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REB LAW REVIEW

ROSS EARLE BONAN & ENSOR, P.A.

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ROSS EARLE BONAN & ENSOR, P.A. NEWS

Shareholder, John Carrigan and his wife, Alex, welcomed their second child, Mila Marie on February 23, 2018. Big brother Theo loves his baby sister!

Ally Fleischer, part time clerk and daughter of founding shareholder, Deborah Ross, has been accepted into the University of Florida Honors Program for the Fall 2018 term. Everyone at the firm will miss her, but look forward to seeing her on her college breaks.

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LEGISLATIVE CHANGES AFFECTING COMMUNITY ASSOCIATIONS EFFECTIVE JULY 1, 2018 AND OCTOBER 1, 2018

ITEMS APPLICABLE TO ALL COMMUNITY ASSOCIATIONS

House Bill 875 – Construction Defect Claims – (effective as of July 1, 2018)

This bill addresses two timing issues when bringing a lawsuit based on a defect in the design, planning, or construction of a building or other improvement to real property.

- First, F.S. 95.11(3) clarifies that a party who is sued, and has related counterclaims, cross-claims, or third-party claims, may bring such claims within one (1) year after being served, *regardless of whether the filing of those claims would otherwise be time barred.*
- Second, actions founded on the design, planning, or construction of an improvement to real property must be commenced within four (4) years. Under current law, that timeframe begins to run after the latest of four specified events occur, one of which is the "completion of the construction contract". In order to combat recent developments in the case law, F.S. 95.11(3) has been amended to clarify that a construction contract performed pursuant to a building permit is complete when a final certificate of occupancy or certificate of completion is issued. (e.g. on-going corrections or repairs of defect work, whether performed under warranty or otherwise, do not extend the period of time in which the lawsuit must be commenced.)
- This bill shall be effective as of July 1, 2018

CHANGES AFFECTING CONDOMINIUM ASSOCIATIONS ONLY

House Bill 841 – (effective as of July 1, 2018)

HB 841 enacts significant changes to Chapter 718, Florida Statutes. These changes are summarized below:

- New Permanent Records: 718.111(12)(a)(1) – (a)(6) & (b) – An association must now keep all official records listed in (a)(1) through (a)(6) permanently starting from the inception of the association. All other official records listed in (a)(7) through (a)(17) must be kept for at least seven years unless otherwise required by general law. The new "permanent" records are:
    1. A copy of the plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4).
    2. A photocopy of the recorded declaration of condominium of each condominium operated by the association and each amendment to each declaration.
    3. A photocopy of the recorded bylaws of the association and each amendment to the bylaws.
    4. A certified copy of the articles of incorporation of the association, or other documents creating the association, and each amendment thereto.

5. A copy of the current rules of the association.
6. A book or books that contain the minutes of all meetings of the association, the board of administration, and the unit owners

- Extended Response Time for Official Records Request: 718.111(12)(b) – An association now has ten (10) business days to respond to official records requests instead of five. This change aligns condominium requirements with HOA requirements.

- Website Documents Deadline Extended: 718.111(12)(g)(1) – The deadline for associations with 150 units or more to maintain and post documents on a website has been extended to **January 1, 2019**.

- New Documents to be Posted on Website: 718.111(12)(g)(2) – associations with 150 units or more must now post on the required website, the following items in addition to items already required under 2017 laws:

    1. A list of all executory contracts or documents of which the association is a party or under which the association or the homeowners have an obligation;
    2. A list of all bids received, upon completion of the bidding period, received by the association within the past year,
    3. Summaries of bids received by the association which exceed $500.00. These must be maintained on the website for one (1) year (the complete bids may be posted in lieu of summaries).
    4. Any monthly income or expense statements to be considered at a meeting,

- Protection Against Disclosure of Protected Information on Website: 718.111(12)(g)(3) – An association with 150 units or more, is now held harmless for any protected or restricted information posted on the association's website, unless such disclosure was made with a "knowing or intentional disregard" of the protected or restricted nature of such information.

- Failure to Post Documents on Website: 718.111(12)(g)(4) – The failure of an association with 150 units or more to post required documents on the Website, is not "in and of itself" sufficient to invalidate any action or decision of the association's board or its committees.

