THE HOA DIRECTORS' DIGEST

September 1, 2024

37 YEARS

A Publication of the Law Offices of Lobeck & Rowe, PA

2024 Law Alert

HANDCUFFING HOA's

Prohibited Restrictions
Criminal Penalties on Directors *and More*

For years, the Florida Legislature has piled on increasing micromanagement of Homeowners Associations.

Led by lawmakers in Miami who favor big government and urged on by some who perhaps find it profitable for the law to be complicated and burdensome, isolated incidents of Director misconduct in southeast Florida are cited as an excuse to make it even more difficult to recruit owners to serve on HOA Boards. Largely undeserved bad press doesn't help.

Absent is the recognition that almost all HOA Directors are just good residents, duly elected and subject to recall, who volunteer their time and talents to serve their neighborhoods — including agreed restrictions to keep the community nice.

For a supposedly conservative Legislature, this overreach into private corporations is hard to justify. Perhaps some day, sense will prevail.

MEET

Brett Paben

Brett Paben joined our firm in 2023 after years as a successful solo practitioner. He was admitted to the Florida Bar in October, 2000.

He earned his Juris Doctorate from University of Oregon School of Law and went on to further his education by receiving his Master of Law in Environmental Law from Georgetown University Law Center.

Brett's legal experience began in the nonprofit sector focusing on environmental subjects and he later expanded to land use and zoning in his private practice.

Brett has experience providing litigation and counseling in environmental, nonprofit organization corporate and tax matters, as well as experience with wills and trusts and otherwise.

Additionally, Brett has worked as a professor teaching environmental law and taught land use law while serving as a visiting professor.

2024 HOA Legislation

The big bill for HOA legislation in 2024 was HB 1203. It passed unanimously in the Senate and with only two "no" votes in the House and was signed into law by Governor DeSantis on May 31, 2024.

The new laws have an effective date of **July 1, 2024**.

Mandatory Management Duties

A manager or management company for an HOA is required to perform the following duties:

Attend "in person" at least one membership or Board meeting annually.

Provide to the members of the HOA (which the HOA shall also post on its website) the name and contact information for each manager or "management company representative" assigned to the HOA, such persons' hours of availability and a summary of the duties for which each such person is responsible. The manager or management company shall update the HOA and its members within 24 hours of any change in that information.

It is unclear how the manager or management company is to provide this information and updates to the members, whether by mail, email (when available) or other means. Notification by posting on the HOA website would not seem sufficient, however, as the statute provides that notification (by the HOA) is to be provided as a supplement to the notification by the manager or management company.

There is an issue as to whether these requirements may validly impair a management contract existing before their effective date on July 1, 2024, by imposing obligations (and arguably expenses) not included in the contract, without additional compensation. It would appear to be an unconstitutional legislative impairment of contract, and as such applicable to new contracts only.

Manager Continuing Education

The existing continuing education requirement for Community Association Managers, up to ten hours (as determined by the Regulatory Council of Community Association Managers), must now include – for any CAM that provides management services to an HOA – at least five hours of education that pertains specifically to HOA's, three hours of which must relate to recordkeeping.

How one can possibly teach about HOA recordkeeping by managers for a full three hours is not explained.

Mandatory Director Education

At present, a newly elected or appointed Director has a choice between attending a Director education class or signing a certificate that the Director has read the governing documents and will work to uphold them and uphold the Director's fiduciary duty.

That would be changed to require both. The education curriculum as approved by the Division must be specific to new Directors and must include certain subjects. New Directors will have 90 days from election or appointment. The education certification is valid for four years and must be repeated for any Board service after that.

Also, a Director of an Association that has 2,500 parcels or more must complete at least four hours of continuing education annually.

Any Director who has not timely fulfilled the education requirement is automatically suspended from the Board and may be temporarily replaced until the education is fulfilled.

Director Standards

It is clarified that officers and directors of an HOA are subject to the standards for directors of non-profit corporations in s. 617.0830, Florida Statutes, in addition to having a fiduciary duty to the members.

Association Records

Association records must be kept for seven years, unless the governing documents require longer. While bids are included in the seven-year list, the statute elsewhere states that they must be kept for one year.

