



ROSS EARLE BONAN & ENSOR, P.A.

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REB LAW REVIEW

ROSS EARLE BONAN & ENSOR, P.A. NEWS

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ASSOCIATIONS

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On July 1, 2015, the founding shareholders, Deborah Ross, David Earle and Elizabeth Bonan, announced that Jacob Ensor has become a named shareholder of the firm. The firm will now be known as Ross Earle Bonan & Ensor, P.A. Congratulations Jacob!

The firm is also pleased to announce the opening of a second office; this one in Vero Beach, Florida. The office will open on September 1, 2015, and will be located in the Transocean Office Building on the corner of Highway A1A and the 17th Street Causeway. This new office will be more conveniently located for our Indian River County and northern St. Lucie County clients.

On July 7, 2015, David Earle was elected Chairman of the Judicial Nominating Commission ("JNC") for the Nineteenth Judicial Circuit. The JNC recommends nominees to Florida's Governor for appointment as Circuit or County Judge within the Nineteenth Judicial Circuit (Martin, St. Lucie, Indian River and Okeechobee Counties).

On May 4, 2015, the Supreme Court of the United States denied *certiorari* (otherwise known as discretionary review) in the case of Jupiter Medical Center, Inc. v. Visiting Nurse Association of Florida, Inc.; a decision which had the effect of upholding a \$1.5 million arbitration award secured for the Visiting Nurse Association ("VNA") in 2009 by the firm's litigation team led by founding shareholder, David B. Earle. This ground-breaking case involved the authority, finality and limits of judicial challenge to an arbitrator's decision and award. Over the past several years, the VNA case wound its way through challenges brought in federal court, the circuit court in Palm Beach County, the Florida Fourth District Court of Appeal, the Florida Supreme Court and, ultimately, the Supreme Court of the United States. The firm's lawyers represented VNA throughout these various challenges and prevailed.

Associate attorney Michael Bonan married Genevieve Napolitano, an attorney with the Attorney General's office in West Palm Beach, on November 9, 2014. Congratulations to the happy couple!

FLORIDA CONDOMINIUM ASSOCIATIONS

Florida Statute 718.111(11)(j) has been modified to clarify that in the absence of an insurable event, the Association or the Unit Owners shall be responsible for the reconstruction, repair or replacement of the Condominium Property as determined by the maintenance provisions of the Declaration or Bylaws.

Florida Statute 718.111(12)(a)(15) has been modified to clarify that the Official Records of the Association include all other written records of the Association relating to the operation of the Association which are not specifically included in the listed items in the statute.

Florida Statute 718.112(2)(d) 6 has been modified to remove the requirement that the Bylaws authorize the electronic transmission to Unit Owners of notices of meetings. Therefore, in all condominium associations, Notice of Meetings of the Board and the Unit Owners (except Unit Owner Meetings to recall a Board Member) and Committee Meetings may be given by electronic transmission to Unit Owners who consent to receive notice by electronic transmission.

Florida Statute 718.116(3) provides that payments received by the condominium or cooperative association are to be applied first to interest accrued by the association, then to administrative late fees, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessments. The amendment clarifies that the application of payments applies in spite of any purported accord or satisfaction contained within the payment or attached to the payment. The amendment specifically overturns the Second District's holding in *St. Croix Lane Trust v. St. Croix at Pelican Marsh Cd'm. Ass'n., Inc.*, 144 So.3d 639 (Fla. 2d DCA 2014).

Florida Statute 718.128 has been added to allow condominium associations to conduct elections and other unit owner votes through an internet-based online voting system. The owner must consent, in writing, to online voting. The board of directors must authorize the online voting via board resolution. There are additional requirements that must be satisfied before using an online voting system. If your association is interested in using an online voting system, we recommend you consult your legal counsel to ensure that all requirements are satisfied.

Florida Statute 718.303 has been amended to clarify that it is the Board of Directors that levies fines and suspensions, and that the fine/compliance committee's role is limited to confirming or rejecting the Board's levying of the fine or suspension. The amendment further provides that when an owner's voting rights are properly suspended, the total number of voting interests of the association must be reduced by the number of suspended voting interests when calculating to total percentage or number of all voting interests available to take or approve any action.

FLORIDA COOPERATIVE ASSOCIATIONS

Florida Statute 719.104(2) has been modified to clarify that the Official Records of the Association include all other written records of the Association relating to the operation of the Association which are not specifically included in the listed items in the statute.

