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Advocate Since 1982

(727) 239-0295

(888) 266-3652

www.TankelLawGroup.com

Info@TankelLawGroup.com

2017 LEGISLATIVE UPDATE

The Legislature, like hurricane season, can have periods of high and low volatility. Just as this year experienced a busy hurricane season, the changes in law for condominium associations was similarly intense.

The Legislature was especially influenced by the actions of a Grand Jury in Miami, where criminal conduct occurred in a condominium, which resulted in changes for all condominiums. Additionally, laws which regulate the preparation and costs of Estoppel Certificates were approved. It remains to be seen whether the changes will improve the governance of such community associations or drive away otherwise qualified persons from volunteering to serve as directors.

The following is a summary of the laws passed during the 2017 Legislative Session which affect Florida condominium and homeowners' associations.

I. HB 1237 - APPLIES TO CONDOMINIUM ASSOCIATIONS AS DOES MOST OF THE LEGISLATION

1. Criminal Penalties.

One effect of HB 1237 allows for application of criminal penalties for directors, officers, or managers who receive anything of value, or "kickbacks," from any person providing goods or services to the Association. It also imposes possible felony charges for forgery of a ballot envelope or voting certificate used in a condominium association election; theft or embezzlement of association funds; and destruction of or refusal to allow the inspection or copy of an official record that is accessible to unit owners within time periods proscribed by law, if the destruction or refusal to permit access is in furtherance of a crime.

2. Legislature as Supreme Court; No More Joint Representation of Association & Management.

The Florida Supreme Court has a set of rules that regulate attorneys. They call for full disclosure when representing clients with possible conflicts of interest. The Legislature now approved a law which prohibits condominium associations from hiring an attorney who represents the association's

management company. This is likely an unconstitutional encroachment on the authority of the Supreme Court, but time will tell if challenged.

3. **Official Records.**

HB 1237 changed the law regarding access to condominium association official records. Bids for materials, equipment, or services will be considered official records that must be maintained by the association. Also, the law clarified that association members' authorized representatives have the right to inspect and copy official records. Further, renters of units will have the right to inspect the association's "bylaws and rules."

4. **Website and Electronic Records Requirement**

By **July 1, 2018**, a condominium association with 150 or more units (the initial draft started with communities over 1000 units) that does not manage timeshare units must post digital copies of various official records on a website. The website must be Internet accessible and the association must ensure the records are password protected so as to only be accessed by unit owners and association employees. The documents must include: all governing documents and amendments; all management agreements, leases, and other contracts to which the association is a party; "summaries of bids" for materials, equipment, or services; the annual budget and any proposed budget; the financial report; and director certifications. In addition, associations must post meeting notices and agendas for membership and board meetings either on the front page of the website or on a separate subpage labeled "Notices." The association must also upload a copy of any document to be considered or voted on by the members during any membership meeting. **Note that while** the records requirement part of the statute provides until July 1, 2018 for compliance, the obligation to designate a person or entity with a street or e-mail address on the association's website for Estoppel Certificate requests commenced July 1, 2017.

5. **Financial Reports.**

Condominium associations that operate fewer than 50 units are no longer permitted (without a membership vote) to prepare a report of cash receipts and expenditures in lieu of financial statements based on the association's annual revenue. In addition, unit owners may complain to the Division of Florida Land Sales, Condominiums and Mobile Homes if the association does not furnish a copy of the most recent financial report within 5 business days after receipt of a written request. If the Division finds that the association failed to deliver the financial report as required, it may require the association to provide a copy of the report to the owner within 5 business days. If the association fails to comply with the Division's notice, it may not waive the financial reporting requirement (presumably for the following year). The change also has a requirement that an association provide an annual report to the Division containing the names of all financial institutions with which it maintains accounts and allows an association member to request that information from the Division.

6. **Prohibition on Use of Debit Cards.**

The law prohibits the use of a debit card issued in the condominium association's name, or billed directly to the association for the payment of any association expense. **Note**, this law doesn't regulate credit cards, which can result in greater liability due to availability of credit versus only what is in an associations' bank account. If a person uses a debit card issued in the association's name or billed directly to the association for payment of an expense that is not the association's lawful obligation, he or she may be prosecuted for credit card fraud.