- Penalty for Failure to Respond to Request for Financial Report: 718.111(13) & (13)(e) – The current law allows an owner to provide written notice to the Division of Condominiums, Timeshares, and Mobile Homes if the association fails to deliver a copy of the most recent financial report within five (5) business days of a written request. If the Division finds a violation and orders the association to mail a report, the statute now states that the association may not waive its financial reporting requirement *for the fiscal year of the request and the following fiscal year.*

- Minimum Board Size for Five Unit Condominiums: 718.112(2)(a)(1) – Condominium associations with five or fewer units, must have a board of administration of not fewer than three members.

- Meeting Notices Must Describe Cost and Purpose of Considered Assessments: 718.112(2)(c)(1) - Notices of any meeting where a special or regular assessment is to be considered must now specifically state that assessments will be considered and provide the estimated cost of the assessment and a description of the purpose for the assessment.

- Meeting Notices By Website: 718.112(2)(c)(1) and 718.112(2)(d)(3) – In addition to the other authorized means of providing notice of a meeting of the Board, the association may now, by rule, adopt a procedure for conspicuously posting the meeting notice and agenda on the website serving the condominium (regardless of how many units the condominium operates) as long as the notice is posted for at least the minimum period of time for which a notice of a meeting is also required to be physically posted on condominium property. In addition to posting on the website, the association must send an electronic notice in the same manner as a notice for the meeting of the members, which must include a hyperlink to the website where the notice is posted; to unit owners whose email addresses are included in the association's Official Records.

- Terms Longer than One Year Possible: 718.112(2)(d)(2) – Previously, the statute said that Board members could serve two (2) year terms if permitted by their governing documents. In that form, the statute effectively allowed for either one or two year terms. HB 841 changed the statute from allowing two year terms, to allowing terms "longer than 1 year." Accordingly, Board members may now serve terms longer than one (1) year if permitted by the bylaws or articles of incorporation. In other words, this change makes terms of *any* length set forth in an association's governing documents permissible under the statute (e.g. terms of four or six years may now be allowed).

- Board Term Limits Clarified: 718.112(2)(d)(2) – The statute now states that a board member may not serve more than 8 consecutive years, *unless approved by an affirmative vote of unit owners representing two-thirds of all votes cast in the election or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy."*

- Spam Filters No Excuse for Failing to Receive Electronic Notice: 718.112(2)(d)(6) – The statute has been amended to expressly state that unit owners who consent to receiving notices by electronic transmission are solely responsible for removing or bypassing filters that block receipt of mass emails from associations in the course of giving electronic notices.

- Election Recalls Must be "Facially Valid" to be Immediately Effective: 718.112(2)(j)(1)-(2) – The law states that, once members approve the recall of a board member, a board meeting must occur within five (5) business days to effect that recall. The statute has been amended to state that the recall becomes effective immediately after that board meeting only if the recall is "facially valid". (This term is undefined).

- Election Recall "Facially Valid" Challenge by Owners: 718.112(2)(j)(4) - If the board of directors determines that the recall was not "facially valid", the unit owner representative for the recall may then file a petition challenging the board's determination.

- Election Recall "Facially Valid" Challenge by Recalled Board Member: 718.112(2)(j)(6) – The statute now provides that the recalled board member my challenge the facial validity of the written agreement or ballots filed, or the substantial compliance with the procedural requirements for the recall. If the recalled board member is successful, he/she is immediately reinstated and is entitled to recover attorney's fees from the respondents (possibly both the association and the unit owner representative). The respondents may be awarded prevailing party fees if they win and the arbitrator finds the recalled board member's challenge was frivolous. Accordingly, we strongly recommend you contact our office in the event of any election recall dispute.

- No Retroactive Material Alteration Approval: 718.113(2)(a) - If the declaration of the association does not specify the procedure for approval of material alterations or substantial additions, then 75% of the total voting interests of the association must now approve the alterations or additions **BEFORE** the material alterations or substantial additions are commenced. The effect of this change is to eliminate the option for associations to go back and obtain a curative or retroactive approval of a material change that already occurred. It is therefore now imperative that the association obtain proper approval before commencement of alterations or changes. We strongly recommend you contact our office before making any alteration or change to association property.