Florida Statute 719.108(3) provides that payments received by the cooperative association are to be applied first to interest accrued by the association, then to administrative late fees, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessments. The amendment clarifies that the application of payments applies in spite of any purported accord or satisfaction contained within the payment or attached to the payment. The amendment specifically overturns the Second District's holding in *St. Croix Lane Trust v. St. Croix at Pelican Marsh Cd'm. Ass'n., Inc.*, 144 So.3d 639 (Fla. 2d DCA 2014).

Florida Statute 719.129 has been added to allow cooperative associations to conduct elections and other membership votes through an internet-based online voting system. The owner must consent, in writing, to online voting. The board of directors must authorize the online voting via board resolution with at least fourteen (14) days notice. There are additional requirements that must be satisfied before using an online voting system. If your association is interested in using an online voting system, we recommend you consult your legal counsel to ensure that all requirements are satisfied.

Florida Statute 719.303 authorizes cooperatives to levy fines against owners or members who violate the association's rules or other governing documents. The bill amends this section to provide general uniformity among the correlating provisions in Chapters 718 and 720. The changes specify that it is the board of administration of the association that levies any fines. Fines levied by the board cannot be imposed unless 14 days' written notice is first provided. The notice and opportunity to challenge the fine must be provided to occupants of the unit, if applicable. Finally, the fining committee must be impartial (no board members or persons residing in a board member's household) and its only purpose is to confirm or reject the fine or suspension.

FLORIDA HOMEOWNERS ASSOCIATIONS

Florida Statute 720.301 the definition of "governing documents" for homeowners' associations is amended to include the rules and regulations adopted under the authority of the association's declaration, articles of incorporation, or bylaws.

Florida Statute 720.303(2)(c) has been amended allow the association to provide electronic notice of meetings to members who consent to electronic notice. The requirement mandating the association's bylaws authorize electronic notice has been deleted.

Florida Statute 720.305 has been amended to specify that it is the board of administration of the association that levies any fines. Fines levied by the board cannot be imposed unless 14 days' written notice is first provided. Subsection (2) now clarifies that fines are not to exceed \$100 per violation unless otherwise provided in the governing documents. Subsection (2)(a) allows the association to suspend certain rights for failure to comply with provisions of the governing documents. Subsection (3) allows the same type of suspension if a member is more than 90 days delinquent in paying any fee, fine, or other monetary obligation. The bill amends both provisions to clearly state that suspensions may not prohibit an owner or tenant from having ingress and egress to the parcel. Subsection (4) newly provides that when an owner or member's voting rights have been suspended, the total number of voting interests of the association must be reduced by the number of suspended voting interests when calculating the total percentage or number of all voting interests available to take or approve any action. Additionally, a newly added Subsection (6) states that any suspensions imposed apply even if the suspension arose from less than all of the units or parcels owned by the member.

Florida Statute 720.306 is amended to clarify that failure to timely provide notice of the recording of an amendment does not affect the validity or enforceability of the amendment. The bill makes a much larger change to Subsection (9)(b) which now provides that an association member's failure to pay a monetary obligation bars him or her from being nominated for the board, and, if he or she is a board member, failure to pay after 90 days results in abandonment in his or her seat on the board.

Florida Statute 720.317 has been added to allow homeowner associations to conduct elections and other membership votes through an internet-based online voting system. The owner must consent, in writing, to online voting. The board of directors must authorize the online voting via board resolution with at least fourteen (14) days notice. The internet-based online voting must be in accordance with the association's bylaws. There are additional requirements that must be satisfied before using an online voting system. If your association is interested in using an online voting system, we recommend you consult your legal counsel to ensure that all requirements are satisfied.

FLORIDA NOT FOR PROFIT CORPORATIONS

Florida Statute 617.0721(2) which applies to all not-for-profit Florida corporations has been modified to add a provision that any copy, facsimile transmission or other reliable reproduction of an original proxy may be substituted and used in lieu of an original proxy for any purpose. Therefore, Associations must accept proxies transmitted via facsimile or email.

CONSTRUCTION DEFECTS

Florida Statute 558 requires community associations to provide notice of construction defects to contractors prior to filing a lawsuit. The statute was amended this year to require a more detailed notice. The notice must identify the location of each alleged construction defect sufficiently to enable the contractor to locate the alleged defect without undue burden. The association must also perform a visual inspection of the defect before sending the notice. The association must also provide, upon request, copies of any maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect and any resulting damages. The association is not required to provide privileged documents.

