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PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

SUMMER 2017 – PART 2

PLEASE NOTE: The Amendments below ONLY apply to condominium associations.

AMENDMENTS UNDER HOUSE BILL 1237 ACCOMPLISHED LITTLE MORE THAN DISCOURAGING SERVICE ON THE BOARD

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Volunteer Officers and Directors Put On Notice of Potential for Criminal Prosecution

Section 718.111(1)(a) which prohibits an officer, director, or manager from soliciting, accepting anything of value from any person providing or proposing to provide goods or services to the association has been amended to include: "or kickback". This subsection has also been amended to refer to the potential for criminal penalties, if violated. This really accomplishes nothing except changing the tone from neutral to hostile.

Immunities Eroded

Provisions were added to Section 718.111(1)(d), which otherwise provides protection from liability to officers and directors who discharge their duties in good faith, to create two "new" criminal offenses. Forgery of a ballot envelope or voting certificate used in a condominium election is now defined and punishable as theft or embezzlement. Destruction of or the refusal to allow inspection or copying of an official record in the time period required by law is now considered tampering with physical evidence or obstruction of justice. Trying to set the association up for a complaint of denial of access to official records is the favorite sport of dissenting owners so this is troublesome.

Presumed Guilty Until Proven Innocent

Section 718.111(1)(d) reverses the innocent until proven guilty rule by requiring that any person charged or indicted must be removed from office until and unless the charges are resolved without a finding of guilt.

No Dual Representation

Section 718.111(3) has been amended to provide that "an association may not hire an attorney who represents the management company of the association". This amendment raises a concern because often times the association's contract with its management company contains a provision that requires it to defend the manager in suits arising out of the performance of the management company's duties. This new provision supersedes the usual rule that would allow an association's attorney to represent both entities by mutual and fully informed consent of the parties and standard practice in these cases.

Directors/Managers May Not Buy Distressed Units

Section 718.111(3) now prohibits a board member, manager, or management company from purchasing a unit at the association's lien foreclosure sale or to "take title in lieu of foreclosure". How any entity except for the association or another lien holder could

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take title by deed in lieu of foreclosure is not clear. But, directors and managers who want to buy a unit at a "short sale" or "buy the debt" are definitely in the cross hairs and should probably eschew any involvement in such transactions.

List of Official Records Expanded

Section 718.111(12)(a) has been amended to include bids for materials, equipment or services as official records. Since many contracts do not require bids, we foresee spending time defending unfounded complaints of obstruction of access to official records arising from complaints that access to bids that do not exist has not been provided.

Renters Have Rights Too

Section 718.111(12)(c) has been amended to provide that a renter has the right to inspect and copy the association's rules and bylaws. This is another change that seems to have no purpose other than to add to the cost and the administrative burden of maintaining the official records.

Stricter Financial Reporting Rules

Section 718.111(13)(c) now requires the association to provide owners with notice that the most recent annual financial report is available to them without charge within five business days of the receipt of a written request by an owner in conjunction with providing notice of availability of the annual financial report(s).

The provision allowing associations operating fewer than fifty units to provide an annual report of cash receipts and expenditures, regardless of revenues, has been eliminated from Section 718.111(13)(b) and the required level of recording now depends on annual revenues.

Section 718.111(13)(e) has been added and provides that if, in response to an owner's written complaint, the Division finds that the association failed to provide the most recent financial report to the owner within five business days after submission of a written request to the association, then the Division shall notify the association that it must provide the report to the owner and the Division. The Division is required to maintain the report and to provide a copy to any owner upon request. The amendment also states that an association which fails to comply with the Division's request may not ask for a unit owner vote to approve waiver of the financial reporting requirements pursuant to Section 718.111(13)(d). Presumably the "most recent" financial report means the report that should have been prepared for the last completed fiscal year, whether or not it actually exists. The ban on "waiver" reinforces the existing provisions of 718.111(13)(d) requiring that any ownership vote to lower the level of the financial reporting occur prior to the end of the fiscal year.

Section 718.71 was added to Chapter 718 and requires the association to file an annual report with the Division listing the names of all of the financial institutions at which it maintains an account. The report may be obtained by an association member upon written request.

No Debit Cards

Section 718.111(15) has been added to prohibit the use of debit cards issued in the association's name "or billed directly to the association" for payment of association expenses. Regardless of what "or billed" means, we do not recommend that any association have debit or credit cards and there should be no "petty cash".

Tinkering with Term Limits

Section 718.112 (2)(d) has been amended to prohibit a director from serving more than four consecutive two-year terms unless approved by an affirmative vote of two-thirds of the owners unless there are not enough eligible candidates to fill the vacancies. Arguably there is no limit on consecutive one-year terms. The term limits do not apply to non-residential condominiums and the amendment expanded the exemption to timeshare condominiums.

Board's Power to Challenge a Recall Eliminated

Section 718.112(2)(j)1 and 718.112(2)(j)2, has been amended to remove the option for the sitting board to either certify a recall or file an arbitration petition within five business days. The recall is now effective immediately as of the date of the members' meeting where the recall vote was taken or upon service of the written recall agreement. Any recalled director now has ten business days to turn over all records and property of the association to the new board. The "old" board is still required to hold a meeting within five business days of the recall vote or service of

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recall agreement. If the meeting is not held or is held and the recall is not "honored", then the unit owners' representative may file a petition to compel the board to comply with the recall. The Division is still required to reject petitions involving recalls if the recalled director is already scheduled to stand for reelection within sixty or fewer days. It is hard to imagine what these changes accomplish except to eliminate certainty as to who is authorized to conduct the business of the association during a pending recall dispute.

