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2017 Community Association Legislative Update

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The legislature sought to increase transparency and protections from malfeasance for condominiums and to reform estoppel certificates. Burdens, ambiguities, and unintended consequences will inevitably arise in pursuit of these worthwhile goals. The resulting bills, HB 1237 and SB 398, took effect on July 1, 2017. SB 377, also enacted and of importance to associations, now specifically defines the construction defect statute of limitations and repose deadline trigger of "completion of the contract" to mean completion of performance as opposed to final payment. SB 377 was adopted to counter the appellate court decision of Cypress Fairway Condominium v. Bergeron Construction Co. Inc. The Governor vetoed HB 653, a bill containing many identical provisions to HB 1237. However, HB 653 also contained proposed changes affecting fire sprinkler retrofitting, association governance, and terminations, including a removal of the sunset provision in the Distressed Condominium Relief Act, none of which became law. HB 1237 attempts to curb condominium conflicts of interest, election fraud, and embezzlement of association funds in response to a Grand Jury Report issued by Miami- Dade County State Attorney Katherine Fernandez Rundle. It prevents the use of debit cards for payment of association expenses and criminalizes several actions:

• failing to provide access to (or copying of) official records upon a valid request by an owner, or destroying official records, if either is in furtherance of a crime;

• forging a ballot envelope or voting certificate in an election;

• using a debit card issued in the name of the association for any expense that is not a lawful obligation of the association;

• soliciting or accepting a kickback for which consideration [essentially, payment] has not been provided for his or her own benefit or that of his or her own immediate family.

The legislation implements a framework for the automatic removal of directors or officers charged with theft, while arguably rendering an officer or director charged with any crime ineligible for election or appointment and forbidden from access to official records without a court order. It prevents an association from hiring an attorney representing the association's management company, and prohibits directors and officers from purchasing a unit at an association foreclosure sale.

HB 1237 also amends Section 718.3025, Fla. Stat., to prevent a post-turnover maintenance or management company, or its officer or director, from purchasing a unit at an association foreclosure sale, and to permit the termination of a contract with a maintenance or management company whose owner owns more than 50 percent of the units, by majority vote. An association cannot employ or contract with any service provider who has a financial relationship with a director or officer or relative within third degree relation of a director or officer (excepting ownership of less than one percent of equity shares).

The bill creates Section 718.3027, Fla. Stat., requiring notice of conflicts of interest. It establishes a rebuttable presumption of a conflict if either of the following occurs without prior notice: (1) a director or officer, or their relative, contracts to provide goods or services to the association; or, (2) a director or an officer, or their relative, holds an interest in a corporation, LLC, or other business entity conducting business with the association or proposing same. If a director or officer, or their relative,

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proposes to engage in an activity that presents a conflict, the proposed activity must be on the meeting agenda, which must attach all contracts and transactional documents related to the proposal. Detailed new requirements are imposed for the meeting and director/ officer acquiescence to a rejection of their conflict.

A contract entered into between a director or officer, or their relative, and the association, not properly disclosed as a conflict or potential conflict, is voidable and terminates upon the filing of a termination notice with the association containing the written consent of at least 20 percent of the voting interest. Ambiguities include applying overlapping Section 718.3026(3), Fla. Stat., governing "interested director transactions[;]" the lack of a rebuttable presumption due to notice of a potential conflict; and defining "an interest" in an entity, especially pre-turnover.

Changes relating to voting and governance include the following:

• directors may not serve more than four consecutive two-year terms, unless two-thirds of the voting interests approve there are an insufficient number of eligible candidates to fill the vacancies;

• recalls no longer require the board to certify or reject a recall, [and] language is removed authorizing an association to initiate a recall arbitration (creating an ambiguity if the Declaration still does, forcing the association to court, and/or pushing this expense onto the affected incoming or outgoing director) and rendering a recall with sufficient votes automatically effective;

• a recalled director must now turn over all records and property of the association in their possession within ten (not five) business days;

• the association now cannot suspend voting rights of an owner due to nonpayment of any fee, fine, or other monetary obligation unless the obligation is in excess of $1,000 and delinquent more than 90 days; and,

• the DBPR Division of Florida Condominiums, Timeshares, and Mobile Homes' ("Division") arbitrator certification process and qualifications are modified, arbitration hearings are expedited, and final orders must be issued within 30 days of a final hearing.

As for changes governing mandatory disclosures and records, associations operating more than 150 units must launch websites for posting specified records (ensuring redaction where necessary) by July 1, 2018, as well as notices (upon adoption of a rule). Associations must provide an annual report to the Division setting forth the names of all financial institutions with which the association maintains its financial accounts, and a copy of such report may be obtained upon written request of any owner. An association that operates fewer than 50 units must now prepare a financial statement based upon total annual revenues, rather than defaulting to a report of cash receipts and expenditures. A unit owner may provide written notice to the Division of the association's failure to mail or hand deliver a copy of the most recent financial report within five business days after submission of a written request to the association for a copy of such report. Tenants now have access to the bylaws and rules. Bids for materials, equipment, or services are expressly designated mandatory official records. SB 398 addresses requirements in Section 718.116 (8), Fla. Stat., for "estoppel certificates" issued in conjunction with the transfer of property within an association (condominium, coop, or HOA). The certificate must now include specified categories of information, including these items:

• assessment information;

• open violations of the rules and regulations and whether the rules and regulations require approval by the board of directors for the transfer of a unit (notably the declaration is not referenced);

• whether a right of first refusal exists (and if yes, whether the "members" have exercised it—assuming a member vote requirement to do so); and,

• contact information for all insurance maintained by the association; etc.

Under prior law, the association had 15 days to furnish a certificate; however, SB 398 now provides

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ten business days. If untimely, no fee may be charged. The certificate must be valid for 30 days (35 if via standard mail), and associations are bound by the amounts claimed. The bill caps the fee for certificates at $250 for current unit owners and at $400 if the owner is delinquent (and establishes adjustment of these fees for inflation). An additional $100 may be charged for an expedited certificate delivered within three business days. Fees cannot be charged for an amended certificate. Reimbursement rights for certificate fees paid within 30 days of a closing that did not occur now cannot be contractually waived. The bill clarifies requirements for certificates requested for multiple units. Seemingly unaffected is Section 718.111(12)(e)(1), permitting a separate fee (and legal fees) to provide information beyond disclosures required to be in a certificate and/or by other provisions of the Condominium Act.

SB 398 was adopted because of an outcry over estoppel fees (among other title agent and broker estoppel related complaints). However, it is controversial. While the changes are potentially less dramatic than they seem at first glance (e.g., 10 business days versus 15 calendar days…), they will create burdens, liabilities, and expenses for associations and management companies generally (especially where smaller or less funded).

Associations and managers should check with legal counsel regarding these changes; reassess management agreement protections, fees, and risk shifting; implement standard intake and investigation due diligence protocols relating to certificate requests; consider grounds to challenge the legislation, if desired; and institute measures for timely compliance.

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