

apm NEWS

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RULES ON CONDUCTING BOARD MEETINGS FOR COMMUNITY ASSOCIATIONS

By John R. Math, LCAM

Chapter 720 defines a Board of Directors Meeting whenever there is a quorum of the Board to conduct Association business. All Board of Directors Meetings must be open to all members of the Association. The only time that the members would not be allowed to attend and participate in a Board of Directors Meeting would be at a meeting of the Board and the Association's attorney. In order to exclude any members from attending the meeting, the statute goes on to explain that the meeting would have to be about any proposed or pending litigation. Also, the discussions in the meeting would have to be governed by the attorney-client-privilege. In other words, if there were to be a meeting that the attorney would attend to discuss proposed amendments or rules enforcement with the Board, the members would be able to attend this meeting.

The Association may adopt reasonable written rules which would govern the right of members to speak and participate at these meetings. These rules may expand the members' frequency, duration and manner of any member statements. Meetings of committees also follow these rules. There is also one other time when the members may be excluded from attending a meeting and that would be when the Board of Directors or Committee was meeting with the attorney and they were discussing personnel matters.

Notices of all meetings must be posted in a conspicuous place in the community at least 48 hours in advance of the meeting. The statute also allows mailing this notice and/or delivery to each member at least 7 days in advance of the meeting. The statute allows for alternative means of notice through newsletters, having a provision of regularly scheduled Board meetings and

broadcast of the notice through a closed-circuit cable television system serving the Association. There are more rules regarding the transmission through the television system. We will not go into detail in this article regarding these additional rules.

Board meetings where an assessment or a special assessment is to be considered must be posted or noticed in the same manner as above, not less than 14 days before the meeting. The notice must state that an assessment will be considered and it must also state the nature of the assessment.

Directors may not vote by proxy or by secret ballot at Board of Directors Meetings, except when they are voting on the election of officers. The same holds true for any meetings of any committees.

In addition to the above, if 20% of the total voting interests of the Association petitions the

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Board to address an item of business, the Board must take up this petitioned item at its next Board meeting and be placed on the Agenda. The Board may hold a special meeting to discuss the petition item. In any case, this item must be discussed at either type of meeting at least 60 days after being presented with the petition. The Board must give at least 14 days notice of the meeting. Each member who attends this meeting shall have the right to speak for at least 3 minutes on any petitioned item. The member may be required to sign a sign-up sheet, if provided, or submit a written request to speak at the meeting. The Board is not obligated to take any action on the petitioned item.

A word about Minutes. All meetings of the members of the Association and of the Board of Directors must be maintained in written form or in any other form that can be converted into written form within a reasonable time. All votes and any abstentions for each Board member must be recorded in the Minutes.

These rules are a minimum requirement, as your documents may have more stringent rules to follow. Let these rules be a guide for your community Association to follow. If you conduct Board of Directors and committee meetings in this manner, your owners will be encouraged to participate and become active in your community.

Ask The Attorney

By Edward Dicker, Esq.

Q. We have owners who attend our Board Meetings and then they try to participate in the meeting, as if they were on the Board. How can we stop this from happening without in the future?

A. Under the Condominium Act and the Homeowners Association Act, owners have the right not only to attend a Board of Directors Meeting, but to participate as well. However, the Board may adopt reasonable rules determining when an owner may speak and the amount of time an owner may speak (not less than three minutes). Under the Homeowners Association Act an owner may be permitted to speak only if an item has been placed on the agenda by petition. If an owner refuses to comply with these restrictions, the owner should be warned, and if he continues not to follow the rules, he may be directed to leave the meeting. If an owner becomes particularly disruptive and refuses to leave the meeting, the Board may choose to adjourn the meeting or even contact the police to remove the person.

Q. We have a President who has replaced our management company with his bookkeeping company, the janitorial contract with his wife and the landscaper with his brother-in-law. Can he do this without a vote of the Board and shouldn't there be bids and specifications for everyone to follow?

