-for-word rendering of everything discussed at a board or unit owner meeting. In fact, this is not desirable. All members should feel free to discuss the issues being debated without fear of their remarks being taken out of context or quoted. All readers know the "Miranda" warnings from television police shows. Any transcript of a meeting could have one sentence taken out of context, and then anything said may be used against the association in a later dispute.

The Condominium, Cooperative and Homeowners' Association Acts provide that any owner may tape-record or videotape meetings of the board and meetings of the membership. Accordingly, boards may not prohibit taping of meetings, but that does not mean that boards must tape them. In fact, if your board of directors does tape meetings for the purpose of assisting the manager or secretary in writing the minutes, this is an acceptable practice. However, it is advisable to erase these tapes after the official minutes have been written and approved.

**Newsletters**

Community newsletters are a valuable source of information for residents.

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**TIDBITS cont.**

any deviations will not prevent the system from functioning in compliance with the developer-submitted plans.

- Also, the District requires that specific language be included in the association's documents as to the maintenance and operation of the surface water management plan. To the extent that the necessary language is absent, the documents must be amended. The document amendments are much easier to accomplish while the association is under the control of the developer.
- The District's enforcement powers include the levy of large fines, though it will often work with an association to ensure compliance once the deficiency is discovered.
- The failure to transfer the District's permit from the permittee (the developer) to the operating entity (the association) is often missed because it does not show up in the public records.
- Also, the failure to complete the transfer does not prevent a certificate of occupancy from being issued.
- The best way to verify compliance is to request that your attorney request a written opinion from your water management district as to the status of the surface water management system.
- Ideally, an ethical developer will ensure that it completes the transfer of the surface water management plan to the association. Often times, this does not occur, and the association, especially when the developer is no longer in business, is left holding the bag.
- If you are an association that is in the process of developer turnover, you should ask your lawyer to verify the status of the surface water management plan to review the permit, determine whether it has been transferred to the association and, also, to recommend whether outside engineering assistance is required with regard to the surface water management plan.

**WORDS cont.**

Many associations use them for announcements and to simply foster a greater level of camaraderie between residents. As a tool to keep your community running smoothly, the association's newsletter can be a valuable tool for the dissemination of board policies and procedures. On the other hand, the association should take care to avoid communications that create problems for enforcement efforts.

In many community association enforcement matters, the unit owner attempts to defend his or her actions by claiming a lack of awareness of a certain policy, procedure, or rule. As most board members are aware, board meetings are frequently poorly attended, especially during the summer months. When the board of directors passes a new rule, simply stating this in the meeting minutes may not be an adequate method of communicating with the membership at large.

Often, errant owners are good people, whom would have followed the rules, had they been aware of them. Accordingly, if your board of directors passes a rule limiting pet ownership, most owners would choose to follow it. However, if owners are unaware of the rule and they purchase a pet, enforcement efforts can be much more difficult once the family has gotten attached to the animal. Keeping your members informed can be the first step in avoiding conflict, and can usually dispel any claims that the violator was not aware of the restriction.

On the other hand, associations must take care not to create a defense for violators. Communications in an association newsletter can create the defense of estoppel. Estoppel is an affirmative defense, the essence of which is that the board should not be permitted to assert one position prior to enforcement, upon which the unit

owner relies, and then rely on an opposite position once enforcement begins. [See: *Enegren v. Marathon Country Club Condo. West Assn., Inc.*, 525 So. 2d 488 (Fla. 3d DCA 1988); *Southeast Grove Management v. McKines*, 578 So. 2d 883 (Fla. 1st DCA 1991).]

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For example, if your association has a rule prohibiting animals from running freely, but the association's newsletter publishes an article about dog owners being permitted to let their animals run freely in a select area, owners could later claim that this is evidence that the board did not intend to enforce this rule. A statement in a newsletter should not be relied upon as a modification of written rules, but it is always best to avoid creating a built-in defense.

Any discussion of community newsletters would be incomplete without a warning about potential libel issues. Libel is a written or broadcasted defamation, (as opposed to slander, which is a spoken defamation). The four essential elements of a defamation claim are set forth in *Valencia v. Citibank, Int'l.*, 728 So. 2d 330 (Fla. 3d DCA 1999). These are as follows: "(1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) the falsity caused injury

to the plaintiff." If the plaintiff can prove all four of these elements, then the plaintiff may prevail in a libel action.

What may seem to the author as an attempt at humor could be a grave insult to the subject of the joke. Even when humor gone awry is not at issue, the publisher of the newsletter should be careful to remember that checking facts, especially in matters that may be contentious, is an important responsibility. Failing to do so could land the association in trouble (if the newsletter is sanctioned by the association).

