COMMUNITY LAW NEWSLETTER

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SUMMER 2013 LEGISLATIVE UPDATE

"No man's life, liberty or property is safe... while the Legislature is in session" is a quote long attributed to Mark Twain. This year's Florida legislative session was particularly very active and what has been approved and signed into law will significantly impact Florida's condominium, HOA and cooperative communities. House Bill 87 was signed into law on June 7, 2013 and became effective on that date. Both House Bill 73 and House Bill 7119 were signed into law on June 14, 2013. Each of these bills becomes effective on July 1, 2013. Below is a summary of HB 7119, 73 and 87.

A. NEW LAWS AFFECTING FLORIDA HOMEOWNERS ASSOCIATIONS (HOAs)

1. ***Community Association Managers: § 468.436(2).*** The statute now provides that the Department of Business and Professional Regulation may discipline community association managers for any violations of chapters 718, 719, or 720 of the Florida Statutes that are committed during the course of performing community management services pursuant to a contract with an association.

2. ***Official Records: § 720.303.*** The bill changes the official records provisions for homeowners' associations to more closely conform to the Condominium Act. Of particular note, official records must be maintained for 7 years, within 45 miles of the community or within the same county, and associations may also maintain records electronically.

The statute has also been changed to reduce the amount an association may charge for copying records. Copies have been reduced from 50 cents per page to 25 cents per page. An association's ability to charge for personnel costs is also now limited to requests exceeding a half hour to complete and only if the pages copied exceed 25 pages at a rate of no more than $20.00 per hour. Finally, another important aspect of the law is that members must now be allowed to photograph records using a camera or other electronic device at no charge.

3. ***Reporting Requirement: § 720.303(13).*** Perhaps one of the most notable changes to the statute that community association managers especially need to be aware of is that community association managers are now required to report certain information about the homeowners' associations they manage to the State DBPR by November 22, 2013. The association's legal name, federal employer identification number, mailing and physical addresses, the total number of parcels, and the total amount of revenues and expenses from the association's annual budget must be reported. Registration will be available on an internet website developed by the DBPR to report the required information by October 1, 2013.

Since the Division does not have the authority to regulate homeowners associations, except in limited situations such as recall elections, it is unclear whether one of the effects of the law is to essentially allow the proverbial camel's nose under the tent. However, at the very least, it is troubling because the law creates somewhat of a trap for community association managers who are subject to disciplinary proceedings under F.S. § 468.436(2) for failing to comply with these new reporting requirements.

4. ***Officers and Directors: § 720.3033.*** A new section has been created that governs officers and directors. It also brings into conformity certain requirements of directors of homeowners' associations to that of directors of condominium associations.

• Board member certification: The section imposes a board certification or education requirement for board members, as is currently required for condominium board members. Newly elected directors must certify in writing, within 90 days, that they have 1) read the association's governing documents and policies; 2) that they will work to uphold the documents and policies; and 3) that they will faithfully discharge their fiduciary responsibility to the association's members. Instead of written certification, a newly elected director may also submit a certificate that he or she has completed the Division's educational curriculum within one year prior to election or 90 days after election or appointment.

• Disclosures: If the association enters into a contract or other transaction with any of its directors certain disclosures are now required. The section also provides that the contract or transaction may be canceled by a majority vote of the members present at the next regular or special meeting of the members.

• Solicitation/Acceptance of anything of value: Another important aspect of the law to be aware of is that officers, directors and managers are prohibited from soliciting or accepting anything of service or value from any person providing or proposing to provide goods or services to the association for which consideration has not been provided. However, there is an exception for accepting food to be consumed at a business meeting with a value of less than $25 per individual or services or items in connection to trade fairs or education programs.

• Board removal: The section provides that officers or directors

charged with felony theft or embezzlement involving association funds must be removed from office. However, if the charges are resolved without a finding of guilt, the director or officer must be reinstated for any remainder of the term of office.

• Insurance/Fidelity Bond: All associations are required to maintain insurance or a fidelity bond for anyone who controls or disburses funds of the association. However, the members of the association may waive this requirement by a majority of the voting interests present at a properly called meeting of the association.

