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AN OVERVIEW OF RECENT AMENDMENTS TO FLORIDA LAWS AFFECTING CONDOMINIUMS AND HOMEOWNERS ASSOCIATIONS AND WHAT YOU NEED TO KNOW

BY: CHRISTOPHER J. SHIELDS, ESQ.

"No man's life, liberty, or property are safe while the legislature is in session" is a quote attributed to both Mark Twain and Gideon J. Tucker. That statement is perhaps more appropriate today as community associations are forced to navigate their way and otherwise comply with an onslaught of new laws. HB 841 consists of 72 pages of text and takes effect on July 1, 2018. Below is an overview of these amendments.

I. Amendments Affecting Condominiums on July 1, 2018.

A. Official Records and Record-keeping. F.S. 718.111(12).

1. While prior law only required minutes to be kept for seven (7) years, effective July 1, 2018, minutes of all meetings of the Association, the Board of Directors and the Unit Owners, must be permanently kept from the inception of the Association. Query: How is a condominium association supposed to comply with the new law that requires minutes to be kept in perpetuity from inception of the association if the prior board previously destroyed or no longer kept minutes more than seven (7) years ago?

2. Electronic records relating to voting by unit owners will now be required to be maintained for one year from the date of the meeting, election or vote.

3. The period upon which the condominium association must respond to written records requests is extended from five (5) business days to ten (10) business days.

B. Websites. F.S. 718.111(12).

1. Under the new law, the date that condominium associations are required to post some of its official records on a website has been extended to January 1, 2019. The previous deadline was July 1, 2018.

2. More importantly, the requirement to have a website will now only apply to a condominium association that manages **a** condominium with 150 or more condominium units. The prior law which was enacted in 2017, and that was scheduled to take effect on July 1, 2018 imposed the website requirement upon condominium associations that operated more than 150 condominium units. That law ensnared multi-condominium associations that operated several condominiums as long as the total number of condominium units operated by the multi-condominium association was more than 150 units. Now only condominium associations which manage **a**

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single condominium containing or consisting of 150 or more units is required to have a website and post and otherwise maintain on its website certain official records on its website.

Stay tuned to our next community law newsletter later this summer where we expound on the other changes to the law regarding websites which has been pushed back and now will take effect on January 1, 2019.

C. Financial Reporting. F.S. 718.111(13).

This amendment simply clarifies that if the State of Florida finds that a condominium association has failed to provide a unit owner with a financial report, the association may not waive the financial reporting requirements for the year in which the owner's request was made and for the following fiscal year.

D. Meeting Notices. F.S. 718.112(2).

1. In what could best be described as simply a semantic change to the pre-existing law, the new law provides that the notice of any meeting in which regular or special assessments are to be considered must specifically state that assessments will be considered and provide the estimated cost and description of the purposes of such assessments.

2. In addition, the new law will require condominium meeting notices to be posted on condominium property, not association property. Unfortunately, this change conveniently assumes that each condominium association operates only one condominium and completely ignores the fact that many condominium associations have been merged into one multi-condominium association where one condominium association operates and administers several distinct but neighboring condominiums. And, of course, the problem is exacerbated if the entire condominium consists of the footprint of the building itself and all the remaining land is common area owned by the master, neighborhood or recreation association. So where does one post the notice, if there is no mailroom, no elevator and no land outside the footprint of the condominium building to post the notice? It would not surprise me if the Florida legislature proposes a new bill to fix this glitch next year. So stay tuned...

3. Effective July 1, 2018, the condominium association may, by rule, adopt a procedure for conspicuously posting notices and the agenda on its website. However, doing so does not negate or otherwise relieve a condominium association from physically posting notices on condominium property.

4. Finally, the new law does contain a worthwhile change in that for those unit owners who consent to receive notice by email, the responsibility to remove or bypass filters that block mass emails is placed squarely on the unit owner who consented to receive notice(s) via email. This change makes perfect sense.

E. Term Limits. F.S. 718.112(2)(d)2.

1. Florida Statute 718.112(2)(d)2 has been amended to provide that board members may serve terms longer than one year if permitted by the Bylaws or the Articles of Incorporation.

