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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

VOTING CERTIFICATES

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One of the most confusing and often overlooked issues by community associations is the requirement to use voting certificates. The term voting certificate is defined in Section 718.103(29), Florida Statutes (2015) as follows:

> "Voting certificate" means a document which designates one of the record title owners, or the corporate, partnership, or entity representative, who is authorized to vote on behalf of a condominium unit that is owned by more than one owner or by any entity.

The same definition is included in Section 719.103(27), Florida Statutes (2015) for cooperatives. While Chapter 720, the Homeowners' Association Act does not contain a definition for voting certificates, many homeowners' association documents also require voting certificates and this definition would seem to apply in the HOA contact as well.

None of the community association statutes require the use of voting certificates. Rather, the requirement that the owners of a unit submit a voting certificate is driven entirely by the association's documents. If there is a requirement for a voting certificate, typically the bylaws will state under what circumstances a voting certificate must be submitted to the association in order for the vote of that unit or parcel (collectively "unit") to be considered. Often the requirement is that any unit owned by multiple individuals (typically excluding husband and wife), or by any fictitious entity, such as a corporation, partnership, trust or limited liability company, must designate in writing the individual authorized to cast the vote for the association. Further, most documents also provide that if a required voting certificate is not on file, the association cannot accept a vote from that unit.

Accordingly, a voting certificate requirement creates not only an additional administrative burden on the affected owners, but also a significant burden on the association and its management in verifying that the association has voting certificates for every unit that is required to provide one and whether the vote cast by that unit was cast by the person named on the voting certificate. As such, the modern practice in drafting association documents is to not require voting certificates, but provide that in the absence of a voting certificate, any owner of record or any officer of a corporation, partner of a partnership or member of a limited liability company, which owns a unit has the authority to cast the vote on behalf of that unit. Such language both increases the ability of owners to participate in elections as well as removing the burden on the association of having to verify that a required voting certificate is on file and that the vote has been cast by the proper person.

However for those associations whose documents do require voting certificates, not enforcing the voting certificate requirement can create a number of problems.

The most common example of the voting certificate requirement causing problems is in the context of recalls. It is not uncommon for an association that is faced with a recall to seek to disqualify votes due to the failure of the units to have a voting certificate on file. If the association has historically enforced the voting certificate requirement, then the association can rightfully reject any recall vote made by a unit that does not have a voting certificate on file. However, the Florida Administrative Code provides that in Rule 61B-23.0028(3)(b)(6) (2015), that "the failure of the association to enforce a voting certificate requirement in past association elections and unit owner votes shall preclude the association from rejecting a written recall ballot or agreement for failing to comply with a voting certificate requirement." Therefore, if the association has failed to enforce the requirement to supply a valid voting certificate, then that issue cannot be used to disqualify recall ballots or petitions.

Further, the failure to require voting certificates, when mandated by the documents, can also jeopardize the election and other votes by the owners. There are arbitration decisions from the Division of Florida Condominiums, Timeshares and Mobile Homes, that have found that the failure of the association to require voting certificates and counting votes from units where such a certificate was required under the documents, can be the basis to invalidate an election. For example, in the arbitration decision of *Hanna v. Hallmark of Hollywood Condominium Association, Inc.*, Case No. 09-02-0757, the association counted thirty-seven votes from units for which a voting certificate was required pursuant to the association bylaws and where no such certificate was on file. The arbitrator ordered that the association conduct a new election. The association attempted to argue that it would be unfair to disqualify, and therefore disenfranchise, the thirty-

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Don't Lose Control OF YOUR CONDOMINIUM OR COOPERATIVE

As the economy has improved over the last few years many condominium and cooperative associations have seen a resurgence of investors attempting to purchase multiple units in a single condominium or attempting to purchase cooperative buildings. Sometimes the investor's goal is to terminate the condominium or cooperative form of ownership and create a rental building. Other times their goal is simply to own a number of rental units as a passive income source for themselves. If your condominium or cooperative community is one which is primarily owner-occupied the Board and membership may wish to take steps to prevent a takeover or multiple unit ownership from occurring. The following are some of the many steps which may, through amendments to your declaration of condominium or cooperative documents, make your community less attractive to investor-purchasers.

