



Legislative Update, Part 4

Ring in the New Year

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As Florida community associations approach the new year with annual members' meetings, officers and directors report greater concerns resulting from the 2008 legislative session. As of January 1, 2009 a community association management firm employed by a Florida condominium or homeowners association governing more than 10 units, or with a budget of \$100,000 or more, must be licensed by Florida's Department of Business and Professional Regulation.

The bulk of the remaining issues arise concerning condominium associations because the most significant homeowners association legislation, House Bill 679, was vetoed. Thus, for now, as a clarification and correction, homeowners associations are not required to undertake candidate certification nor staggered term votes. Florida condominium associations scheduling and planning for their 2009 annual members' meetings must consider many new provisions, including the following well before their meetings:

- **Staggered Terms.** If a condominium association's bylaws permit staggered terms of no more than two years, even if the staggered term provisions were adopted by a vote of members, then to continue staggered term elections, a majority of the condominium association's total voting interests must approve staggered terms on or after October 1, 2008.

- **Candidacy.** In addition to self-nomination, a candidate for election to a condominium association's board of directors must provide the association a signed certification form. The form states that the candidate "has read and understands, to the best of his or her ability, the governing documents of the Association and the provisions of this chapter and any applicable rules." While the nomination deadline is forty days before a scheduled election, the certification must be received by the Association no less than thirty-five days before the election, the same deadline for a candidate to provide a candidate information sheet. The Association is to deliver each candidate's form to each unit owner with the first notice of meeting.

- **Building Inspection Report.** Within five years beginning October 1, 2008 a condominium association's board of directors is responsible to have each condominium building greater than three stories in height inspected. A report based upon the inspection is to be provided under the seal of an architect or engineer which is authorized to practice in the State of Florida. The report must attest to required maintenance, useful life, and replacement cost of the common elements.

A majority of a condominium association's voting interests may waive this building inspection report requirement. The waiver undoubtedly was incorporated into the law because of the anticipated expense of the inspection and report. An informal survey has indicated that few commercial buildings undertake this process unless there is a sale or significant reconstruction; thus, many condominium association directors have questioned whether undertaking the report is reasonable.

If a condominium association desires to waive the building inspection report requirement, then the association must approve that waiver before the end of the five year period beginning October 1, 2008. To avoid missing deadlines, condominium associations that do not plan to undertake the reports generally should undertake the waiver vote now rather than wait until the "proverbial" last minute. Note that a waiver is valid only for one, five year reporting period.

- **Financial Reporting.** Financial reporting requirements may be waived for no more than three consecutive years. Thus, at least every fourth year a condominium association must undertake full financial reporting as required by statute. If a financial reporting waiver is sought, then the waiver must occur during the fiscal year reported, or the year before. A vote does not waive financial reporting requirements for longer than two years.

Homeowners associations are warned that in the 2009 legislative session, requirements similar to those noted above for condominium associations will be considered. If you do not desire to undergo the expense for these items, then it is imperative that you contact your state legislators now.

Independent Contractor v. Agent: When is an Employer Liable?

Whether a Florida association can be held liable for the negligence of a worker frequently boils down to the question of whether the worker is an independent contractor or is an agent.

A Florida appellate court recently ruled that the question of whether an agency or independent contractor relationship exists must normally be decided at a trial, frequently a time consuming and expensive proposition. In *Del Pilar v. DHL Global Customer Solutions, Inc.*, DHL was sued for damages when a van used to deliver DHL packages, but not owned by DHL, collided with the plaintiff's car. The trial court concluded in a summary proceeding that the driver was an independent contractor; thus, DHL could not be held liable for the van driver's negligence.

The appellate court noted that although a principal is not liable for the actions of an independent contractor, a principal is normally liable for the negligence of its agent. The appellate court held that the question of whether the driver was an independent contractor should normally be determined by a jury at trial, not by a judge using a summary procedure. To help businesses avoid this question from arising, the court pointed out several elements of control that suggest when a principal can be vicariously liable for an agent's negligence, including requirements that the agent: (1) use the principal's logo; (2) is prohibited from working on behalf of competitors; (3) use only equipment selected pursuant to the principal's specifications; and (4) submit to inspections conducted at the principal's discretion.

Florida associations will find this decision important because the decision provides guidelines to help determine whether the association is working with an agent or an independent contractor, especially since a mere label or title is not conclusive. The extent of the right to control a worker will normally determine if there is an agency or an independent contractor relationship, and thus potential liability. ■