

2019 Florida Legislative Session - CALL Alert for March 11, 2019

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By: Donna DiMaggio Berger



Today's alert focuses on a bill that has some folks cheering and others cringing. HB 1259 (Fernandez-D-114) primarily addresses the issues of illegal kickbacks and fraudulent voting activity in condominiums, but goes a step too far in terms of criminalizing failed document inspection requests.

This bill has the support of the Speaker of the House, Rep. Jose Oliva. SB 610 (Pizzo) is likely to be conformed to the House bill.

HB 1259 seeks to address behavior that has already been defined as criminal behavior under the Condominium Act.

1. The statute already provided that any officer, director, or manager who knowingly solicits, offers to accept or accepts any thing or service of value or a kickback was subject to civil and criminal penalties. The new language makes it clear that criminal penalties pursuant to Sections 775.082, 775.083 and 775.084, F.S. will be imposed.

CALL's Suggestion: Since the bill seeks to clarify that criminal penalties will ensue, it should further seek to clarify the common sense items that can safely be accepted by managers or directors such as coffee or bagels brought to a board or membership meeting. The idea that giving a director a pen to use at a meeting or a ride back to his or her unit on a rainy night might be a felony is extreme.

2. The statute already imposed criminal penalties upon any person who willfully and knowingly refuses to release or otherwise produce association records with the intent to avoid or escape detection, arrest, trial, or punishment for the commission of a crime, or to assist another person with such avoidance or escape, by providing that such person commits a felony of

the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S. which includes the imposition of a personal fine of \$5,000 and court costs.

CALL's Suggestion: The bill should go further and impose the same criminal penalties upon persons who are inspecting official records and seeking to remove, alter or destroy same with the intent to avoid or escape detection, arrest, trial, or punishment for the commission of a crime, or to assist another person with such avoidance or escape.

3. The bill seeks to criminalize the use of a debit card, issued in the name of the association, for any expense that is not a lawful obligation of the association with "lawful obligation of the association" being defined as an obligation that has been properly pre-approved by the board and is reflected in the meeting minutes or the written budget.

CALL's Suggestion: This language is stilted and not in keeping with the manner in which most associations operate. Instead, it should reference that a lawful obligation of the association is any expense which is properly identified as a common expense under either the statute or the association's governing documents. An even better solution would be to simply follow the law which is already on the books which disallows the use of debit cards altogether as most boards have discontinued their use after the statutory changes two years ago

4. The bill creates a new s. 718.129 to address fraudulent voting activities by making each of the following acts a fraudulent voting activity related to association elections which constitutes a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084:

- (a) Willfully and falsely swearing or affirming any oath or affirmation, or willfully procuring another person to swear or affirm falsely to an oath or affirmation, in connection with or arising out of voting or elections.
- (b) Perpetrating or attempting to perpetrate, or aiding in the perpetration of, any fraud in connection with any vote cast, to be cast, or attempted to be cast.
- (c) Preventing an elector from voting, or preventing an elector from voting as the elector intended, by fraudulently changing or attempting to change a ballot, ballot envelope, vote, or voting certificate of the elector.
- (d) Using bribery, menace, threat, or any other corruption to attempt, directly or indirectly, to influence, deceive, or deter any elector in voting.
- (e) Directly or indirectly giving or promising anything of value to another person with the intent to buy the vote of that person or another person or to corruptly influence that person or another person in casting his or her vote.

(f) Directly or indirectly using or threatening to use force, violence, or intimidation, or any tactic of coercion or intimidation to induce or compel an individual to vote or refrain from voting in an election or on any particular ballot measure.

CALL's Concerns: The bill exempts from the definition of fraudulent voting activity, the serving of food to be consumed at an election rally or meeting or to any item of nominal value, which is used as an election advertisement, including a campaign message designed to be worn by a person. Furthermore, the reference to an "election rally" is unclear. Does this apply to association-sponsored events like a "Candidates' Night" or does it apply to events organized by individual candidates, or both? If it is acceptable to serve food at an "election rally" then perhaps the bill should also exempt the serving of food at a regular board or membership meeting from the criminal penalties associated with accepting things or items of value?