7. Director Term Limits.

Section 718.112 of the Condominium Act was amended to implement a term limit for association directors. The new legislation provides that a board member may not serve more than four consecutive 2-year terms (so a total of 8 consecutive years), unless approved by an affirmative vote of two-thirds of the total voting interest of the association, or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy.

8. Recall of Directors.

Prior to the amendment, the condominium association's board of directors were required to hold a meeting within 5 business days of receipt of a written recall petition or the meeting at which the members voted to recall the director to determine whether to certify the recall. If the board voted to not certify the recall, the association was required to file a petition for recall arbitration with the Division. A Division arbitrator would then determine whether the board's decision to not certify the recall was proper.

The amendment deleted the portion of the statute which provided for the board's determination to certify a recall. Now, it is unclear what the association must do if it deems a recall effort to be invalid. Does the Legislature intend for recall efforts to be presumed valid, and if a recalled director wishes to challenge the recall, he or she must file a petition for arbitration with the Division? The amendment provides little guidance as to what the board must do if it considers the recall effort to be invalid (for example, for failure to obtain a majority vote of the membership).

9. Conflicts of Interest.

Condominium associations are now prohibited from employing or contracting with a service provider that is owned or operated by a board member or officer, 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 of a board member or officer. Relatives within the third degree of consanguinity include: children – great grandchildren; parents – great grandparents; siblings; aunts, uncles, nieces and nephews. First cousins are not within the third degree of consanguinity. The amendment includes an exception which states that it does not apply to any service provider for which the board member or officer owns less than 1 percent of the equity shares.

Additionally, directors and officers of a condominium association must disclose any activity that may reasonably be construed to be a conflict of interest. There is now a procedure for a director or officer to

who may have a conflict of interest, which provides that the director or officer may make a presentation on the issue but must excuse himself or herself from the board's discussion on the issue, and abstain from voting. If the director or officer fails to follow the required disclosure procedure, he or she is deemed removed from office and the contract (if any) may be terminated with the consent of 20 percent of the voting interests in the association.

10. Arbitration.

The law eliminated the requirement for the Division to employ full-time attorney arbitrators and instead established a procedure for independent certified attorneys to preside over arbitration proceedings. Arbitrators are now required to conduct a hearing within 30 days of being assigned a petition unless the petition is withdrawn or a continuance is granted for good cause. Further, the arbitrator is required to render a written decision within 30 days after the hearing. Failure to do so may result in cancellation of the arbitrator's certification.

11. Acquisition of Units in Foreclosure.

The law prohibits any party contracting to provide maintenance or management services to an association managing a residential condominium after transition of control of the association, and any officer or board member of such party, from purchasing a condominium unit or taking a deed-in-lieu of foreclosure of a lien for nonpayment of assessments.

12. Cancellation of Management & Maintenance Contract.

If 50 percent or more of the units in a residential condominium are owned by a party contracting to provide maintenance or management services to an association, or by an officer or board member of any such party, after transition of association control (turnover), the contract may be cancelled by majority vote of the unit owners other than the contracting party.

13. Voting Rights.

Prior to the amendment, a condominium association could suspend a member's voting rights if he or she were 90 days' delinquent in the payment of any monetary obligation due to the association. The amendment requires the monetary delinquency to *exceed \$1,000.00 and be more than 90 days' delinquent*. In addition, the amendment requires the association to provide proof of the obligation 30 days before the suspension takes effect. Further, the amendment provides that a receiver may not exercise voting rights of any unit owner whose unit is placed in receivership.

II. ESTOPPEL CERTIFICATE-APPLIES TO ALL ASSOCIATIONS

1. Estoppel Response Time & Designation of Address on Website.

The law requires the association to respond to an estoppel request within 10 business days after receiving a written or electronic request from a unit owner or mortgagee, or their representative. Under previous law, the estoppel certificate request had to be made in writing, and the association had 15 days to respond. The statute did not specify whether the days were business days or calendar days. The

amendment also requires the association to designate on its website (if it currently has one) a person or entity with a street or email address for receipt of estoppel certificate requests. If the association fails to deliver an estoppel certificate within 10 business days after receipt of a request, it may not charge a fee for the preparation and delivery of the certificate.