A. The decision of whether to change a management company, bookkeeping company, or janitorial company, should be a Board decision, and not the decision of the President alone. The fact that the President has a relationship with particular companies does not make hiring the company inappropriate, as long as the President discloses his relationship with the company, and as long as the proposed contract is fair and reasonable. Under the Condominium Act and the Homeowners Association Act, competitive bids should be obtained in certain circumstances. Under the Homeowners Association Act, competitive bids may be required for a

contract which exceeds ten percent of the Annual Budget (See 720.3055, Florida Statutes). Under the Condominium Act, competitive bids may be required for a contract which exceeds five percent of the Annual Budget.

Q. We are starting the budget process and I think there should be provisions for hurricane preparation and repairs. Should this be in the operating portion of the budget or in reserves?

A. The Board would have the authority to provide for such an expense, either in the operating portion of the budget, or may create a reserve account for this purpose. However, in a Condominium, if it is a reserve account, the owners may choose to reduce or waive the amount funded in the reserve account.

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REMINDERS!

1. Remember, there are new financial reporting requirements now for Chapter 720 Clients. Put in Budget.
2. Any waiver of reserves for Chapter 718, 719 and 720 association members must be voted on and waived prior to the beginning of the new fiscal year.
3. If the documents so require, the amount of Directors for the coming year must be determined according to the by-laws prior to the first notice of Annual Meeting.
4. Any proposed amendments must be drafted, reviewed and proposed by the Board of Directors, prior to the Members Meeting or Annual Meeting.

RULE AND COVENANT ENFORCEMENT

By Edward Dicker, Esq.

Every community association is governed by a Declaration, Articles of Incorporation and By-Laws. In addition, many Boards have the authority to promulgate rules. All Associations are also bound by the Not For Profit Corporations Act (Chapter 617, Florida Statutes). In addition, Condominiums are bound by the Condominium Act (Chapter 718, Florida Statutes), and Homeowner Associations are bound by the Homeowners Association Act (Chapter 720, Florida Statutes).

All directors have the fiduciary duty to enforce the restrictions and rules contained in the governing documents. If a board of directors prefers not to enforce a particular restriction, the Board should seek to amend that particular restriction, rather than choosing not to enforce it.

Generally speaking, if a restriction is clearly worded, and not inconsistent with the law, the Association should be successful in enforcing the restriction. There are only a few limited defenses an owner may raise. These defenses include selective enforcement, waiver, laches and estoppel.

Prior to pursuing any formal legal action, it is generally recommended that an Association pursue certain informal action in an effort to resolve the violation. This action may include sending one or more letters from the Association and/or attempting to speak to the owner (either by telephone or in person). These efforts may prove successful and, if so, will avoid having to take further action. However, if an owner continues to violate the restriction, the Association may pursue further legal action.

Certain communities have the authority under the governing documents to enter onto the owner's property to remove the violation. Such a provision may include authority to maintain the property when an owner fails to do so. Generally, these provisions require that the owner be provided notice before having the work performed. Communities with this authority often take advantage of this option, particularly when the cost involved is not significant.

In order to pursue legal action, the Condominium Act requires "Mandatory Non-Binding Arbitration" for many disputes. This procedure requires that a petition to be filed by the Association (or an owner) with the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes. Upon the filing of a Petition, the Division will appoint an Arbitrator. The Arbitrator will generally require the parties to mediate the dispute. This involves the parties meeting with a mediator, at which time the mediator will attempt to assist the parties in achieving a resolution. The mediator does not decide the case on the merits, but rather, attempts to assist the parties in reaching a settlement. If the case is resolved at mediation, the matter is concluded. If the case is not resolved and the parties agree to continue the arbitration, the Arbitrator will render a decision on the merits of the case. Either party then has the right to appeal the Arbitrator's decision by filing a lawsuit in Court.

With respect to Homeowner Associations, in order to pursue

legal action, a Petition for Mediation is required to be filed with the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes. Upon doing so, a mediator is appointed in an attempt to resolve the case, similar to the procedure for Condominiums. If the case is not resolved at mediation, either party has the right to file a lawsuit. If a lawsuit is filed (by either a Condominium or Homeowners Association), generally, the Association seeks an injunction. An injunction is an order from the Court directing the owner to stop the violation. Generally, the Association also seeks to recover its attorney fees and costs incurred in pursuing the lawsuit.

