



*We are frequently asked the question, "What is the Sunshine Law?" Although Florida's Sunshine in Government Act does not apply to community associations, the statutes applicable to condominiums, cooperatives, and homeowners' associations each contain their own "sunshine" requirements. We use the term "sunshine" as a shorthand phrase, and not as a legal definition. We are pleased to offer you this guide, which sets forth the various "sunshine" requirements applicable to community associations. We encourage you to refer to Florida Statutes and current case law as the definitive source on these legal issues.*

## Definitions

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First, almost all community associations fall into one of three categories: a condominium association (governed by Chapter 718 of the Florida Statutes); a cooperative association (governed by Chapter 719); or a homeowners' association (governed by Chapter 720). The sunshine laws applicable to condominiums and cooperatives discussed herein are essentially identical, so when we mention the law for condos, you can assume that it applies to co-ops as well. The law for HOAs is similar to the condominium counterpart, but slightly different in a few key respects, as we will see.

Like any beginners course, we must of course start with the definitions. All of the relevant laws define a "meeting" of the association's board as any "gathering" of a "quorum" of the board where association business

is "conducted."

The first relevant point is that a quorum must be present. This is different than the sunshine laws for public officials, where two or more public officials cannot meet, even if this constitutes less than a quorum. The association law is more liberal in this regard and two directors can discuss association business (except in the case of a three-member board).

One of the most frequently debated topics is what constitutes the "conduct" of business. We have seen many associations whose directors meet under the auspices of "executive sessions", "planning meetings", or "agenda development workshops", argue that a quorum of the board could gather out of the sunshine as long as no binding votes were being taken.

However, this is not what the law says, and is certainly not what it means. Although we are not aware of any reported appellate court cases in the association context, there are a number of cases in the public arena that have held that any interaction contributing to the development of ideas constitutes a "meeting", without regard to whether or not a formal vote has been taken.

Otherwise, association boards could make decisions in "executive session", with the "public meeting" being simply a rubber-stamp event. While many associations legitimately desire to avoid certain topics in open meetings, it is simply the price that is paid for the owners' right to remain informed. To do otherwise defeats the statutory requirements that board meetings be open and that the owners have the right to participate.

Let's now look at the definition of a "gathering" of a quorum of the board. If you have a five-member board, clearly three of them sitting in the same room constitutes a quorum. Those three are certainly free to get together for social purposes, or other reasons, but once association business is discussed, the gathering is technically a meeting of the board. Board decisions are made at board meetings.

## The Do's and Don'ts of Noticing Meetings

As with meetings of governmental bodies, the right to attend and speak at meetings is of little benefit to the governed if they do not know when or where the meetings are going to be held. While governmental entities normally advertise meetings through newspapers, association advertisement is generally handled through physical posting of the notice.

Section 718.112(2)(c) of the Florida Condominium Act provides that notice of all board meetings must specifically identify agenda items, and must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting, except in an emergency. Further, written notice of any board meeting at which non-emergency special assessments, amendments to rules regarding unit use, the association budget or insurance deductibles will be considered must be mailed, delivered, or electronically transmitted to the unit owners, and posted conspicuously on the condominium property not less than 14 days prior to the meeting. Some bylaws may even prescribe more stringent notice requirements for these meetings and some notices, like

those for meetings at which assessments will be considered, have additional notice requirements.

No regular or special assessment may be levied at a condominium association board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature, estimated costs, and description of the purposes for such assessments. If there is no condominium property upon which notices can be posted, notices of all board meetings shall be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit. In lieu of or in addition to the physical posting of notice of any meeting of the board, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. If broadcast notice is used in lieu of a notice posted physically on the condominium property, the notice and agenda must be broadcast at least four (4) times every broadcast hour of each day that a posted notice is required.

Section 720.303(2)(c), Florida Statutes, applicable to HOAs, likewise provides that notices of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. Unlike the law for condominiums, there is no requirement that an agenda be included in the notice. As an alternative to posting, notice of board meetings can be mailed or delivered to each member at least 7 days before the meeting. For communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association.