TENANT PROTECTIONS UPON FORECLOSURE

From 2009 through 2014, federal law required the purchaser at a foreclosure sale to give a bona fide tenant at least 90 days' notice of eviction from a foreclosed home. This federal law expired on December 31, 2014. Florida Statute Section 83.561 has been amended to fill the gap left by this expired federal law. The newly amended statute only requires the purchaser at a foreclosure sale to give thirty (30) days' written notice to a bona fide tenant before seeking a writ of possession. The statute provides a form notice to be sent to the tenant. A tenant is protected from retaliatory actions by a landlord. The tenant must also pay rent during this period. Subsection (3) of the statute limits its protections to "bona fide" tenants, which excludes relatives of the mortgagor foreclosed upon, tenants whose rental agreement is not the result of an arm's length transaction, and tenants who pay rent substantially less than fair market value.

COMMUNITY ASSOCIATION MANAGER UNLICENSED PRACTICE OF LAW

The Supreme Court of Florida issued a new advisory opinion on May 14, 2015 addressing what activities, if performed by Community Association Managers, constitute unlicensed practice of law. First, the Court reviewed a list of activities previously determined to be the unlicensed practice of law in a prior 1996 opinion. The Court also addressed a new list of activities in order to provide further clarification. Below is a table outlining the various activities considered by the Court, and their decisions regarding whether they amount to unlicensed practice of law (UPL):

Activity in Question:	Is it UPL? (Do you need an attorney)
Completing Business and Professional Regulation Form 33-032 (frequently asked questions and answers sheet.	YES
Drafting a claim of lien, satisfaction of claim of lien, and notice of commencement form	YES
Determining the timing, method, and form of giving notice of meetings, or determining the number of days to be provided for any statutory notice	YES
Determining the votes necessary for certain actions which would entail interpretation of certain statutes and rules (e.g. number of votes needed to pass a proposition, or number of votes needed to establish a quorum)	YES
Answering a community association's question about the application of law to a matter being considered or advising a community association that a course of action may not be authorized by law, rule, or the Association's governing documents.	YES
Completion of two Secretary of State forms (change of registered agent or office for corporations, and annual corporation report)	NO
Drafting certificates of assessments	NO ¹
Drafting first and second notices of date of election	NO
Drafting ballots	NO
Drafting written notices of annual or board meetings	NO
Drafting annual meeting or board meeting agendas	NO
Drafting affidavits of mailing	NO
Modification of limited proxy forms promulgated by state	MAYBE ²
Drafting a limited proxy form	MAYBE ³
Drafting documents required to exercise the community association's right of approval or right of first refusal on the sale or lease of a parcel. Drafting	MAYBE ⁴

documents concerning the right of the Association to approve prospective owners.	
Drafting of amendments (and certificates of amendment that are recorded in the official records) to the governing documents of the association when such documents are to be voted upon by members	YES
Drafting of pre-arbitration demand letters required by 718.1255, Fla. Stat.	NO
Preparation of construction lien documents (e.g. notice of commencement and lien waivers, etc.)	YES
Preparation, review, drafting, and/or substantial involvement in the preparation/execution of contracts, including construction contracts	YES
Identifying, through review of title instruments, the owners to receive pre-lien letters.	YES ⁵
Any activity that requires statutory or case law analysis to reach a legal conclusion.	YES

¹ The Supreme Court determined that preparation of certificates of assessments did not constitute unlicensed practice of law, regardless of whether the delinquent account has been turned over to a lawyer, whether a foreclosure has commenced, or whether a member has disputed in writing the amount owed.

² Modifications to limited proxy forms that do not require any discretion in phrasing are "ministerial actions" that did not constitute unlicensed practice of law. Examples are: (1) modifying the form to include the name of the community association, (2) phrasing a yes or no voting question concerning either waiving reserves or waiving the compiled, reviewed, or audited financial statement requirement, (3) phrasing a yes or no voting question concerning carryover of excess membership expenses, (4) phrasing a yes or no voting question concerning the adoption of amendments to the governing documents. More complicated modifications that involve more changes such as listing multiple options or interpreting a statutory provision require an attorney to be consulted.

³ Ministerial actions such as filling in the name and address of the owner do not constitute unlicensed practice of law. Drafting the form itself or drafting questions in addition to those on a pre-printed form requires an attorney.

⁴ The drafting of a document by a CAM is not unlicensed practice of law, however, CAMS cannot advise the association as to the legal consequences of taking a certain course of action. Also if the drafting requires interpretation of statutes or legal documents, a CAM may not prepare the documents. However, drafting a document regarding a non-interpretive provision, such as the weight limit of pets, does not require an attorney.

⁵ The Supreme Court determined that searching public records to merely make a list of the record owners is not the unlicensed practice of law, however, determining which owners must receive pre-lien letters requires a legal determination to be made and would be unlicensed practice of law.