



COMMUNITY ASSOCIATION MANAGERS (CAM) CAN BE SANCTIONED FOR REFUSAL TO TURN OVER THE ASSOCIATION’S OFFICIAL RECORDS

BY: CHRISTOPHER J. SHIELDS, ESQ.

Perhaps no other circumstance causes more displeasure and hurt feelings than when their employment is terminated. Termination by its very nature is a rejection by one party of the other party’s performance. Community Association Managers can unfortunately cause more heartache for themselves if and when they withhold possession or refuse to timely deliver any of the original books, records, accounts, funds or other property of the Association to the Association when requested.

Rule 61E14-2.001(6)(a) of the Florida Administrative Code provides:

A licensee shall not withhold possession of any original books, records, accounts, funds, or other property of a community association when requested by the community association to deliver the same to the association upon reasonable notice. Reasonable notice shall extend no later than 10 business days

after termination of any management or employment agreement and receipt of a written request from the association. The manager may retain those records necessary for up to 20 days to complete an ending financial statement or report. Failure of the association to provide access or retention of accounting records to prepare the statement or report shall relieve the manager of any further responsibility or liability for preparation of the statement or report. The provisions of this rule apply regardless of any contractual or other dispute between the licensee and the community association. It shall be considered gross misconduct, as provided by Section 468.436(2), F.S., for a licensee to violate the provisions of this subsection. [Emphasis added.]

Keep in mind the CAM’s obligation to turn over the Association’s records, etc. applies regardless of whether or not the Association had the right to terminate the manager’s agreement. It is important for all CAMs to be aware that regardless of whether or not they believe the Association is entitled to terminate the agreement and regardless of whether or not the CAM believes they have recourse against the Association to enforce the agreement, CAMs must cooperate and timely turn over the Association’s books, records, accounts, funds and other property, when requested.

HOW MANY SEATS ARE ON THE BOARD?

BY: SUSAN M. MCLAUGHLIN, ESQ.

Chapter 617, Florida Statutes governs Not-for-Profit Corporations and applies to both Condominiums and Homeowner’s Association unless there is some provision, under Chapter 718 or Chapter 720, respectively, that is in conflict with the provisions of

Section 617, Fla. Stat.

Section 617.0803 of the Florida Not-for-Profit Corporation law states:

- (1) A board of directors must consist of three or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or the bylaws.

(2) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but the corporation must never have fewer than three directors.

Therefore, if neither the Bylaws nor the Articles of Incorporation governing a Community Association clearly state how many seats are on the Board, they are defective.

Yet it is very common for both the Articles of Incorporation and the Bylaws of Community Associations to be unclear on the exact number of directors. A provision such as "...at least three but no more than seven," is all too typical.

Why is this problem? It is a problem because the number of seats on the Board determines whether an election is required, whether there is a quorum at the Board meeting and, potentially, the validity of votes on matters before the Board.

The Condominium statute supplies a default provision for a five (5) member Board that applies in most situations. Section 718.112(2)(a) states:

The form of administration of the association shall be described indicating the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards. In the absence of such a provision, the board of administration shall be composed of five members, except in the case of a condominium which has five or fewer units, in which case in a not-for-profit

corporation the board shall consist of not fewer than three members.

There is a long line of Condominium Arbitration decisions, dealing with Associations of more than 5 units, that leaves no doubt that there are five (5) seats on the Board in any case where the governing documents fail to specifically state a different number or are in anyway indefinite or unclear on that point.

Some governing documents provide for formulas for establishing a different number of directors on annual basis. For instance, the Bylaws may provide that the number of seats shall be determined by a vote of the membership at the annual meeting or shall be set by the Board of Directors from year to year. For the most part, the Arbitrators have found such formulas unclear and have imposed the statutory default. See, *Smith v. Ocean View Association, Inc.*, Arbitration Case No.: 97-0040, where the Arbitrator imposed the statutory number due to vagueness. Contrast this with *Miller v. Glen Condominium Association, Inc.*, Arbitration Case No.: 00-0360, where the Arbitrator ordered the Board to implement the procedure for setting the number of seats. However, this ruling was in the context of ordering a new election on multiple grounds. The Arbitrator suggests that failure of the Board to implement the procedure for setting a specific number of seats prior to a particular election would mean an election of a five-member Board.

