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PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

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A PRIMER FOR CONDUCTING COMMUNITY ASSOCIATION MEETINGS VIA REMOTE MEANS

BY: CHRISTOPHER J. SHIELDS, ESQ. & VANESSA FERNANDEZ, ESQ.

Many Associations are reaching out to our office on a daily basis to determine what to do about Board Meetings, Committee Meetings, and Membership Meetings in light of the coronavirus pandemic. Each Association's governing documents may provide particular parameters for Association Meetings, so the first step is to confirm the language of your Association's governing documents. If you have specific concerns about the language of your governing documents and the "location" required for particular kinds of meetings, consider reaching out to your Association's legal counsel for specific advice. In what follows, we will discuss how Associations can conduct meetings using videoconferencing platforms which allows the Association to continue to conduct business without the need for in-person meetings.

Section 617.0820(4) of the Florida Statutes allows Board to conduct meetings through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting and provides that directors participating in such a manner are deemed to be present "in person" at the meeting. Section 617.0721(3) of the Florida Statutes allows members and proxy holders who are not physically present at a meeting to participate and vote in the meeting by means of remote communication under certain conditions. Specifically, Section 617.0721(3) indicates 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." (emphasis added).

Keep in mind that the notice requirements for meetings under Chapter 718, Chapter 719, and Chapter 720 of the Florida Statutes must still be followed. Additionally, with respect to Board Meetings, although e-mail may be used as a means of communication, members of the Board may not cast a vote on an Association matter via e-mail. Although the statutes allow for different kinds of remote means, an Association will greatly benefit from choosing a single platform for remote participation going forward. When choosing a platform for remote participation, our office generally advises the use of videoconferencing platforms that allow the host of the meeting to mute participants during the meeting until it is a participant's turn to speak. This prevents the cacophony that often accompanies telephonic meetings where the host has to rely on individual participants to mute themselves. Remember that with many videoconferencing platforms, the participant does not actually have to join the call with video, but the platform will give the host a better handle over the progression of the meeting. Another thing to remember is that not all videoconferencing platforms are the same. Some of the free or low-cost platforms are limited in the number of participants or length of time for the meetings, so when the Association is making its choice, make sure it will be a good fit for the particular needs of the Association.

Once the Board of Directors decides on a platform to use for remote participation in Association meetings, the Board should set up instructions and guidelines for the meetings, either by resolution or by rule. For example, some Associations have requested (but not required) that members submit questions or comments on the specific agenda items prior to the meeting so that the Board can be better prepared for the discussion. Members must still be allowed to participate in the meeting itself, but this kind of request allows for guided discussion on the agenda items.

As a practical matter, in the case of a Membership Meeting voting and maintaining accurate voting records are serious concerns for Associations to be aware of. Our office strongly encourages the continued use of limited proxies for voting on agenda items which must be submitted to the Association prior to the meeting. Remember that the statutes have very specific requirements for electronic voting under Sections 718.128, 719.129, and 720.317 of the Florida Statutes. You should consult your Association's legal counsel before an election if there are concerns with proxies and electronic voting.

Below we have provided some basic considerations for Associations that want to conduct meetings via remote means:

1. Post the Notice and Agenda for the meeting as required by the governing documents with instructions for how to access the meeting remotely. The instructions should include information a member would need to access the meeting, such as a dial in number or meeting identification number. In our opinion, the Association should also include the password for the meeting in the instructions.

2. Make sure that there is someone standing by and available to take phone calls on the day of the meeting to guide members through the process of getting connected. Consider scheduling a test run for individuals with concerns before the day of the actual meeting.

3. Have the Secretary or other designee take accurate meeting minutes indicating who is speaking at any given point and what is being spoken (or typed into a chat feature) by that individual. Ask members to identify themselves when participating in the meeting.

4. Make sure that the meeting is password protected and that the participants in the meeting are authenticated. Some meeting platforms allow for registration which also adds a layer of security to the meeting. If your chosen platform has a waiting room feature, this is a great way to screen participants to make sure they are members of the Association. Require members to identify their Unit or Lot number or their names when they join the meeting so that participants can be screened by the host with more accuracy.

5. Make sure that members can access the meeting at any point during the meeting, in other words make sure the host refrains from "locking" a meeting since this will prevent participants that wish to join the meeting once it has already started.

There are many challenges Associations face when it comes to videoconferencing for Association meetings. However, the Association should welcome the opportunity to increase member participation via videoconferencing or other remote communication. Keep in mind that the information above is not exhaustive and each Association has unique circumstances that should guide the Board in deciding whether and how to conduct videoconferencing Association meetings in the near future. Our office is always available to discuss any questions or concerns you may have with your Association's upcoming meetings.

PROPER PAYMENTS: DON'T PAY TWICE FOR YOUR CONSTRUCTION PROJECT

BY: CHRISTOPHER L. POPE, ESQ.

