Kaye Bender Rembaum
Attorneys At Law

Legislative Guide

-2018-

1200 Park Central Blvd South,
Pompano Beach, FL. 33064
Tel: 954.928.0680

9121 North Military Trail, Ste. 200
Palm Beach Gardens, FL. 33410
Tel: 561.241.4462

KBRLegal.com

2018 Legislative Guide for Community Associations

Kaye Bender Rembaum
Attorneys At Law

1. Condominium Associations

House Bill 841 containing this year's community association legislation ("HB 841" or "Bill") has made its way through the 2018 Florida legislative session and was signed into law by Governor Scott on March 23, 2018. As the Bill is now signed into law, it became effective on July 1, 2018.

Condominium Official Record-keeping:

Certain official records must be permanently maintained from the inception of the association, including the following:

(i) a copy of the plans, permits, warranties, and other items provided by the developer;

(ii) a copy of the recorded declaration of condominium and all amendments thereto

(iii) a copy of the recorded bylaws and all amendments thereto;

(iv) a certified copy of the articles of incorporation and all amendments thereto;

(v) a copy of the current rules; and

(vi) ***all meeting minutes.***

All other official records of the association must be maintained within the state for at least seven years, unless otherwise provided by general law. Notwithstanding, all election records, including electronic election records, must only be maintained for one year from the election.

Condominium Website: As a result of the 2017 legislative session, the website posting requirement applies to condominiums containing 150 or more non-timeshare units. The deadline to post digital copies of the governing documents, association contracts, budget, financial report, and other required documents on the association's website is extended to January 1, 2019. Of the documents to be posted to the website, a list of bids received by the association within the past year for contracts entered into by the association and any monthly income and expense statement must also be posted.

Notwithstanding this requirement, the failure to post these documents on the website does not, in and of itself, invalidate any action or decision of the association. Additionally, in complying with the posting requirement, there is no liability for disclosing information that is protected or restricted unless such disclosure was made with a knowing or intentional disregard of the protected or restricted nature of such information.

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Condominium Financial Reporting: In the event an association fails to comply with an order by the Division of Florida Condominiums, Timeshares, and Mobile Homes to provide an owner with a copy of the financial report within a specified amount of days, then the association is prohibited from waiving the financial reporting requirement for the fiscal year in which the owner's initial request for a copy was made and for the following fiscal year, too.

Condominium Posting Board Meeting Notices: Board meeting notices must be posted on the **condominium property**, in a specific location designated by the board. *(Previously, an association was permitted to post on the condominium property or the association property.)*

Condominium Board Meeting Notices: Notice of any board meeting in which regular or special assessments against unit owners are to be considered must specifically state that assessments will be considered and provide the estimated cost and description of the purposes for such assessments.

Condominium Meeting Notices:
The association may adopt a rule for conspicuously posting meeting notices and agendas on the association's website for at least the minimum period of time for which a notice of a meeting is also required to be physically posted on the condominium property. This rule must include a requirement that the association send an electronic notice in the same manner as a notice for a meeting of the members, including a hyperlink to the website where the notice is posted. *(As yet, it is not patently clear whether this is in place of the existing "posting in a conspicuous place" requirement or in lieu of it. The safer course of action is to do both.)*

Condominium Director Term: A director can serve a term longer than one year if permitted by the bylaws or articles of incorporation. However, a director cannot serve more than eight consecutive years, unless approved by two-thirds of all votes cast in the election or unless there are not enough eligible candidates to fill vacancies on the board. This part of the legislation replaces and fixes last year's ridiculous new law that a director could not serve more than four consecutive two-year terms. (*It appears that based on this year's legislative changes, directors can serve any length of term so long as authorized by the articles or bylaws. At present, directors can only serve one or two year terms depending on the provisions of the articles and bylaws. Also, staggered terms remain permitted.*)

Condominium Director Recall: A recall is only effective if it is facially valid. (*Of course, as what the term of art "facially valid" is intended to mean is left out of the legislation.*) In any event, if the recall is determined to be facially invalid by the board, then the unit owner representative of the recall effort may file a petition challenging the board's determination on facial validity. Similarly, a recalled board member may file a petition challenging the facial validity of the recall effort. If the arbitrator determines that the recall was invalid, the petitioning board member is immediately reinstated and the recall is null and void. In some instances, the arbitrator may award prevailing party attorney fees.