1 **LIMIT THE NUMBER OF UNITS** that any one person or entity such as a partnership, limited liability company, or corporation may own. If drafted in a manner that avoids loopholes, any one individual or business entity will never own enough units to take control or turn an otherwise owner-occupied community into a rental community.

2 **PROHIBIT OWNERSHIP BY ENTITY**. Individuals often attempt to own multiple units through a series of limited liability companies. In one association which had this occur, the investor purchaser was in control of at least 18 LLC's, each owning one unit. This type of amendment, coupled with a prohibition on multiple unit ownership, above, will often dissuade an investor-purchaser from buying into your community. Even if they still wish to purchase a single unit, they will never be able to obtain enough leverage to take over the building or have enough votes to change the governing documents or force the termination of your condominium or cooperative form of governance.

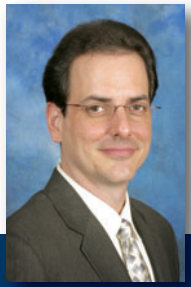
3 **PLACE A MORATORIUM ON LEASING** for the first year or two of ownership. Most individuals who purchase multiple units lease those units to, at a minimum, cover the annual assessments charged by the community association. This type of amendment dissuades purchases by investors as the investor would have to carry all charges without an income stream. The amendment should take into account how to deal with the transfer when a tenant is already in the unit.

4 **LIMIT MORTGAGEES** to institutional mortgagees, such as banks, credit unions, and governmental entities which provide loans. Many governing documents provide an exception to the restrictions found therein for first mortgagees taking title through foreclosure or deed in lieu of foreclosure. The idea behind this amendment is to prevent private individuals from acting as mortgagees on condominium or cooperative units and then claiming title to their mortgaged units through foreclosure actions or through deed in lieu of foreclosure.

5 **TIGHTEN UP YOUR GUEST RESTRICTIONS**. Sometimes, when a leasing moratorium is in place, the investor-owner suddenly has "guests" during that period. Many boards suspect that these individuals are actually tenants but they have no provisions in the governing documents to limit the occupancy of the units by these individuals. This is an attempt at an end-run around the leasing moratorium so it should not be overlooked when amending your governing documents. Limit the amount of time that any guest may stay in the unit without the owner present and require such individuals to be screened as tenants if they stay a certain length of time.

6 **REQUIRE ALL DEEDS TO BE RECORDED** in the Public Records of the county where the association is located so that transfers by deed are not kept secret from the Board.

7 **STATE IN YOUR DOCUMENTS** that transfers which are not approved by the Board or which run contrary to the requirements of the Declaration are void.



If your Association takes the steps outlined above, you will make your condominium or cooperative unattractive to most investors who want to buy multiple units. It will also become very difficult for an investor to buy out the entire condominium or cooperative and potentially, terminate its existence. The foregoing types of amendments should never be attempted without the assistance of legal counsel. Board members should use the foregoing information as guidelines in the discussion with their community association attorney but should never attempt to draft amendments themselves.

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seven unit owners who had failed to submit a voting certificate because the association had not previously enforced the voting certificate requirement and in doing so cited the language of Rule 61B-23.0028(3)(b)(6). However, the arbitrator stated that Rule 61B-23.0028(3)(b)(6) applies only in the context of recalls and that there is no similar language in Rule 61B-23.0021, governing elections. Therefore, the association cannot use its past failure to enforce a voting certificate requirement as a defense to a challenge by an owner concerning the Association's failure to require voting certificates in a particular election or owner vote.

As such, if the association does not enforce the voting certificate requirement in its documents, it is in a no win situation. The failure to enforce the voting certificate requirement cannot be used to invalidate recall ballots or petitions; however, the failure to require voting certificates will also not be a defense in a challenge to any vote taken by the association where voting certificates were not required. As such, an association should review its documents to determine whether voting certificates are required. To the extent voting certificates are required, the association should enforce that requirement to ensure that future elections and votes by the members are valid or remove the requirement through a properly adopted amendment to the documents. This is an area where many associations may want to investigate and determine whether they need to take some action.

Reliance On Advice Of Counsel And Other Expert Opinions...

What Are The Board's Obligations?