We have seen numerous homeowners' and condominium associations that have had Claims of Lien filed by suppliers or subcontractors because they were not paid by the general contractor. The hard lessons being learned by these associations (and their managers) is that the lien waiver provided by a general contractor to induce payment from the association does not waive the lien rights of the subcontractors and suppliers that have properly preserved their lien rights by serving a Notice to Owner. As a result, some associations have been required to satisfy liens, incurring liability far in excess of the original contract price with the general contractor. This scenario is completely avoidable by associations if they make "proper payments," which limits the association's liability for all liens to the amount of the contract price.

The term "proper payments" means to make payments in accordance with the Florida Lien law (Chapter 713, Florida Statutes). The lien law is very complicated, but one of the most common mistakes is associations failing to cause "lienors" (e.g. sub-contractors or suppliers) that have properly served a Notice to Owner to be paid prior to making a payment to the general contractor (a valid Notice to Owner

is served by a sub-contractor or supplier within 45 days of furnishing work or materials to notify the owner that they are providing work on a project or deliver materials to the job site).

However, this common mistake can be easily remedied by having the association verify that the "lienors" have been paid by requiring the general contractor to provide lien waivers from each lienor as a condition of payment. For example, if an association has received 5 Notices to Owner from 5 different sub-contractors or suppliers, then the association should require at least 6 lien waivers in exchange for making payment to the contractor (1 from each sub-contractor or supplier that gave a Notice to Owner and 1 from the general contractor).

If the general contractor balks at this or gives an excuse such as "I need to get paid before I can pay the others" then that is a red flag and the association should immediately seek competent counsel, because it is improper to pay the general contractor first without ensuring the general contractor has first paid his sub-contractors and suppliers. In fact, in order to preserve liability protection, it is the reverse – the general contractor pays the sub-contractors and suppliers, provides a lien waiver for each of them as well as itself when asking for payment, and then pays itself last.

WHAT DOES THE LIMITED EXTENSIONS OF MORTGAGE FORECLOSURE AND EVICTION RELIEF MEAN FOR COMMUNITY ASSOCIATIONS?

BY: VANESSA FERNANDEZ, ESQ. & CHRISTOPHER J. SHIELDS, ESQ.

On July 29, 2020, Governor Ron DeSantis signed Executive Order 20-180 clarifying and extending the moratorium on single-family mortgage foreclosures and evictions of residential tenants adversely affected by the COVID-19 emergency. In previous versions, such as Executive Order 20-94, there was no real guidance on what kind of mortgage foreclosure causes of action were suspended and tolled, although the language surrounding the suspension and tolling of eviction causes of action specifically identified "residential" tenants and related solely to the non-payment of rent due to the COVID-19 emergency. The latest extension takes the relief efforts out to September 1, 2020.

The latest extension also defines the phrase "adversely affected by the COVID-19 emergency" as the phrase relates to both types of relief provided by the Order. For example, for the purposes of the extension of relief from foreclosures for single-family mortgagors, the phrase means "loss of employment, diminished wages or business income, or other monetary loss realized during the Florida State of Emergency directly impacting the ability of a single-family mortgagor to make mortgage payments." Similarly, as it relates to the extension of relief from evictions for residential tenants, the phrase means "loss of employment, diminished wages or business income, or other monetary loss realized during the Florida State of Emergency directly impacting the ability of a residential tenant to make rent payments." The language of the Order further clarifies, "Nothing in this Executive Order shall be construed to suspend or otherwise affect foreclosure proceedings unrelated to non-payment of mortgage," and "Nothing in this Executive Order shall be construed to suspend or otherwise affect eviction proceedings unrelated to non-payment of rent."

In an attempt to further clarify concerns from the public with previous versions of the Order, the latest version indicates, "Nothing in this Executive Order shall be construed as relieving an individual

from his or her obligation to make mortgage payments or rent payments. All payments, including tolled payments, are due when an individual is no longer adversely affected by the COVID-19 emergency." The relief provided by these Orders does not excuse mortgage payments or rent payments. Absent an agreement indicating otherwise, single-family mortgagors and residential tenants will still be liable for all tolled mortgage payments and rent payments.

So what do all of these Orders mean for community associations?

In sum, they do not prevent, nor do they prohibit, an association from continuing to collect assessments. This means associations may begin collection efforts when those assessments become delinquent. Associations may still file claims of lien and pursue lien foreclosures on unpaid accounts. The Orders do not prevent an association (or landlord) from pursuing the removal of a tenant for reasons other than the non-payment of rent. If there are tenants in a community committing persistent violations of the governing documents, and if the governing documents allow, the association may pursue the removal of those tenants since the matter would relate to violations of the governing documents and would not to the non-payment of rent resulting from the COVID-19 emergency. Community associations should consult with legal counsel prior to pursuing any collection efforts or any tenant removal/eviction efforts.

EMOTIONAL SUPPORT ANIMALS – SB 1084: NEW DOG, OLD TRICKS

BY: CHRISTOPHER J. SHIELDS, ESQ. & ALEXANDER J. MENENDEZ, ESQ.

