

COMMUNITY ASSOCIATION LAW ALERT

6/29/17

2017 Community Association Legislation

The Florida Legislature has approved several bills affecting condominium, cooperative, and homeowners' associations. House Bill 1237 and Senate Bill 1520 only amend Chapter 718, Florida Statutes (the Condominium Act). Senate Bill 398 amends the Condominium Act, Chapter 719, Florida Statutes (the Cooperative Act), and Chapter 720, Florida Statutes (the Homeowners' Association Act). House Bill 377 does not amend any of the association statutes, but does have an impact on condominium, cooperative and homeowners' associations. **All four bills become effective July 1, 2017.**

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HOUSE BILL 1237

House Bill 1237 revises several provisions of the Condominium Act as outlined below.

Criminal Penalties

Section 718.111(1)(a), Florida Statutes previously prohibited officers, directors, and managers from accepting any thing or service of value for which consideration has not been provided for his or her own benefit or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association. House Bill 1237 clarifies that kickbacks are similarly prohibited. Acceptance of any prohibited thing, service or kickback subjects the officer, director, or manager to civil penalties and, if applicable, criminal penalties.

House Bill 1237 also imposes criminal penalties for the following acts of the officers or directors of the Association:

- Forgery of a ballot envelope or voting certificate
- Theft or embezzlement of funds of a condominium association

- Destruction of or the refusal to allow inspection or copying of an official record that is accessible to unit owners within the time periods required by general law in furtherance of any crime

An officer or director charged by information or indictment with any of these crimes must be removed from office, and if a criminal charge is pending, may not be appointed or elected as an officer or director of any association and may not have access to the official records of any association, except pursuant to a court order. A seat vacated by removal following a charge of criminal conduct is to be filled by election for the remainder of the term, unless the charges are resolved without a finding of guilt, at which time the officer or director is to be reinstated.

Conflicts of Interest

House Bill 1237 amends the Condominium Act to prohibit an association from hiring an attorney who represents the association's management company. The association is also prohibited from employing or contracting with a service provider that is owned or operated by a Board member or with any person who has a financial relationship with a board member or officer, or a relative of a board member or officer, unless said individual owns less than 1% of the equity shares.

As it relates to conflicts of interest, 'relative' means a relative within the third degree of consanguinity by blood or marriage.

The bill also regulates conflicts of interests for directors and officers of a condominium association that is not a timeshare and the relatives of such directors and officers and provides that they must disclose to the board any activity that may reasonably be construed as a conflict of interest. A rebuttable presumption of a conflict of interests exists if any of the following occurs without prior notice:

- A director or an officer or a relative of said person enters into a contract for goods or services with the association
- A director or an officer or a relative of said person holds an interest in a business entity that conducts business with the association or proposes to enter into a contract or other transaction with the association

If a director, officer, or relative of said person proposes to engage in an activity that is a conflict of interest, the proposed activity must be listed on, and all contracts and transactional documents related to the proposed activity must be attached to, the meeting agenda. If the Board votes against the proposed activity, the director, officer, or relative of said person must notify the Board in writing of his or her intention to either not pursue the proposed activity or to withdraw from office. If an officer or director violates this section, he or she shall be deemed removed from office.

A director, officer, or relative of said person is authorized to make a presentation to the board regarding any proposed activity that might be considered a conflict of interest. After the presentation, the director, officer, or relative of said person must leave the meeting during the discussion of, and the vote on, the proposed activity. A director or an officer who is party to, or has an interest in, the activity must recuse himself or herself from the vote.

A contract entered between a director, officer, or relative of said person and the association, which is not a timeshare condominium association, that has not been properly disclosed as a conflict of interest or potential conflict of interest is voidable and terminates upon the filing of a written notice terminating the contract which contains the consent of at least 20% of the association's voting interests.

Purchase of Units in Foreclosure/Cancellation of Certain Contracts

House Bill 1237 prohibits a board member, manager, management company, party contracting to provide maintenance or management services to a post-turnover association, or officer or board member of such party from purchasing a unit at a foreclosure sale following the foreclosure of the association's lien on the unit or taking title in lieu of foreclosure, unless the condominium is a timeshare condominium.

If 50% or more of the units in the condominium are owned by a party contracting to provide maintenance or management services to a post-turnover association or an officer or board member of such party, the contract with the party or an officer or board member of the party may be cancelled by a majority vote of the unit owners other than the contracting party or an officer or board member of the party, unless the condominium is a timeshare condominium.