No assessments may be levied at a homeowners' association board meeting unless the notice of meeting includes a statement that assessments will be considered and the nature of the assessments. Written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or

broadcast on closed-circuit cable television not less than 14 days before the meeting.

In general, both the condominium and homeowners' association laws require that notice of most board meetings be posted in the community at least 48 hours before the meeting. Both laws also require that if assessments are to be considered, or if rules regarding use of the units or parcels (as opposed to common element or common area rules) are to be considered, notice must be mailed, delivered or electronically transmitted and posted conspicuously on the property at least 14 days before the meeting. Additionally, certain rules must be followed in both condos and HOAs when television notice is used in lieu of posted notice.

The location requirement for posted notices often causes some confusion and potential legal complications. The Florida condominium law requires the board to adopt a rule stating where official notice may be posted. The board may specify more than one official location, but there must at least be one location in a conspicuous place on the condominium property or association property where the notices must be posted. The notices can also be posted in other locations. If the association does not have a location where notices can be physically posted, notices must be mailed to the owner of each unit at least fourteen days before a board meeting.

For homeowners' associations, the law simply states that the notices must be posted "in a conspicuous place" in the community. While there is no requirement that the HOA board adopt a posting location, it is a good idea to do so. Also, in lieu of posting notice of regular or special board meetings, the HOA can mail out the notices seven days in advance, which is slightly more liberal than the condominium notice requirement.

## **Owners' Rights at Board Meetings**

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One common thread in our discussion of community association sunshine laws is the fact that the law for condominium associations is very similar to the law for homeowners' associations, but with subtle and occasionally significant differences between the two.

First, let us look at the condominium law. Section

718.112(2)(c), Florida Statutes, provides that meetings of the board are open to all unit owners, who may tape record or videotape such meetings. The law states that unit owners have the right to speak at such meetings on all designated agenda items. A condominium association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

Section 720.303(2)(b) provides that members of a homeowners' association have the right to attend meetings of the board and the right to speak at such meetings with reference to all designated items. Additionally, Section 720.306(10) provides that members have the right to tape record or videotape such meetings. The irony is that the HOA statute does not require that there be any designated items, as there is no requirement for an agenda. The HOA may also adopt reasonable rules expanding the right of members to speak and governing the taping of the meetings and the frequency, duration, and other manner of member statements, which rules must be consistent with Section 720.303(2)(b). For example, the rules adopted by the HOA may require the use of a sign-up sheet for members wishing to speak.

For both HOAs and Condominiums, if 20 percent of the total voting interests petition the board to address an item of business, the board at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, shall place the petitioned item on an agenda. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

The following are the highlights of members' (homeowners') rights for both types of associations:

- **Requiring The Board To Address An Issue.** For condominium associations and HOAs, if 20 percent of the total voting interests petition the board to address an item of business, the board at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, shall place the item on the agenda. There is no requirement in the law that the board act favorably on the requested item, only that it be appropriately considered.
- **Right To Speak At Board Meetings.** For HOAs, the statute confers a general right to speak at meetings

of the board, although members may only speak to designated items, unless the HOA adopts rules expanding this right. Similarly, condominium unit owners have the right to speak at meetings of the board of directors with respect to items that have been placed on the agenda for the meeting. In both the HOA and condominium context, this does not mean that every unit owner is entitled to debate motions, but it does mean that the owners are entitled to be heard regarding matters the board intends to consider at the meeting. Therefore, unit owner statements should be taken either at the beginning of the meeting, or at a set time in connection with a specific agenda item. Allowing owners to speak after the board has voted does not fulfill the requirement allowing participation by members.

- ***The Board's Right To Establish Meeting Rules.*** Both condominium and HOA laws permit a board to establish reasonable regulations regarding the procedures for speaking at meetings of the board. For example, we think it is reasonable to require those who wish to speak to turn in a form at the beginning of the meeting, indicating which agenda item or items they would like to address. We also believe that an association may impose reasonable time limits. Three minutes per topic, per speaker, is typically considered a reasonable time limit.