Each of the following acts constitutes a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084:

(a) Knowingly aiding, abetting, or advising a person in the commission of a fraudulent voting activity related to association elections.

(b) Agreeing, conspiring, combining, or confederating with at least one other person to commit a fraudulent voting activity related to association elections.

(c) Having knowledge of a fraudulent voting activity related to association elections and giving any aid to the offender with intent that the offender avoid or escape detection, arrest, trial, or punishment.

CALL's Concerns: The term "fraud" in connection with voting could be misused and exaggerated to apply to unintentional misstatements of fact by candidates and/or directors. What constitutes "changing a ballot"? Would folding it qualify? Would an owner changing his/her vote qualify? Does opening the envelope qualify as changing the ballot envelope?

What is "coercion" in the context of getting someone to vote? Would advising a neighbor that "your assessments will go up, if you vote for him or her" constitute coercion? These are all questions that will certainly fuel legal work after the bill is passed if they are not clarified beforehand. The bill does thankfully allow licensed attorneys to provide legal advice to their clients regarding elections and voting activities without running afoul of the foregoing.

CALL Suggestion: apply the foregoing definitions and criminal penalties to forged recall petitions and recall ballots as well as forged proxies and ballots in other membership votes. If election fraud is a serious enough concern to impose criminal penalties then it should not matter whether the fraud is committed by a board member or officer or by an owner or group of owners. Unfortunately, some of our public policy makers

continue to turn a blind eye to criminal activity by those community residents who are not serving on the board.

HB 1259 seeks to impose criminal penalties on behavior that should not be criminalized.

1. The bill seeks to criminalize repeated failures to allow a document inspection request with the term “repeatedly” defined as two or more violations within a 12-month period. Any director or member of the board of an association who knowingly and willfully participates in a thwarted document inspection request twice in any 12-month period would be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

CALL's Concerns: The existing statutory deadline and penalties already invite, create, and encourage abuses by the few who want to harass, embarrass or intimidate the association in (very) bad faith. Some examples of those disingenuous document inspection requests include:

- Requests for voluminous records with no intent on the part of the requesting owner to see them all and, in some cases, no intent to even show up for the inspection.
- Multiple requests submitted on toilet paper.
- Requests written in crayon.
- Requests submitted on December 23 after 9 PM, knowing that the association office would be closed from December 24 until January 2.
- Requests for access to records buried in a 20-page rambling letter or email replete with words not suitable for public printing.
- Requests made in the aftermath of a hurricane when the manager and board are struggling to dry out units and secure the building.
- Dozens of requests made simultaneously by different owners in large master associations overseeing thousands of units.

In short, the playing field does have to be leveled, even if slightly, to reflect the reality of association operations in different types of communities. That would require adding additional good faith criteria for making requests and allotting additional time to comply in certain circumstances.

Sadly, this bill further weaponizes the document inspection process and is likely to encourage greater abusive document inspection requests should it pass in its current form.

On a positive note, the bill amends Section 215.32, F.S. to safeguard the Division of Florida Condominium's Trust Fund from transfer to the Budget Stabilization Fund and General Revenue Fund in the General Appropriations Act. The Condo Trust Fund is funded by the \$4.00 per door fee that condominiums, cooperatives, and timeshares pay annually. Unfortunately, the Fund has been routinely raided over the last decade, making the Division's

education and enforcement goals much more difficult to achieve.

Please be sure to give the sponsor of HB 1259, Rep. Javier Fernandez your thoughts on this bill and how it may impact your association's operations. You may contact Rep. Fernandez at Javier.Fernandez@myfloridahouse.gov or by phone at 305-442-6825.

Lastly, I would like to take a moment to acknowledge a dear friend and colleague, Lee Burg, who recently passed away. Many of you reading this CALL Alert were fortunate to have worked with Lee over the years as your community's attorney. Lee faithfully served his association clients for 37 years and successfully guided those communities through complicated issues and projects. Lee will be greatly missed by everyone who knew and worked with him.

Respectfully yours,

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Community Association Leadership Lobby