BACKERREPORT©

Special Edition – Summer 2011

On June 21, 2011, Florida Governor Rick Scott signed HB1195 into law. The law becomes effective on July 1, 2011 and includes changes to laws that impact condominiums, homeowners associations, cooperatives and time share condominiums. This Special Edition of *BackerReport* will highlight the changes that affect condominiums and homeowners associations. This newsletter should not be construed as legal advice; it is simply a summary of the new laws and a discussion of the potential effect of the laws on community associations. Ultimately, the meaning and effect of the changes may be construed by Florida courts. If your community has a specific issue of concern that may be impacted by the changes in the law, you should consult with an experienced community association lawyer.

Florida Fire Prevention Code

The law was amended to include cooperatives and other multifamily residential buildings. Under the amended law, a condominium, cooperative or multifamily residential building that has less than four stories in height and has an exterior corridor providing a means of egress is exempt from installing a manual fire alarm system as required by Section 9.6 of the most recent edition of the Life Safety Code adopted in the Florida Prevention Code.

Condominium Associations

Official Records

Section 718.111 (12) was amended to include facsimile numbers along with electronic mailing addresses of those owners who consent to receiving notice by electronic transmission. The law provides that the fax numbers and email addresses are not to be made accessible to the other unit owners if consent to receive notice by electronic transmission is not provided. Even though this appears to set yet another trap for unwary associations who do not have sufficient structure or supervision to control what materials may be disclosed to unit owners and what may not, the statute states that the association is not liable for "inadvertent" disclosure of the email addresses and fax numbers. If an association does not create some protocol for protecting this information, a court may find it difficult to conclude that disclosure was inadvertent. The prudent association will make sure that there is some security in place to protect unit owner information that is not subject to other unit owners' inspection rights.

Non-Disclosure of Records - Attorney-Client Privilege

The new statute clarifies and expands the right of associations to withhold records which are protected by the attorney-client privilege. Any record that is prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy or legal theory of the attorney or the association which was prepared exclusively for civil or criminal litigation or adversarial administrative proceedings or which was prepared in anticipation of such litigation or proceedings need not be disclosed until the conclusion of the litigation or proceedings. Prior to this amendment, there was language that required that the anticipated litigation of proceedings be "imminent." That requirement was removed from the amended statute.

Non-Disclosure of Records - Owners' Personal Information

Among the records that associations may not disclose to other owners are social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, emergency contact information, any addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person. Excluded from the disclosure prohibition are the person's name, unit designation, mailing address and property address. The amended statute adds the following to the information which *may* be disclosed: any address, e-mail address or facsimile number provided to the association to fulfill the association's notice requirements.

In 2010, when the legislature expanded the non-disclosure law, many communities which had traditionally provided owner directories to all owners that included information which was not permitted to be disclosed found themselves in a quandary. There was nothing in the law which allowed owners to waive the non-disclosure law or otherwise give permission to the associations to include their information in the directories. Many communities abandoned the directories entirely or took a risk by asking owners for permission. The new law now permits owners to consent in writing to the disclosure of protected information. The statute provides that the association is not liable for the inadvertent disclosure of protected information if the information is contained in an official record of the association *and* is voluntarily provided by an owner and *not* requested by the association. If you are scratching your head at this point, you are not alone. The wording of the statute seems to allow owners to consent in writing to the disclosure of protected information, but only provides the association from immunity from liability for disclosing the information if it was not requested by the association.

The new law begs the questions: How is the association supposed to get the owners' consent if it doesn't ask? If the association asks for consent and an owner provides consent, does the association lose its immunity? If there is only immunity for inadvertent disclosure of information that the association has in its records that it had not asked for, how is an association that wants to preserve its immunity supposed to get the owners' email addresses and fax numbers without asking? The unfortunate quirky language of this amendment may either be fixed in another legislative session or construed by a court at some point.

Open Board Meetings

Many informed readers of *BackerReport* are aware that Board meetings are required to be open to all members. The law has been amended to expand instances when the Board may choose to meet privately without allowing owners to attend. Meetings of the Board held for the purpose of discussing personnel matters may now be held without permitting owners to attend.