If there is any question of whether an article in a newsletter is potentially libelous, the association should consult legal counsel for pre-publication review. As they say, "an ounce of prevention is worth a pound of cure."



In the case of *Madness, L.P. v. DiTocco Konstruktion, Inc.*, 29 Fla.L.Weekly D1005 (Fla. 4th DCA), the Florida Fourth District Court of Appeal recently held that a property owner was not liable for treble damages for stopping payment on a check, when there was no intent to defraud. Pursuant to §68.065, Florida Statutes, under certain circumstances, a check payee may have the right to collect triple the amount of a check which is refused by the drawee bank. Section 68.065, in pertinent part, states:

In any civil action brought for the purposes of collecting a check, draft, or order of payment, the payment of which was refused by the drawee because of the lack of funds, credit, or an account, or where the maker or drawer stops payment on the check, draft, or order of payment with intent to defraud, and where the maker or drawer fails to pay the amount owing, in cash, to the payee within thirty days following a written

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demand therefor...the maker or drawer shall be liable to the payee, in addition to the amount owing upon such check, draft, or order, for damages of triple the amount so owing.

In *Madness*, the court found that where a property owner stops payment prior to a contractor performing any actual work, and where the contractor was notified not to proceed on the same day as the check was stopped, there was no intent to defraud. Thus, the owner was found not liable for treble damages. It should be noted, however, that there was also evidence presented at the trial level that the parties disputed whether they had agreed on final contract terms. Further, the owner was still liable for consequential damages actually incurred by the contractor. In a situation similar to the one presented by the case, it would be advisable for an association to secure a legal opinion prior to stopping payment on a check to the contractor.

## Practicing Law WITHOUT A LICENSE

Providing even the minimum of legal assistance without a license can be considered the unlicensed practice of law. In *The Florida Bar v. We The People Forms and Service Center of Sarasota, Inc.*, 29 Fla. L. Weekly S 187 (Fla. 2004), the Florida Supreme Court dealt with a claim involving the unlicensed practice of law by a company and its principal who provided legal assistance in various forms.

The Supreme Court found that numerous instances of the unlicensed practice of law occurred when We The People and Danielle Kingsley offered legal assistance to third parties. The Court found various violations of the prohibition on the unlicensed practice of law where the company and its principal: (1) provided customers with legal assistance in the selection, preparation, and completion of legal forms; (2) corrected customers' errors and omissions with respect to those legal forms; (3) prepared or assisted in the preparation of pleadings and other legal documents for customers; (4) corresponded with attorneys who represented opposing parties; (5) hired a licensed, Florida attorney to provide legal advice to customers; (6) held out the attorney as the supervisor of the company performing these services; and (7) advertised services in such a way as to lead the public to believe that the business was capable of providing legal services.

Among other activities, the Court found that We The People had offered legal services directly to their customers by employing a licensed attorney to give legal advice. However, much of the advice and assistance was provided by the company and Ms. Kingsley. The legal assistance related to a range of activities including dissolutions of marriage, bankruptcy and wills and trusts.

The Court reviewed a number of previous cases, which provided an analysis on what constitutes the unlicensed practice of law. The unlicensed practice of law includes a non-lawyer who has direct contact with individuals in the nature of consultation, explanation,

recommendations, advice, and assistance in the provision, selection and completion of legal forms. While a non-lawyer may sell certain legal forms and type up instruments completed by clients, a non-lawyer cannot engage in personal legal assistance in conjunction with business activities, including the correction of errors and omissions. The Court will enjoin a non-lawyer from doing so and from advertising in any fashion that may lead a reasonable lay person to believe that the non-lawyer may offer to the public legal services, legal advice or personal legal assistance.

The many activities, which the Court enjoined as a result of this case, included completing forms or assisting in the completion of forms that were not simplified forms approved by the Court. The Court also prohibited the use of the title "Paralegal" or "Legal Assistant" by Ms. Kingsley, unless she was working for or under the supervision of a member of The Florida Bar and performing specifically delegated substantive legal work for which the Bar member is responsible. The Court specifically found that giving legal advice to another person concerning the application, preparation, advisability, or quality of any legal instrument or document or forms in connection with any legal proceedings or procedures would not be allowed.

In this case, the Court found that the rules regulating the Florida Bar allowed the imposition of a civil penalty not to exceed \$1,000.00 per incident. The Court noted that a Nine Thousand Dollar (\$9,000.00) penalty, which was imposed jointly and severally on We The People and Kingsley, was appropriate, given the number of incidents in which they were involved. The Court also awarded over Four Thousand Four Hundred Dollars (\$4,400.00) in costs incurred in connection with the proceedings, which led to the opinion. Not only is the unlicensed practice of law unlawful and unethical, but it can ultimately be costly to those who hold themselves out as being able to perform services that only a lawyer licensed to practice law can perform.