

SUMMARY OF 2017 LEGISLATIVE ENACTMENTS SIGNIFICANTLY AFFECTING FLORIDA COMMUNITY ASSOCIATIONS

There were four main bills passed in the 2017 legislative session which directly impacted Florida community associations. These four bills, separately addressed below, were signed into law by the Governor, and became law July 1, 2017.

For ease of review, changes are summarized in the order stated in the Bills. Please recall that statutes referring to a section in Chapter 718 of the Florida Statutes affect condominium associations; statutes referring to a section in Chapter 719 affect cooperative associations; and statutes referring to a section in Chapter 720 affect homeowners' associations.

We hope that the following summary will prove useful to your association when discussing current events and legal issues that are important to your community. However, it is not intended to provide legal advice. The information set forth herein is not specific to your association and, therefore, should not be relied on or acted upon without first contacting legal counsel.

We will continue to keep our clients apprised of changes in the law which affect community associations through regular updates to our website, www.rabinparker.com, and through our quarterly newsletter. If you would like to subscribe to our newsletter, please send us an email requesting same to admin@rabinparker.com.

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1. SENATE BILL 398 “ESTOPPEL CERTIFICATES.”

1.1 As we advised in a separate communication to our clients immediately after this bill was signed into law, requirements for preparation and issuance of estoppel certificates have drastically changed. This new law affects all three major community association types (condominium, homeowners' and cooperative associations) governed by Chapters 718, 719 and 720 of the Florida Statutes.

1.2 To protect against undisclosed financial obligations and to obtain title to the property free of any lien or encumbrance in favor of the association, purchasers may request that the seller provide an estoppel certificate from the condominium, cooperative, or homeowners' association. An estoppel certificate certifies the amount of any total debt owed to the association for unpaid monetary obligations by a unit or parcel owner as of a specified date. The new law:

A. Revises the period in which an association must respond to a request for an estoppel certificate from fifteen (15) days to **ten (10) business days**. The request may be in either a written or electronic format.

B. Provides that an estoppel certificate delivered by hand delivery or e-mail has a thirty (30) day effective period, and a certificate sent by regular mail has a thirty-five (35) day effective period.

C. Requires designation on the Association's website of the person or entity, with a street or email address, to whom a request for the estoppel certificate on behalf of the board or association is to be sent.

D. Specifies the information that the association must provide in the estoppel certificate, which includes information related to matters in addition to the amount of any outstanding assessments, including the following:

1. Whether there is a capital contribution fee, resale fee, transfer fee, or other fee due, and if yes, the type and amount of the fee.
2. Whether there are any open violations of rules or regulations noticed to the unit owner in the Association's official records.
3. Whether the rules and regulations of the Association require approval by the board of the transfer of the unit, and if yes, whether the board has approved of the transfer.
4. Whether there is a right of first refusal provided to the members or the Association, and if yes, whether that right has been exercised.
5. Whether there are other associations of which the unit is a member, and if yes, the contact information for each; and

6. Contact information for all insurance maintained by the Association.
- E. Prohibits an association from charging a fee for an amended estoppel certificate, and provides a new effective period of thirty (30) days or thirty-five (35) days, depending on the method used to deliver the amended certificate.
- F. Provides that an association waives the right to collect any moneys owed in excess of the amounts set forth in the estoppel certificate from any person, and his or her successors and assigns, who in good faith relies upon the certificate.
- G. Prohibits an association from charging a fee for preparing and delivering an estoppel certificate that is requested, if it is not delivered within ten (10) business days.
- H. Authorizes the use of a summary proceeding pursuant to § 51.011, F.S., to compel compliance with the estoppel certificate requirements for a cooperative association (existing law already provides such a right for condominium and homeowners' associations).
- I. Permits an association to charge a maximum fee of two hundred and fifty dollars (\$250) for the preparation and delivery of an estoppel certificate, if there are no delinquent amounts owed to the association.
- J. Permits an association to charge an additional one hundred dollar (\$100) fee for an expedited estoppel certificate delivered within three (3) business days after a request for an expedited certificate.
- K. Permits an association to charge an additional maximum fee of one hundred and fifty dollars (\$150), if there is a delinquent amount owed to the association.
- L. Specifies the maximum fee that an association may charge when it receives simultaneous requests for estoppel certificates for multiple units or parcels owned by the same person and there are no past due monetary obligations owed to the association.
- M. Provides a non-waivable right to certain individuals or entities, other than the unit owner, who pay an estoppel fee, to be reimbursed the fee by the unit owner if the sale or transaction for which it was requested does not close within thirty (30) days under certain circumstances.
- N. Provides that the authority to charge a fee for the preparation and delivery of the estoppel certificate must be established by a written resolution adopted by the Board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate.

