

<p>N E W S</p>	<p style="text-align: center;">COMMUNITY LAW</p> <p style="text-align: center;">NEWSLETTER</p>
<p>LETTER</p>	
<p>July 31, 2009</p>	<p style="text-align: center;">PAVESE LAW FIRM Written by: Christopher J. Shields, Esq., Christina Harris Schwinn, Esq., Stacy L. Bennings, Esq. and Matthew D. Koblebard, Esq.</p>

Summer 2009 – Part 2

Legislative Update

Senate Bill 2330, which amends Florida's Chapter 607 and Chapter 617, was recently approved by Governor Charlie Crist. Certain changes to Chapter 617 may impact local condominium and homeowners associations, and are discussed below.

1. Except as authorized in Section 617.1302 a corporation may not make distributions to its members, directors or officers. Florida Statutes, Section 617.505 is an exception to this general rule. Distributions; Exceptions is amended to add new subsection 5 which provides as follows:

A corporation that is regulated by chapter 718, chapter 719, chapter 720, chapter 721 or chapter 723, or a corporation where membership in such corporation as required pursuant to a document recorded in the county property records, may make refunds to its members, giving credits to its members, disbursing insurance proceeds to its members, or disbursing or paying settlements to its members without violating this section.

2. Florida Statutes, Section 617.0601(2) is amended to provide that a not for profit corporation may issue membership certificates.

3. Florida Statutes, Section 617.0601(5) is amended and provides as follows:

The resignation, expulsion, suspension, or termination of membership pursuant to s. 617.0606 or s. 617.0607 shall be recorded in the membership book.

Many associations may not currently maintain a membership book per se, rather a termination of membership occurs when a member's name is deleted from the assessment roster. Arguably, the amendment to Section 617.0601(5) now requires associations to maintain a membership book.

4. Florida Statutes, Section 617.0607 is a new section that addresses termination, expulsion and suspension.

(1) *A member of a corporation may not be expelled or suspended, and a membership in the corporation may not be terminated or suspended, except pursuant to a procedure that is fair and reasonable and is carried out in good faith.*

(2) *Any written notice given by mail must be delivered by certified mail or first-class mail to the last address of the member shown on the records of the corporation.*

(3) *Any proceeding challenging an expulsion, suspension, or termination, including a proceeding in which the defective notice is alleged, must be commenced within 1 year after the effective date of the expulsion, suspension, or termination.*

(4) *A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension.*

Unfortunately, this section doesn't define what is meant by the term "suspension." Many homeowners association have provisions in their bylaws that allow the suspension of use privileges for failing to pay assessments or for rule violations.

Given the ambiguity that is raised by the word "suspension" without further definition or clarification and the change to Florida Statutes, Section 720.3085(1) which occurred in 2008, it is important to make sure that it is clearly defines in the governing documents that the suspension of use privileges is not a suspension of membership. However, until a court interprets the above provision in connection with provisions of Chapter 720, it is difficult to anticipate the effect that the amendment may have on the rights of homeowners associations to suspend membership privileges. When Florida Statutes, Section 720.3085(1) was changed in 2008, the following language was removed: "The parcel owner's liability for assessments may not be avoided by waiver or suspension of the use or enjoyment of any common area or by abandonment of the parcel upon which the assessments are made."

5. Florida Statutes, Section 617.0721 "Voting Members" has been amended and new subsections have been added which are as follows:

Subsection (2)(b) has been added and reads as follows:

A corporation may reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has a reasonable basis for doubting the validity of the signature on it or the signatory's authority to sign for the member.

However, pursuant to Florida Statutes, Section 617.0721(7), this does not apply to Chapter 720 homeowners associations, but does presumably apply to condominium associations organized under Chapter 718.

Subsection (3) has been added and reads as follows:

If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, members and proxy holders who are not physically present at a meeting may, by means of remote communication:

(a) *Participate in the meeting.*

(b) *Be deemed to be present in person and vote at the meeting if:*

1. *The corporation implements reasonable means to verify that each person deemed present and authorized to vote by means of remote communication is a member or proxy holder; and*

2. *The corporation implements reasonable measures to provide such members or proxy holders with a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrent with the proceedings.*

If any member or proxy holder votes or takes other action by means of remote communication, a record of that member's participation in the meeting must be maintained by the corporation in accordance with s. 617.1601.

6. Florida Statutes, Section 617.0808 is amended by adding new subsections (a)1 and 2 which provide as follows:

(a) *Any member of the Board of directors may be removed from office with or without cause by:*

1. *Except as provided in paragraph (i), a majority of all votes of the directors, if the director was elected or appointed by the directors; or*

2. *A majority of all votes of the members, if the director was elected or appointed by the members.*

Mortgage Foreclosure Delays and Collection of Unpaid Assessments:

During the 2009 Legislative Session, the Florida Legislature proposed several bills, including one that was intended to require lenders to conclude a foreclosure action within one (1) year after the filing of the complaint, or be held responsible for all assessments due to the Association from such point forward. Many were hoping that this would provide financial incentive and sanctions on lenders who are dilatory in pursuing mortgage foreclosures. However, the Bill was not passed into law.

Many of the Associations represented by this office have had the experience of being a defendant to a prolonged mortgage foreclosure and the inordinate delays in recovering unpaid assessments following transfer of title in connection therewith. Some of our clients have thus directed us to prepare and file motions to compel against these lenders to attempt to force them to move forward or dismiss the action.

It is our hope that merely filing the motion to compel will get the lenders to move forward with their foreclosures. If so, we can dispense with noticing the motion with the courts for a hearing and attending the same to save the Association the additional expense.

Please keep in mind that while some lenders are undoubtedly intentionally delaying mortgage foreclosures to avoid taking title to the property, there are a variety of reasons that lenders delay foreclosure actions, including the fact that the courts are inundated with these actions, and such does at the very least contribute to the delays experienced.

Please feel free to contact our office at (239) 336-6245 for more information.

Alterations to Units and Condominium Property by Unit Owners

Under many condominium documents, unit owners are allowed, or even required as part of the owners' maintenance, repair and replacement responsibility, to make various installations which

may potentially result in incidental damage to the exterior or other common elements of the condominium buildings, for which the Association is ultimately responsible. For example, the installation of tile or screen enclosures on balconies, replacement of sliding glass doors and windows, installation of hurricane shutters, etc. Improper tile installation or failure to install waterproof membrane can result in concrete swelling and deterioration. Windows and sliding glass doors that are not installed or waterproofed correctly are often the cause of water intrusion. Beyond these examples, impacts on the condominium, from aesthetic nonconformity to weakened structural integrity may result.

Despite the potential liability of the Association for improperly performed repairs and installations, many Associations do not have sufficient architectural control guidelines or restrictions in their condominium documents to allow control and oversight of these projects. At the minimum, Associations should reserve the authority to approve proposed improvements, limit or require certain materials be used and precautions taken, and require work to be performed by licensed and insured contractors.

New Federal Minimum Wage

Please note that effective July 24, 2009, the Federal Minimum Wage has been raised to \$7.25 per hour.

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. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Stacy L. Bennings (stacybennings@paveselaw.com) and Matthew D. Koblegard (matthewkoblegard@paveselaw.com) are Associates with the Pavese Law Firm. Each attorney practices in the area of Real Estate Development and Community Association Law. Ms. Schwinn also specializes in Employment Law. Should you wish to contact any one of them, please feel free to contact them via the e-mail addresses listed above.