Alteration Rules Cause Controversy

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Today's column continues our review of issues tackled by condominium and homeowners' associations when updating the community's governing documents. Today's topic, one of the most controversial in association living, changes to the common property.

This is one area where the law applicable to condominiums and homeowners' associations is entirely different.

In most HOA's, the association holds title to common areas, such as roadways, lakes, clubhouses, tennis courts, swimming pools, and even golf courses. Although likely a topic for future legislative debate, the current law applicable to HOA's places no limit on a board's authority to improve or alter the common area. Rather, the sole source of authority granted to the board, and the limitations placed on that authority, are found in the governing documents, usually the declaration of covenants (sometimes called CC&R's, deed of restrictions, and the like).

Conversely, the authority of a condominium association to improve property is heavily regulated by state statute, specifically Section 718.113(2) of the Florida statute applicable to condominiums. That law says that there can be no material alteration of or substantial addition to common elements or association real property except as provided in the declaration of condominium. The law goes on to say that if the declaration of condominium is silent, seventy-five percent of the entire voting interests (there is usually one voting interest per unit) must approve the alteration or addition.

In my opinion, the declarations for both condominiums and HOA's should spell out a clear procedure for the alteration of or addition to common property. Since every community will have different relevant factors to consider (including the size of the community, the price point of the units, the nature and extent of common property, the age of the development, etc.), there is no one-size fits all clause that works in dealing with the issue of alterations and additions.

It is important to make sure that the board of directors is given the authority to maintain and repair the property, which is a different issue than the issue of alteration or additions, the latter concept being more geared toward improvements and "upgrades" of the property. A point of contention in alteration disputes often involves whether the board's action involves "maintenance," or is indeed an upgrade. This can become particularly controversial when an existing item (for example, window installations in a twenty year old high-rise building that are no longer available on the market) must be replaced.

I have found that most associations feel comfortable delegating a certain amount of leeway to the board for alterations and additions, but not a completely open checkbook. For example, a common clause found in many updated documents gives the board the authority to improve common property up to a specified dollar amount, or some percentage of the association's annual budget. For any planned project that would exceed that limit, a vote would have to be taken.

The law does not mandate what percentage vote is required for alterations or additions (except, as noted above, if condominium documents are silent a seventy-five percent threshold is implied by the law).

Most associations prefer a super-majority such as two-thirds or seventy-five percent. Some are comfortable with a majority.

Regardless of the voting threshold selected, I have found that most associations prefer to have voting based upon the number of owners who vote, rather than the entire membership. One of the most frustrating situations faced by many boards involves cases where the documents permit those who do not vote to essentially cast a negative vote.

There is a fine line between granting a board unfettered power (which can be abused) and requiring a popular vote for every issue that an association may face. The alteration issue is one of those issues where a balance can be struck by a clear set of governing documents. ⚖

Termination Clause Covers Redevelopment Projects

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QUESTION: Our condominium association may be offered a buy-out from a developer. I do not want to sell for any reason. Am I compelled to sell if the board or the majority agrees to sell at a set price? S.V. (via e-mail)

ANSWER: Your question addresses an issue that will be faced by Florida condo dwellers with increasing frequency. Many older condominium projects are built on highly desirable land (such as waterfront), which may no longer be the highest and best use of the property. When that fact is coupled with the cost needed to maintain an aging condominium structure, it is often a "win-win" situation for the property to be redeveloped.

However, in order to accomplish this objective, it is usually necessary to "terminate" the condominium, which means to end the condominium structure of ownership.

Termination is governed by the declaration of condominium, as originally recorded. For example, some declarations permit a condominium to be terminated by an eighty percent unit owner vote, plus the consent of certain lienholders, such as mortgagees. Other documents require unanimous approval of all unit owners. The termination clause of your condominium documents is what will answer the question.

Termination and redevelopment are becoming increasingly common on Florida's east coast, and the trend will no doubt find its way here as well. In most redevelopment cases I have heard of, the unit owners fetch a much better price for their unit than they could by simply selling it as an ongoing condo unit to a third party purchaser. Before you foreclose any of your options, you should certainly listen to the proposals and look at the dollars and cents.

QUESTION: I live in an older deed-restricted community. We have deed restrictions (covenants) which are recorded. There is an association which enforces the documents, but membership is voluntary. Are we subject to any "sunshine" laws? J.H. (via e-mail)

ANSWER: Probably not.

The only "sunshine" laws applicable to community associations are for condominiums (which you obviously are not involved with) and "homeowners' associations." Technically speaking, a "homeowner's association," in the legal sense, requires mandatory membership, which you have stated does not apply.

Therefore, the state's statutory "sunshine" provisions (requirements for posting notice of board meeting, member's right to attend, and the like) would not apply. However, many bylaws for non-mandatory associations also contain their own "sunshine" clauses, which may apply.

QUESTION: I would like to know if the board of our homeowner's association can conduct association business through e-mails. K.K. (via e-mail)

ANSWER: Your question addresses one of those issues where the law does not keep pace with technology. Obviously, electronic mail is an invaluable communication tool, and undoubtedly is here to stay.

I am aware of one condominium association which received a stiff fine from the Department of Business and Professional Regulation when the board regularly utilized e-mail polls as a substitute for open board meetings and the conduct of association business.

In the strictest legal sense, if Director A writes a letter to Directors B, C, D, and E, there is no requirement for "sunshine" in that communication (although the letter may be an "official record"), since no "meeting" occurs. If Director B then responds to Director A and also copies C, D, and E with the response, the same concept applies. Theoretically, e-mail is no different than letter-writing, but as a practical matter it can be nearly instantaneous.

While I do not discourage association boards from using e-mail as a method of keeping each other current, it certainly should not be used to avoid the conduct of business at open meetings, which is intended to permit homeowners to know what is going on and also have input on the issues facing the community.

Whether that fine line is crossed is probably a question of degree. This is a gray issue for the Florida legislature to tackle, and maybe that will happen some day.

QUESTION: There is a unit owner in our condominium who does not live in the unit. He allows his family members and guests to use the unit for vacation stays. Our documents clearly state that units cannot be leased for less than thirty days and that transient tenants are not permitted. There is a disagreement between our board and our property manager as to how the documents should be interpreted. Could you provide your opinion? R.K. (via e-mail)

ANSWER: Coming from a lawyer, I'm sure this sounds self-serving, but interpretation of legal documents is best left to lawyers, that is what they go to school for. Your property manager should not be interpreting documents, as that is the unauthorized practice of law, and violates Florida law.

Typically, permitting a guest to use one's home is not considered a "rental," transient or otherwise, unless something of value (like money) changes hands between the lessor (landlord) and lessee (tenant).

Some associations do address "guest usages," and this was in fact the featured topic in one of my recent column addressing possible document updates (see Guests Can Wear Out Welcome Fast, April 22, 2004, which is available on-line). Your board probably needs to look elsewhere than the rental restrictions, and consider whether regulation of guest usage is necessary. ⚖

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.

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