Conflicting Conflict of Interest Rules

Section 718.112(2) has been amended to add a new subsection which provides an association may not employ or contract with a service provider that is owned or operated by a board member or by any person who has a financial relationship with a board member or officer, or a relative within the third degree of consanguinity by blood or marriage unless the ownership interest is less than 1% of the equity shares. The provision provides that it does not apply to timeshares.

Notwithstanding the apparent total prohibition against contracting with any service provider in which a director or a director's kin has interest, Section 718.3027 has been added to Chapter 718 and it appears to create a road map to the proper handling of transactions involving "interested directors", which include contracts for services. The new section requires officers and directors to disclose any: "…activity that may reasonably be construed to be a conflict of interest…" A rebuttable presumption of a conflict exists if a director or an officer or a relative within in the third degree of consanguinity, by blood or marriage, without prior notice, enters into a contract for goods or services with the Association or holds an interest in an entity that conducts business or proposes to conduct business with the association. Any proposal to enter into an activity which may be a conflict of interest must be listed on all contracts and transactional documents and they must be attached to the meeting agenda. The interested party may attend the meeting and make a presentation but must leave during the discussion and vote and may not vote. If the board votes against the proposed activity then the interested party must withdraw from office or notify the board in writing that they do not intend to pursue the activity. A contract with an interested officer, director or their relative, formed without the required disclosure, terminates upon "filing" a notice of termination with consent of at least 20% of the owners with the board. If the board finds that a director or officer has violated Section 718.3027 then the director or officer is deemed removed from office. The section says that it does not apply to timeshares which may be misleading to timeshare directors who do not understand that similar disclosure and cancelation provisions are contained in Chapter 607 and 617, Florida Statutes and also apply unless there is a conflicting provision in Chapter 718. We have always advised directors who have an interest in entities providing or proposing to provide goods or services to the association to get off the board and a renewal of that advice is obviously timely. There is no upside to the risks.

Subsection 720.3025(2)(p) has been added to Chapter 718 and provides that the majority of the minority unit owners may vote to cancel a maintenance or management contract with the owner of the majority of the units. This provision does not apply prior to turnover from developer control or to timeshares.

Suspension of Voting Rights Requires Prior Notice & Delinquency of at Least $1,000

Section 708.303 has been amended to add a requirement that the delinquent obligation involve at least $1,000 and to require the association to provide "proof" of such obligation to the member at least thirty days before a proposed suspension of voting rights goes into effect. Note that the provision exempting suspension of use rights for delinquency from the requirement of any prior notice has not been changed. The only requirement for a suspension of use rights for delinquency is formal action at properly noticed board meeting and subsequent written notice to the owner whose use rights have been suspended. The enhancement of protection of voting rights over use rights seems misplaced and will likely cause some confusion.

Voting Rights for Units in Receivership Suspended

Another subsection has been added to section 718.303 to provide that the receivers appointed for the benefit of the Association may not vote. This is one of the few provisions that provides helpful clarification.

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Arbitration Reforms

Provisions setting out qualifications for arbitrators have been added to Section 718.1225. Arbitrators are also required to hold a hearing within 30 days of the assignment of a petition unless a continuance has been granted for good cause and to render a decision within 30 days of the hearing. The method of enforcement and or remedy for an aggrieved litigant is not included and, as we all know, the deadlines for processing complaints and requests for advisory opinions filed with the Division are routinely ignored.

Website Requirement for Condos with 150 or More Units

Effective July 1, 2018, condominiums with 150 or more units must have a website on which most of the condominium association's official records must be accessible to unit owners from the website. Unit owners must be given user names and passwords to ensure that any records posted on the website that are not available in the public domain must not be accessible to non-owners. Publicly accessible records are those that can be found in the official records of the Clerk of Courts for the county in which the condominium is located, e.g. the declaration of condominium and bylaws, but the rest of the association's official records may not be accessible in the public domain, e.g. budgets, ballots, financial statements or insurance policies. A list of the documents that must be available on the website after July 1, 2018 can be found in § 718.112(12)(g), Florida Statutes. The website must be independent or wholly owned by the association.

The legislature failed to define its intent behind "independent". Independent may mean that the website must be controlled by the association and not the management company. This is significant because many management companies host condominium association websites through their systems which begs the question as to what party owns the website and the information thereon. What happens if the contract between your association's management company and your condominium association is terminated? How does the information on the website get transferred to a new website? What party owns the URL and the right to the website domain name? All of these issues need to be addressed in your association's property management contract. If your association's website is hosted by your property management company, you need to start the dialogue now regarding a transition plan should the property management agreement be terminated.

Other issues need to be addressed as well. For example, once an official record is scanned and uploaded to the website, what happens to the hard copy? What systems are in place to ensure that data uploaded to the website is backed up on a regular basis? Daily is best.

As board members, you have a duty to make sure that official records are accessible to members. We are concerned that deficiencies in the association's website could provide grounds for a complaint that the association obstructed access to official records.

If your condominium has more than 150 units, the time is now to begin implementing a plan to be in compliance by July 1, 2018.

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This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm and also practices in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner in the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner in the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate in the Pavese Law Firm. Matthew B. Roepstorff (matthewroepstorff@paveselaw.com) is an Associate in the Pavese Law Firm. Matthew G. Petra (matthewpetra@paveselaw.com) is an Associate in the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate in the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including the following:

- Planning, Drafting, and Creating the Community Projects
- Developer Representation and Regulatory Approvals, Vendor Contract Review and Preparation
- Turnover from the Developer
- Construction Defect Litigation
- Covenant Interpretation and Enforcement
- Amendments of Governing Documents
- Collection of Assessments, Liens, and Foreclosures
- Insurance and Maintenance/Repairs/Replacement and Reconstruction Issues
- HOA Pre-Suit Mediation, Arbitration, and Litigation

Please feel free to contact them via the e-mail addresses listed above.

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