2. If only the legislature could have stopped there. But, unfortunately it did not. The legislature decided to compound the mistake it made in 2017 by taking another stab at trying to impose term limits. Last year the legislature changed the law to forbid board members from serving more than four consecutive two year terms unless approved by two-thirds of the entire voting interests. Effective July 1, 2018 the new law will now prohibit any board member from serving more than eight (8) consecutive years unless approved by two-thirds of all votes cast in the election. Why the legislature decided to attempt to impose term limits either last year or this year is a source of consternation but in any event, the legislature entirely mucked up the process to opt out from this term limit restriction. Instead of simply allowing condominium associations to opt-out simply by setting a voting threshold that could simply be understood and followed, the legislature now requires a vote of two-thirds of all votes cast in the election. Practically speaking, it remains to be seen how and when this vote would occur since the

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vote is not based upon 2/3rds of the total voting interests in the association but rather based upon 2/3rds of all votes actually cast in the election. So that means that persons who reached their eight years of consecutive service could still be perhaps contingently eligible to run for the board and be elected if they:

a. are so elected and,

b. 2/3rds of those who actually voted at the election, approve the candidate's eligibility to be placed on the ballot in the first place.

This confusion could have all simply been avoided if the legislature had simply not ventured into this area and/or if the legislature felt a need to impose term limits, it could have simply allowed associations to opt-out from this restriction by 2/3rds vote of the entire membership.

3. Finally, the new law will not impose the 8 consecutive year term limit in cases where there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. So in all cases, even if a board member has already served eight (8) consecutive years, they should be permitted and encouraged to timely send in their notice of intent to run since if the number of other candidates who have timely provided their notice of intention to run does not equal or exceed the number of vacancies, they are still entitled to serve. Finally, as before, there is a serious question whether the new law has any impact on those who are currently serving consecutive year terms now. As a general rule, new legislation only applies prospectively and cannot be applied retroactively if it adversely affects pre-existing rights of parties. So it remains to be seen whether the law will be applied to and will effect board members who are already serving consecutive terms or those who have already reached eight consecutive years or whether the new law will only be triggered and take effect eight (8) years after its effective date of July 1, 2018. Don't turn that dial and stay tuned.....

F. Condominium Recalls

1. Last year the Florida legislature eviscerated the recall statute with a precision of an axe leaving more questions than answers. This year the Florida legislature has attempted to fix the errors that it alone caused last year.

As before, the board is required to hold a board meeting within five (5) business days after the adjournment of a unit owner recall meeting or within five (5) full business days after it has been served with a written recall agreement. The board members shall be considered recalled effective immediately upon the conclusion of the board meeting provided the recall is "facially valid". Note: the legislature uses the term "facially valid" but has failed to provide a definition or any examples as to what they mean by the term "facially valid".

If the board determines the recall was not facially valid then, the unit owner may then file a recall arbitration petition with the State challenging the board's determination.

In addition, if the board did, in fact, certify the recall, then a board member who has been recalled may file a recall arbitration petition challenging the board's determination that the recall was facially valid.

If the arbitrator determines the recall was invalid, the petitioning board member is reinstated and the board member is entitled to recover reasonable attorney's fees and costs. But if the recalled board member challenges the recall and does not prevail in his/her recall arbitration petition, the arbitrator "may" award reasonable attorney's fees and costs to the association, if the arbitrator finds the recall board member's petition frivolous.

G. Material Alterations and Substantial Additions.

In what could best be described as wreaking havoc needlessly, the Florida legislature tweaked F.S. 718.113(2) by requiring approval "before material alterations or substantial additions are commenced." Prior approval was commonly understood by anyone who had ever dealt with this statute. However, the fact that the

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legislature has now specifically mandated that any approval must have been voted upon and approved before the alteration or addition is commenced implies that if a unit owner asserted that any alteration or an addition is required a vote of the membership and challenged the association for making the unauthorized alteration or addition, the association would not be able to obtain a vote of the membership to ratify after the fact the action taken. This flies in the face of the common law defense of ratification and would seemingly prevent an association from seeking and obtaining membership consent after the fact to ratify board action that arguably exceeded their authority. This additional language is seemingly innocuous but, unfortunately, has profound legal consequences. For instance, assume the board erects an equipment storage shed or expands a parking area, a pool deck or replaces concrete surface with decorative pavers. If the change was later found to be material or substantial and membership vote was not held to approve the change prior to the alteration or addition being made, the association would seemingly be precluded from obtaining the requisite vote after the fact. That conceivably would mean that alterations or additions would have to be removed and the property restored to its prior condition. This could not be a good result for anyone.