Election of Directors

The provisions of 718.112 concerning elections where tweaked to fix some awkward sentence structure, but little of substance changed. It is still not necessary to conduct an election if there are no more candidates than there are vacancies. The definition of "candidate" was clarified to mean an eligible person who provides the required timely written notice of intent to be a candidate. In other words, an owner cannot wait until after the deadline to decide to run when he discovers that there will otherwise not be an election. The statute clarified that the terms of all directors expire at the annual meeting unless there are staggered terms. Also, a glitch in the existing statute was also fixed to clarify that directors may stand for reelection unless *prohibited* by the bylaws. Previously, it stated that directors may run for reelection unless "otherwise *permitted*" by the Bylaws. Even though the prior law made no sense, the new law creates yet another question. There are a series of opinions from the Division of Condominiums that state that term limits are not valid, so, the addition of language that seems to authorize bylaw limitations on the ability of a director to seek reelection is quite curious.

The statute was also clarified to provide that, if the number of available open seats exceeds the number of candidates, unless the bylaws provide otherwise, any remaining vacancies shall be filled by the vote of the majority of directors that make up the newly constituted board even if the directors constitute less than a quorum or there is only one director.

Ineligible Candidates

Since the Act was previously amended to disqualify those owners who are more than 90 days delinquent in the payment of any fee, fine or special or regular assessment, controversy arose when the delinquent owner submitted his name as a candidate. Most had concluded that the law did not preclude the delinquent owner's candidacy, but, if he was still delinquent on the day of

the election, he could not be elected. The amendment to the law changes that. Now, the statute provides that eligibility is determined at the time of the deadline for submitting a notice of intent to run. If an owner is more than 90 days delinquent on the deadline for declaring one's intent to run, he may not be listed on the ballot and may not serve on the board.

Director Certification

Within 90 days of being elected or appointed to a condominium board, each new director must certify in writing that he or she has read the governing documents and current written policies and must certify that he or she will work to uphold the documents and policies to the best of his or her ability and will faithfully discharge his or her fiduciary responsibility to the association members. In lieu of the written certificate, within 90 days of being elected or appointed, a newly appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered b a division-approved condominium educator within one year before or 90 days after the election or appointment. Once a director has complied with one of these certification requirements, he need not submit another as long as he is serving on the board without interruption.

Hurricane Protection

Yet again, the legislature has toyed with the language of the Condominium Act that authorizes associations to impose hurricane protection on their unit owners. In this author's opinion, they still have not gotten it right. This time, the legislature expanded the kind of protection the associations may install to include impact glass or other code-compliant windows with the approval of a majority of the voting interests. A vote of the owners is not needed if the maintenance, repair and replacement of "hurricane shutters, impact glass or other code-compliant windows" are the responsibility of the association pursuant to the declaration. Note, the statute doesn't say the hurricane protection may be installed simply because the association has the maintenance and replacement obligation for *windows* alone even though, presumably, those, too, were code-compliant when they were installed. Before the current amendment, the language of the statute seemed to preclude an association from installing impact glass if shutters had been previously installed at some time in the past. Now, the statute has been amended to allow an association to install impact glass or other code-compliant windows with the approval of a majority of the voting interests even if other forms of hurricane protection had been previously installed.

Lien Priorities

Some condominiums are located in communities where there are one or more master associations which also collect maintenance assessments from the unit owners. In situations where a unit owner has become delinquent and of the associations in the community acquires title to the unit through foreclosure or otherwise, disputes arose about whether that association is obligated to pay all of the delinquent assessments that had been owed by the previous owner. Such controversies were not easily resolved given existing laws concerning liability for unpaid assessments. Until now, there was nothing in the law that settled competing interests among associations in a single community. In a stated attempt to "clarify existing law," Section 718.116 was amended to provide that a condominium association that takes title to a unit is not liable to other associations (whether condo or hoa) for unpaid assessments, attorney fees, late fees, costs or interest that came due prior to the association taking title if the other association "holds a superior lien on the unit."

Rent Payments from Tenants of Delinquent Owners

In 2010, the legislature created a new statute that authorized associations to make demand for rent from tenants of those owners who were delinquent in the payment of their assessments. The language of the statute strongly suggested that associations were only able to demand that tenants pay that portion of the rent to cover assessments that came due following the mailing of the notice to the tenant. Maintenance assessments that had come due before the notice was mailed could not be paid from the rent. The legislature amended the law to provide that, from the date of the notice to the tenant forward, the entire rental payment must be paid to the association until all monetary obligations of the owner related to the property have been paid in full to the association. A new form was created that must be mailed or hand delivered to the tenant (with a copy to the owner) making demand for the rent.

