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2013 Legislative Update

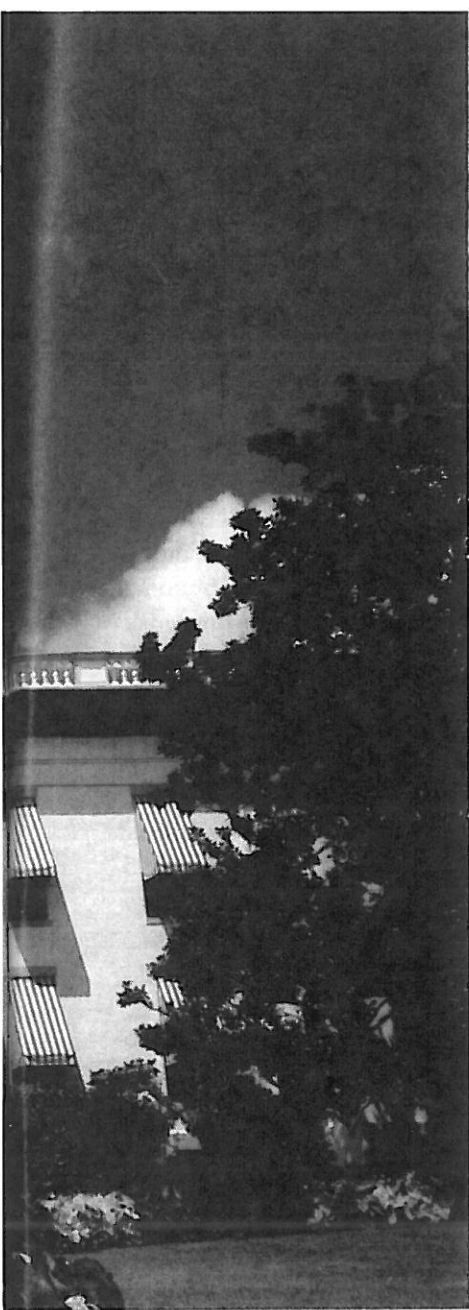
HOUSE BILLS 73 AND 7119



BY DONNA DIMAGGIO
BERGER, ESQ.

Every year in Florida, we are virtually guaranteed to see legislative proposals, which will impact Florida's significant community association population. Most years, at least some new laws pass, which directly or indirectly affect association operations.

The 2013 Session, however, was busier than ever, perhaps because last year's session was dominated by redistricting concerns. This Session saw the passage of two very significant community association bills along with more than a dozen other bills that will impact associations.



With neither controversy nor debate, HB 73 sponsored by Representative George Moraitis (R-Ft. Lauderdale) passed the Senate unanimously on April 26. My law firm's Community Advocacy Network (CAN) drafted several of the provisions in this bill including the language concerning elevator upgrades, digital inspection of records, lender consent for document amendments, increased budgetary thresholds for financial reporting purposes, and impact glass and other hurricane protection.

This bill contains the following changes, which will take effect on July 1, 2013:

FOR CONDOMINIUMS

- Removes the July 1, 2015, deadline for Phase II Firefighters' Service upgrades on elevators in condominiums or multi-family residential buildings. These costly upgrades can now wait until an elevator is replaced or requires major modifications.
- Allows a condominium association to purchase any land or recreation lease subject to the same manner of approval as the acquisition of leaseholds set forth in Section 718.114.
- Allows condominium associations to undertake reconstruction work on items that are the responsibility of the unit owner, charge those costs to the unit owner, and collect those costs through the lien and foreclosure procedures set forth in Section 718.116.
- Allows a condominium owner or his or her authorized representative to use a smartphone, tablet, or other portable device to scan or take a photograph of an official association record in lieu of the association making a copy of same. The association may not charge a member or his authorized representative for the use of such portable device.
- Allows a condominium association to print and distribute a social directory containing the name, address, and telephone number of each owner unless an owner has requested in writing that his or her phone number be excluded from that directory.
- Increases the budgetary thresholds triggering the levels of financial statement review as follows: associations with total annual revenues of less than \$150,000 shall prepare a report of cash receipts and expenditures; associations with total annual revenues of \$150,000 or more but less than \$300,000 shall prepare compiled statements; associations with total annual revenues of at least \$300,000 but less than \$500,000 shall prepare reviewed statements; and associations with total annual revenues of \$500,000 or more shall prepare audited financial statements. An association that operates fewer than 50 units regardless of annual revenue shall prepare a report of cash receipts and expenditures in lieu of financial statements.
- Removes the requirement that two-year board terms be staggered and removes the requirement that a majority of the total voting interests must approve two-year terms. Authorizes board members to serve two-year terms if the bylaws or articles of incorporation permit such terms.
- Clarifies that owners must be eligible to be a candidate at the time of the deadline to submit a notice of intent to run and further clarifies that an owner who is delinquent in the payment of any monetary obligation due to the association is not eligible to be a candidate for the board and, thus, may not be listed on the ballot.
- Clarifies that if broadcast notice is used in a condominium association in lieu of notice posted physically on the condominium property,

the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required.