Condominium Material Alterations:
In situations where the declaration as amended does not specify the procedure for approving material alterations or substantial additions to the common elements or association property, the already statutorily required approval of seventy-five percent of the total voting interests of the association must now be obtained before the material alterations or substantial additions to the common elements or association property are commenced. (*Clearly then, if the declaration is silent as to the procedure for material alterations or substantial additions to common elements or association property, this new legislation implies that a curative vote of the members to approve the changes is a thing of the past. It does not make sense to force the association to restore the property to its prior condition where the members might vote to approve the change. Hopefully, this will be fixed in next year's legislative proposals*.)

Condominium Electric Vehicles: A declaration of condominium or restrictive covenant may not prohibit or be enforced so as to prohibit any unit owner from installing an electric vehicle charging station within the boundaries of the unit owner's limited common element parking area. Moreover, the board may not prohibit a unit owner from installing an electric vehicle charging station for an electric vehicle within the boundaries of his or her limited common element parking area. The unit owner is entirely responsible for the charging station, including its installation, maintenance, utilities charges (which must be separately metered), insurance, and removal if no longer needed.

The association may impose certain requirements upon the installation and operation of the charging station, including, for example, that the unit owner comply with all safety requirements and building codes, that the unit owner comply with reasonable architectural standards adopted by the association governing charging stations, and that the unit owner use the services of a licensed and registered electrical contractor or engineer knowledgeable in charging stations. Labor performed on or materials furnished for the installation of a charging station may not be the basis for filing a construction lien against the association, but such a lien may be filed against the unit owner.

Condominium Director Conflicts of Interest:

The process allowing a director to enter into a contract with the director's association has become better organized. Disclosure requirements that were set out in section 718.3026(3), Florida Statutes were deleted from that location and relocated to section 718.3027, Florida Statutes. In brief, directors and officers of non-timeshare condominiums must disclose to the board any activity that could be reasonably considered a conflict of interest. A rebuttable presumption of such a conflict exists if:

i) directors or officers of the association (including their relatives) enter into a contract for goods or services with the association;

ii) directors or officers of the association (including their relatives) holds an interest in a corporation. Limited liability corporation, partnership or other business entity that conducts business with the association.

In the event of such a conflict, then the proposed activity and all relevant contracts must be attached to the meeting agenda and the requirements of section 617.0832, Florida Statutes must be adhered to, as well. The relevant provisions of section 617.0832, Florida Statutes follow:

"No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association, or entity in which one or more of its directors are directors or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because his or her or their votes are counted for such purpose, if:

i) *The fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors;*

ii) *The fact of such relationship or interest is disclosed or known to the members entitled to vote on such contract or transaction, if any, and they authorize, approve, or ratify it by vote or written consent; or*

iii.) *The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members."*

In addition, section 718.3027, Florida Statutes, provides that the disclosures required by this section must be set out in the meeting minutes, and the contract must be approved by two-thirds of all of the directors present (excluding the conflicted director). At the next membership meeting, the existence of the contract must be disclosed to the members and then may be canceled by a majority vote of the members present. If the contract is canceled, the association is only liable for the reasonable value of the goods and services provided up to the time of cancellation and is not liable for any termination fee, liquidated damages, or other form of penalty for such cancellation.

Finally, in the event of a failure to disclose a conflict or potential conflict, the contract is voidable and terminates upon the filing of a written notice terminating the contract which contains at least 20 percent of the voting interests of the association.