- Electric Vehicle Charging Stations: 718.113(2)(c)(8) –An association cannot prohibit a unit owner from installing an electronic vehicle charging station within the boundaries of the unit owner's limited common element parking area. However, installation is subject to detailed conditions set forth in the statute. If a unit owner requests to install a charging station, we recommend contacting our office to discuss the relevant conditions in the new statute.

- Director Conflicts of Interest: 718.3026(3) and 718.3027(2) have been amended to be better organized. As before, directors must still disclose to the board any activity that may be reasonably construed to be a conflict of interest and the association must follow the disclosure requirements set forth in the statute.

- Fining Committee/Procedures: 718.303(3)(b) – The statute has been amended to clarify that an association's fine or grievance committee must be composed of "at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee". The statute has also been amended to clarify that fines must be approved by a majority vote, and has set a statutory deadline requiring the payment of fines within five (5) days after its approval.

CHANGES AFFECTING COOPERATIVE ASSOCIATIONS ONLY

House Bill 841 – (effective as of July 1, 2018)

HB 841 enacts changes to Chapter 719, Florida Statutes. These changes are summarized below:

- Official Records: - 719.104(2)(a) – This provision is amended to delete the requirement that all meeting minutes of the association and accounting records be kept for not less than seven (7) years, however, that requirement remains stated in 719.103(2)(b). Please note that, the legislature did not add a requirement that certain records be maintained permanently (as was done with condominiums).
- Minimum Board Size for Five Unit Cooperatives: 719.106 (1)(a)(1) - cooperative associations with five or fewer units, must have a board of administration of not fewer than three members.

- Co-owners serving as Board Members: 719.106(1)(a)(1) – In a residential cooperative association of more than ten (10) units, co-owners of a unit may not serve as members of the board of directors at the same time, unless the co-owners own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy.

- Email Communication for Board Members: 719.106(1)(c) – the statute has been amended to allow members of the board of administration to use email as a means of communication, but not a means of casting votes.

- Meeting Notices Must Describe Cost and Purpose of Considered Assessments: 719.106(1)(c) - Notices of any meeting where a special or regular assessment is to be considered must now specifically state that assessments will be considered and provide the estimated cost of the assessment and a description of the purpose for the assessment.

- Meeting Notices By Website: 719.106(1)(c)-(d) – In addition to the other authorized means of providing notice of a meeting of the Board or Shareholders of the association, the cooperative may now, by rule, adopt a procedure for conspicuously posting the meeting notice and agenda on the website serving the cooperative (regardless of how many units the cooperative operates) as long as the notice is posted for at least the minimum period of time for which a notice of a meeting is also required to be physically posted on cooperative property. In addition to posting on the website, the association must send an electronic notice in the same manner as a notice for the meeting of the members, which must include a hyperlink to the website where the notice is posted; to unit owners whose email addresses are included in the association's Official Records.

- Spam Filters No Excuse for Failing to Receive Electronic Notice: 719.106(1)(d)(3) – The statute has been amended to expressly state that unit owners who consent to receiving notices by electronic transmission are solely responsible for removing or bypassing filters that block receipt of mass emails from associations in the course of giving electronic notices.

- Director and Officer Delinquencies: 719.106(1)(m) - A director or officer who is more than 90 days delinquent in the payment of any monetary obligation due the association shall be deemed to have abandoned the office, creating a vacancy in the office or on the board to be filled by operation of law.

- Bulk Internet Services as Common Expense: 719.107 (1)(b) – If so provided in the By Laws, the prior statute allowed the cost of master antenna television system or cable television service obtained under a bulk contract to be deemed a common expense. The provision was amended to expand the covered services to include "information services or internet services."

- Fining Committee/Procedures: 719.303(3)(b) – The statute has been amended to clarify that an association's fine or grievance committee must be composed of "at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee". The statute has also been amended to clarify that fines must be approved by a majority vote, and has set a statutory deadline requiring the payment of fines within five (5) days after its approval.

CHANGES EFFECTING HOMEOWNERS ASSOCIATIONS ONLY

House Bill 841 – (effective as of July 1, 2018)

HB 841 enacts significant changes to Chapter 720, Florida Statutes. These changes are summarized below:

- Email Communication for Board Members: 720.303(2)(a) – the statute has been amended to allow members of the board of administration to use email as a means of communication, but not a means of casting votes.