Official Records

House Bill 1237 amends the Condominium Act to include bids for materials, equipment, or services under the definition of official records. The Condominium Act was also amended to provide a renter of a unit with the right to inspect and copy the association's bylaws and rules.

Website Requirement

House Bill 1237 amends the Condominium Act to require condominium associations with 150 or more units (which do not manage timeshare units) to establish a website and post digital copies of the current versions of the following documents on its website by July 1, 2018, making sure to redact any information protected by the statute prior to posting:

- Recorded Declaration of Condominium and all amendments for each condominium operated by the association
- Recorded Bylaws and all amendments
- Articles of Incorporation, as filed with the Secretary of State, or other documents creating the association and all amendments
- Rules and Regulations
- Any management agreement, lease or other contract to which the association is a party or the unit owners have an obligation or responsibility
- Summaries of bids for material, equipment or services (need only be kept on the website for one year)
- Annual budget and any proposed budget to be considered at the annual meeting
- Financial report and any proposed financial report to be considered at a meeting
- Certification of each director
- Contracts or transactions between the association and any director, officer, corporation, firm, or association that is not an affiliated condominium association, or any other entity in which an association director is also a director or officer and financially interested
- Contract or document regarding a conflict of interest or possible conflict of interest
- Notice and agenda of any unit owner meeting (both of which must be posted in plain view on the front page of the website or on a separate subpage labeled "Notices" with a link conspicuously visible on the front page no later than 14 days before the meeting)
- Any document to be considered and voted on by the owners during the meeting or any document listed on the agenda (which must be posted at least 7 days before the meeting)
- Notice and agenda of any board meeting together with any document required for the meeting (all of which must be posted no later than the date required by the statute)

The association's website must be:

- Wholly owned and operated by the association or operated by a third-party provider with whom the association owns, leases, rents, or otherwise obtains the right to operate a web page, subpage, web portal, or collection of subpages or web portals

- Accessible through the Internet and contain a protected electronic location that is inaccessible to the general public and accessible only to unit owners and employees of the association by username and password to be provided by the association upon written request of a unit owner

Financial Reporting

House Bill 1237 amends the Condominium Act to require the association to mail to each unit owner the most recent financial report, or notice that a copy of such report will be delivered to the unit owner, within 5 business days after receipt of a written request from the unit owner. If the association fails to do this, a unit owner may provide written notice to the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") of such failure. If it determines the association did fail to provide the required notice, the Division shall provide a notice to the association requiring it to send a copy of the report to the requesting owner and the Division within 5 business days of receipt of the notice. If the association fails to comply with this notice, the association may not waive the financial reporting requirement.

The bill also removes the less than 50 unit exemption relative to financial reporting requirements. As such, financial reporting requirements are now based solely on total annual revenues, regardless of the number of units.

It also requires condominium associations to provide an annual report to the Department of Business and Professional Regulation containing the names of all of the financial institutions with which it maintains accounts.

Debit Cards

House Bill 1237 provides that an association and its officers, directors, employees and agents may not use a debit card issued in the name of the association, or billed directly to the association, for the payment of any association expense. Violation of this provision may be prosecuted as credit card fraud.

Term Limits

House Bill 1237 clarifies that Board members may serve 2-year terms if permitted by the bylaws or articles, but imposes term limits by stating that a Board member may not service more than four consecutive 2-year terms, unless approved by an affirmative vote of two-thirds of the total voting interests of the association or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. It does not, however, address whether term limits apply where only 1-year terms are served.

Recall

House Bill 1237 deletes the authority of the Board to reject a recall following approval by the members at a meeting or by written agreement. The Board is still required to hold a meeting within 5 full business days after the adjournment of the member meeting or receipt of the agreement in writing, as applicable, but the statute no longer addresses what the Board is to do at that meeting. Presumably, the Directors are to certify the recall even though they are given no other choice. To further complicate matters, the statute continues to reference the failure of the Board to file a petition, though it is not given the option to do so.

Those that are recalled are recalled effective immediately and shall turn over to the Board any and all records and property of the association in their possession within 10 (as opposed to 5, as the law previously provided) full business days after the vote.

Arbitration

House Bill 1237 amends the provisions relative to nonbinding arbitration to provide that the Division may, rather than shall, employ full-time arbitrators. It further specifies the certification requirements for attorneys not employed by the division that will act as arbitrators.