5. ***Amendments to Governing Documents: § 720.306.*** Within 30 days after recording an amendment to the governing documents, the association now must provide copies of the amendment to the members.

6. ***Suspension of Use Rights***. New Florida Statute Section 720.305(2), as amended, clarifies existing law and provides that in a HOA setting a suspension of use rights in common areas does not allow the association to suspend access to and from a member's home or the right to suspend utility services to their home.

7. ***Mortgagee Consents to HOA Amendments***. Florida Statute Section 720.306 has been amended to alleviate the need for an HOA to solicit and receive mortgagee consents to certain amendments. For any mortgage recorded after July 1, 2013, any provision in the HOA's governing documents that requires consent and joinder of some or all the mortgagees of record will only apply if the proposed amendment will adversely affect the priority of the mortgagee's lien. As to mortgages recorded before July 1, 2013, any provisions in the HOA's governing documents requiring mortgagee consents is still enforceable. However, in securing these consents, the HOA is entitled to rely upon the public records to identify the mortgagees and the HOA is entitled to request the mortgagee for their consent. Any mortgagee who fails to respond within 60 days after being requested in writing is deemed to have consented to the amendment.

8. ***Right to Speak.*** HOA members already had a right to attend membership meetings and the right to speak for at least three minutes on any agenda item. Effective July 1, 2013, the member is no longer required to submit a written request to speak prior to the meeting and the association may not require the member to submit a written request to speak prior to the meeting. Florida Statute Section 720.306(6).

9. ***Elections and Board Vacancies: § 720.306(9)(a).*** The statute has been amended to clarify that nominations from the floor are not required if the election process allows candidates to be nominated in advance of the meeting. This is an important change and should alleviate the need for HOAs to accept nominations from the floor. The section has also been amended to provide that an election is not required unless more candidates are nominated than vacancies exist.

10. ***Turnover of Association Control: § 720.307.*** The statute, as amended, adds several scenarios that trigger the transition of control of the board from the developer to nondeveloper parcel owners. The statute also now permits members other than the developer to elect at least one member of the board when 50% of the parcels in all phases of the community which will ultimately be operated by the homeowners association have been conveyed to the members.

11. ***Prohibited Clauses in Association Documents: § 720.3075.*** A new subsection is added which limits the ability of the developer to

make certain unilateral amendments to the declaration subject to a test of reasonableness.

12. ***Payment for Assessments; Lien Claims: § 720.3085(2)(b)***. The statute has been amended to clarify that the term "previous owner" shall not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The subsection further provides that a present parcel owner's liability for unpaid assessments is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

B. NEW LAWS AFFECTING CONDOMINIUMS

1. ***Elevator Safety for Existing Elevators and Escalators***. Florida Statute Section 399.02 is now amended to provide that Phase II firefighters service on elevators will not be required to be enforced until the elevator is replaced or requires major modification. Previously, updates to the elevator service code were required, in all events, no later than July 1, 2015.

2. ***Copying Official Records.*** Florida Statute section 718.111(12) has been amended to allow a member to use a portable device, including smart phone, tablet, portable scanner or other device to copy official records in lieu of the association providing the member with a copy of such records (and more important charging the member for the cost of making the copies).

3. ***Membership Directories.*** Effective July 1, 2013, pursuant to Florida Statute Section 718.111(12) a condominium association may print and distribute a membership directory containing the name, unit address and telephone number of each member. A member may exclude their telephone number from the directory by so requesting in writing to the association. (Note: In all events, and as before, condominium associations are not allowed to publish any member's email address or any other confidential or protected information of any member without that member's consent in writing.)

4. ***Financial Reporting Requirements Thresholds.*** Florida Statute Section 718.111(13). Financial Statements based upon association's total annual revenues has now been increased and adjusted as follows:

> Compilations are permitted for associations with total annual revenues of $150,000 or more but less than $300,000. Reviewed financial statements are allowed for associations with total annual revenues of at least $300,000 but less than $500,000 and an association with total annual revenues of $500,000 or more are required to have audited financial statements.
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> Condominium associations with total annual revenues of less than $150,000 are merely required to prepare a cash receipts and expenditures report. In all events, the thresholds have been increased presumably due to inflation. However, where previously associations that operated fewer than 75 units, regardless of the association's annual revenues, were only required to issue a cash receipts and expenditures report, effective July 1, 2013, only associations with fewer than 50 units may issue reports using cash receipts and expenditures. Please note this important change.

