



PRACTICE FOCUS / REAL ESTATE

Condo Trouble? Preemptive Participation Offers Protection

Commentary by
Jonathan S. Goldstein

Hurdles abound for condominium unit owners concerned about malfeasance. Owner interests are fractional and proportionate, yet owners risk their own resources to combat fraud alone.



Goldstein

Provisions in the governing documents and the Florida Condominium Act enable reimbursement of prevailing party legal fees.

The wrongful act doctrine may permit recovery of fees incurred in relation to third-party disputes arising from association or director wrongdoing. However, fee provisions correspondingly place the owner at risk.

Often associations in violation cannot recover damages from the wrongful perpetrators or insurance proceeds, and owners bear the expenses. For these reasons, pervasive and preemptive group participation is paramount.

Undocumented reimbursements and checks made to cash, questionable and excessive vendor expenditures, unmonitored management influence, improper use of reserves, absence of meetings, or noncompliant budget and accounting practices all may warrant pursuing compliance or board control.

Voting rights can be supplemented with petitions for an election monitor from the ombudsman's office of the Florida Department of Business and Professional Regulation, Division of

Florida Condominiums, Timeshares and Mobile Homes and the use of recall procedures pursuant to Section 718.112(j), Florida Statutes, permitting a membership majority vote to replace the current board for any reason and outside of an election. Absent board control, preemptive participation requires owners to exercise and enforce transparency rights.

DAWNING AWARENESS

The Condominium Act embraces the Sunshine Law requiring open governance and record keeping.

Pursuant to Administrative Rule 61B-23.001(1)(a), a board quorum gathered to discuss association business constitutes a meeting, which must be noticed and publicly held (though personnel

meetings and privileged meetings with legal counsel regarding potential or existing litigation are exceptions). Owners can speak at and record public meetings. If the board refuses to address an item of concern at a meeting, a petition from 20 percent of the eligible voting interests will require the association to call a board meeting regarding that topic pursuant to Section 718.112(2)(c)(1), Florida Statutes. Obvious measures to prevent fraud (positive pay banking, dual signatures, capped invoices paid without board vote, etc.) can be forced on the agenda for board consideration.

Subsection 718.111(12), Florida Statutes, governs the obligation to maintain and provide access to official records. A remedy of actual damages and/

or minimum damages of \$50 per day for up to 10 calendar days applies where access is willfully denied.

Using these record access rights, owners can regularly review minutes, contracts, bids, insurance, management and other reports, communications as well as general ledgers or other accounting records. Owners can enforce requirements to maintain mandatory records. Regular inspections create oversight and financial pressure. Owner rosters should be obtained for dissemination of constructive mass communications, taking care to obtain a qualified privilege from defamation by limiting good faith commentary to fellow owners. Written inquiries by certified mail can be used to document association positions and legal

opinions (or risk prevailing legal fee waiver).

Budgets and special assessments must be publicly adopted pursuant to Subsections 718.112(2)(c)(1), (e) and (f), Florida Statutes. Owners should scrutinize expenditures, which provide a window into fraud. Section 718.111(13), Florida Statutes, governs annual financial reporting requirements and requires an association to have mandatory financial reporting prepared or contracted for within 90 days of the end of the previous fiscal year, or annually as provided in the bylaws. Within 21 days of the report's preparation but not later than 120 days from the trigger date for the reporting deadline, the association must either send owners a copy of the required financial report, which are audited financial state-

ments for associations with annual revenues in excess of \$500,000, or a notice of its availability. All financial records should be analyzed by owners regularly for compliance and irregularities.

ENFORCEMENT

Suspected financial crimes should be reported to law enforcement. Litigation is the direct enforcement approach with recoverable legal fees but has increased risk.

Litigation of association transparency requirements are often disputes requiring pre-suit nonbinding arbitration with the state division, although claims challenging assessments or for breach of fiduciary duty are excluded from division arbitration.

The division also provides cost-effective alternatives: a petition for a declaratory statement on purely legal disputes or an administrative complaint triggering a division investigation. Division-enforced first offences result in a warning letter, avoiding association penalties (punishing owner/victims) while deterring problematic conduct.

Whatever the method, pervasive and preemptive participation and sunshine law compliance enable earlier fraud detection by lighting a beacon setting owner and director vigilance ablaze.

Jonathan S. Goldstein is a senior associate at Haber Slade in Miami. The firm practices in the areas of homeowner and condominium association law, commercial complex litigation, construction law, real estate and banking litigation, and aviation litigation. He can be contacted at jgoldstein@dhaberlaw.com.

BOARD OF CONTRIBUTORS