H. Conflicts Amongst and Between the Association and any Board of Director - Conflicts in Interest.

1. For those members who remember the Florida legislative's 2017 foray into this field, the Florida legislature attempted to clarify what it intended when it enacted F.S. 718.3026(3) and F.S. 718.3027(2).

2. Florida Statute 718.3026(3) has been deleted. Florida Statute 718.3027(2) has been amended to provide that any contract between the association and any board member must:

a. comply with all requirements set fourth in Chapter 617, F.S. and all disclosures so required must be in written minutes of the meeting;

b. receive approval by at least 2/3rds of all other board members;

c. be disclosed to the unit owners at the next membership meeting at which time the unit owners by a majority vote of those members present may vote to cancel the agreement; and

d. if contract is cancelled at such unit owner meeting, the association shall not be liable for any termination fee or any other form of penalty for cancelling the agreement.

I. Fining and Suspension of Use Rights.

1. Florida Statute 718.303(3) has been amended once again to specify:

a. that the fining or suspension committee is required to "approve" the fine or suspension by a majority vote of the committee in order for the fine or suspension to be imposed;

b. payment is due five (5) days after the date of the committee meeting where the fine was approved by the committee; and

c. the association is required to provide written notice of the fine or suspension by mail to the owner and if applicable to the tenant or guest occupying the unit.

II. Changes to Chapter 720 Re: Residential Homeowners' Associations. Effective July 1, 2018.

A. Board Member Communication and Voting.

Florida Statute 720.303(2) has been amended to simply mirror a provision previously added to the Florida Condominium Act. Simply stated, this new provision acknowledges and expressly permits board members

to use email as a means of communication but nothing will allow board members to vote on matters outside of a properly noticed board meeting.

B. Fines and Suspension of Use Rights.

1. In a valiant attempt to mirror that which is required in a condominium setting, Florida Statute Section 720.305(2) has been amended to simply clarify that the board of directors is the party which levies the fine or suspension but that it may not be imposed unless the fining committee provides for a hearing and the committee by a majority vote approves the fine or suspension. As before, if the committee does not approve the fine or suspension that the board has levied, then it cannot be imposed. So, simply providing an opportunity for a hearing is not sufficient. The committee must conduct a hearing and approve the fine or suspension in order for it to be imposed. So as we have always advised our clients in the past, the hearing is not optional.

2. As with the same change also made to Florida Statute Section 718.303(3) if the committee approves the fine, the fine is due five (5) days after the date of the committee meeting.

C. Amendments.

Interestingly enough, Florida Statutes Chapter 720 has never contained any specific requirements as to how amendments could be proposed. Effective July 1, 2018, Florida Statute Section 720.306(1)(e) has been added to essentially require proposed amendments to indicate added language by underlining same and language to be deleted as being stricken through.

D. Elections and Board Vacancies.

As before, contrary to the condominium statute which strictly forbids nominations from the floor, candidates are allowed to nominate themselves at the meeting where the election is to be held, provided however, if the election process allows candidates to be nominated in advance of the meeting, the association is not required to allow nominations at the meeting. Effective July 1, 2018, if an election is not required because either the number of candidates either equals or is less than the number of vacancies, and if the nominations from the floor are not required because the election process or the HOA bylaws provided for and allowed nominations in advance of the election, those qualified candidates who previously nominated themselves in advance of the meeting automatically take their seats on the board on the date of the annual meeting and regardless whether a quorum was attained at the annual meeting.

