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THE NEW LAW WHICH IMPOSES TERM LIMITS FOR CONDOMINIUM BOARD MEMBERS; WHAT WE ARE ADVISING OUR CONDOMINIUM CLIENTS AT THIS TIME

BY: CHRISTOPHER J. SHIELDS, ESQ.

In 2017, the Florida Legislature attempted to impose term limits when it changed the law to forbid board members from serving more than four (4) consecutive two (2) year terms unless approved by two-thirds of the entire voting interests. Of course, that change in the law had very limited effect, if at all, for a number of reasons; most of which is due to the fact that few condominiums have boards which have two (2) year terms and even fewer condominiums had board members who had served more than four (4) two (2) year consecutive terms. More importantly, the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") took the position that it would apply prospectively only and not retroactively. Toward that end, prior years of service would not count and the law would only be construed as counting only those terms of service on the board after July 1, 2017.

Regrettably, the Florida Legislature apparently believing that experience on the board was overrated and that term limits were a good thing, took another stab at amending F.S. 718.112(2)(d)2. Effective July 1, 2018, Florida Statutes 718.112(2)(d)2 now provides in relevant part that: "A board member may not serve more than eight (8) consecutive years unless approved by an affirmative vote of unit owners representing two-thirds of all votes cast in the election or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy..."

When this new law was enacted July 1, 2018, we were then and we still are of the opinion that the new law should not be applied retroactively and would not apply to those board members who were currently serving on the board or those who had already served eight (8) or more consecutive years on the board for a variety of reasons. First, a legal rule of statutory interpretation is that laws enacted by the legislature are presumed to apply prospectively and not retroactively, unless there is a clear legislative expression in the new law for it to apply retroactively. Secondly, both U.S. and Florida Constitution prohibit the state legislature from enacting laws which impair existing contract rights, in this case the preexisting rights of any unit owner under the condominium's governing documents to run for and serve on the board and every owner's right to vote for the candidate of their choosing.

Thirdly, although not necessarily authoritative, the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") when considering the law enacted a year earlier, expressed an internal agency opinion that they would not interpret or apply the law prohibiting more than four consecutive two year terms retroactively.

However, in recent days, it appears that the Division has now "flip flopped" and changed its position of a year ago and has espoused a new position that the new law enacted on July 1, 2018 should be applied retroactively

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to board members who were already serving on the board. On September 14, 2018, the Division issued its Declaratory Statement in the matter of The Apollo Condominium Association, Inc. finding that the new term limit law applies in upcoming elections. Of course, it should be noted that as a legal matter the Division is precluded by applicable Florida case law from issuing Declaratory Statements on matters of general applicability. Moreover, technically the Division's interpretation in Apollo only applies to the members in Apollo and while state agencies are not permitted to interpret Florida law except where the legislature has delegated rule making authority, that is precisely the effect of what the Division has done here by issuing its Declaratory Statement cited above.

So faced with this uncertainty, until and unless the Florida Appellate Courts rule on this matter or the law is changed or hopefully repealed (which repeal or amendment is not likely to occur until at least the Spring of 2019, if at all), we are suggesting to our condominium clients to consider the following in your upcoming elections:

1. First, the new law will not apply where the number of candidates running for the board is less than or equals the number of seats that will become vacant and will need to be filled at the annual meeting. In such a case, no election is necessary or takes place where the number of qualified and eligible candidates who have timely submitted their written notice of his or her intention to become a candidate does not exceed the number of vacant seats to be filled at the annual meeting. In such a case, even those board members who have already served eight (8) or more years on the board are still qualified and permitted by law to continue serving on the board. So in all events and regardless whether a current board member has already served eight (8) or more consecutive years on the board, they should be allowed and, in fact, assured that just like any other member of the association, they can continue running for the board.

2. A second exception is where a board member who has already served eight or more consecutive terms receives a super majority of the votes cast in the election. Even if a board member has already served eight (8) or more consecutive years on the board, if that person receives at least two-thirds (2/3rds) of all the votes that were actually cast in the election (as opposed to two-thirds 2/3rds of the votes of the entire membership), they are entitled to continue to serve on the board.