## Keeping Minutes of Board Meetings

The purpose of minutes is to record what was done, not what was said. Where detailed findings of facts are appropriate for inclusion with minutes, they should be recited in a separate resolution of the board. If detailed reports were the basis for decisions, they can be attached as an appendix to the minutes.

A typical set of board minutes should reflect:

- The date, time, and place at which the meeting was called to order.
- The presiding officer.
- The establishment of a quorum, with attendees listed by name.
- Proof of proper notice for the meeting.
- Disposal of unapproved minutes from previous board meetings.

- A summary of reports given to the board and a statement by whom the reports were given (a one or two sentence summary is typically sufficient).
- Unfinished business.
- New business.
- Adjournment.

Whenever an item of board business is put to a vote, the person making the motion for approval of the item should be identified in the minutes, as should the name of the person who seconds the motion. The exact wording of the motion should also be included in the minutes. The points raised in debate are typically not included in the minutes.

Both the Condominium and HOA Acts require the vote of every director to be recorded in the minutes. Accordingly, if five directors vote in favor of a motion and two are opposed, the minutes should reflect the names of the five who voted for the item, as well as the names of the two who voted against.

Most boards operate under Robert's Rules of Order, either through mandate from the bylaws, or simply because most people are familiar with them as a standard reference for parliamentary procedure.

Under Robert's Rules, the chair of a meeting typically does not vote, except to break ties. This is not the case for associations. Typically, the chair of board meetings is the association's president and, in most communities, he or she is also a member of the board. As a member of the board, the president is entitled to vote on issues before the board.

Directors are obliged by law and concepts of fiduciary duty to abstain from voting when the subject matter of the vote presents a conflict of interest. For example, if a board member owned a unit and approval of a lease application for the unit was on the agenda, that director should abstain from voting on that item due to a conflict of interest. If a board member abstains, he or she is considered to have taken no position on the matter at hand. A director's abstention should always be noted in the minutes.

Both the laws for condominiums and homeowners' associations require minutes of board meetings to be kept for seven years, as part of the official records of the association.

## Sunshine Laws for Committees

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As we have learned by now, the sunshine laws for condominium associations and homeowners' associations contain many similarities, but also some important differences.

For both condos and HOAs, there are certain committees that must always operate in the sunshine, which means they must post notice of meetings, permit all association members to attend meetings and keep minutes. Operating in the sunshine also means the committee must permit other unit owners to speak to designated agenda items.

The sunshine laws for homeowners' associations apply to committees that can make final decisions regarding the expenditure of association funds, or committees that are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. The sunshine laws for condominiums apply to committees that are empowered to take final action on behalf of the board, or committees that make recommendations to the board regarding the association budget. A committee to which sunshine laws apply is commonly referred to as a "statutory committee."

Regardless of what the bylaws say, the sunshine requirements always apply to those committees that are required to have open, noticed meetings. For all other committees, there is a significant difference between condominium law and HOA law.

For homeowners' associations, committees that are not required by statute to have open, noticed meetings are not subject to sunshine requirements.

Conversely, the condominium statute provides that all committees are subject to sunshine requirements unless the bylaws for the association specifically exempt committees from the sunshine laws. In our experience, very few older bylaws for condominium associations exempt committees, and in such cases, the sunshine rules apply to all condominium association committees, not just statutory committees.

One final point to note is that members of condominium associations may tape record or videotape meetings of statutory committees. They may also tape record or videotape meetings of non-statutory committees unless the Bylaws contain the above-noted exemption. HOA members do not, however, have a right to tape record or videotape any committee meetings, even those meetings of committees which must operate in the sunshine.

## Exceptions to the Sunshine Law

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Every rule has its exceptions. In this section, we will look at the exceptions to the sunshine laws for condominium and homeowners' associations.

As noted previously, there are no exceptions to the sunshine law for "executive sessions", "planning sessions", "fact-finding missions", or for any other gathering of a quorum of the board (or, where applicable, committees) for the purpose of conducting association business. Remember, votes need not be taken for association business to be conducted.