Termination of Condominium & Bulk Assignements

There were substantial changes to Section 718.117 concerning the termination of condominiums under various circumstances (such as major damage from casualties like fire or storms) and to Section 718.703 concerning parties who acquire many units in a condominium. The details of both of these sections are complicated and are not relevant to the day to day operation of most condominiums. If your condominium may be terminated or someone acquires more than seven units in your condominium, the assistance of experienced legal counsel will be needed to explain the association's rights.

Suspension of Voting Rights

Section 718.303 was amended to clarify the effect of an association's decision to suspend a delinquent owner's right to vote. An association may suspend an owner's voting rights if the owner is delinquent in the payment of any monetary obligation due the association which is more than 90 days delinquent. The new amendment states that a voting interest or consent right that is suspended may not be counted toward the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election or the number of voting interests required to approve an action provided for in the statute or in the governing documents. There is no requirement that an owner be provided with the kind of notice and hearing required for fines, but any such suspension must be approved at a properly noticed board meeting and the owner must be notified of the suspension by mail or hand delivery.

Homeowners Associations (Chapter 720)

Right to Attend Meetings

Lot owners have the right to attend all Board meetings. The new changes to the law now provide that the owners who attend the meetings must be permitted to speak at the meetings with reference to all "designated items." Previously, owners who attended the meetings were only required to be allowed to speak on items that the owners had petitioned to be included on the agenda.

Official Records Inspection Rights – Personnel Matters

One of the exceptions to the rule that owners are permitted to inspect and copy all official records relates to personnel records of association employees; those records are not available for inspection and copying. The new law clarifies the rule by stating that "personnel records" does not include written employment agreements with an association employee or budgetary or financial records that indicate the compensation paid to an association employee; those records must be made available for inspection and copying.

Non-Disclosure of Records - Owners' Personal Information

Among the records that associations may not disclose to other owners are social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, emergency contact information, any addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person. Excluded from the disclosure prohibition are the person's name, unit designation, mailing address and property address.

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Suspension of Voting Rights

Section 720.305 was amended to clarify the effect of an association's decision to suspend a delinquent owner's right to vote. An association may suspend an owner's voting rights if the owner is delinquent in the payment of any monetary obligation due the association which is more than 90 days delinquent. The new amendment states that a voting interest or consent right that is suspended may not be counted toward the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election or the number of voting interests required to approve an action provided for in the statute or in the governing documents. There is no requirement that an owner be provided with the kind of notice and hearing required for fines, but any such suspension must be approved at a properly noticed board meeting and the owner must be notified of the suspension by mail or hand delivery.

Elections

A new paragraph was added to Section 720.306 which makes a person who is delinquent in the payment of any fee, fine or other monetary obligation to the association for more than 90 days ineligible for board membership. A person who has been convicted of a felony is not eligible for board membership until his civil rights have been restored for at least 5 years as of the date he seeks election to the board.

Lien Priorities

Some homeowners association communities are located in master communities where there are various other associations who collect maintenance assessments from the lot owners. In situations where a unit owner has become delinquent and of the associations in the community acquires title to the unit through foreclosure or otherwise, disputes arose about whether that association is obligated to pay all of the delinquent assessments that had been owed by the previous owner. Such controversies were not easily resolved given existing laws concerning liability for unpaid assessments. Until now, there was nothing in the law that settled competing interests among associations in a single community. In a stated attempt to "clarify existing law," Section 720.3085 was amended to provide that a condominium association that takes title to a unit is not liable to other associations (whether condo or hoa) for unpaid assessments, attorney fees, late fees, costs or interest that came due prior to the association taking title if the other association "holds a superior lien on the unit."

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Bulk Internet as a Common Expense

Reflecting Americans' growing dependence upon the Internet and various online services, Section 720.309 was amended to authorize homeowners associations to include the cost of providing bulk Internet service as a common expense. If the association's governing documents do not provide the authority for such services (and most older communities were created before anyone ever thought of the Internet), the association may still contract for bulk service, but the owners have cancellation rights if they timely do so as provided in the statute.