Sunshine Law Raises Questions

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By **Joe Adams**

jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

In the past thirty days, I have participated in three seminars aimed primarily at providing education for community association board members. A total of about 500 people attended the events, all of which were held in Fort Myers.

As a consequence of that experience, it remains clear to me that the most misunderstood (and most frequently violated) area of Florida's community association laws is the so-called "sunshine law."

Although Florida's Sunshine In Government Act does not apply to community associations, the statutes applicable to condominiums, cooperatives, and homeowners' associations each contain their own "sunshine" requirements. The law is the same for condominiums and co-ops, slightly different for homeowners' associations. Today's column is part one of a two-part primer for community association board members on the application of Florida's sunshine laws for associations.

All of the relevant laws define a "meeting" of the board as any gathering of a quorum of the board for the purpose of conducting association business. In almost every association, a quorum is defined as a majority of the board, so if there are five directors, three constitute a quorum. If there are seven directors, four would constitute a quorum, and so on.

A frequently misunderstood issue is what constitutes "conducting" association business. There are no reported Florida appellate court cases involving community associations. There are interpretations for condominiums by the state agency which regulates condos. As HOAs are not regulated, there are no administrative interpretations available for homeowners' associations.

Based upon the rulings of the condo agency, court cases that have arisen under sunshine laws for governmental entities, and the opinions of nearly every attorney I have ever spoken with about the topic, a "meeting" occurs when association business is even discussed, regardless of whether or not a vote is taken. Therefore, a "workshop" meeting would be subject to the "sunshine" requirements if it involves a quorum of the board, since business is being "conducted." Otherwise, associations could skirt the law under the auspices of "workshop" or "information-gathering" meetings, and rubber-stamp their decisions at the public meeting.

There are some substantial differences between the law for homeowners' associations and that for condominiums and cooperatives. Here's a look at the major issues in the sunshine law, and the difference between HOAs and condominiums (all references to condominium procedures apply to cooperatives as well):

Agendas: In condominiums, there must be a specific agenda posted for the board's meeting. Generic agenda designations such as "new business" are not sufficient. There is an exception for emergency situations, and a somewhat complicated procedure which must be followed in emergency cases. For HOAs, generic agendas are still acceptable, with the only exception being that board meetings where assessments will be considered must contain a specific disclosure to that effect.

Posting of Notices: Notice of condominium board meetings must be posted forty-eight hours in advance on the condominium property, in a conspicuous location as designated by board rule. Fourteen days notice (actual notice to the owners plus posted notice) is required for meetings regarding assessments, and board meetings where certain rules and regulations will be considered. For HOAs, the general forty-eight hour posting is sufficient. If the HOA does not have a location where notices can be posted, mailed notice is acceptable, and must be sent out seven days in

advance. For both condos and HOAs, the association may permit the posting of notice through a community television channel, if authorized by the bylaws.

Owners' Right to Speak: In condominiums, unit owners are conferred by law the right to address the board with respect to each designated agenda item. The board may adopt rules regarding the manner, frequency, and duration of unit owner statements, but the rule must be reasonable. Many associations adopt a "three minute per topic" limit, and require anyone wishing to speak to fill out a card before the start of the meeting. In HOAs, the laws does not confer a right to speak at board meetings, although the Governor's Task Force on Homeowners' Associations has recommended a change on this point.

Recording Meetings: In both condominiums and HOAs, association members have the right to record meetings, either through audio-tape or video means. Again, the board can adopt reasonable regulations regarding the set-up of the equipment, prohibitions against distracting conduct, and the like.

Next week we will wrap up this topic with a discussion of minute-keeping requirements, the application of the law to committees, exceptions to the general rules, and penalties for breaking the law. ⚖

No Quorum, No Action is Rule at Owner Meeting

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QUESTION: I live in a condominium community in which the board of directors did not record proposed amendments because no quorum was met at the unit owner meeting. Does this mean that the amendment is not effective? G.M. (via e-mail)

ANSWER: That is precisely what it means. If a quorum is not met, then no action may be taken at the meeting.