To try and combat the rampant fraud surrounding an explosion of ESA requests, and to provide better guidance to housing providers, the Florida legislature enacted SB 1084 earlier this year. The Bill came into effect on July 1, 2020, and the Bill amends Florida's Fair Housing Act to specify who qualifies for an ESA accommodation. The Bill also creates stiffer penalties for anyone who falsely diagnoses a disability. However, despite the Legislature's best intentions, the Bill will likely do very little to improve the situation.

This is because State law cannot supplant or contradict Federal law and policies on this issue. The Federal law has not changed, and the Federal law remains the source of the problems with ESAs for community associations. State law can only create additional protections and rights for the disabled, and while much of the Bill appears to try and incorporate aspects of Federal guidance on ESAs, there remains many more aspects that may have inadvertently created additional rights for ESAs. For these reasons, we foresee the new Bill actually creating additional and potentially more dangerous misinterpretations of the law, which will only expose more community associations to potential liability for violating the FHA. Perhaps worst of all, the new Bill simply solidifies, and legitimizes, a very broken Federal regulatory scheme that many had been hoping would be scrapped all together.

Here is a breakdown of the major aspects of the Bill, along with our analysis:

Associations may Deny a Request for a Dangerous Animal

The Bill creates a new Section 760.27 of the Florida Statutes that specifies who qualifies for an ESA accommodation. In line with Federal guidance, Section 760.27(2)(a) provides that an association may deny an accommodation request if the particular animal poses a direct threat to the safety, health, or

property of others. However, only if the threat cannot be "reduced or eliminated" by another reasonable accommodation, such as use of a muzzle or a shorter leash – so this provision may end up being worthless in practice.

Guidelines for Establishing a Disability

Section 760.27(2)(b) provides four ways that a person can qualify for an ESA accommodation. The Statute also clarifies what constitutes acceptable medical documentation of a disability. The Statute provides that acceptable information from a heath care provider can come from a "telehealth provider," and the Statute simply requires that a healthcare provider have "personal knowledge" of a patient's disability and have treated the patient "on at least one occasion." These requirements are not much more than the kinds of buzz words that we see commonly used in mass-produced letters, and expressly endorsing letters from telehealth providers (which has always been considered acceptable under Federal law) will not help matters further.

Requests to Keep more than One ESA must be Justified

If someone requests to have more than one ESA, Section 760.27(2)(d) provides that an association can request that the person submit proof of the specific need for each animal.

Associations Cannot Ask about the Severity of a Disability

In line with Federal Guidance, Section 760.27(3) provides that an association cannot request information that discloses the diagnosis or severity of a person's disability or any medical records relating to the disability.

Liability for ESA

Section 760.27(4) provides that a person with a disability or a disability-related need for an accommodation is liable for any damage done to the premises or to another person on the premises by their ESA.

Criminal Sanctions for False or Fraudulent Documentation

The Bill creates a new Section 817.265 of the Florida Statutes that makes it a second degree misdemeanor for anyone to misrepresent themselves as having a disability, or to create or knowingly provide false information or written documentation for an ESA. The Statute also requires that anyone convicted of the crime perform 30 hours of community service for an organization that serves persons with disabilities or any other organization that a court determines is appropriate.

"Disability" vs a "Disability-Related Need"

In an interesting twist, new Section 760.27(2) provides that someone is entitled to an ESA accommodation if they are "disabled" ***or*** if they have a "disability-related need." The Federal law uses these terms as a filter so that someone is not entitled to an accommodation unless they are both disabled ***and*** there is a demonstrated need for an accommodation. By simply requiring a disability without a nexus

to a need, the new Statute arguably creates greater access to an ESA. We will have to see whether this new distinction is later clarified by the Florida Legislature. Until the matter is clarified, now more than ever, it is important to consult with association legal counsel to ensure that an ESA accommodation is not improperly denied based upon the new statutory standards.

Summary

In summary, we believe that SB 1084 will do little to help community associations keep out unwarranted ESAs. Instead, the Bill introduces a host of new provisions and modified standards that will lead many unwary associations into trouble. Now, more than ever, with arguably a new standard, it is imperative that legal counsel be involved when an association is confronted by a request for an ESA accommodation.

CHANGING TO REQUIREMENTS FOR 55+ HOUSING COMMUNITIES

BY: VANESSA FERNANDEZ, ESQ.

On June 30, 2020, Governor Ron DeSantis signed CS/HB 255 into law which, among other things, removes the registration requirement for 55 and over communities. Previously, §760.29(4)(e) of the Florida Statutes required facilities or communities claiming an exemption as "housing for older persons" under provisions of the Fair Housing Act to register with the Florida Commission on Human Relations (FCHR) and to renew registration documentation every two years. Effective July 1, 2020, communities claiming the exemption no longer have to register or renew registration documentation with the FCHR. Communities claiming the exemption will still have to meet all previously existing eligibility requirements including the requirement that 80 percent of the occupied units are occupied by at least one person 55 years of age or older. The community must also publish and adhere to policies and procedures that demonstrate the intent to provide housing for older persons and have age verification procedures in place that are kept up to date.

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