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LAW FIRM



# MONTHLY NEWSLETTER

## AUGUST 2019



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# E-Voting Basics and Common Hurdles

FRANK A. RUGGIERI

IN MY NEVER ENDING ENDEAVOR TO PLEASE OUR VALUED CLIENTS, THIS MONTH'S ARTICLE WILL ADDRESS A REQUEST RECEIVED FROM A CLIENT CONCERNING THE BASICS OF ELECTRONIC VOTING AND COMMON HURDLES.

This brief article will provide an outline of the basic procedure and highlight common issues which may prompt the Board to seriously consider amendments to its governing documents.

## STEPS IN THE PROCESS

### Step 1 – Review governing documents

Consideration of electronic voting should begin with a thorough review of the governing documents with the guidance of Association legal counsel. The common issues which will be discussed below could indicate the need to amend the governing documents to ensure that electronic voting is consistent with any specific requirements contained in the Association's Bylaws.

### Step 2 – Select online voting provider

The statute requires specific technological capability for the online voting system to ensure various things including authentication of the member's identity, verification that a member's electronic device can successfully communicate with the online voting system, as well as safe and secure transmission of the vote itself and storage for potential later use. These technological requirements are most effectively accomplished by identifying a reputable and experienced third-party online voting service with familiarity with the requirements of Florida statutes and a history of implementing electronic voting systems for community associations. The contract with the vendor should specifically provide for a new election at the vendor's expense where the vendor's system is not able to successfully complete the election in compliance with the statute.

### Step 3 – Procedures and notifications

A Board resolution must be adopted with 14 days' notice to the homeowners of the Board meeting at which the resolution will be considered by the Board. The Board resolution must provide reasonable procedures and deadlines for members to consent in writing and to opt out of online voting after giving consent (homeowners must consent to e-voting in writing and may also opt-out at any time). The notice must be mailed/delivered and posted conspicuously on property at least 14 days before the meeting.

## COMMON HURDLES TO E-VOTING

As indicated in the statute, the online voting system must be consistent with the election and voting procedures in the Association's Bylaws. Nominations from the floor, proxy voting, and a specific requirement that the election be held at the annual meeting will arguably be inconsistent with online voting and may require an amendment or amendments to the Bylaws. A specific requirement in the Bylaws that the votes be cast at the meeting would certainly present issues for online voting and would most likely require an amendment to the Bylaws. Online voting necessarily involves absentee voting which also creates issues with respect to voting by proxy and nominations from the floor.

A proxy necessarily assumes that the proxy holder will be present and will vote at the meeting on behalf of the homeowner. However, proxy voting is not necessarily inconsistent with online voting as there is nothing that prohibits voting in an absentee fashion while also allowing votes to take place at the meeting itself.

Nominations from the floor can also arguably be reconciled with online voting by simply including a disclosure in the meeting notice which clearly indicates that homeowners will still be permitted to nominate themselves from the floor and any homeowners who wish to consider candidates who nominate themselves from the floor should not participate in online voting and should instead attend the meeting and vote in person. This would likewise be consistent with proxy voting.

Notwithstanding, it may be most prudent to pursue an amendment or amendments to the Association's Bylaws to specifically provide for an absentee election process which also eliminates nominations from the floor with a specific procedure for nominations to be made in advance, including a deadline for candidacy similar to that which applies to condominium elections. Please consult with your Association's legal counsel to properly implement an Internet-based online voting system. ■





# Common Defects In Construction Could Be a Matter of Common Interest

ANTHONY T. PARIS, III

WHAT ARE THE OPTIONS AVAILABLE TO AN OWNER OF AN EIGHT-YEAR-OLD SINGLE-FAMILY HOME WHICH IS DEVELOPING CRACKS IN ITS EXTERIOR STUCCO SHELL, ACROSS THE DECORATIVE TRIM OF THE FAÇADE, AND DOWN THE HOME'S COLONNADE?

The first impulse answer (and a logical one at that) might be to sue the builder. But even with the help of a construction attorney, a single homeowner's fight against a national builder might quickly turn into a David and Goliath type struggle. Now, the owner notices that a majority of his neighbors' homes, which include those of members on the homeowners' Association Board, are suffering from the exact same issues. This might change things a bit for our hypothetical owner.

Section 720.303 of the Florida Statutes allows for the Association to institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning *matters of common interest* to the members, including, **but not limited to**, the common areas. But what constitutes a matter of common interest? The question is simpler to answer in the context of a condominium community. For instance, in [Charley Toppino & Sons v. Seawatch at Marathon Condo. Ass'n.](#), a condominium Association sued the developer after turnover when it was discovered that cracks were forming throughout the condominium's buildings. The condominium Association relied on Section 718.111 of the Florida Statutes (which is analogous to 720.303 to a degree). The Court in [Charley Toppino](#) held that "Section 718.111's grant of power to Associations to sue on behalf of unit owners is plainly and broadly worded and [should not be given] a cramped reading." In other words, at least in the context of condominiums, the authority to sue is not limited to just common elements and enumerated items in the statute, but rather a broad spectrum of matters which affect the community as a whole.

Can the same argument be made for a homeowner's Association organized under Chapter 720 of the Florida Statutes? The definitive answer to this question remains to be seen, as no District Court of Appeal has issued a decision which would serve as a direct answer. However, the ruling of Charley Toppino is encouraging. Section(s) 720.303 and 718.111 are identical in their language regarding the Association's ability to sue on behalf of its members for matters of common interest. Hence, our hypothetical owner could arguably seek the involvement of his homeowner's Association where the

construction defects affect a majority of his community. Such defects not only disrupt the Association's aesthetic qualities and community wide standard but may also have a chilling effect on the Association's ability to enforce its maintenance covenants where owners are simply unable to maintain the appearance of their homes as a result of the defects.

The biggest challenge to our hypothetical Association's suit would undoubtedly include the fact that the defects exist on individual homes for which the Association has no maintenance responsibilities. However, [Charley Toppino](#) makes it clear that the Association's standing to sue is not limited to just the common areas and items enumerated by the applicable statute. Be sure to review your situation with legal counsel and remain vigilant of the statute of limitations after turnover of control from the developer. ■



# UPCOMING EVENTS

## ORANGE COUNTY

### **Board Member Certification Class**

October 3, 2019

Avalon Park

## BREVARD COUNTY

### **Board Member Certification Class**

October 14, 2019

Viera/Suntree

## OSCEOLA COUNTY

### **Board Member Certification Class**

October 23, 2019

Kissimmee

## BREVARD COUNTY

### **Covenant Enforcement: An Interactive Review of the Process**

November 6, 2019

Viera/Suntree

Final locations and times TBD. Refreshments and light hors d'oeuvres will be served.  
Please RSVP to [jamiebroomfield@ruggierilawfirm.com](mailto:jamiebroomfield@ruggierilawfirm.com)

## ORLANDO

111 N. Orange Ave.  
Suite 725  
Orlando, FL 32801

P (407) 395-4766  
F (407) 890-5177

## MELBOURNE

6767 N. Wickham Rd.  
Ste. 400-H  
Melbourne, FL 32940

P (321) 241-4770  
F (321) 241-4771

CORRESPOND TO ORLANDO



RUGGIERI  
LAW FIRM