QUESTION: Can a Florida cooperative that is a "55 and over" community sell memberships or rent lots to prospective candidates who are less than 55 years of age (but older than forty) who plan to live in the unit? All park residents agree that we want to make sure that it continues to be a 55 and over community. We need to sell shares though, and we want to sell some to a candidate who is less than 55 but older than forty. Is this legal, and can they live in the park as long as eighty percent of the residents are over 55? V.G. (vie e-mail)

ANSWER: A 55 and over mobile home cooperative may legally sell units or rent lots to prospective candidates who are less than 55 years of age, assuming that your documents do not prohibit it, which would be a question for your Park's legal counsel. However, I believe that doing so, is highly inadvisable. If the community's dynamics change, and for some reason your number of units occupied by persons over 55 years of age drops below eighty percent, you will immediately lose your status as a 55 and over Park.

QUESTION: In June 2002, my husband and I bought a building lot in a deed-restricted community. We have not built on it yet, and we are trying to sell it. A few months ago, our realtor told us that if we did not start building on our lot within two years from the date of purchase, the developer could force us to sell it back to them at the price we paid when we initially purchased it. We do not want to do this as the lot has appreciated by fifty percent. I do not recall this being disclosed to me at the time of purchase, but the realtor faxed me a page from the homeowner's association's covenants and, sure enough, it is stated in this document. My question is, can this rule be enforced since it was not disclosed to us upon purchase of the lot? J.E. (via e-mail)

ANSWER: Many communities have a provision in their documents requiring purchasers to begin building within a certain period of time. I believe that this provision, if enforced by the homeowners' association, would be upheld as a reasonable and legal provision of your governing documents. With regard to your question as to whether the rule would be enforceable because it was not "disclosed," I believe that you may have a problem. If the rule is contained in the community's recorded governing documents, you are presumed to have read them, and are charged with what the law calls "constructive notice."

There may be a question whether the developer's option to repurchase is valid under Florida law. You should consult with a real estate attorney as

to whether the covenant to re-sell at the price you paid constitutes an unreasonable "restraint on alienation."

QUESTION: At my condo, a few residents and some board members want to construct a clubhouse, which most residents feel is unnecessary and too costly. Our documents require the board to get approval for any expenditures over $10,000.00. This will cost more than $10,000.00, but the board says that they can spend the $10,000.00 to begin, and then levy a special assessment on all owners for the remaining costs without first obtaining a majority vote. Is this allowed? B.H. (via e-mail)

ANSWER: Without reading the specifics of your governing documents, I cannot give you a concrete answer. However, it appears that what the board is trying to do is circumvent the governing documents' prohibition on expenditures of over $10,000.00 without unit owner approval. I do not believe that a board could circumvent this kind of rule by simply "spending in stages." Additionally, the construction of a clubhouse would be considered a "material alteration of or substantial addition to the common elements." As such, your governing documents probably provide for the procedure by which such a material alteration must be approved. If they do not, the Florida Condominium Act then provides that such alterations must be approved by seventy-five percent of the unit owners.

QUESTION: A quorum of the directors met to discuss landscaping and they did not post the meeting nor did they keep minutes. When I questioned them on it, they told me they did not have to because these meetings are called "review meetings." Is this correct? R.H. (via e-mail)

ANSWER: In my opinion, any time a quorum of the board of directors is together and they discuss association business, this is a "meeting" which must be noticed, and minutes must be taken.

QUESTION: I am a homeowner in what I believed until recently was a condo association, which should follow Statute 718. But, now we have a new manager that believes our master association is actually an HOA and should follow Florida Statute Chapter 720. We are a community built in eleven phases, therefore, we have eleven separate condo associations with one master association. What are we governed by? D.A. (via e-mail)

ANSWER: This question can easily be resolved by an attorney looking at your governing documents (the Florida Supreme Court has specifically admonished community association managers against giving legal advice). If all of the subassociations are condominium associations, then it is likely that the master association is also considered to be a condominium association. However, if there is one or more subassociations which are not condominiums, then the master association is probably considered to be a homeowner's association. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.