There is no statutory default for Homeowners' Associations and the Condominium Statute is not clear on the outcome when the governing documents fail to clearly state the number of seats on the Board for Condominiums of less than 5 units. This leaves these Associations at an even greater risk for disputes.

SAME-SEX MARRIAGE IN FLORIDA – IT WAS ONLY A MATTER OF TIME

BY: CHRISTINA HARRIS SCHWINN, ESQ.

As of January 6, 2015, Florida's County Clerks began issuing marriage licenses to same-sex couples. Florida has now joined a growing list of states that recognize this type of marriage. Now that these types of marriages are legally recognized in Florida, community associations are well advised to keep this fact in mind when making judgments about whether a

same-sex spouse is eligible to run for the board even if the person is not on the deed to the parcel or unit.

Is a spouse who is not named on the deed for the parcel or unit eligible for board membership? It depends. The starting point for the inquiry is to review the applicable provisions of your association's governing documents. While some association documents limit board eligibility to legal owners, i.e. those named on the deed; other associations' governing documents permit a spouse of a member and legal title holder to run for the board.

If your association's governing documents happen to—which is rare—define marriage as that between a man and a woman, note that such a provision is no longer lawful and should not be enforced. Any provision in an association's governing documents that attempts to discriminate against same-sex couples should be removed from your association's

governing documents and same-sex married or unmarried couples should be afforded the same privileges as heterosexual married or unmarried couples, regardless of one's own personal beliefs on the matter. To do otherwise will likely only lead to unnecessary legal expenses and potential litigation including fair housing claims of discrimination.

BORROWING FROM RESERVES

BY: SUSAN M. MCLAUGHLIN, ESQ.

Many associations are obligated to pay large bills, such as the insurance premiums, in the early part year, before sufficient cash has been collected under the budget for that item. Maintaining sufficient operating capital is often not practical. Financing insurance premiums is expensive. The reserve accounts, which typically earn very nominal amounts of interest, are a tempting source of financing. Borrowing from reserves is a common practice but in many cases the Board is in violation of the law unless the members have approved the “loan.”

Before discussion on that point, it is important to distinguish between reserves that are regulated by statute and discretionary reserve accounts. In condominiums the reserves required by statute are the reserves required by Section 718.112(2)(f), Florida Statutes, for capital expenditures and deferred maintenance including roofing, painting, paving, and any other item for which the deferred maintenance expense or replacement cost exceeds \$10,000. Under Section 720.303(6)(d), Florida Statutes, reserve accounts that have been initially established by the developer or by vote of the members, are regulated by statute.

It takes a majority of the entire voting interests to create or terminate a statutory HOA reserve account. However, as with condominiums, it takes only a majority of voting interests represented at the meeting to waive funding or approve alternative uses of the statutory reserves. Again, the Board has complete discretion over “non-statutory” reserves accounts.

It is a common misperception that it is permissible to borrow from reserves without membership approval so long as the reserve account is fully funded by the end of the year. It is not. Section 61B-22.005, Florida Administrative Code, requires that statutory reserves shall be funded in at least the same frequency that assessments are due from the unit owners (e.g., monthly or quarterly). However, the Code also provides that Associations that collect operating and reserve assessments as a single payment are not considered to have commingled the funds provided the reserve portion of the payment is transferred to a separate reserve account, or accounts, within 30 calendar days from the date such funds were deposited. Thus, the Board's opportunity to borrow from reserves without membership approval is limited to a 30 day window. While these regulations are not specifically applicable to HOAs, it is almost certain that the Department of Business and Professional Regulation and the Courts apply these concepts of “accounting” to HOAs as well as condominiums.

It is critical to word the question presented to the members precisely, because Section 61B-22.005, Florida Administrative Code, also provides that any vote to waive or reduce Statutory Reserves shall be effective for only one annual budget. Therefore, if the members approve a “loan” from the reserve account, the account should be fully funded by the end of the year unless otherwise specified in the question approved. On the other hand, when the membership approves using the reserves for some other specific purpose without reference to any “loan,” that vote operates to “waive” full funding for that year.