1.3 **IMPORTANT NOTE.** If the Association has not previously adopted a resolution in connection with a required fee for preparation and delivery of an estoppel certificate, or if the Association is not already under a management, bookkeeping, or maintenance contract which

already provides for such a fee, the Association will need to formally adopt a resolution consistent with the limitations described, to enable it to charge a fee for its preparation.

2. HOUSE BILL 1237 “CONDOMINIUMS: VARIOUS TOPICS INCLUDING CRIMINAL PENALTIES; CONFLICTS OF INTEREST; AND TERM LIMITS.”

2.1 This new law only affects Florida condominium associations governed by Chapter 718.

2.2 **KICKBACKS EXPRESSLY PROHIBITED.** Prior to this new law, Section 718.111(1)(a) already prohibited an officer, director, or manager from soliciting, offering to accept, or accepting any thing or service of value for which consideration has not been provided for his or her own benefit or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association; the violation of which subjected such individual to a civil penalty. This new law adds the word “kickback” to this list of impermissible actions and, in addition to the previously existing liability for a civil penalty, expressly subjects individuals who violate this provision to a criminal penalty as well.

2.3 **CRIMINAL PENALTIES.** Sections 718.111(2)(a) and (d) have been amended to now impose criminal penalties for the following actions (in addition to violation of the kickback prohibition described above):

- A. Forgery of a ballot envelope;
- B. Forgery of a voting certificate;
- C. Theft or embezzlement of funds;
- D. Destruction of an official record; and
- E. Refusal to allow inspection or copying of an official record that is accessible to unit owners within the time periods required by general law *in furtherance of any crime*.

2.4 If an officer or director is charged by indictment or information (not convicted) of any of the above violations, the statute requires the officer or director to be removed from office and the vacancy is to be filled during the pendency of said proceeding. The accused officer or director is also disqualified from appointment or election until the charge is resolved, and if in the end there is no finding of guilt and the accused officer or director has time remaining on the term, the accused director must be reinstated for the remainder of his or her term.

IMPORTANT NOTES:

- A. The new legislation is not clear as to whether these penalties apply solely to officers, directors, or agents of the Association, or whether they apply to any unit owner as well. Given the context of the legislation and its intended effect, we believe that such penalties would apply to non-board member/officer unit owners as well.

B. While the law is too new to know how the courts will interpret its provisions, before concluding that an officer, director, or agent of the Association will be subject to criminal penalties for every claimed failure to provide official records to an owner or authorized agent of an owner within the statutorily prescribed time period, pay particular note to the italicized portion of the summary above which draws attention to language within the legislation which purports to only subject the individual or entity to a criminal penalty if such failure to provide the records was in furtherance of a crime. To be certain, however, association directors, officers, and agents, should check with their D & O and Professional liability insurance professionals to ensure that the liability insurer will provide a defense, defense costs, and damages (should they be awarded) if a claim includes an allegation of applicable criminal penalties.

2.6 CONFLICT OF INTEREST. Section 718.111(3)(b) now prohibits an association from hiring an attorney that also represents that association's management company. **IMPORTANT NOTE:** Rabin Parker P.A. has had a policy from inception of the law firm of not representing management companies, nor other individuals or entities who provide service to associations. We are pleased to confirm that our practice is limited to representation of community associations to avoid conflicts of interest and questions as to whom our fiduciary duties are owed.

2.7 LIMITATION ON PURCHASE OF UNITS. Section 718.111(9) has been amended to expressly prohibit an association's directors, managers, or management companies from purchasing a unit at a foreclosure sale resulting from the association's foreclosure of its lien for unpaid assessments, or as a result of a deed in lieu of foreclosure, unless the condominium is a time share.

2.8 RETENTION/INSPECTION OF OFFICIAL RECORDS. Section 718.111(12)(a) has been amended to now require "bids for materials, equipment, or services" to be retained in the same manner as other as accounting records for a period of seven (7) years. Section 718.111(12)(c) has also been expanded to allow a member's authorized representative to permit a *renter* of unit a right to inspect and copy the association's bylaws and rules.