If the HOA has 100 or more parcels, the Association must post a long list of its records on its website or make them available through a mobile device app.

That includes timely notice of membership and Board meetings, with agendas. The posted notices of membership meetings must also include any item to be voted on at the meeting. The notices of Board meetings must include any document required for the meeting by s.720.303(3), Florida Statutes, but that seems to be a drafting error, as it is subsection (2) which provides for notices of Board meetings and subsection (3) requires minutes – which are elsewhere required in by this legislation to be posted on the website or app posting and are of course not known before the meeting.

The Association's website and any app must include a section that is accessible only by user name and password by parcel owners and employees of the Association (which technically does not include management contractors), provided to parcel owners on request. It is not stated what is to be on the protected portion of the website or app, other than providing that the access by user name and password is to be to "the protected sections of the association's website or application which contains the official documents of the association", whatever that means.

Association records which the HOA Act provides must be confidential and inaccessible to owners' access must be redacted and otherwise kept off the Association's website or app. However, the Association or its agent is not liable for such disclosure "unless such disclosure was made with a knowing or intentional disregard of the protected or restricted nature of such information."

The Association must adopt rules which govern the "method or policy" for retaining its records, including the retention time periods, which rules must be made available to parcels owners through the website or app.
"If an association receives a subpoena for records from a law enforcement agency, the association must provide a copy of such records or otherwise make the records available for inspection and copying to a law enforcement agency within 5 business days after receipt of the subpoena, unless otherwise specified by the law enforcement agency or subpoena. An association must assist a law enforcement agency in its investigation to the extent permissible by law."

Financial Statements

Although the statute continues to base the level of the annual financial report on the Association's annual revenues, it is now provided that if the Association has at least 1,000 members, an audit is required, regardless of the annual revenues.

The level of accounting remains subject to reduction by a vote of the members. However, that reduction is now disallowed in consecutive years, such that a reduction is only permitted every other year.

Debit Cards

An association and its officers, directors, employees, and agents may not use a debit card issued in the name of the Association, or billed directly to the Association, for the payment of any Association expense. Credit cards are still allowed.

Owner Request for Accounting of Sums Due

"A parcel owner may make a written request to the board for a detailed accounting of any amounts he or she owes to the association related to the parcel, and the board shall provide such information within 15 business days after receipt of the written request. After a parcel owner makes such written request to the Board, he or she may not request another detailed accounting for at least 90 calendar days.

Failure by the Board to respond within 15 business days to a written request for an accounting constitutes a complete waiver of any outstanding fines of the person who requested such accounting which are more than 30 days past due and for which the association has not given prior written notice of the imposition of the fines."

The penalty of a waiver of sums due if a timely accounting is not provided on request applies only to fines. It does not apply to assessments or other sums due the Association. If raised by an owner in defense to a collection action, Florida case law provides that a partial enactment on a subject by implication excludes its application more broadly. Also pertinent in that event, the HOA Act requires an accounting to an owner at least 30 days before collection action by an attorney if the Association is able to recover attorney fees.

Compound Interest

Although never or rarely attempted (and perhaps disallowed by prior law anyway), the governing documents may not allow compound interest of delinquent assessments (that is, interest on interest).

Electronic Voting

It is clarified that a unit owner may consent to participate in electronic voting "electronically" rather than only "in writing" as at present.

Architectural Review

A notice of denial by an Association to an owner "for the construction of a structure or other improvement on a parcel" must include specification of the covenant or rule relied upon by the Association and the specific aspect of the improvement which does not conform to that covenant or rule.

Prohibited Restrictions

By prior amendment, the HOA Act prohibits an Association from restricting a parcel owner or tenant "from installing, displaying, or storing any items on a parcel which are not visible from the parcel's frontage or an adjacent parcel." This is changed to allow the Association to also restrict items if they are visible from "an adjacent common area, or a community golf course." Although this applies to any item (not prohibited by law or ordinance), the list of items which are protected by example is expanded from artificial turf, boats, flags and recreational vehicles to also include vegetable gardens and clotheslines.

Now going further, the governing documents of an HOA may not prohibit:

- The parking of a pickup truck in the owner's driveway or elsewhere that the owner or tenant, guest or invitee has a right to park under state, county or city regulations.