Another remedy for Associations to consider is levying a fine against the owner. The law does not provide Condominium or Homeowner Associations with the authority to levy fines. Such authority must be contained in the governing documents for an Association. However, if an Association has the authority, both the Condominium and Homeowners Association Acts provide certain procedural requirements, including notice of a hearing and the requirement that a fine be levied by a committee and not the Board of Directors.

If a fine is levied, the owner is notified and payment of the fine may be demanded. If the fine is not paid, the question arises as to how the Association may pursue the collection of the fine. Condominiums do not have the authority to file a lien for the collection of fines. However, until a recent change in the law, Homeowner Associations could file a lien for non-payment of fines, provided the documents for the Association provided such authority. This meant that if the fine was not paid, the Association could file a lien, and ultimately foreclose the lien. In addition, since the fine was deemed an assessment, the Association could also seek to recover its attorney fees and costs. Having this effective procedure available appeared to cause many owners to pay the fine. However, primarily due to the adverse publicity surrounding the Jupiter flagpole case, the Homeowners Association Act now prohibits filing a lien when a fine is not paid. Consequently, if the governing documents provide authority, a Homeowners Association may levy a fine, however, if an owner refuses to pay the fine, it may not file a lien. The Association (both Condominium and Homeowner Associations) may seek the collection of the fine by filing a lawsuit. Although the Association is entitled to seek the attorney fees and costs in such a lawsuit, many Associations are reluctant to file a lawsuit to recover a fine.

With the change in the law, some Homeowner Associations have considered another alternative in lieu of fining. Although the law prohibits treating a fine as an assessment, with proper authority in the governing documents, the Association could assess an owner for the attorney fees incurred by the Association in enforcing a restriction against an owner. Generally, most governing documents, as originally drafted by the Developer, provide that the Association may recover attorney fees if it is the prevailing party in a lawsuit. By way of an amendment, an Association can provide authority that

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requires an owner who is in violation to pay the Association's attorney fees, regardless of whether a lawsuit is filed (this would include the attorney fees for the attorney's letter, etc.). The amendment may also state that if the attorney fees are not paid, the attorney fees shall be deemed as an assessment, and collectible in the same manner as an assessment. With this authority, the Association could advise an owner who is in violation that if the violation is not resolved, the Association will refer this matter to the Association attorney, at which time the owner will become responsible for the attorneys fees incurred by the Association. The owner may also be notified that if the attorney fees are not paid, they shall be collected as an assessment. Perhaps upon being advised of the financial consequences, an owner will resolve the violation at that time. However, if an owner refuses to do so, the Association then has the authority to demand the attorney fees incurred, commencing with the initial letter sent by the attorney to the owner. As with collecting delinquent assessments from an owner, many owners pay the delinquent assessment upon receiving the initial letter from the Association's attorney. For those owners who continue the violation, the Association has the ability to pursue the collection of attorney fees as an assessment.

Many communities with the authority to assess for attorney fees have generally found it helpful in resolving violations at an earlier stage. Again, it is necessary to have the specific authority in the governing documents, which require an owner to pay for the attorney fees incurred, and further, that the attorney fees may be collected as an assessment against the owner.

Associated Property Management of the Palm Beaches, Inc., is a seventeen-year-old full-service association management firm. APM serves more than 125 associations in Palm Beach County. If you have any questions or comments, you may contact us at 1928 Lake Worth Road, Lake Worth, Florida 33461. Please call us at 561-588-7210, or you may email us at assocpropmgt@bellsouth.net

USEFUL WEBSITES FOR YOUR ASSOCIATION

Associated Property Management
561-588-7210 or www.assocpropmgt.com

Florida Department of State
904-487-6000 or www.sunbiz.org

South Florida Water Management District
561-686-8800 or www.sfwmd.gov/index

Palm Beach County Property Appraiser
561-355-3230 or www.pbcgov.com/papa/

Florida Division of Emergency Management
850-413-9900 or www.floridadisaster.org

Palm Beach County Div. of Emergency Mgt.
561-712-6400 or www.co.palm-beach.fl.us/eoc