2.9 WEBSITES. Section 718.111(12)(g) now requires an association governing 150 or more units, and which does not manage time share units, to maintain a website, and post copies of certain documents to such website, by July 1, 2018. There are a number of requirements imposed upon an association in connection with creation, ownership, and maintenance of the website, and the legislation mandates that the following documents must be posted to the website in digital format (and redacted, as necessary, to ensure protected or restricted information is not posted):

- A. The recorded Declaration of Condominium of each condominium operated by the association and each amendment to each Declaration;
- B. The recorded Bylaws of the association and each amendment to the Bylaws;

C. The Articles of Incorporation of the association, or other documents creating the association, and each amendment thereto.

D. The Rules of the Association;

E. Any management agreement, lease, or other contract to which the association is a party or under which the association or unit owners have an obligation or responsibility (summaries of bids for materials, equipment, or services must be maintained on the website for one year);

F. The annual budget and any proposed budget to be considered at the annual meeting;

G. The financial report and any financial report to be considered at a meeting;

H. The statutory certification of each director;

I. All contracts or transactions between the association and any director, officer, corporation, firm, or association that is not an affiliated condominium association or any other entity in which an association director is also a director or officer and financially interested;

J. Any contract or document regarding a conflict of interest or possible conflict of interest;

K. The notice of any unit owner meeting and the agenda for the meeting (posted in plain view on the front page of the website, or on a separate subpage of the website labeled “Notices” which is conspicuously visible and linked from the front page; together with any document to be considered and voted on by the owners during the meeting or listed on the agenda, at least seven days before the meeting; and

L. Notice of any board meeting, the agenda, and any other document required for the meeting, and posted within the applicable time period required by statute for the issues considered.

2.10 FINANCIAL STATEMENTS. Section 718.111(13) rescinds the option for small associations (less than fifty (50) units) to prepare a report of cash receipts and expenditures in lieu of financial statements. If financial statements are not provided to an owner within five (5) business days of a written request, and if the Division of Condominiums (“Division”) determines that the association failed to mail or hand deliver a copy of the most recent financial report to the requesting member, then the Division will require the association to provide the financial report to the requesting member within the next five (5) business days from the date such notice is received. An association that fails to comply with the Division’s request may not waive the financial reporting requirement provided by the statute. A financial report received by the Division will be maintained by the Division, and a copy of such report will be provided to an association member upon request.

2.11 DEBIT CARDS. Section 718.111(15) prohibits an association and its officers, directors, employees, and agents from using a debit card issued in the name of the association, or billed directly to the association, for the payment of any association expense. The use of a debit card issued in the name of the association, or billed directly to the association, for any expense that is not a lawful obligation of the association may be prosecuted as credit card fraud pursuant to Florida Statute Section 817.61.

2.12 TERM LIMITS. Section 718.112(2)(d) provides that a board member may not serve more than four (4) consecutive two (2) year terms, unless approved by an affirmative vote of two-thirds of the total voting interests of the association, or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. **IMPORTANT NOTE:** There is no express statutory limit on the length of time a director may serve for one (1) year terms.

2.13 RECALLS. Section 718.112(j) now limits what an association can do once it is in receipt of a written recall agreement containing signatures from what purports to be a majority of voting interests, or following a vote at a recall meeting purporting to meet the requisite majority of voting interests required by statute and applicable administrative rules. No longer is it permissible for an association to “certify” or “not certify” the recall effort. As the statute now reads, following receipt of a written recall agreement facially meeting the requirements of law, or following a vote at a recall meeting where it appears the requisite vote has been obtained, rather the board must still hold a meeting within five (5) full business days after receipt of a written recall agreement, or five (5) days of after adjournment of a recall meeting, at which time such member or members shall be recalled effective immediately. The recalled member or members must then turn over to the board, within ten (10) business days, any and all records and property of the association in their possession. The statutory remedy for an aggrieved member, or members, who wish to challenge a petition or vote, is the filing of a petition for recall arbitration within sixty (60) days following the recall.

2.14 SERVICE PROVIDERS/CONFLICTS OF INTEREST. A new subsection (p) has been added to Section 718.112(2), which now prohibits a non-time share association from contracting with, or employing, any service provider that is owned or operated by a director or any person who has a financial relationship with a director or officer, or a close relative (defined as a relative within the third degree of consanguinity by blood or marriage), except if the ownership interest is less than one percent (1%) of the equity shares of the entity.