- The parking of a "work vehicle" of the owner or tenant, guest or invitee, regardless of official insignia or visible designation, in the owner's driveway. An exception is provided to allow prohibition of a commercial vehicle as defined in s. 320.01(25), Florida Statutes, that is, "any vehicle which is not owned or operated by a governmental entity, which uses special fuel or motor fuel on the public highways, and which has a gross vehicle weight of 26,001 pounds or more, or has three or more axles regardless of weight, or is used in combination when the weight of such combination exceeds 26,001 pounds gross vehicle weight." (Also not a commercial vehicle under that statute – in a good example of special treatment for a lobbyist or constituent – is a vehicle that without corporate sponsorship transports race cars or other property to a closed-course motor facility. So HOA's have to allow race car transports as well).

  The foregoing provisions may have the effect of elevating the right to park pickup trucks and work vehicles over the parking of other vehicles, to the extent to HOA restricts driveway parking, and as to the parking of work vehicles disallowed by the HOA but for which parking is a right "as governed by state, county or city regulations" – such as possibly parking on public roadsides (although the latter is subject to other legal considerations as well).

- The parking by a first responder as defined by s. 112.1815(1), Florida Statutes, of a first responder vehicle, in any place where the owner or his or her tenant, guest or invitee otherwise has a right to park, including on public roads or rights-of-way. The definition includes law enforcement officers, firefighters and emergency medical technicians and paramedics as defined in turn by certain statutes, as

employees or volunteers of the state or local government. Previously, only parking by law enforcement officers was protected. (The reference to parking on public roads and rights-of-way is also an addition and could actually help to uphold restrictions in HOA governing documents on such parking by others, under the theory that the Legislature would not protect that which could not be legally disallowed anyway).

- Operating any vehicle which is not a commercial vehicle as defined by the statute cited above, in conformance to state traffic laws, on public roads or rights-of-way or the owner's parcel.

- Any constraint on an owner using a "contractor or worker" solely because of not being on the Association's "preferred vendor list" or not having a professional or occupational license.

Although not going so far as to prohibit enforcement, by legal action if needed, an Association may no longer levy a fine or impose a suspension of common area use rights for the following violations:

- Leaving garbage receptacles at the curb or end of the driveway within 24 hours before or after the designated garbage collection day or time.

- Leaving holiday decorations or lights on a structure or other improvement on a parcel longer than indicated in the governing documents, unless such decorations or lights are left up for longer than 1 week after the association provides written notice of the violation to the parcel owner.

Enforcement Fines and Suspensions

The 14-day minimum notice to an owner of an intent to impose an enforcement fine or suspend common area use rights must be in writing and must now include a statement of the right to a hearing (in addition to the date and location of the hearing and a description of the violation and action required to cure it, as before).

The hearing before a certain committee must now be held within 90 days of the issuance of that notice.

"The committee may hold the hearing by telephone or other electronic means." A right to hold the hearing in person is not stated, but may be implied. In any event, as before, the owner has a right to attend the hearing by telephone or electronic means, and now the information for that access must be included in the notice.

Significantly, if the owner cures the violation before the hearing, a fine or suspension shall not be imposed.

The notice of a fine or suspension and how the owner "may cure the violation" now must also state how a suspension may be "fulfilled" and when (not sooner than 30 days) the fine must be paid. That notice must now be provided to the owner not later than seven days after the hearing.

It is also provided that the fine or suspension may not be imposed if the violation is cured after that post-notice hearing. Although not clear, it would seem that the post-hearing notice should state a deadline to cure the violation in order to negate the fine or suspension, perhaps the same 30 days upon which the fine is due.

Attorney's fees and costs incurred after the deadline to cure or pay the fine in the post-hearing notice may be "awarded" to the Association, but not those incurred prior to that date. The use of the word "awarded" suggests that the fees and costs would be awarded by a court in a lawsuit to collect the fine and perhaps also to obtain compliance.

These new protracted opportunities for an owner to cure a violation before the hearing and even well after it, in order to avoid paying a fine, could tempt an owner to commit a violation and test the Association's resolve, knowing that the fine can ultimately avoided, or to repeat a violation in a cat-and-mouse cycle in which fines are never collected.