2. Content of Estoppel Certificate.

Prior to the amendments, only limited information regarding the assessments and other charges due to the association was required to be included in the estoppel certificate. The amendment established a form and prescribes the content that must be included in all estoppel certificates. The law requires that the certificate include the following information:

1. The date of issuance of the certificate.
2. The names of the unit owner(s) as reflected in the books and records of the association.
3. Unit designation and address (designation likely means the unit number).
4. Parking or garage space number, as reflected in the association's records.
5. Attorney's name and contact information if the account is delinquent and has been given to an attorney for collection. No fee may be charged for this information.
6. Fee for preparation and delivery of the estoppel certificate.
7. Name of the estoppel requester.
8. Assessment information and other information:

Assessment Information

1. The amount and frequency of the regular periodic assessment (e.g., \$100 monthly).
2. The date the regular periodic assessment is paid through.
3. The date and amount of the next installment of the regular periodic assessment.
4. An itemized list of all assessments, special assessments, and "other moneys owed" on the date of issuance to the association by the unit owner for a specific unit.
5. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate.
6. In calculating the amounts scheduled to become due, the association may assume that any delinquent accounts will remain delinquent during the effective period of the estoppel certificate.

Other Information

1. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? (Yes/No). If yes, specify the type and amount of the fee.
2. Is there any open violation of rule or regulation noticed to the owner in the association official records? (Yes/No).
3. Do the rules and regulation of the association applicable to the unit require the approval by the board of directors of the association to transfer the unit? (Yes/No). If yes, has the board

approved the transfer of the unit? (Yes/No).

4. Is there a right of first refusal provided to the members or the association? (Yes/No). If yes, have the members or the association exercised that right of first refusal?
5. Provide a list of, and contact information for, all other associations of which the unit is a member.
6. Provide contact information for all insurance maintained by the association.
7. Provide the signature of an officer or authorized agent of the association.
8. The association may include additional information in the estoppel if desired. Also, the amendment provides that an association waives the right to collect any monies owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate (and his or her successors and assigns).

3. **Effective Period for Estoppel Certificates.**

An estoppel certificate that is hand delivered or sent via electronic means has a **30-day** effective period. An estoppel certificate that is sent by regular mail has a **35-day** effective period. If the association makes a mistake in the estoppel certificate, it can provide an amended estoppel certificate and it will be effective if the sale or refinancing of the unit has not been completed during the effective period. If an amended estoppel certificate is provided, it will have a new effective date period from the date of transmission.

4. **Fees Permitted to be Charged for Estoppel Certificate.**

The amendment establishes a schedule of fees that may be charged for the “preparation and delivery” of an estoppel certificate: 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 in the management, bookkeeping, or maintenance contract. The fees prescribed by statute will be adjusted every 5 years based on the total of the annual increases in the Consumer Price Index and the Division is obligated to calculate the fees and publish them on its website. Moreover, the amendments provide that the estoppel certificate fee is “payable upon the preparation of the certificate,” which does not appear to clearly specify whether payment may be required before delivery of the Certificate.

5. **Reimbursement of Estoppel Certificate if Closing Does Not Occur.**

Under prior law, there was an obligation to reimburse the fee charged for the estoppel certificate prior to the amendments, but it was not often requested by title companies and other parties requesting estoppel certificates. We foresee requests for reimbursement increasing as title companies and other parties become aware of the right to reimbursement. The right to reimbursement may not be waived or modified in any agreement (e.g., association governing documents) and a party may file a lawsuit and recover attorney’s fees and costs to enforce a right to reimbursement. The association may recover the estoppel certificate fee from the unit owner in the same manner as an assessment; however, there are situations where that might not be a helpful remedy (e.g., estoppel certificates requested prior to a short sale).

To become entitled to reimbursement, the estoppel certificate preparer must receive a written request for reimbursement accompanied by “reasonable documentation” that the sale did not occur from a payor that is not the parcel owner within 30 days after the closing date for which the certificate was sought. The fee must be refunded to the party who paid for the estoppel certificate within 30 days after receipt of the request.