However, the laws for HOAs and condominiums provide an exemption regarding legal meetings, found in Section 718.112(2)(c) (3) of the Condominium Act and Section 720.303(2)(b) of the HOA Act. Specifically, there is an exception to the requirement that board meetings and committee meetings be open to the owners when there are meetings between the board or a committee and the association's attorney with respect to "proposed or pending litigation", if the meeting is held for the purpose of "seeking or rendering legal advice."

Therefore, association boards (or committees) may hold closed meetings if they are meeting with legal counsel to discuss proposed or pending litigation. The rationale for the exemption is obvious. For example, if an association is involved in litigation with a member, it would be unfair to the association to permit the member to attend meetings with the association's attorney to discuss the strengths and weaknesses of the case, strategic issues, and the like.

Second, the HOA and condominium laws also contain another exemption, which is found at Section 720.303 (2)(b) of the HOA statute and Section 718.112(2)(c)3 of the Condominium Act. This law provides that meetings between a quorum of the board may be closed when "personnel matters" are under discussion. Presumably, "personnel matters" would be limited to the discussion of specific issues pertaining to employees of the association.

Boards (and committees) should also keep minutes of attorney-client privileged meetings, particularly if a vote is taken at the meeting. The minutes should never reflect attorney-client privileged information, but only who attended the meeting and proper documentation of any vote that was taken. ■

# MEETING NOTICE REQUIREMENTS

Type of Meeting	Condo/Co-op	HOA
<i>Board Meeting</i>	48 hours posted with agenda	48 hours posted (or pursuant to bylaws)
<i>Budget Meeting</i>	14 days mailed (along with a copy of the proposed budget) and posted, unless documents require a longer time period	Pursuant to documents
<i>Board Meeting To Levy An Assessment</i>	14 days mailed and posted - Notice must also include a statement that assessments will be considered and provide the nature, estimated cost, and description of the purposes for the assessments	14 days mailed and posted - Notice must also include a statement that assessments will be considered and the nature of assessments
<i>Board Meeting To Establish Insurance Deductible</i>	14 days mailed and posted	Not Applicable (unless required by documents)
<i>Board Meeting To Adopt Rules Regarding Unit or Parcel Use</i>	14 days mailed and posted	14 days mailed and posted
<i>Annual Meeting</i>	60 days for first notice; 14 days for second notice, mailed, delivered or electronically transmitted and posted	14 days mailed, delivered or electronically transmitted (unless bylaws provide otherwise)
<i>Member Meeting (other than Annual Meeting)</i>	Pursuant to bylaws (usually at least 14 days mailed, delivered or electronically transmitted)	14 days mailed, delivered or electronically transmitted (unless bylaws provide otherwise)
<i>Committee Meeting</i>	Committees that take final action on behalf of the board or make recommendations to the board regarding the association budget must notice their meetings 48 hours in advance, and the meetings must be open to unit owners. Committees that DO NOT take final action on behalf of the board or make recommendations to the board regarding the association budget must notice their meetings 48 hours in advance, and the meeting must be open to the unit owners UNLESS the bylaws provide otherwise.	Must be posted 48 hours in advance when a final decision will be made regarding the expenditure of association funds and to meetings of any committee vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.
<i>Meetings with the Association Attorney (Board or Committee)</i>	Must be noticed 48 hours in advance, but are not open to unit owners when the Association's attorney is present and the meeting is held for the purpose of seeking or rendering legal advice with respect to proposed or pending litigation.	Must be noticed 48 hours in advance (or pursuant to the documents) but are not open to owners when the Association's attorney is present and the meeting is regarding proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege.
<i>Meetings Regarding Personnel Matters (Board only)</i>	Must be noticed 48 hours in advance, but are not required to be open to unit owners when the meeting is held for the purpose of discussing personnel matters	Must be noticed 48 hours in advance (or pursuant to the documents), but are not required to be open to owners when the meeting is held for the purpose of discussing personnel matters