5. ***Delinquency and Eligibility to Run for the Board.*** Florida Statute Section 718.112(2) has been amended to clarify that a person who is delinquent in the payment of any monetary obligation to the

association is not eligible to be a candidate for board membership and may not be listed on the ballot.

6. ***Certainty of Elections and Closure of Recall Process.*** Under the heading "Certainty", Florida Statute Section 718.112(2) will now provide that any challenge to the election process must be commenced within 60 days after the election results are announced. This makes abundant good sense. However, Florida Statute Section 718.112(2)(j) has now been amended to allow any board member who has been recalled to challenge the validity of the recall so long as the challenge is filed within 60 days of the recall being certified. We do not think this new provision helps brings closure to what can be a very divisive process.

7. ***Hurricane Protection.*** Florida Statute Section 718.113 has now been amended to expressly permit a unit owner the right to install impact glass, or code-compliant windows and doors in much the same fashion as a unit owner would have the right to install hurricane shutters.

> Further, if the association later installs hurricane shutters or impact or code compliant windows and doors, and levies assessments to fund the project, those owners who previously did so at their own expense are now expressly by statute entitled to a pro-rata credit towards their assessment.

8. ***Suspension of Use Rights.*** Florida Statute Section 718.303(3) has been amended to clarify that an association's right to suspend use of common elements and facilities does not extend to common elements needed to access the unit, utility services provided to the unit, parking spaces or elevators.

C. NO REAL RELIEF FOR COMMUNITY ASSOCIATIONS IN THE NEW MORTGAGE FORECLOSURE LAW

On June 7, Governor Scott signed into law House Bill 87 which contains a package of amendments to Florida mortgage foreclosure procedures. Unfortunately, the only Association-friendly change that survived into the final version is a provision that makes the "negative notice" procedure under Section 702.10, F.S., available to any lienholder, including a defendant in the Bank's mortgage foreclosure case.

The "negative notice" process will allow an association which is named as a junior lienor defendant in the bank's mortgage foreclosure action to require the Judge to examine the Court file and if the Judge finds it appropriate to do so, to issue an "order to show cause" why judgment should not be entered. The problem is that there were no corresponding changes to what has to be in the Court's file before the Judge can issue the order to show cause.

First, the original mortgage and note must be in the Court's possession. The Judge must have a proposed form of judgment to attach to the order to show cause. That has to come from an attorney who can attest that he or she has reliable information that the amounts due and owing and other key proposed "findings" are indisputably true. In either event, the Association has no control over the original mortgage and note and cannot therefore file it with the court, much less submit to the Court a proposed judgment when it has no control or information as to what is owed to the bank by the defaulting owner.

Moreover, there is still no authority for the Judge to force the mortgage holder to complete the foreclosure or to pay the Association assessments. The amendment also adds a provision that exempts owner-occupied property from the procedure which further limits its potential application.

While the "order to show cause" may still be another viable tool to put pressure on the Bank in some situations along with tools that have a proven track record, including a motion for a case

management conference, notice for trial and motion to dismiss for lack prosecution, it does not provide the real relief community associations were hoping for. Aggressively pursuing foreclosure of the Association's own lien will often still be more effective in pushing the Bank and the homeowner to a final decision. In addition, lien foreclosure also has other advantages as compared to the Association doing nothing or investing resources in trying to move the Bank foreclosure process.

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This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also specializes in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw. com) is an Associate with the Pavese Law Firm. Charles B. Capps (charles capps@paveselaw.com), is an Associate with the Pavese Law Firm. Kathleen Oppenheimer Berkey (kathleenberkey@paveselaw.com) is an Associate with the Pavese Law Firm. Matthew P. Gordon, Esq. (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is well versed and capable of handling all aspects of community association law, including but not limited to governing document interpretation, covenant enforceability, collection of assessments, lien foreclosures and general litigation. Please feel free to contact them via the e-mail addresses listed above.

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We are a full service law firm and capable of handling all of your legal needs. Visit us on the web at www.PaveseLaw.com.

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