III. **FINANCIAL REPORTS FOR CONDOMINIUMS**

1. Chapter 718 now eliminates the ability of associations that operate fewer than 50 units to prepare a report of cash receipts and expenditures in lieu of financial statements based on the annual revenues of the Association. The amendment also eliminates a provision of current law prohibiting condominium and cooperative associations from waiving the financial reporting requirements for more than 3 consecutive years.

IV. **CONDOMINIUM TERMINATION**

1. This area of law has been in a state of flux because the Florida Constitution prohibits laws that retroactively impair the rights of parties under contracts. Declarations are contracts and the law cannot change the way condominiums are terminated by the Declaration unless it incorporates changes in the law from time to time. So, in the case of *Tropicana Condominium Association, Inc. v. Tropical Condominium, LLC*, 208 So. 3d 755 (Fla. 3d DCA 2016), the court ruled that the provisions of that Declaration of Condominium controlled over the conflicting statutory provisions regarding termination, which were adopted after the Declaration of Condominium was recorded in the public records.

2. **Division Approval Now Required.**

The law now gives the Division authority to approve the plan of termination in residential condominium associations. Before a plan of termination is submitted to the Division, it must be approved by at least 80 percent of the total voting interests in the condominium. However, if 5 percent (previously 10 percent) or more of the total voting interests reject the plan of termination, the plan of termination may not proceed. Once received, the Division has 45 days to notify the association of any procedural deficiencies or that the filing has been accepted.

3. **Multiple Termination Plans.**

Prior to the amendment, if a plan of termination failed because the requisite number of voting interests rejected it, a subsequent plan of termination could not be proposed for 18 months after the date of the rejection. The law now require a waiting period of 24 months.

4. **Bulk Owner Termination.**

If a bulk owner initiates a termination, the other unit owners must be paid at least 100% of the “fair market value” for their units. A “bulk owner” in this context is an owner of at least 80 percent of the total voting interests in the condominium. If a person has homestead statue on a unit, under a plan of

termination, the fair market value of the unit must be at least the purchase price the person paid for the unit (so long as the person is current in payment of monetary obligations due to the association).

V. 2017 CHANGES OF INTEREST TO COMMUNITY ASSOCIATIONS

House Bill 615 – Licensing

HB 615 provides that the licensure of surviving spouses of members of the armed forces shall be kept in good standing and not be subject to renewal requirements. It also requires the DBPR, for the boards included within s. 20.165, F.S., to issue a permanent license to all current and former active duty members of the armed forces, and their current spouses or surviving spouses, if they hold a license in another jurisdiction, foreign or domestic. Application and licensure fees shall be waived; however, persons licensed pursuant to this provision may renew their license upon completing conditions for renewal required of license holders. In addition, licensure fees for low-income individuals are waived.

Senate Bill 818 – Timeshares

This bill revises the definition of the term “interest holder” to clarify that the term does not include certain parties to a certain multisite timeshare plan; revising requirements for the termination of a timeshare plan; specifying the percentage of votes required to extend the term of a timeshare plan under certain circumstances, etc.

House Bill 241 – Alarm Systems

This legislation amends s. 553.793, F.S., “Streamlined low-voltage alarm system installation permitting” to include “low-voltage electrical fences” and defines a “low-voltage electrical fence”. It allows such systems to be permitted under the provisions of s. 553.793, F.S., which provides that contractors can purchase uniform basic permit labels without any detailed information about the project, and exempts the contractor from having to notify the building department prior to installation. The bill also amends s. 489.529, F.S., “alarm verification calls required” to provide that verification calls are not required before contacting law enforcement for dispatch under certain conditions, including instances where the premises is used for storage of firearms or ammunition by a firearms/ammunition dealer.

House Bill 6027 – Financial Reporting

This legislation deletes the provision requiring associations with less than 50 units or parcels to prepare a report of cash receipts and expenditures in lieu of certain financial statements. It further deletes the provision limiting the ability of condominium and cooperative associations to waive the financial reporting requirements for more than three (3) consecutive year.



Main Office:

1022 Main Street, Suite D

Dunedin, FL 34698

By Appointment:

Jacksonville · Orlando · Tampa

(727) 239-0295 • (888) 266-3652 • Info@TankelLawGroup.com

www.TankelLawGroup.com