COMMUNITYUPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

The Options for the Regulation of Second Hand Smoke in Community Associations

"Secondhand smoke," means smoke emitted from lighted, smoldering, or burning tobacco when the smoker is not inhaling; smoke emitted at the mouthpiece during puff drawing; and smoke exhaled by the smoker. The U.S. Environmental Protection Agency has reported that second hand smoke is known to cause cancer in humans, even healthy nonsmokers. Second hand smoke is the third leading cause of preventable deaths in the United States and may cause, or be a contributing cause, of Sudden Infant Death Syndrome, miscarriages, nasal sinus cancer, lung cancer, heart disease, and chronic respiratory problems. Due to the many negative health impacts of second hand smoke, states have taken action to eliminate smoking in public places.

It may also be prudent for community associations to regulate or ban smoking. Recently, a jury in a California case, *Chauncey v. Bella Palermo Homeowners' Association, Inc.*, Orange County Superior Court Case No. 30-2011-00461681, found a condominium association partially liable for failing to prevent a resident from smoking on his patio and sidewalks in front of the units. While the association's covenants and rules did not restrict smoking, it had a nuisance provision and the jury found that the association should have prevented the incessant smoking based upon the nuisance provision. On the other hand, in Maine, the Supreme Judicial Court, in *America v. Sunspray Condominium Association, Inc.*, 61 A.3d 1249 (2013), found that a unit owner could not proceed forward with his case because he failed to show that the association had not enforced its ban on smoking or that he had been injured by any second hand smoke. Instead, the unit owner had only shown that the association did not enforce the smoking ban how the unit owner had requested it be enforced.

Based upon these cases, an association may want to consider the following restrictions for its community:

1. A ban on smoking on the common areas or common elements, and/or on limited common element balconies, lanais, and patios;

2. Require smokers to use smokeless ashtrays, or to install air purifiers or fans to reduce the transmission of second-hand smoke from their immediate vicinity; and/or

3. A ban on smoking in the entire community.

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"Worried about second hand smoke much?"

Even if an association's board has authority to adopt a rule as to smoking, it may be better to adopt an amendment to the Declaration. Covenants and restrictions found in Declarations are "clothed with a very strong presumption of validity", which arises from the fact that each owner purchases their property knowing of and accepting the restrictions to be imposed. Such restrictions will usually not be invalidated unless they are entirely subjective in their application, are in violation of public policy, or negate some fundamental constitutional right. Furthermore, an amendment would express the will of the community and is likely to withstand judicial scrutiny. Since second hand smoke is so controversial, an amendment would be the better avenue to pursue.

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resulted in wasted effort and expense for the association because it was required to send out and collect election ballots or proxies, and to anticipate a contested election in the unlikely event that a last second nomination was made from the floor at the election meeting.

The problem for members who wish to be candidates stems from the ability of each association to adopt its own election procedures. Many homeowners' association's governing documents provide for an election procedure that uses absentee ballots or proxies, and in some cases, the nomination process in order to get listed on the ballot is not entirely open or fair. But if the association's nomination procedure does not provide a fair opportunity to be a candidate listed on the absentee ballot, it will be difficult for excluded members to be elected. Obviously, the right of members to nominate themselves at the election meeting where many, if not most, election ballots have already been cast by absentee ballots from a list of candidates that did not include them is somewhat of a hollow right.

In 2010, the Legislature attempted to simplify the election process and it amended the HOA Act to provide that members could nominate themselves at the election meeting "or, if the election process allows voting by absentee ballot, in advance of the balloting." While some community association attorneys believed the amendment adding the "or" clause meant that members could nominate themselves in one way, or the other, but not both, other attorneys interpreted the "or" clause to mean "both in advance of absentee balloting and at the election meeting." In 2013, the Legislature cleared up any confusion and the statute now expressly provides that "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. An election is not required unless more candidates are nominated than vacancies exist."

As a result, if your homeowners' association election procedures allow candidates to be nominated, including by nominating themselves, in advance of the election meeting, then in those cases where the number of candidates is equal to or less than the number of board seats open for election, the effort and expense of balloting can be avoided. While the statute does not set forth a specific, required procedure for soliciting and accepting nominations, it is highly recommended that the procedure be well-publicized and that it provides a fair opportunity for all members to be candidates. Otherwise, the procedure will not meet the spirit, and likely not the letter, of the law.

