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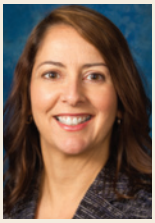
New Condo Laws Have Potential to Increase Litigation

Commentary by Yeline Goin

During the 2017 legislative session, new laws were adopted which significantly change the way condominium associations are managed and operated. Many of the new provisions are well-intentioned, but raise a number of questions that remain unanswered and have the potential to increase litigation in some condominiums. This article will address two particular issues—term limits and recalls—and provide suggestions for fixing them during the next legislative session, which is scheduled to begin in January 2018.


Goin

TERM LIMITS

The new law provides that a board member may not serve more than four consecutive two-year terms, unless approved by an affirmative vote of two-thirds of the total voting interests of the association or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. One of the unanswered questions raised by this new law is whether it applies to boards with one-year terms. The plain language of the statute suggests that it does not apply to one-year terms. Another unanswered question is whether the law is intended to be applied retroactively or prospectively beginning with terms starting after July 1. In other words, if prospective, the earliest that a board member would be prohibited from running because of term limits is 2025. If retroactive, many directors may be "termed out" now or at the next election. Interestingly, when Floridians voted to amend the Florida Constitution to impose term limits on state office holders, it was implemented prospectively. The constitutional amendment was adopted in 1992 but became effective in 2000, thereby allowing sitting legislators to serve an additional eight years. The Division of Condominiums, Timeshare, and Mobile Homes has not announced its interpretation, although only an interpretation by an appellate court would be binding in the legal sense. As such, associations face uncertainty and will need to consult with counsel to decide how the law applies to them.

BOARD OF CONTRIBUTORS

Another issue with the new law is that it allows a "term-limited" board member to continue to

serve if approved by two-thirds of the total voting interests of the association (i.e., two-thirds of all members). Assuming this means that the two-thirds vote is determined in conjunction with the election, (which is also debatable), it is my experience that the chance of getting two-thirds of the members to vote in a condominium election is slim to none. Further, the condominium law only requires 20 percent of the members to cast a ballot in order for there to be a valid election, acknowledging that it is hard to get condominium owners to vote. I suggest changing the two-thirds threshold to two-thirds of those who vote, and to allow an omnibus "opt out" from the statute to be included in the association's bylaws. The "two-thirds of those who vote" threshold will still allow an incumbent director to be defeated if owners are truly opposed to the director continuing to serve on the board, or if enacted through the bylaws, would require super-majority support for an "opt out."

RECALLS

Under the "old" recall law, when the board was served with a petition for recall, the board was required to "certify" or "not certify" the recall. This gave the board the opportunity to review the recall petition to make sure it was actually signed by a majority of the owners. If the board did not certify the recall, the board was required to file a petition for arbitration with the Division of Condominiums, Timeshare, and Mobile Homes, and the arbitrator would decide whether the recall was valid or not. The old law was criticized because owners argued that boards were using their power to not certify a recall, even if clearly valid, just to stay in control of the association for as long as possible. The intent of the "new" law appears to be to make recalls effective immediately upon receipt by the board of directors of a recall petition. The intent also appears to be to require the individual board members who are recalled to file a petition for arbitration if they believe the recall to not be effective. However, the law leaves in the provision which requires a board meeting to be held when the board is served with a petition for recall arbitration, but removes the provision requiring the board to certify or not certify the recall. So, what is the board supposed to do at the board meeting? Also, what is the board's responsibility or duty with respect to a recall that is on its face is invalid, or that clearly is not signed by a majority of the owners? In my opinion, the law should require the board to make an initial determination as to whether the recall petition is facially valid. The law should be amended to list the things that would make a recall petition facially valid—the most important being that it was signed by a majority of the owners. If the legislature wants to place the burden of challenging a recall petition on the board members being recalled, it should at least require that the petition be facially valid. Otherwise, the law could be easily abused, and would have the unintended consequence of undermining the integrity and reliability of the election process.

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