All associations need legal and other expert advice from time to time. Directors are not expected to be experts in every field. Where the matter under consideration can best be understood with the assistance of an appropriate professional, the association should retain one. Fla. Stat. 617.0830, which applies to both condominium and homeowner associations, explicitly recognizes that board members may rely on "information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by" the association's legal counsel or by public accountants. While a director can take some comfort from this statute, its protections should not be read as granting blanket immunity to board members relying on such opinions.

Reliance on expert reports must be reasonable under all surrounding circumstances. Where an expert opinion appears to be given strictly for the purpose of providing cover for a questionable decision, reliance may not be reasonable. Directors must make a good faith effort to understand the advice within the full context of which it is given. Board members are not expected to "know the law," but they are expected to have a basic understanding of the facts behind any legal matter coming before the board, and to be able to weigh expert advice in light of that understanding. In the final analysis, the board is accountable to the membership for the decisions it makes. By following a few simple guidelines, directors should be able to make the best use of the advice they receive, and identify situations where they may need to seek further information before acting.

1. Insist that any report or opinion from counsel or any other expert be in writing. If board members are going to rely on an expert report, there should be a written record documenting exactly what information is being relied on.
2. Pay close attention to the assumptions made by the expert. Lawyers and accountants, as well as other professionals, generally pepper their written opinions with disclaimers and assumptions in order to make clear what facts they have not investigated or have no knowledge of. Board members are responsible for understanding what those assumptions are before acting on the opinion. If the expert is assuming critical facts that have not been investigated, the board should consider a fact-gathering mission before proceeding on the opinion.
3. If the matter under consideration is of sufficient magnitude, insist that the person providing the advice be available for questioning by the board. Boards should be cautious of relying on any report until they gain an understanding of who prepared the report and what research went into it.
4. Always be on guard concerning possibilities of self-dealing and conflicts of interest. Consider who is likely to benefit and who is likely to suffer detriment if the board accepts and acts on the advice. Where a conflict of interest is apparent, the board should look under every rock before signing off on any recommendation of an outside expert.
5. Exercise caution where another expert has previously opined differently on the same subject. A prior opinion that is contrary to the opinion being relied on raises the specter of opinion shopping.
6. When in doubt, seek a second opinion. Experts are not immune from mistakes. Directors should not blindly follow the advice of any source when it does not accord with their own notion of what is reasonable. Expert advice is critical to board operations, but it is no substitute for common sense. Just be sure there is a legitimate reason to seek a second opinion so that the board does not appear to be opinion shopping.

Directors cannot know everything, nor are they expected to. Reliance on opinions and reports prepared by others is a common aspect of board operations. While the board can rely on advice from a trustworthy expert, that reliance must be reasonable. In the end, it is the board, not the advice-giver, who is accountable to the membership.

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WHO GETS THE MONEY

When An Association Is Served With A Writ Of Garnishment?

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In my last article, I discussed the basics of what happens when an Association receives a Writ of Garnishment for one of its employees or vendors. This article focuses on "Who Gets the Money?"

Once the Association begins the garnishment process mentioned in my last article, it does not automatically mail the money to the person/company seeking payment on the judgment. The Association actually has to hold on to the money until the Court enters a final order providing disbursement instructions. The process of getting that order could take anywhere from a few weeks to months depending on the nature of the employee/vendor's arguments against garnishment and the date the Court can hear those arguments. Regardless of the time frame, each time the employee or vendor is due a check from the Association the garnished funds must be appropriately withheld until a Court Order advises otherwise. For example if a Court advises of a bankruptcy, the garnishment stops but the Association continues to hold the funds already garnished until an order requiring disbursement or requiring the garnishment to continue is received.

Once the Association receives the Court Order instructing it with regard to the Writ of Garnishment, the Association must simply follow the instructions. For example, the Order may require the Association to immediately disburse to the person/company seeking payment on the judgment the amount which has been collected and held while the Court's Order was pending along with regular disbursements each time the employee is due a paycheck. The Order may also increase or decrease the amount to be withheld with each paycheck so the Association would have to adjust its garnishment amount accordingly.

The garnished funds and disbursement thereof, will continue until the time frame set forth in the Order or the person/company seeking the garnishment advises the Association that the debt is paid in full and the garnishment is dissolved. The withholding and disbursement of garnished funds would also end if the employee/vendor no longer works for the Association. In such a circumstance the Association should notify the person/company seeking the payment on the judgment to avoid a claim that the Court's Order is not being complied with.

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