- Fine Payment Deadline: 720.305(2)(b) – The statute has been amended to set a statutory deadline requiring the payment of fines within five (5) days after its approval.

- Amendments to Governing Documents: 720.306(1)(e): A proposal to amend the governing documents must contain the full text of the provision to be amended, with new language underlined and deleted language stricken. However, if the proposed change is so extensive that underlining and striking through language would hinder, rather than assist, the understanding of the proposed amendment, the following notation must be inserted immediately preceding the proposed amendment: "Substantial rewording. See governing documents for current text." An immaterial error or omission in the amendment process does not invalidate an otherwise properly adopted amendment. An amendment to a governing document is effective when recorded in the public records of the county in which the community is located. (This provision simply requires HOAs to present amendments in the same manner as condominiums).

- Notice of Amendments to Governing Documents: 720.306(1)(g) – All notices under Section 720.306(1) must be mailed or delivered to the address identified as the parcel owner's mailing address on the property appraiser's website for the county in which the parcel is located, or electronically submitted in a manner authorized by the association if the parcel owner has consented, in writing, to receive notice by electronic transmission.

- Election by Acclamation (without Quorum): 720.306 (9)(a) – When an election is not required because there are either an equal number or fewer qualified candidates than vacancies, and if nominations from the floor are not required pursuant to the statute or bylaws, then write-in nominations are not permitted and such qualified candidates shall commence service on the Board of Directors regardless whether a quorum was attained at the annual meeting.

- Application of Payments: 720.3085(3)(b) –Assessment payments received by the association will be applied according to the statute notwithstanding any purported accord and satisfaction or any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

House Bill 617 – (effective October 1, 2018)

HB 617 enacts significant changes to Chapter 712, Florida Statutes, also known as the Marketable Record Title Act (MRTA) and makes coordinating changes to Chapter 720.

- Expansion of MRTA Preservation to Commercial Property Owners Associations: Generally, MRTA works to extinguish covenants and restrictions on real property that are older than thirty (30) years following the effective date of the root of title (the instrument creating or transferring an estate in real property). However, MRTA also allows for the preservation and revitalization of covenants by homeowners associations. Many of the changes implemented by HB 617 extend this power to "property owners' associations" using an expanded definition that includes, for example, commercial property owners associations.

- New Options for Preservation of Covenants: 712.05(2) now provides three options for preserving covenants and restrictions:

    - Option 1: Written notice in accordance with 712.06 (this is the current method).

    - Option 2: A summary notice in the form provided in 720.3032(2). The form must be recorded in the official records of the county where the community is located, and a copy provided along with the notice for the next member's meeting.

    - Option 3: An amendment to the association's governing documents.

- Two-Third Approval of Board/Notice to Members Not Always Required: 712.05 previously required (1) two-thirds of the members of the board of directors approve the preservation of covenants, and (2) that approval be obtained at a meeting where a notice containing the statement of marketable title action was mailed to the members of the association at least seven days prior to the meeting. HB 617 struck these requirements from the 712.05. However, 712.06(b) stills requires that a notice recorded under the old procedure include a statement affirming the statement of marketable title action.

    - Note: The new statute pointedly creates three mechanisms for preserving covenants, but these mechanisms are not created equal. Under the new statutes, the summary notice procedure can be approved by the board of directors in the same manner as any other action, and implemented by recording a form document with the clerk of court.

- Covenant Revitalization for Parcel Owners without HOA: Section 712.12 was created to allow parcel owners who were at one time subject to covenants and restrictions but who do not have an existing homeowners association, to revitalize the extinguished covenants and restrictions via the same mechanism delineated for homeowners associations.

- Required Consideration of MRTA at Annual Meetings: 720.303(2)(e) – the statute has been amended to require that the board "consider the desirability of filing notices to preserve the covenants" at the first board meeting following the annual meeting of the members. Based on its unusual language, the provision seems to require this "consideration" occur (and be recorded in the minutes) every year, regardless of whether the association has an imminent need for preservation or has already preserved its covenants.