3. Third, for those board members who have already served eight or more consecutive years on the board and are not confident that they will receive at least two-thirds (2/3rds) of the votes that are actually cast in the upcoming election, they may wish to consider whether or not formally resigning from the board before their existing term expires and before the election takes place to interrupt and cutoff their consecutive years of service on the board and create a hiatus between their prior years of service on the board and any newly elected term, is a viable option. Now, as Association Counsel, we can't provide legal advice to individual sitting board members, particularly as to how this new law affects them individually and personally. However, once the 40th day prior to the annual meeting deadline has been reached, those board members who have already served on the board for more than eight (8) consecutive years will know whether an election is necessary (i.e. where the number of candidates exceeds the seats becoming vacant at the annual meeting). Between then and the annual meeting they need to consider whether they wish to risk the prospect of not receiving at least two-thirds (2/3rds) of the actual votes cast and weigh that risk against resigning from the board. If this option is considered by any board member, then we would suggest that resignation from the board should be tendered unequivocally and in writing by delivering written notice of said resignation to the rest of the board. The resigning board member may consider explaining the reasons why he or she chose to resign prior to the end of the current term in their resignation letter. After all, any member who resigns from the board shortly before the annual meeting and prior to the election may have a difficult time explaining to his/her fellow unit owners why they should be elected for a new term at the same time they have chosen to resign from their existing term. In addition, the board should notify and inform the rest of the membership that it has received a resignation from the board member in question. However, with respect to expressing reasons why the board member has resigned or speculating in any manner, we caution the board, as a whole, not to express anything which could be construed as indirectly or

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directly endorsing any candidate. However, any board member who has resigned simply in an attempt to cutoff the consecutive years of service and is a candidate at the upcoming election is free on their own accord and at their own expense to inform the membership with his or her own mailing or other communication the reasons why he/she felt it was necessary to resign from the board in advance of their elected term ending.

We can't guarantee that resigning from the board, especially for any short window of time prior to the annual meeting, will be considered legally effective. Nor can we predict whether or not their resignation will be legally challenged. However, based upon what we know now, if an election is necessary due to the fact that the number of eligible candidates exceeds the vacant seats on the board, and unless an existing board member who has already served eight consecutive years is confident that they will receive at least two-thirds (2/3rds) of the votes that are actually cast in the upcoming election, then resigning from the board before their current term expires and before annual election may be an option they may wish to consider.

Finally setting aside the argument whether this new law should be applied retroactively and count prior years service on the board or whether only prospectively and only count consecutive years served after July 1, 2018, we believe that the law may ultimately fail altogether simply on constitutional grounds since it will require those who have served more than eight (8) consecutive years on the board to receive a higher threshold of the votes (in this case two-thirds (2/3rds) of the votes cast) in order to be elected whereas all other candidates will simply need one more vote than other candidates vying for the board.

The new statute which requires experienced candidates to receive two-thirds (2/3rds) of the votes cast whereas others receive one more vote than other candidates, in our view, unfairly and impermissibly impairs every owner's preexisting contract rights including their right to vote and select board members of their choosing and diminishes the prospects of one class of candidates, those who had already generously volunteered their time and served on the board for eight (8) consecutive years, at the same time it enhances the prospects and odds of all other candidates becoming elected.

It unfairly penalizes those who have served on the board and has creates an unlevel playing field in favor of those who have not. But until and unless this law is repealed or the Florida Appellate Courts rule on this matter, this is a muddled mess that condominium boards will need to live with.

WEBSITE REQUIREMENT FOR CERTAIN CONDOMINIUM ASSOCIATIONS EFFECTIVE JANUARY 1, 2019[1]

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Effective January 1, 2019, an association that manages a condominium with 150 or more units must have a website on which most of the condominium association's official records must be housed and accessible to unit owners. Unit owners must be given user names and passwords and any records that are not in the public domain must not be accessible to nonowners. Publicly accessible records are those that can be found in the official records of the Clerk of Courts for the county in which the condominium is located.

New S. 718.111(12)(g)1

1. By January 1, 2019, an association managing a condominium with 150 or more units (except timeshare units) shall post digital copies of the documents specified in new subparagraph s. 718.111(12)(g)2 on its

[1] This article was adapted from a continuing legal education course presented by Christina Harris Schwinn for The Florida Bar on June 27, 2018.

website. New ss. 718.111(12)(g)1 and 2 provide as follows:

a. The association's website must be:

(I) An independent website or web portal wholly owned and operated by the association; or

(II) A website or web portal operated by a third-party provider with whom the association owns, leases, rents, or otherwise obtains the right to operate a web page, subpage, web portal, or collection of subpages or web portals dedicated to the association's activities and on which required notices, records, and documents may be posted by the association.

b. The association's website must be accessible through the Internet and must contain a subpage, web portal, or other protected electronic location that is inaccessible to the general public and accessible only to unit owners and employees of the association.

c. Upon a unit owner's written request, the association must provide the unit owner with a username and password and access to the protected sections of the association's website that contain any notices, records, or documents that must be electronically provided.

