

## “Homeowner Association Confusion & Frequently Asked Questions,” FLCAJ Magazine

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Although the term community association encompasses different types of community associations, in Florida, the two predominant forms of community associations are homeowners associations and condominium associations. There are vast differences but also numerous similarities between the two. Unfortunately, this can cause confusion

when owners, directors, and/or managers assume the two are the same. Simply put, they are not.

There are two entirely different chapters in the Florida Statutes that govern these communities. The Florida Condominium Act, Chapter 718 of the Florida Statutes, governs condominiums in the state. The Florida Homeowners' Association Act, Chapter 720 of the Florida Statutes, governs homeowners associations in the state. Knowing which applies to a community is paramount. Obviously, it is important to seek legal advice from an attorney in the field when a legal issue arises, especially given the fact that each factual circumstance and each community's governing documents will be different. Below, I address some of the common general questions that often arise regarding homeowners associations.

### **How can you tell if a community is a homeowners association or a condominium?**

There are many ways to determine which kind of community one is dealing with. The first step should be to review the governing documents.

A condominium is governed by a declaration of condominium (along with other association governing documents), and the legal description in the deeds for the units will include a reference to the declaration of condominium. The declaration of condominium will have a statement submitting the property to condominium ownership and the name by which the condominium property is

to be identified, which must include the word “condominium” or be followed by the words “a condominium.”

A homeowners association is usually governed by a declaration of covenants, or a declaration of restrictions, or some similarly titled document (along with other association’s governing documents). Deeds to homes within a homeowners association may or may not include reference to the declaration. One of the most basic differences between a homeowners association and a condominium is the ownership concept. In a condominium a piece of land is divided into units and common elements. The condominium unit owner owns his/her unit and an undivided share of the common elements (shared portions) of the condominium. This means, for example, the unit owners all own an undivided share of the pool, the elevator, the hallways, etc.

In a homeowners association, owners own parcels, or lots, and the improvements thereon. There are no “common elements”; there are “common areas.” Common areas are those shared portions of the community like the clubhouse, the pool, the management office, etc. In a homeowners association, the association usually owns the common areas, and the owners have use rights over them. While this may seem to be a distinction without a difference to most people, it is legally very different.

### **Can a homeowners association file liens for unpaid assessments and fines?**

Both types of community associations levy assessments to pay for community expenses, and both have the right to file and foreclose a claim of lien to secure payment of these assessments. Because owners in a homeowners association usually bear the expense of maintaining the exterior of their homes individually, the regular assessments are typically lower than in a condominium, where owners need to share the expense of maintaining the exterior and common portions of the condominium building.

As for fines, the Florida Homeowners’ Association Act allows the association’s governing documents to authorize the association to levy more than \$100 per violation and for the maximum aggregate fine to exceed \$1,000. Also, a homeowners association can file a lien for unpaid fines if these amount to \$1,000 or more.

### **Can members in a homeowners association vote electronically?**

Yes. The Florida Homeowners’ Association Act allows homeowner associations to conduct elections and other membership votes through internet-based online voting systems. The association must adopt a resolution with certain requirements before offering voting in this way. It must also follow specific requirements to ensure the owners are able to communicate with and confirm access to the online voting system. The association must also use an online voting system that complies with the requirements of the Florida Homeowners’ Association Act. Finally, owners must consent in writing to online voting.

### **Are homeowners' associations required to have a website?**

Unlike the Florida Condominium Act, which requires condominiums of a certain size to keep and maintain a website, the Florida Homeowners' Association Act does not at this time require that homeowners associations of any size have and maintain a website.

### **Can the board of directors be elected by proxy?**

Maybe. Unlike the Florida Condominium Act that has very specific details regarding the process by which elections of the board of directors are supposed to occur, the Florida Homeowners' Association Act defers to the procedures in the association's governing documents for election details. Most homeowner association's governing documents simply state that directors are elected by a plurality of the votes at the meeting. So, unless prohibited by the association's governing documents, proxies could potentially be used to elect directors. Each community will have specifics regarding how its election is to be carried out in its association's governing documents.

### **Do new members of the board of directors have to take a new board member certification course?**

No, but they do have to take one of two actions within 90 days of being elected or appointed. The Florida Homeowners' Association Act requires directors to certify within 90 days after being elected or appointed to the board that he or she has read the association's governing documents, will work to uphold these to the best of his or her ability, and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members.

Alternatively, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered by a division-approved education provider within one year before or 90 days after the date of election or appointment.

### **Do homeowners associations have to fund reserve accounts?**

Maybe. The Florida Homeowners' Association Act does speak to reserve accounts, but whether they are required in a given community depends on how the homeowners association was initially created and whether the owners have since voted to keep reserve accounts for capital expenditures and deferred maintenance.

### **Do homeowners associations have to have insurance?**

Yes. Unlike the Florida Condominium Act, which specifically requires the condominium association maintain certain property insurance and details exactly what it should cover, the Florida Homeowners' Association Act doesn't speak to property insurance requirements. The homeowner association's governing documents will explain the community's requirements for property or other insurance.

However, the Florida Homeowners' Association Act does require the homeowners association to maintain insurance or a fidelity bond for all persons

who control or disburse funds of the association to cover the maximum funds that will be in the custody of the association or its management agent at any one time. (Note, the Florida Homeowners' Association Act allows the membership to vote to waive this requirement, but it is required unless waived.)

Something to keep in mind, particularly for older documents that may not have focused on insurance, is that the association may have insurance needs above and beyond what the governing documents require. The board of directors should review this with its attorneys and insurance agents to ensure the association is properly covered.

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