



Owner Has Legal Right to Examine Association's Documents

Attorney-client privilege an important exception

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Q: I am becoming increasingly concerned with the financial well-being of my condominium association. We have a few owners who are delinquent in the payment of their assessments, and that is causing a strain on our budget. In addition, the board made some roof repairs over the past 6 months, and I understand additional roof repairs are planned. I made a request to look at the records of the association and was disappointed to be told that I would have to travel to the manager's office in Lee County when I live in Collier County. I was also told that the contract documents for the roof work are not available for my review because there is a possible lawsuit against that contractor for the work that was performed. Obviously, I am not happy with the response I received to my request to review records. Could you please tell me if I am being treated fairly and legally? **A.R.** (via e-mail)

A: As you may know, the Florida Condominium Act contains several provisions designed to establish the right of members to attend board meetings, to attend certain committee meetings, and to inspect and copy association official records. The Act defines the "official records" of the association very broadly. In fact, the definition includes any record not specifically

listed by the statute which is related to the operation of the association.

There are some very important exceptions to the members' rights to inspect these documents. It should be no surprise that the Act allows the association to separate, and hold as confidential, records protected by the lawyer-client privilege and any record protected by the work-product privilege, which typically includes records prepared by the association attorney or by a director or manager at the attorney's express direction in anticipation of litigation. Also exempt from inspection are documents which reflect mental impressions or litigation strategies and theories that are prepared in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

But as to the records that are available for inspection, the Act contains provisions that are helpful to the members. Specifically, the association is required to provide the opportunity to inspect records within 5 working days after a written request is received by the board or its designee. Failure to provide the records for inspection within 10 working days creates a rebuttable presumption that the association

willfully failed to comply with the requirement and the member may claim actual damages or minimum damages of \$50.00 per day for up to 10 days. Moreover, a member who is not given the opportunity to inspect records under the statute has the right to file a complaint with the Division of Condominium, Timeshares, and Mobile Homes and you can expect that the Division will take action to compel the association to comply with the statute.

The portion of the statute governing the logistics of where the records must be made available was amended effective October 1, 2008. Section 718.111(12)(b) now provides that records must be made available to unit owners within the county in which the condominium property is located or, if outside the county, then within 45 miles of the condominium. The new statute also provides that, should a requesting member agree, the association can comply with the records inspection request by allowing the member to review records on a computer screen and print copies upon request. Obviously, these new statutory provisions are designed to accommodate associations that do not have an office on the condominium property, and which might contract with a management company that is headquartered some distance away. The Legislature obviously believes that 45 miles is an appropriate distance to require members to travel to inspect records.

Finally, with respect to the association holding back certain records related to the contract dispute, it seems clear to me from your question that the initial contract itself is certainly an official record that is available for review, even though that contract is a subject of a lawsuit. However, any written communication between the board and the attorney with respect to the dispute and any engineering reports or other information that was generated by the board or the association's attorney to develop strategy or create a case on behalf of the association, is certainly confidential and is not required to be disclosed until after the dispute has been resolved.

Q: Our HOA has an Architectural Review Committee ("ARC") consisting of five members. Our HOA Board has five Directors, two of whom are permanent members of the ARC, not including our President. The By-Laws of the HOA state that the President "is an ex officio member" of all standing committees of the HOA. All ARC meetings are properly noticed per the sunshine laws. Assuming all ARC members attend a properly noticed meeting and the President attends, either in his ex officio Committee member role or in his role as an Owner, does this constitute an illegal "gathering" of the Board per the sunshine statutes? If yes, what impact can this have on the ARC matters discussed at this meeting and the subsequent Board approval of such actions? Do the President and the remaining two Board members, although owners, need to refrain from attending these ARC meetings owing to their fiduciary obligation to operate the Association in accordance with Florida law? **G.B. (via e-mail)**

A: I believe it would be helpful to provide a general overview of the law regarding meeting notices for homeowners' associations. Section 720.303(2), Florida Statutes, states that a meeting of the Board occurs whenever a quorum of the Board "gathers to conduct association business." This statute further requires that all Board meetings "must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency." It should be noted that not less than fourteen days written notice is required in certain circumstances, as well. The requirement for posting notice also applies to ARC meetings.

If the President attends and participates as a committee member in an ARC meeting, along with the two other Board members who also serve on the ARC, a quorum of the Board has been established. Therefore, since "Association business" is being conducted at the ARC meeting under this scenario, a Board meeting has occurred, which must be properly noticed. This can become a tricky situation because if the ARC votes on a certain item, and all three Board members (who also serve on the ARC) also vote on the matter, an

argument can be made that the actual Board, not just the ARC, has voted on and addressed the subject issue.

To avoid any complications that may arise going forward, the Association should amend the bylaws to omit the provision that the President serves as a member on every committee.

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.