Once it is determined that a dispute exists, the assigned or contracted attorney is required to conduct a hearing within 30 days after being assigned or entering into a contract with the Division unless the petition is withdrawn or a continuance granted for good cause shown. A decision must then be rendered within 30 days after the hearing. Failure to timely render a decision may result in cancellation of the arbitrator's certification.

Voting Rights

House Bill 1237 provides that an association may only suspend a unit owner's voting rights if he or she is more than \$1000 and more than 90 days delinquent. Proof of the amount owed must be provided to the unit owner 30 days before the suspension takes effect.

It also provides that a received may not exercise voting rights of any unit owner whose unit is placed in receivership for the benefit of the association.

SENATE BILL 1520 – Termination

Senate Bill 1520 revises the optional termination section of the Condominium Act to add additional information that must be included in the optional termination plan presented to the members for consideration. The plan must include the factual circumstances that show that it complies with the requirements of and supports the public policies expressed in the statute.

An optional termination plan must be approved by at least 80% of the total voting interests and not rejected by more than 5% (as opposed to 10%, as the law previously provided) of the total voting interests. If 5% or more of the total voting interests reject the plan, a new termination plan may not be considered for 24 months from the date of rejection.

After receiving the requisite membership approval, the optional termination plan must be approved by the Division. The Division review of the termination plan is to be completed and notice of procedural deficiencies or acceptance of the filing shall be provided within 45 days of receipt of the filing. If notice is not given within that time, there is a presumption of acceptance. With the Division's acceptance, the termination may proceed as set forth in the statute.

It further provides that the termination provisions of the Condominium Act apply to all condominiums in the state in existence on or after July 1, 2007.

SENATE BILL 398 – Estoppel Certificates

Senate Bill 398 revises the requirements pertaining to estoppel certificates and places a cap on the fee that may be charged for preparation of same in the Condominium Act, Cooperative Act, and Homeowners' Association Act.

The association must provide an estoppel certificate, which may be prepared by any Board member, authorized agent, or authorized representative of the association, by hand delivery, regular mail or e-mail within 10 business days (as opposed to 15 days, as the law previously provided) from receipt of a written or electronic request from a unit owner or its designee or a unit mortgagee or its designee.

The estoppel certificate must contain the specific information now required by the statute and will be effective for 30 days from the date delivered to the requesting party by hand delivery or e-mail and 35 days from the date delivered to the requesting party by regular mail. The estoppel certificate can be revised during the effective period, but the effective period then begins to run anew once the revised certificate is delivered.

The association is required to designate on its website a person or entity with a street or e-mail address for receipt of estoppel certificate requests.

The association, or authorized agent, may charge a reasonable fee for preparation of the certificate, provided that it is delivered within the 10 business day period outlined above, as follows:

- A fee not to exceed \$250, if no delinquent amounts are owed to the association
- An additional \$100 rush fee can be charged if estoppel certificate is requested as expedited and delivered within 3 business days
- An additional \$150 fee can be charged if delinquent amounts are owed to the association
- For simultaneous estoppel certificates issued to a single owner of multiple units, the total fee that can be charged may not exceed, in the aggregate:
 - For 25 or fewer units, \$750
 - For 26 to 50 units, \$1,000
 - For 51 to 100 units, \$1,500
 - For more than 100 units, \$2,500

If an estoppel certificate is not delivered within the 10-day period, the association cannot charge an estoppel fee.

HOUSE BILL 377 – Statute of Limitations Applicable to Construction Defect Claims

House Bill 377 amends Section 95.11(3)(c), Florida Statutes to clarify the statute of limitations on construction defect claims. The statute continues to provide that the time in which to bring a construction defect claim is four years from the later of the date of (1) actual possession by the owner, (2) issuance of the certificate of occupancy, (3) abandonment of construction if not completed, or (4) completion or termination of the contract at issue. A definition of “completion of contract” has been added; it is now defined to mean the date of final performance of the contracted service or the date that final payment becomes due without regard to the date final payment is made.

For additional information regarding this alert, please contact one of the listed Roetzel attorneys.

Contacts

[Ashley D. Lupo](#)
alupo@ralaw.com
239.649.2736

[Sean M. Ellis](#)
sellis@ralaw.com
239.338.4245

[Jennifer A. Nichols](#)
jnichols@ralaw.com
239.649.2724

[Sarah E. Spector](#)
sspector@ralaw.com
239.338.4213

Media Contact

Ashley McCool
amccool@ralaw.com