(*Note that section 718.112(2)(p) Florida Statutes, pertaining to service provider contracts still provides that "an association, which is not a timeshare condominium association, may not employ or contract with any 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 within the third degree of consanguinity by blood or marriage of a board member or officer. This paragraph does not apply to a service provider in which a board member or officer, or a relative within the third degree of consanguinity by blood or marriage of a board member or officer, owns less than 1 percent of the equity shares.*")

Condominium Electronic Notice: A unit owner who consents to receiving notices by electronic transmission is solely responsible for removing or bypassing filters that block receipt of mass emails sent to members on behalf of the association in the course of giving electronic notices.

Condominium Grievance Committee:

The grievance committee appointed by the board to conduct hearings for fines and use right suspensions for violations of the governing documents must be comprised of at least three members who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. (*The restriction against not allowing someone living with the director from serving on the committee was removed.*) The fine or suspension can only be imposed if approved by a majority of the committee. If a fine is approved, the fine payment is due five days after the date of the committee meeting at which the fine is approved. *(This seems illogical in that the offending member may not have received the required written confirmation of the fine from the association.)* The association must provide written notice of the approved fine or suspension by mail or hand delivery.

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2. Cooperative Associations

House Bill 841 - Effective July 1, 2018

Cooperative Official Records: The official records must be made available to a unit owner within ten working days after receipt of written request by the board or its designee.

Cooperative Director/Officer Eligibility: In a residential cooperative association of more than ten units, co-owners of a unit may not serve as members of the board at the same time unless the co-owners own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy.

Cooperative Director/Officer Financial Delinquency: A director or officer more than 90 days delinquent in the payment of any monetary obligation due to the association shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.

Cooperative Bulk Communication Contracts: Cooperatives are now lawfully permitted to enter into bulk communication contracts which can include internet services and such expenses are deemed common expenses of the cooperative.

Cooperative Electronic Notice: A unit owner who consents to receiving notices by electronic transmission is solely responsible for removing or bypassing filters that block receipt of mass emails sent to members on behalf of the association in the course of giving electronic notices.

Cooperative Grievance Committee:
The grievance committee appointed by the board to conduct hearings for fines and use right suspensions for violations of the governing documents must be comprised of at least three members who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. (*The restriction against not allowing someone living with the director from serving on the committee was removed.*) The fine or suspension can only be imposed if approved by a majority of the committee. If a fine is approved, the fine payment is due five days after the date of the committee meeting at which the fine is approved. *(This seems illogical in that the offending member may not have received the required written confirmation of the fine from the association.)* The association must provide written notice of the approved fine or suspension by mail or hand delivery.

Cooperative Board Meeting Notices: Notice of any board meeting in which regular or special assessments against unit owners are to be considered must specifically state that assessments will be considered and provide the estimated cost and description of the purposes for such assessments.

Cooperative Meeting Notices: The association may adopt a rule for conspicuously posting meeting notices and agendas on the association's website for at least the minimum period of time for which a notice of a meeting is also required to be physically posted on the condominium property. This rule must include a requirement that the association send an electronic notice in the same manner as a notice for a meeting of the members, including a hyperlink to the website where the notice is posted. *(As yet, it is not patently clear whether this is in place of the existing "posting in a conspicuous place" requirement or in lieu of it. The safer course of action is to do both.)*

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3. Homeowners' Associations

House Bill 841 - Effective July 1, 2018

HOA/Cooperative Board Email Use: Members of the board may use email as a means of communication but may not cast a vote on an association matter via email.

HOA Fines: If a fine levied by the board is approved by the grievance committee, the fine payment is due five days after the date of the committee meeting at which the fine is approved. *(This seems illogical in that the offending member may not have received the required written confirmation of the fine from the association.)*

HOA Amendments: A proposal to amend the governing documents must contain the full text of the provision to be amended with new language underlined and deleted language stricken. However, if the proposed change is so extensive that underlining and striking through language would hinder, rather than assist, the understanding of the proposed amendment, the following notation must be inserted immediately preceding the proposed amendment: "Substantial rewording. See governing documents for current text." An amendment to a governing document is effective when recorded in the public records of the county in which the community is located. (*In other words, HOA proposed amendments must be presented in the same manner as proposed condominium amendments have been required to do for years and years.*) *Furthermore, the definition of "governing documents" in the HOA Act includes rules and regulations and, therefore, amendments*

to rules and regulations must now be recorded in the public records, too).