RESERVES FUNDS DISTINCT FROM OPERATING BUDGET

BY: SUSAN M. MCLAUGHLIN, ESQ.

The distinction between reserve and operating accounts is important because the funding and use of “reserves” are regulated by statute. Also, the misclassification of operating funds as reserves will distort the Association’s financial statements. The discussion below is not intended to address the regulation of reserves but to explain the difference between reserve funds and expenses that should be in the operating budget.

Reserve funds are created to pay for capital expenditures and deferred maintenance. These are defined terms. Section 61B-22.001 of Florida Administrative Code provides that:

“Capital expenditure” means any expenditure of funds for:

- (a) The purchase of an asset whose useful life is greater than one year in length;
- (b) The replacement of an asset whose useful life is greater than one year in length; or
- (c) The addition to an asset that extends the useful life of the previously existing asset for a period greater than one year in length.

Section 61B-22.001 also provides that:

“Deferred maintenance” means any maintenance or repair that:

- (a) Will be performed less frequently than yearly; and

CONSIDERING TERMINATING A CONTRACT? READ THE FINE PRINT.

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Prior to terminating a contract that your association has entered into with another party it is important to read both the notice and termination provisions to ensure compliance with both. Improperly terminating a contract can lead to litigation and unnecessary frustration. While it is important to always review and comply with notice and termination provisions, it is especially critical when

- (b) Will result in maintaining the useful life of an asset.

These definitions exclude many large line items from being classified as “reserves.” This is also significant because the funding of reserves can be waived and the Board may utilize special assessments or loans to fund capital expenditures and deferred maintenance. On the other hand, the Board has an absolute duty to budget for all of anticipated maintenance repair and replacement expenses for the coming year even if those expenses are large. Loans and special assessments should not be used to cover ordinary repair and replacement expenses.

The Board may and should include a provision for “working capital” and a “contingency account” in the Budget to provide sufficient cash on hand to operate the Association and provide funds for unanticipated expenses but, these funds are operating funds, not reserves. The Board may also include line items for any number of specific purposes in the budget. Unlike reserves, the use of these funds is always discretionary. For example, if the Board included a line item in the budget for planting annual flowers, the Board may elect to use the money for another purpose without considering whether it needs approval of the owners.

The foregoing is an explanation of the basic concept of reserve funds. For questions on the proper classification of specific expenses, the Association should consult its accountant or lawyer. Again, the duty to establish and fund certain types of reserve accounts and restrictions on the use of reserves is a topic beyond the scope of this discussion

changing property management companies or vendors.

In addition to exercising notice and termination rights under an existing property management or vendor contract, it is also important to develop a transition plan that includes the transfer of funds to the new bank accounts (if new bank accounts are being established) and the transfer of documents. With respect to property management companies, the property management company is considered a community association’s agent. Keep in mind that blaming the association’s failure to have the

association's official records within 45 miles of the community or condominium on the prior management company is not a viable defense to a claim by a member that your association failed to make official records available in accordance with the applicable statutory provisions governing same.

Another type of provision that appears in contracts of all kinds is the provision that requires notice of breach and an opportunity for the breaching party to

cure the breach. While these types of provisions sound good at first blush, such provisions can be a trap. Why? Because if notice of a breach is given and the breaching party cures the breach, then the nonbreaching party no longer has a basis to terminate the contract. "Breach-notice-cure" provisions oftentimes create an endless loop of breaches and cures that preclude termination of the contract without liability for the nonbreaching party.

BEAUTY IS IN THE EYE OF THE BEHOLDER

BY: CHRISTINA HARRIS SCHWINN, ESQ.

In a recent appellate decision issued by the First District Court of Appeals,¹ the court had occasion to interpret the following provision found in the Declaration of Covenants, Conditions and Restrictions and Easements for The Pointe at South Pointe:

Ostentatious Site Features: The construction of ostentatious site features such as topiary, sculpture, free standing fountains in the foreground of townhouses or lighting systems which may be offensive to adjacent neighbors is unacceptable.