- Clarifies that the statutory election procedures do not apply to an association governing a timeshare condominium.
- Requires the secretary of a condominium association to retain a director's written certification or educational certificate for five years after a director's election or the duration of the director's uninterrupted tenure, whichever is longer.
- Limits challenges to the condominium election process to no more than 60 days after the election results are announced.
- Allows an owner representative to file a petition challenging the board's failure to act if the board fails to duly notice and hold the required board meeting or fails to file the required petition after being served with a written recall agreement.
- Allows a board member who has been recalled to file a petition challenging the validity of the recall so long as that petition is filed within 60 days after the recall is deemed certified.
- Prohibits the filing of a recall petition when there are 60 or fewer days until the scheduled re-election of the board member sought to be recalled or when 60 or fewer days have elapsed since the election of the board member sought to be recalled.
- Adds impact glass, code-compliant windows or doors, and other types of code-compliant hurricane protection into the items that a majority of

the members may vote to allow the board to install.

- Clarifies how phases in condominiums and condominiums created within condominium parcels are to be handled by developers.
- Prohibits an officer or full-time employee of the Condominium Ombudsman's Office from engaging in any other business or profession that directly or indirectly relates to or conflicts with his or her work in the Ombudsman's Office.

FOR COOPERATIVES

- Requires that a cooperative association's official records be kept for at least seven years and within 45 miles of the cooperative property or within the county in which the cooperative is located.
- Allows a cooperative association to make the official records available for inspection electronically via the Internet or by allowing the records to be viewed in an electronic format on a computer screen and printed upon request.
- Allows the recovery of reasonable attorney's fees from the person in control of cooperative records who directly or indirectly denies access to records. Subjects an individual to civil penalties if that individual knowingly or intentionally defaces or destroys accounting records.
- Allows a cooperative member to use a smartphone, tablet, or other portable device to take images of association records at no charge.
- Clarifies which cooperative records are protected

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from inspection to mirror the protections already found in the Condominium Act. These privileged documents include personnel records, social security numbers, driver license numbers, fax numbers, emergency contact numbers, etc.

- Allows a cooperative association to print and distribute a social directory as described above for condominiums.
- Provides a statutory procedure by which cooperative associations can obtain or avoid lender consent when amending their documents.
- Provides that board or committee meetings held for the purpose of discussing personnel matters do not have to be open to the members.
- Provides certification requirements for cooperative

directors to serve on their boards, which match those currently required of condominium directors.

- Provides for the same recall provisions and election challenges discussed above for condominiums.
- Specifies that the suspension of use rights does not apply to limited common elements intended to be used only by a particular unit, common elements needed to access a unit, utility services provided to a unit, parking spaces, or elevators.
- Clarifies that the Division shall provide educational programs for cooperative directors and that the training may include, in the Division's discretion, webinars as well as live training and seminars in various locations throughout Florida. The Division shall also approve private sector programs and make such list of approved educators and classes available to cooperative directors.

FOR HOAs

- Allows an HOA member to use a smartphone, tablet, or other portable device to take pictures of association records at no charge.
- Clarifies that the personnel records of an association's employees or a management company's employees are privileged and therefore not accessible to members for inspection.
- Allows an HOA to print and distribute a social directory containing the name, parcel address, and telephone numbers of the members unless an owner has requested in writing that his or her number be excluded from that directory.

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- Increases the budgetary thresholds that trigger varying levels of financial reporting requirements to track inflation in the same manner discussed for condominiums above.
- Provides for the same recall rights and limitations and election challenges as discussed for condominiums above.
- Clarifies that an HOA's right to suspend use rights does not apply to that portion of the common area used to provide access or utility services to the parcel. A suspension may also not impair the right of an owner or a tenant to have vehicular and pedestrian ingress to and egress from the parcel, including the right to park.
- Provides a statutory procedure by which HOAs can obtain or avoid lender consent when amending their governing documents.


As you can see the changes brought about by HB 73 are extensive and will require further discussion between your board, your manager, and your association attorney to properly implement same no later than this bill's effective date of July 1.


HB 7119 sponsored by Representative Mike LaRosa (R-Saint Cloud) and the Professional Regulation Subcommittee passed on April 25. This bill marks significant changes for Florida's homeowners associations. We are thrilled that this bill contains several of our CAN proposals including the important clarification on joint and several liability needed in the aftermath of the *Aventura Management LLC v. Spiaggia Ocean Condominium Association, Inc.* decision released on January 23, 2013.

Here is a full look at what the HOA bill does:

- Subjects community association managers to disciplinary action for violating provisions of Chapters 718, 719, or 720 during the course of performing their services.
- Requires that HOA official records be maintained within the state for at least 7 years and be made available within 10 business days after receipt of a written request to any parcel owner for inspection or copying within 45 miles of the community or within the county where the community is located. HOAs can also comply with this requirement by making the records available to an owner electronically via the Internet or by allowing the records to be viewed in an electronic format on

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a computer screen and then printed out.