2. A current copy of the following documents must be posted in digital format on the association's website:

a. The recorded declaration of condominium of each condominium operated by the association and each amendment to each declaration.

b. The recorded bylaws of the association and each amendment to the bylaws.

c. The articles of incorporation of the association, or other documents creating the association, and each amendment thereto. The copy posted pursuant to this sub-subparagraph must be a copy of the articles of incorporation filed with the Department of State.

d. The rules of the association.

e. A list of all executory contracts or documents to which the association is a party or under which the association or the unit owners have an obligation or responsibility, and a list of closed bids for materials, equipment, or services must be maintained on the website. Summaries of bids which exceed $500 must be maintained for at least a year. In lieu of summaries, complete copies may be posted.

f. The annual budget required by s. 718.112(2)(f) and any proposed budget to be considered at the annual meeting.

g. The financial report required by subsection (13) and any proposed financial report to be considered at a meeting plus monthly income and expense statements, if any.

h. The certification of each director required by s. 718.112(2)(d)4.b.

i. All contracts or transactions between the association and any director, officer, corporation, firm, or association that is not an affiliated condominium association or any other entity in which an association director is also a director or officer and financially interested.

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j. Any contract or document regarding a conflict of interest or possible conflict of interest as provided in ss. 468.436(2)(b)6 and 718.3027(3).

k. The notice of any unit owner meeting and the agenda for the meeting, as required by s. 718.112(2)(d)3, no later than 14 days before the meeting. The notice must be posted in plain view on the front page of the website, or on a separate subpage of the website labeled "Notices" which is conspicuously visible and linked from the front page. The association must also post on its website any document to be considered and voted on by the owners during the meeting or any document listed on the agenda at least 7 days before the meeting at which the document or the information within the document will be considered. Failure to post required information on the association's website will not invalidate any proper action or decision.

l. Notice of any board meeting, the agenda, and any other document required for the meeting as required by s. 718.112(2)(c), which must be posted no later than the date required for notice pursuant to s. 718.112(2)(c).

The association shall ensure that statutorily exempt records described in s. 718.112(2)(c) are not posted on the association's website. If protected information or information restricted from being accessible to unit owners is included in documents that are required to be posted on the association's website, the association shall ensure the information is redacted before posting the documents online. No association liability for inadvertent disclosures of confidential information.

The "Independent" Requirement

The website must be independent or wholly owned by the association. The legislature failed to define the term "independent". What does independent mean? Does it mean that the association has to have complete control over the website? If the association's property management company offers a website, will it qualify as independent? The property management company is an agent of the association and not truly independent from the association. As such, having the association's property management company host the website probably does not satisfy the independent requirement. However, the reality is that many management companies do host condominium association websites through their own systems. What happens if the contract between your association's management company and your association is terminated? How does the information on the website get transferred to a new website? What party owns the URL and the right to the website domain name? Whose information is it? All of these issues need to be addressed in your condominium association's property management contract if your association's property management company is currently hosting your association's website. If your association's website is hosted by your property management company, you need to start the dialogue now regarding a transition plan if the property management agreement is terminated and to determine what steps will be taken to ensure that your association's website complies with the "independent" requirement on January 1, 2019.

Other Issues to Address

There are a number of issues that need to be addressed and decisions implemented by associations that have to comply with this requirement by January 1, 2019, to include:

- Ensuring that it is clear that the association owns the data uploaded onto the association's website.
- Who is responsible for uploading the data?
- Who is responsible for identifying the documents that have to be uploaded to the association's website?

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- Original records (what happens to them).
- What company is going to be selected to host the website? [2]
- How will the data be organized on the website?
- Ensuring ownership of the domain name.
- What security measures will be in place to ensure the public does not have access?
- Who will have the authority to make changes to the website? Set up user names?
- What type of firewall will be used?
- Website architecture (e.g., how will the pages be set up and what type of drop down menus will be displayed.)
    - Choice of Platform, e.g. Word Press.
    - Choosing a website design.
- Choosing the website software – a choice that requires research.[3]
- Where is the information stored?
    - On the hosting company's server? In the cloud, i.e. document storage service?
    - If the information is stored on a server, is it backed up? How often? Who owns the server? How is the server maintained?
    - What security features are being used to secure the data against hackers?
    - What policies and procedures are in place to restore lost data from prior backups?
- What is the true cost?[4]
- Ensuring that none of the statutorily exempt records are posted on the website.
- Who is responsible for maintaining the data on the website? How often will new data be uploaded?

[2] There are many, many website hosting companies and options that will need to be considered. Here is a link to a website that posts information and ratings about association website hosting: www.webhosting10.com. The website contains many articles that address some of the practical issues raised herein as well.

[3] There are tailored website services available for community associations, e.g. www.hoasites.com, www.clubexpress.com and www.associationsonline.com. Note that this list is not exhaustive and by listing these examples the author of this handout is not making an endorsement of any one of these website software providers.