HOA Election by Acclamation: If an election is not required because there are either an equal number or fewer qualified candidates than vacancies exist, and if nominations from the floor are not required and write-in nominations are not permitted, then such qualified candidates shall commence service on the board of directors, regardless of whether a quorum is attained at the annual meeting. (*This is a major change!*)

HOA Application of Payments: The application of assessment payments received by the association is applicable regardless of any purported accord and satisfaction or any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

4. Marketable Record Title Act

House Bill 617. Approved by Governor March 21, 2018**.** Effective October 1, 2018.

It is clarified that Part III of Chapter 720, Florida Statutes, is intended to provide mechanisms for the revitalization of covenants or restrictions for all types of communities and property associations and is not solely limited to residential communities. In plain English, this means that commercial associations can both preserve and revitalize their covenants. As such, and as you will read below, the terms used in other statutory sections affected by this change are also changed. A new summary process to preserve the covenants is also included in the legislation.

Short Title – Chapter 712 of the Florida Statutes is given the short title, "Marketable Record Title Act."

Definitions – Terms and definitions were added and revised to the Marketable Record Title Act.

The new term "*community covenant or restriction*" is defined to mean any agreement or limitation contained in a document recorded in the public records of the county in which a parcel is located which subjects the parcel to any use restriction that may be enforced by a property owners' association or authorizes a property owners' association to impose a charge or assessment against the parcel or the parcel owner.

The term "*homeowners' association*" is replaced by the term "*property owners' association*" which term also includes a corporation or other entity responsible for the operation of property in which the voting membership is made up of the owners of the property and/or their agents and membership is a mandatory condition of property ownership.

The definition for the term "*parcel*" is revised to remove the requirement that the real property be residential and be subject to exclusive ownership.

Finally, the definition for the term "*covenant or restriction*" was simplified to remove reference to enforcement of such covenant or restriction by a homeowners' association or the Florida Department of Environmental Protection and authorization of a homeowners' association to impose a charge or assessment against the parcel or the parcel owner.

Preservation of Covenants Process – Any person claiming an interest in land or other right subject to extinguishment under the Marketable Record Title Act will be able to preserve such right by filing a written notice in accordance with the Marketable Record Title Act at any time during the 30-year period immediately following the effective date of the root of title. As to a property owners' association, preservation may be accomplished in one of three ways:

i) by filing a written notice in accordance with the Marketable Record Title Act, which is a process currently available;

ii) by filing a summary notice in accordance with section 720.3032(2), Florida Statutes, (a new statute); or

iii) by filing an amendment to a covenant or restriction indexed under the legal name of the property owners' association which references the recording information of the covenant or restriction being preserved.

In the event a summary notice or amendment filing is not "indexed" to the current owners of the property affected by the preservation, the validity of the summary notice or the amendment to protect the covenants or restrictions is not affected.

An association is not required to mail a seven-day notice to the members providing the statement of marketable title action for the summary notice.

At the first board meeting, excluding the organizational meeting, which follows the annual meeting of the members, the board must consider the desirability of filing notices to preserve the covenants or restrictions affecting the community or association from extinguishment under the Marketable Record Title Act and to authorize and direct the appropriate officer to file notice in accordance with section 720.3032, Florida Statutes. *This was added as a constant reminder to Boards to prevent inadvertent extinguishment of existing covenants.*

As to the existing "notice" method to preserve, the requirements of what must be in the notice

have been clarified and revised to reflect and accommodate the newly defined terms.