- Allows HOA members to use a smartphone, tablet, or other portable devices to take photos or images of association documents at no charge to the member. This is the CAN language, which is also found in HB 73.
- Allows an HOA to charge for the personnel costs incurred to retrieve and copy records if the time spent doing so exceeds one-half hour and if the personnel costs do not exceed \$20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages.
- Requires an HOA budget to designate the components for which a reserve account may be used if such reserve account was established by the developer.
- Creates new annual reporting requirements for the association manager or the board if the community is self-managed. Each year, a report containing the following information must be sent to the Division by November 22, 2013: Legal name of the association; federal employer ID number of the association; association's mailing and physical addresses; total number of parcels; and total amount of revenues and expenses from the association's budget. For HOAs that are still under developer control, the report must also contain the following information: developer's legal name;

developer's mailing address; the total number of parcels owned by the developer on the date of reporting.

- Requires the DBPR to establish and implement an online registration system for the foregoing reporting requirements no later than October 1, 2013.
- Requires the DBPR to present the data collected on Florida's HOAs to the Governor, the Senate President, and the Speaker of the House by December 1, 2013, each year.
- Provides an expiration date for these reporting requirements of July 1, 2016, unless further re-enacted by the Legislature.
- Requires certification of HOA directors in the same manner as currently required of condominium directors. This has been on CAN's Legislative Agenda for two years in a row, and we are grateful to see our language enacted in this bill.
- Requires contracts in which a director has a financial interest to be disclosed and approved by the affirmative vote of two-thirds of the directors present.
- Allows HOA members to cancel any contract in which a director is financially interested at the next regular or special membership meeting following execution of that contract. Clarifies that if the membership cancels such a contract, the association is only liable for the reasonable value of goods and services provided up to the time of cancellation and is not liable for any termination fee, liquidated damages, or other penalty for cancellation.
- Requires the board to immediately remove any director or officer who is found to have accepted any good or service of value without paying for same for himself or herself or his or her family. The exception to



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this rule is that a director or officer may accept food to be consumed at a business meeting with a value of less than \$25 per individual or a service or good received in connection with trade fairs or education programs.

- Requires the immediate removal from office of any director or officer who is charged with a felony theft or embezzlement offense involving the association's funds or property.
- Requires an insurance policy or fidelity bond for all persons who control or disburse funds of the HOA. Such policy or bond must cover the maximum funds that will be in the custody of the association or management agent at any one time. Persons who control or disburse funds includes persons authorized to sign checks on behalf of the association and the president, secretary, and treasurer of the association. A majority of the association's voting interests can vote to waive the requirement of this insurance policy or fidelity bond annually at a duly called association meeting.
- Requires the HOA to provide copies of amendments to the members within 30 days after recording such amendments in the Public Records.
- Clarifies that an HOA does not have to allow nominations from the floor the night of an election if there is a process in place for candidates to be nominated prior to the election meeting. Further clarifies that an election is not required unless more candidates are nominated than vacancies exist.
- Adds abandonment or desertion by a developer as a triggering event for turnover of association control. Creates a rebuttable presumption

of abandonment and desertion if the developer has unpaid assessments of guaranteed amounts for more than two years.

- Adds a developer's filing a petition for bankruptcy protection under Chapter 7 of the Bankruptcy Code as a triggering event for turnover of association control.
- Adds a developer losing title to the property via foreclosure or a deed in lieu of foreclosure as a triggering event for turnover of association control unless the successor owner has accepted an assignment of developer rights and responsibilities.
- Adds the appointment of a Receiver for more than 30 days as a triggering event for turnover of association



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control unless the court determines that such turnover would be detrimental to the association or its members.

- Allows members other than the developer to elect at least one member of the board if 50 percent of the parcels in all phases of the community have been conveyed to members.
- Prohibits a developer from unilaterally amending the governing documents in a manner which is arbitrary, capricious, or in bad faith. Further prohibits the developer from making such amendments as would destroy the general plan of development, prejudice the rights of non-developer members to use and enjoy the common property, or materially shift economic burdens from the developer to the existing non-developer members. Developer amendments will now be subject to a reasonableness test, which is a welcome change!
- Clarifies that an HOA, which forecloses on a delinquent property, is still entitled to collect unpaid assessments, which accrued prior to the time the association took title from third-party purchasers at the bank's subsequent foreclosure sale. This is language, which CAN pushed hard to enact given the detrimental 3rd DCA *Spiaggia* decision, which held that an association should be treated as a previous owner for joint and several liability purposes and thus, unable to collect any amounts from third party purchasers.

Bills like HB 73 and HB 7119 do not just happen without a lot of hard work and the input and assistance from many stakeholders around the state. Floridians are a fortunate bunch inasmuch as there are a great many passionate, knowledgeable legislators and citizens who pull together each Session to discuss, debate, and draft helpful proposals. Next year, we will all be back doing the same thing over again, but for now, we can enjoy some new laws that will hopefully assist Florida's shared ownership population.

Donna DiMaggio Berger, Esq. is one of the Founding Partners of the state-wide law firm, Katzman Garfinkel & Berger (KG&B), a firm that devotes its practice to the representation of community associations. Ms. Berger can be reached directly at (954) 315-0372 or via e-mail at dberger@kgblawfirm.com. ■

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