2.15 ARBITRATION. Section 718.1255(4) has been amended to require the Division of Florida Condominiums to ensure that their in house, or outside, arbitrators have been members in good standing of The Florida Bar for at least five (5) years, and have mediated or arbitrated at least ten (10) disputes involving condominiums in Florida during the three (3) years immediately preceding the date of application for certification, or that the arbitrators have attained board certification in real estate law or condominium and planned development law from The Florida Bar. It also requires an arbitrator to conduct a hearing within 30 days after being assigned a case unless good cause is shown, and that he or she render a final written decision within thirty (30) days after a final hearing. If an arbitrator does not render

the final written decision with the required thirty (30) day time period, the arbitrator may have his or her certification cancelled.

2.16 LIMITATIONS ON MANAGEMENT. Section 718.3025 prohibits a manager or management company, including directors and officers of those entities, from purchasing a unit at a condominium lien foreclosure sale, or from obtaining a deed in lieu of such a foreclosure, in connection with a residential non-time share condominium under its management. Additionally, the new legislation provides that in a situation where the management or maintenance company owns fifty (50%) percent or more of such units, their management or maintenance contract may be canceled by a majority of the unit owners other than the contracting party.

2.17 CONFLICTS OF INTEREST/DISCLOSURE. Section 718.3027 has been added to regulate conflicts of interest for non-time share associations. It requires directors and officers of the association, and the relatives of such directors and officers, to disclose to the board any activity that may reasonably be construed to be a conflict of interest. It also provides that a rebuttable presumption of a conflict of interest exists where a director or an officer, or a relative of a director or an officer, enters into a contract for goods or services with the association; and where a director or an officer, or a relative of a director or an officer, holds an interest in a corporation, limited liability corporation, partnership, limited liability partnership, or other business entity that conducts business with the association or proposes to enter into a contract or other transaction with the association. If such an individual proposes to engage in an activity that is a conflict of interest, the proposed activity must be listed on (and any contracts or related documents attached to) the meeting agenda where the action is being considered. There are also certain requirements which must be followed in connection with presentation of the transaction to the board; recusal of voting by the interested director, and in connection with what occurs following the presentation and vote. Failure to follow the statutory requirements makes the transaction or activity voidable by the board with concurrence of at least twenty percent (20%) of the voting interests of the association.

2.18 VOTING SUSPENSION. Section 718.303(5) has been amended to require a financial delinquency to reach more than \$1,000.00 before an owner's voting rights may be suspended. Additionally, proof of such monetary obligation must be provided to the unit owner or member thirty (30) days before such suspension can take effect.

2.19 RECEIVERS. A new subparagraph (8) has been added to Section 718.303, which prohibits a receiver from exercising the voting rights of any unit owner whose unit is placed in receivership for the benefit of the association.

2.20 OMBUDSMAN. Section 718.5012(5) has now been amended to permit the condominium ombudsman to review *secret* ballots cast at a vote of the association.

2.21 FINANCIAL INSTITUTION REPORTING REQUIREMENT. Section 718.71 has been added which now requires associations to file an annual report to the Department of Business and Professional Regulation which contains the names of the financial institutions

with which it maintains accounts. It also provides that a copy of this report may be obtained from the Department upon written request of any association member.

3. SENATE BILL 1520 “TERMINATION OF CONDOMINIUM.”

This new law also only applies to condominiums governed by Chapter 718. It amends Section 718.117 to describe the legislative goals, or requirements, for termination of condominium, which must also be reflected in any plan for termination of condominium. These new provisions lower the threshold of voting interests needed to defeat a termination plan, specifically requiring an “optional” termination to include approval by at least eighty percent (80%) of the total voting interests of the condominium, *and not objected to by more than five percent (5%) of such total voting interests* (it was 10% previously); and should a plan fail, it increases the waiting period necessary to submit a new plan of termination to *twenty-four (24) months after the date of rejection* (it was 18 months previously); and it includes new protection for owners of homestead property regardless of whether the unit was purchased from a developer.

4. HOUSE BILL 6027 “FINANCIAL REPORTING.”

This new law applies to condominium, cooperative, and homeowner associations, governed by Chapters 718, 719, and 720. It amends the financial reporting requirements by:

4.1 Removing the provisions permitting condominiums, cooperatives, and homeowners’ associations operating fewer than fifty (50) units, regardless of their annual revenues, to prepare a report of cash receipts and expenditures in lieu of financial statements; and

4.2 Removing the provisions prohibiting cooperatives and condominiums from waiving the statutory financial reporting requirements for more than three consecutive years.

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