As to the new method of preservation by summary notice, a new section 720.3032(2), Florida Statutes, is created to provide for preservation by the recording of a summary notice containing the following information:

- The legal name of the association.
- The mailing and physical addresses of the association.
- The names of the affected subdivision plats and condominiums or, if not applicable, the common name of the community.
- The name, address, and telephone number for the current community association management company or community association manager, if any.
- Indication as to whether the association desires to preserve the covenants or restrictions affecting the community or association from extinguishment under the Marketable Record Title Act.

- A listing by name and recording information of those covenants or restrictions affecting the community which the association desires to be preserved from extinguishment.
- The legal description of the community affected by the covenants or restrictions, which may be satisfied by a reference to a recorded plat.
- The signature of a duly authorized officer of the association, acknowledged in the same manner as deeds are acknowledged for record.

This new section provides a form which satisfies the required information, as set out above. The originally executed notice must be recorded in the official records of the applicable circuit court clerk or county. A copy of the notice, as recorded, must be included with the next meeting notice or other mailing to all members.

Revitalization of Covenants – A new section 712.12 is added to the Marketable Record Title Act regarding the revitalization of covenants by parcel owners who are not subject to a homeowners' association.

This new section sets out its own defined terms, including the term "parcel," which, unlike for the preservation of covenants, is required to be residential and subject to exclusive ownership.

The term "covenant or restriction," which is defined to mean any agreement or limitation imposed by a private party and not required by a governmental agency as a condition of a development permit which is contained in a document recorded in the public records of the county in which a parcel is located and which subjects the parcel to any use restriction that may be enforced by a parcel owner.

This new section allows for the revitalization of covenants by parcel owners who are not subject to a homeowners' association by the same revitalization procedures as applicable to a homeowners' association, except that there is no need to reference a homeowners' association or articles of incorporation or bylaws of a homeowners' association.

The approval necessary to revitalize must be in writing, and not at a meeting.

An organizing committee, as opposed to the president and secretary of a homeowners' association, may execute the revitalized covenants or restrictions; and the community name in the covenants or restrictions are indexed as the grantee and the parcel owners are indexed as the grantors.

Newly created owner rights - The owner of a parcel that has ceased to be governed by covenants or restrictions as of October 1, 2018 may commence an action by October 1, 2019 for a judicial determination that the covenants or restrictions did not govern that parcel as of October 1, 2018 and that any revitalization of such covenants or restrictions as to that parcel would unconstitutionally deprive the parcel owner of rights or property. Revitalization of covenants or restrictions against the parcel after such judicial determination is not affective against the parcel, and the rights of the parcel owner so recognized may not be subsequently altered by revived covenants or restrictions without the consent of the affected parcel owner.

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5. Tax Deed Surplus

House Bill 1383. Signed by Governor on April 6, 2018. Effective July 1, 2018 (although it applies to tax deed applications filed on or after October 1, 2018).

From time to time, community associations are served with a notice from the Clerk of Court that a unit or lot owner has not paid their property taxes and, as a result, the home will be sold at a sale with open bidding. By way of over simplification, delinquent tax obligations are auctioned to buyers that pay the delinquent tax on behalf of the owner and charge the owner interest. The buyers receive what is known as a tax certificate. After several years, the tax certificate holder can apply for a tax deed. The tax certificate holder can bid at the tax deed sale in the amount of the delinquent tax.

If the winning bid at the tax deed sale is in excess of the tax certificate holder's bid amount, then any excess amount of surplus proceeds, after the tax certificate holder is made whole, will be held by the Clerk of Court. The Clerk of Courts must now issue, to all known lienholders, a notice to file a claim for the surplus. The Clerk of Court determines the priority of the claims based

on the information provided by the claimants and pays out from the surplus accordingly. A new hard deadline of 120 days from the date of the Clerk of Court's notice of surplus is now imposed to file a claim for surplus funds, except for claims by a property owner. (*Believe it or not, there was no such deadline in the past*.) The new requirement will apply to tax deed applications filed on or after October 1, 2018. Since many declarations impose a lien for assessments, it remains to be seen whether an association will need to record an assessment lien to ensure entitlement to surplus, or if the declaration itself will suffice for receiving notice of surplus.