Criminal Penalties

Any officer, Director or manager who solicits, offers to accept or accepts any thing or service of value from any person providing or proposing to provide goods or services to the Association, or a kickback, without paying consideration for it, commits a third-degree felony and shall be deemed to be removed from office. (What has been called the "CAI Community Association Day" exemption, for gifts in connection with a trade fair or educational program, remains).

Any officer, Director or manager who knowingly, willful-

ly and repeatedly violates any of the statutory requirements to provide access to inspect and obtain copies of Association records to a unit owner or an owner's authorized representative, with the intention to cause harm to a member or member, commits a second-degree misdemeanor and shall be deemed to be removed from office. It may be expected to be hotly contested whether a violation of a records access requirement was intended to cause such harm. "Repeatedly" is defined as two or more violations within a 12-month period.

Any person who knowingly and intentionally defaces or destroys accounting records during the period for which such records are required to be maintained (without any need to show harmful intent), or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members commits a first-degree misdemeanor.

"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" commits a felony of the third degree.

The use of a debit card held by or billed directly to the Association (now unlawful anyway) for an expense that has not been "properly preapproved by the Board" and reflected in the written minutes or the written budget – even if otherwise a valid Association expense – is the commission of theft under s. 812.014, Florida Statutes. Such theft is punishable as a first, second or third degree felony or misdemeanor, depending on the sum and circumstances.

Prior to the new law, numerous acts involving Association elections were each made a first-degree misdemeanor. They include fraud, generally; making a willfully false affidavit; fraudulently seeking to change a ballot, ballot envelope, vote or voting certificate; using force or violence or any "tactic of coercion or intimidation" to compel a member to vote or not vote in an election or ballot issue; seeking to influence a vote by giving or promising "anything of value" to someone, other than a wearable campaign advertisement of nominal value or food at an election rally. (Providing beverage at a rally is apparently not protected, or buying lunch for an influential unit owner, or providing a very high quality campaign shirt or hat). Added to these first degree misdemeanor election crimes – except if by a licensed attorney providing legal advice -- are now: knowingly aiding, abetting or advising someone in the commission of election fraud; agreeing or conspiring with such a person; or knowing of an election fraud and trying to help the person who committed it avoid or escape consequence.

Directors' Rap Sheet

Felony: Jail for 5, 15 or 30 years - for third, second and first degree respectively, and/or
Fine of up to $5,000 (second or third degree) or $10,000 (first degree)

First Degree Misdemeanor:
Jail for up to one year and/or
Fine of up to $1,000 plus costs and damages

Second Degree Misdemeanor:
Jail for up to 60 days and/or
Fine of up to $1,000 plus costs and damages

Third Degree Misdemeanor:
Fine of up to $500 plus costs and damages

775.082 and 775.083, Fla. Stat.

Removal of Officers and Directors Charged with a Crime

At present, an officer or Director is removed from office upon being charged or indicted for theft or embezzlement of Association funds or property, obstruction of justice, as well as forgery of a ballot envelope or voting certificate used in an election (but oddly, not a ballot) and the destruction or refusal to allow owner access of an Association record which is accessible to owners, if in furtherance of a crime.

The new crimes recited above are now added to those for which automatic removal from the Board occurs upon a charge or indictment.

The new law also provides that upon such removal, a vacancy in the Board is declared.

As such, a new Director may be appointed.

37 YEARS

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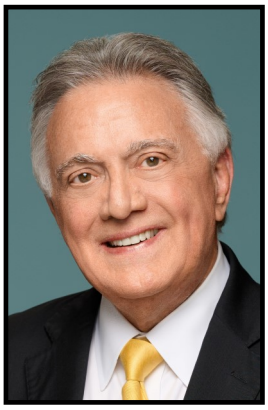

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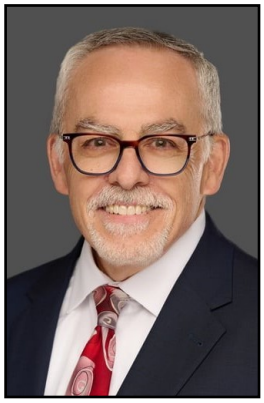

Joe Gugino

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