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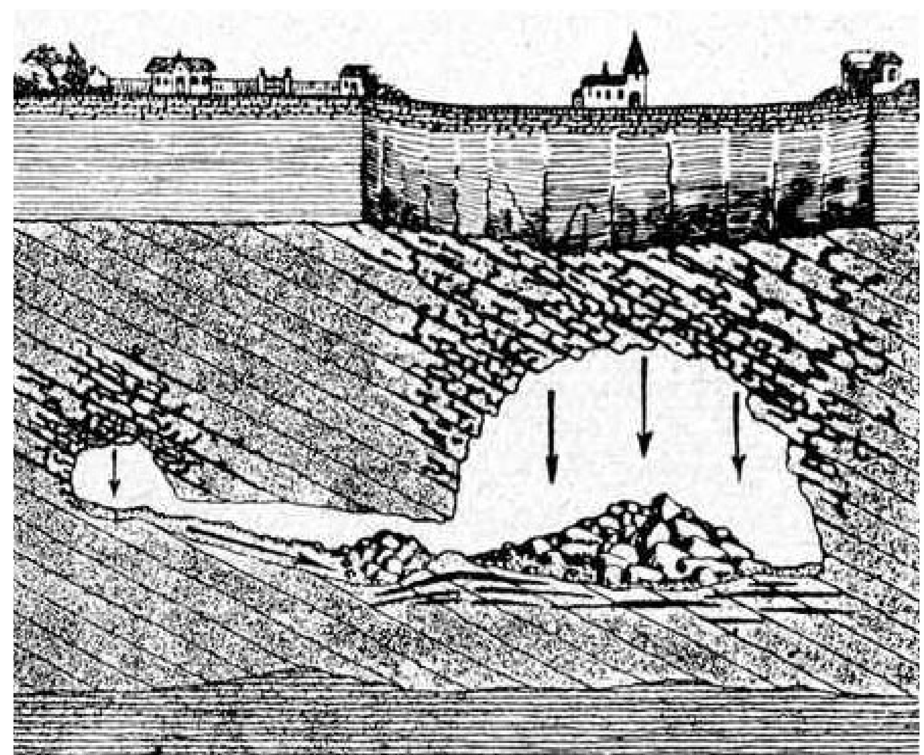

Before the bottom drops out.

INVESTIGATE SINKHOLE ACTIVITY WHILE THERE IS STILL HELP AVAILABLE

One of the most active sinkhole regions of the state is within the area bounded by the triangle formed by extending a line from Ocala to Orlando and over to Tampa. Many community associations that could be impacted in this region may be unaware that these claims will be covered by their property insurance at this point. However, sinkhole activity is certainly not confined to any one area as we are seeing it occur throughout our state (there are a number of claims in the Miami Dade County area recently, and even up into Palm Beach County).

A procedure is available under current law that authorizes policy holders who have evidence of possible sinkhole activity such as exterior cracking of walls, roadways, sidewalks, or interior cracking and other signs of structural movement or subsidence, to present that information to their property insurance carriers and cause the carriers to conduct a structural investigation to identify possible sinkhole activity. In many cases, the insurer must engage a professional engineer for this assessment. The insurer will be required to notify the insured about the cause of the damage identified. If there is sinkhole activity, obviously, insurance benefits may be available under current law; if the investigation reveals no current activity that can be attributed to sinkholes, then that information is also useful to the association when policy renewal time comes around.

Unfortunately, every year the powerful insurance lobby is successfully convincing our legislators to decrease the insurance coverage available for sinkholes. In 2011, for example, the legislature decreased the existing statute of limitation for these claims to provide that an initial, supplemental or reopened sinkhole claim must be asserted against the insurer within 2 years after the policyholder “knew or reasonably should have known about the sinkhole loss.” This standard is objective, meaning that actual knowledge of sinkhole activity is not required if the circumstances show that the insured should have investigated. Given the importance (i.e. the potential cost to the insurance industry) of this Florida phenomenon, the industry will undoubtedly continue to push for more gains at consumers’ expense. As such, volunteer boards are well-advised to determine whether they may be affected by sinkholes right now and, if so, obtain the level of benefits still available.

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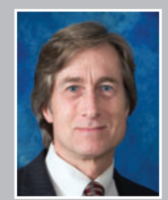

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At Last, A Workable HOA Election Statue

The Florida Homeowners' Associations Act ("HOA Act") has long provided that the election of directors must be conducted in accordance with whatever procedures are set forth in the governing documents of the association. But in order to ensure the right of every member to be a candidate regardless of the particular nomination and election procedures of the association, the HOA Act required homeowners' associations to allow any member to nominate themselves as a candidate for the board at the meeting where the election was to be held.

Together, the HOA Act election provisions have historically caused problems for both associations trying to conduct elections, and for members who wish to be candidates. Thankfully, amendments enacted by the Florida Legislature in 2013 appear to have finally resolved these issues. Now, if your homeowners' association's governing documents include clear and complete provisions describing the election process, your association and its members can be assured of a fair and efficient election process.

The HOA Act allows each homeowners' association to establish its own method of electing directors. But because some nomination and election procedures might unfairly exclude members who wish to run for the board from being placed on the ballot, the statute also allowed each member to nominate themselves at the election meeting. The problem with this statute was that even when an association's election procedures gave every member a fair opportunity to be a candidate for the board in advance of the election meeting, and there were still not enough members interested in running for the board to cause a contested, the association was still required to go through with the balloting process. This was so because until the very last moment at the election meeting, a member might nominate himself or herself and create a contested election at that time. This all

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