[4] Contracts for hosting websites are akin to property management contracts, i.e. there can be a base charge and then additional charges for services beyond the basic agreed upon services provided for in the base price per month.

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SB 398 – Estoppel Certificates – Website – July 1, 2017

The new estoppel requirements apply to condominiums, homeowners association and cooperatives.

S. 718.116(8) provides in part, "[e]ach association shall designate on its website a person or entity with a street or email address for receipt of a request for an estoppel certificate issues pursuant to this Section."

The same language was also incorporated into ss. 719.108(6) and 720.30851, Florida Statutes.

Unlike s. 718.111(12)(g), which only applies to a condominium association that manages 150 or more condominium units, the amendments to the estoppel requirements requires that all associations which, in fact, have a website (regardless of whether they are required to have a website), also designate on their website a person or entity with a street or email address for receipt of a request for an estoppel certification.

Effective Dates

The effective date for an association that manages 150 or more condominium units is January 1, 2019, which seems like a date far off into the future. It's not. The time is now for condominium associations covered by this new requirement to begin planning for compliance with this new website requirement.

The new estoppel certificate requirements relating to the above-referenced information went into effect on July 1, 2017.

NEW LAW REQUIRES HOMEOWNERS' ASSOCIATIONS' BOARD OF DIRECTORS TO CONSIDER FILING NOTICE OF PRESERVATION OF COVENANTS EACH YEAR

BY: CHRISTOPHER L. POPE, ESQ.

The Florida Marketable Record Title Act, or MRTA, is a law that was enacted by the Florida Legislature to eliminate ancient defects or stale claims against real property. However, one of the unintended consequences of this law is that it also extinguishes covenants, conditions, and restrictions of planned developments, including homeowners' associations in Florida. Therefore, property owners' or homeowners' association's covenants and restrictions will extinguish and no longer be effective after 30 years unless the governing documents are "legally preserved".

Over the years, many Boards have been surprised to find out that their covenants and restrictions expired and are generally unenforceable. They rightfully complained that there was no warning in the statutes governing homeowners' associations' (Chapter 720, Florida Statutes), giving them notice that this could happen to their community's governing documents. The Florida Legislature listened, and recently added a little known change to the statutes that highlights the issue of MRTA and requires an association's Board of Directors to consider whether to file a notice of preservation each year.

The new Section 720.303(2)(e), Florida Statutes, provides:

> (e) At the first board meeting, excluding the organizational meeting, which follows the annual meeting of the members, the board shall consider the
>
> desirability of filing notices to preserve the covenants or restrictions affecting the community or association from extinguishment under the Marketable Record Title Act, chapter 712, and to authorize and direct the appropriate officer to file notice in accordance with s. 720.3032.

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Accordingly, under the new statute, which became effective on October 1, 2018, the Board of Directors is now on notice that each year it must consider whether to file notices to preserve the governing documents from extinguishment under MRTA.

In addition, it should be noted that the Legislature revised Chapter 720 to streamline the preservation process in lieu of old methods and procedures under Chapter 712, Florida Statutes.

If any property owners' or homeowners' association is nearing 30 years in age, it is likely that its governing documents may soon expire. As such, the association would be well-served to seek the advice of counsel to ensure the documents are properly preserved in accordance with the new statutes.

For communities where the governing documents have already expired, all hope is not lost. There is a procedure in Chapter 720, Florida Statutes, to revitalize an expired set of covenants and restrictions. However, the revitalization process is more complicated than preservation and requires more time, expense, and a vote of a majority of the membership.

It should be noted that, as of October 1, 2018, the Legislature has also amended the statutes to provide that the revitalization of governing documents is now also available for commercial and volunteer associations.

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 Florida Bar Certified in Real Estate Law as well as Condominium and Planned Development Law and a Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Steven C. Hartsell (stevehartsell@paveselaw.com) is Florida Bar Certified in Condominium and Planned Development Law and a Partner in the Pavese Law Firm. Charles Mann (charlesmann@paveselaw.com) is Florida Bar Certified in Real Estate Law as well as Condominium and Planned Development Law and the managing partner in the Pavese Law Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm and also practices in Labor/Employment Law. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner in the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is Florida Bar Certified in Real Estate Law as well as Condominium and Planned Development Law and a Partner in the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner in the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is a Partner in the Pavese Law Firm. Matthew B. Roepstorff (matthewroepstorff@paveselaw.com) is an Associate in the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate in the Pavese Law Firm. Alexander J. Menendez (ajm@paveselaw.com) is an Associate in the Pavese Law Firm. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is Of Counsel in the Pavese Law Firm.

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