The issue before the court was whether the complaining next door owner had veto power over his neighbor's choice of lighting. The district court interpreted the language of the above restrictive covenant in favor of the complaining owner and the appellate court reversed, finding that only the Association's board of directors had the authority to determine whether site features proposed or installed by one owner over the objection of another were ostentatious. While the board could consider a complaining owner's objections, the board could not punt and let the complaining owner make a decision vested in the board. No veto power for the chagrined owner.

¹ *Leamer v. White, et al.*, 40 Fla. L. Weekly D283b (Fla. 1st DCA Jan. 27, 2015).

WHEN IS A "NOTICE OF INTENT TO RUN" FOR THE BOARD CONSIDERED TIMELY RECEIVED

BY: CHRISTOPHER J. SHIELDS, ESQ.

The Florida Condominium Act provides that the notice of intent to be a candidate for the Board must be received by the Association at least 40 days before the scheduled election, pursuant to Section 718.112(2)(d)4, Florida Statutes, and Florida Administrative Code Rule 61B-23.0021(5).

The notice of intent must be received on or before the 40th day even if the last day falls on a Sunday, and there are arbitration decisions to support this. See *Al Coletta and Joe Grosso, v. The Bayshore Yacht & Tennis Club Condominium Association, Inc.*, Arbitration Case No. 99-1256, Final Order (September 14, 1999) (holding the last day that notice could have been given was Sunday. There is no provision for extending the statutory deadline of 40 days to a longer period of time.

MEMBERSHIP PARTICIPATION AT BOARD MEETINGS

BY: CHRISTOPHER J. SHIELDS, ESQ.

Condominium and homeowner associations can and should adopt written reasonable rules and regulations for membership participation at Board meetings.

Florida Statutes Section 718.112 provides that condominium associations may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements. The HOA statute contains a similar provision that provides that members of a homeowners' association have the right

to attend meetings of the Board and the right to speak at such meetings with reference to all designated items. However, the statute also provides that a homeowners' association may adopt reasonable rules expanding (Note, the statute uses the word "expanding" and not the word "limiting" or "restricting") the right of members to speak and governing the taping of the meetings and the frequency, duration, and other manner of member statements, as long as the rules are consistent with Section 720.303(2)(b), Florida Statutes.

The above-referenced provisions of the Florida Statutes are still valid and current law. I would note that Section 720.303(2)(b) used to contain a requirement that members had the right to speak on any matter placed on the agenda only after the voting interests petitioned the Board. However, the

legislature amended the statute a few years ago to remove that requirement.

As such, the Board has the authority to adopt reasonable rules and regulations governing members' right to speak at Board meetings, as long as the rules allow members to speak for at least three (3) minutes on any agenda item or any item that is open for discussion and the rules adopted board may also require that owners, who wish to speak, sign the sign-up sheet prior to the meeting . However, unless the board has adopted a rule that requires owners, who wish to speak, to sign the sign-up sheet prior the meeting, the board can't so require those owners and /or prevent them from speaking at a board meeting so long as it is on any agenda item for at least three (3) minutes.

ARE CANDIDATES REQUIRED TO SUBMIT TO BACKGROUND CHECKS?

BY: CHRISTOPHER J. SHIELDS, ESQ.

Both Florida Statute Sections 718.112(2)(d)2 and 720.306(9)(b) each provide that a person who has been convicted of a felony is not eligible for board membership unless such felon's civil rights have been restored for at least five (5) years as of the date such person seeks election to the board. Persons merely charged with a felony are still eligible as long as they have not been convicted.

However, both statutes are silent on whether associations can require candidates to submit to background checks and unless the associations so require candidates to submit to background checks, there is nothing in the current law that would require same.

Associations would be wise to consider amending their bylaws to require candidates to submit reasonable personal data about themselves so that the association can timely determine whether they are eligible to serve on the board.

Tidbit

Effective January 1, 2015, Florida's minimum wage will increase from \$7.93 to \$8.05 per hour. Tipped employees' cash wage will be \$5.03 per hour; maximum tip credit to stay the same at \$3.02 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 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 practices 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 a Partner with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner with the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Matthew E. Livesay (matthewlivesay@paveselaw.com) is an Associate with the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including but not limited to governing document interpretation, covenant enforcement, collection of assessments, lien foreclosures and general litigation matters. Please feel free to contact them via the e-mail addresses listed above.

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