E. Accepting Partial Payments.

Florida Statutes Section 720.3085 has been amended to clarify that notwithstanding any restrictive endorsement on any check or payment presented by the delinquent unit owner such as "payment in full" etc. the association may accept the partial payment and apply it towards interest, late fees, costs, and the delinquent principal notwithstanding the restrictive endorsement on the check or other writing presented with the payment.

LEGISLATIVE CHANGES TO FLORIDA'S COOPERATIVE STATUTE – EFFECTIVE JULY 1, 2018

BY: CHRISTINA HARRIS SCHWINN, ESQ.

This past legislative session the Florida Legislature passed a number of amendments to Florida's Cooperative Statute (Chapter 719) to include:

§ 719.104 Official Records.

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- A member's email address becomes an official record if the member consents to receive official notices via email. The signed consent form becomes an official record of the association.

- All accounting records must be maintained indefinitely.

§ 719.106(1) Bylaws.

- Co-owners may not serve together simultaneously on the board in a residential cooperative with 10 or more units unless they own two or more units.

- Board members may communicate via email, but they may not vote via email.

- Meeting notices that notify members that the board will consider levying assessments must include the estimated amount and purpose in the notice.

- For cooperatives with websites, the board may establish a rule that provides a method for posting meeting notices and agendas on the cooperative's website. The notice and agenda must be posted for the minimum period of time as required for other notices. As to members who consented to receive official notices electronically, the association may send them a hyperlink to the website rather than sending the notice attached to an email.
- A member who consents to receive official notices electronically is responsible for ensuring that the owner's email filters do not block receipt of the association's notices.

- A director who is more than 90 days past due on any monetary obligation owed the association is deemed to have abandoned the board seat and/or office.

§ 719.303 Obligations of Owners.

- Any fine approved by the appropriate committee is payable within 5 days from the date it is approved by the committee.

THE PROPERTY APPRAISER'S DATABASE AND MAILING ADDRESSES – WHAT DO THEY HAVE IN COMMON?

BY: CHRISTINA HARRIS SCHWINN, ESQ.

New Section 720.306(1)(g) was added to Florida's Homeowners Association Statute effective July 1, 2018. This new section provides as follows:

> A notice required under this section must be mailed or delivered to the address identified as the parcel owner's mailing address on the property appraiser's website for the county in which the parcel is located, or electronically transmitted in a manner authorized by the association if the parcel owner has consented, in writing, to receive notice by electronic transmission.

What does this mean for property managers and self-managed associations? Put simply, it means that before the association sends out official notices to members that the member's mailing address needs to be cross referenced with the county property appraiser's office where the community is located. If an HOA member has consented to receive official notices via email, then there is no requirement to cross check a member's mailing address.

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This new statutory section shifts the burden from the member to the association to confirm a member's mailing address. As a result of this change, it would be wise to encourage members to consent to receiving official notices electronically.

Important Note: This new requirement does not yet apply to condominiums or cooperatives.

STATE CHANGES BARBECUE GRILL RULES ON CONDOMINIUM LANAIS AND BALCONIES

BY: CHRISTOPHER J. SHIELDS, ESQ.

Effective January 1, 2018, the Florida Fire Prevention Code now permits use of certain electric grills on condominium lanais and balconies. The law still prohibits using fire, gas, propane or wood burning hibachis or grills on any balcony or lanai, under any overhang portion or within ten (10) feet of any structure, other than in one and two family dwellings.

However, effective January 1, 2018, electronic portable and table top grills are permitted so long as they do not exceed 200 square inches of cooking surface. Of course, many condominium associations still wish to forbid cooking on lanais for reasons such as concerns regarding smells and odors associated with cooking and those rules and restrictions are still enforceable unless, of course, the association wishes to change its rules to allow use of electronic grills in lanai areas.

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Visit us on the web at www.PaveseLaw.com.

Fort Myers
1833 Hendry Street
Fort Myers, FL 33901
Phone: (239) 334-2195

Cape Coral
4632 Vincennes Blvd.
Suite 101
Cape Coral, FL 33904
Phone: (239) 542-3148

West Palm Beach
4524 Gun Club Rd.
Suite 203
West Palm Beach, FL 33415
Phone: (561) 471-1366

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