



Law Says Very Little About Association Board Decisions by E-mail

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Q: Please advise as to what decisions our association board members can make by e-mail.
C.M. (via e-mail)

A: Good question. There is no clear answer in the law.

Obviously, electronic mail (e-mail) has become a permanent part of our society's way of communicating with each other. Text messaging is not far behind, and videoconferencing is also coming more into vogue.

Unfortunately, the laws for community associations do not react well to cutting edge technologies. The only provisions regarding electronic communications currently found in the community association statutes provide that owners in condominium and homeowners' associations can waive the right to receive printed/mailed notice of certain association meetings, and instead consent to receive those meeting notices by e-mail. There is no provision in the law for the owner to interact back with the association through electronic media, such as electronic voting.

E-mails present a particularly tough question. Clearly, board members cannot "vote" by e-mail, voting is required to take place at a duly-noticed board meeting, open to observation by the owners

(with limited exceptions applicable to attorney-client privileged matters). I am aware of one condominium association board which received a stiff fine from the State of Florida a couple of years ago, for conducting all of their business by e-mail. The board apparently voted on everything by e-mail, and held a meeting once a year to ratify all of their decisions.

Very few boards actually "vote" by e-mail. The more problematic question is whether the debates which often take place among board member e-mail groups regarding issues that may come up for a future vote constitute a "gathering of a quorum of the board conducting business", which is how the law defines what an association "board meeting" is.

I am not aware of any court rulings or administrative agency decisions on the point. Most attorneys I have asked about the issue believe that debating board issues by e-mail does not violate the "sunshine law" applicable to associations, so long as the e-mail discussion does not occur in "real time" (such as a "chat room"). However most attorneys also opine that such e-mails should be retained as part of the association's "official records", and made available to owners upon request, unless subject to a legal privilege (such as the attorney-client privilege).

This is clearly an area where the Legislature should focus some attention.

Q: I have a three-part question that comes into play because of the current foreclosure activity happening here in Florida. First, when a mortgage holder acquires title to a condominium unit as part of a foreclosure proceeding, do they automatically become a member of the association? Second, are they liable for ongoing maintenance fees? Third, as the default owner, are they liable for the monies owed to the association by the former owner? **B.C. (via e-mail)**

A: When a mortgage holder (technically known in the law as a “mortgagee”) acquires title to a condominium unit through foreclosure of their mortgage lien, the mortgagee then becomes a “unit owner”, just like every other unit owner. The mortgagee becomes the owner on the date a “Certificate of Title” is issued by the County Clerk of Court after the foreclosure proceeding has been concluded. As of that date, the mortgagee becomes liable for all future assessments, has the right to vote, and basically takes on all of the rights and responsibilities of a condominium unit owner. As a practical matter, most mortgagees which foreclose on condominium units try to sell them as quickly as possible. After all, banks are in the business of lending money, not owning real estate.

With respect to past-due assessments, a foreclosing first mortgagee of a condominium unit is liable for six months of unpaid assessments or one percent of the original mortgage debt, whichever is less. The mortgagee must pay these sums within thirty days of taking title, or a lien can be filed against them. The first mortgagee’s preferential position (six months assessment/one percent of original mortgage debt limitation) only applies if the mortgagee named the association as a defendant in the lawsuit where the mortgage foreclosure took place. A second mortgagee is typically liable for all unpaid assessments.

The law is essentially the same for homeowners’ associations, with one significant difference. A

foreclosing lender in the HOA context, is liable for twelve months’ worth of unpaid assessments (as opposed to only six months in the condominium context) or one percent of the original mortgage debt, whichever is less.

Q: We live in a community that is governed by a homeowner’s association which is still under developer control. As seems to be happening everywhere, sales have come to a halt, although our developer is still technically “in business”, but sitting on a large tract of land slated for future development. What are the laws on our having the right to elect our own board of directors? **B.K. (via e-mail)**

A: Assuming that your community was created on or after October 1, 1995, the answer to your question lies in Section 720.307 of the Florida Statutes. You can find all of the Florida Statutes from many on-line sources, including Online Sunshine at www.leg.state.fl.us.

This law provides that members other than the developer are entitled to elect at least a majority of the board three months after ninety percent of the parcels in all phases of the community that will ultimately be operated by the association have been conveyed to members, unless a lower threshold is set forth in the governing documents (which is rarely the case).

This is one area where the HOA law is much more pro-developer, when compared to the condominium law. For condominiums, transition of control can be mandated three months after ninety percent of the planned units have been sold, or three years after fifty percent of the contemplated units have been sold. Unit owners in the condominium context are also entitled to transfer of control if a developer files bankruptcy, is put into receivership, or ceases selling units in the ordinary course of business. However, these consumer protections do not apply in the HOA context.

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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