

LUTZ, BOBO, TELFAIR, P.A.

L A W Y E R S

Scott E. Gordon and Jonathan P. Whitney

sgordon@lutzbobocom

jwhitney@lutzbobocom

Our blog for resident-owned communities: www.floridaroc.com

2 N. Tamiami Trail, Suite 500, Sarasota, FL 34236

941-951-1800

BOARD MEMBER TRAINING FOR COOPERATIVE ASSOCIATIONS

I. Reasons for Board Training

II. Role of the Board in operating the Cooperative

A. Cooperatives vs. Condominiums

1. Florida Statutes Section 719.103(12): “Cooperative” means that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession (e.g., occupancy agreement) granted by the association as the owner of all the cooperative property
2. F.S. Section 719.103(2): “Association” means the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of the cooperative and that is responsible for the operation of the cooperative
3. F.S. Section 719.103(26): An interest in a “unit” is an interest in real property

B. F.S. Section 719.103(3): “Board of Administration” means the board of directors or other representative body responsible for the operation of the association. Unless the bylaws provide otherwise, the board shall be composed of five (5) members, unless the cooperative has five or fewer units, in which case the board shall consist of not less than three (3) members is the cooperative is a not-for-profit corporation per F.S. Section 719.106(1)(a).

C. Limits on Association’s and Board’s Authority

1. Florida Statutes – Chapters 719 and 617 (or 607)
2. Federal, State and Local laws – e.g., Fair Housing Act **and the Corporate Transparency Act**
3. Governing Documents
4. The Division does not have authority to enforce Chapters 607 or 617

D. Permissive versus Obligatory versus Prohibitive Language

1. F.S. Section 719.1055(5): The bylaws must include a provision whereby a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the association's units with the applicable fire and life safety code.

E. Governing Documents versus Statutes

1. E.g., F.S. Sections 719.1055 and 719.106

F. Examples of Association Powers:

1. F.S. Section 719.104(6): The association has the power to make and collect assessments, and to lease, maintain, repair, and replace the common areas. However, the association may **not** charge a use fee against the unit owner for use of common areas unless otherwise provided in the cooperative documents or by a majority vote of the association or unless the charges relate to expenses incurred by an owner having exclusive use of common areas.

2. F.S. Section 719.104(7): The association has the power to purchase any land or recreation lease upon the approval of such voting interests as is required by the cooperative documents. If there is no provision in the cooperative documents, the vote required is that required to amend the cooperative documents to permit the acquisition.

3. F.S. Section 719.104(11): Powers and duties include those provided in the laws governing corporations in addition to those powers and duties provided in the Cooperative Act.

4. Unless prohibited by its governing documents, an association has the power to purchase units in the cooperative and to acquire, hold, lease, mortgage, and convey those units. In addition, F.S. Section 719.108(5) gives associations the power, unless prohibited in the cooperative documents, to purchase units at a foreclosure sale for unpaid assessments or to take title in lieu of foreclosure and to hold, lease, mortgage or convey any such unit.

5. The association may enter into contracts, and may sue or be sued with respect to the exercise or non-exercise of its powers, and may file, settle or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners

6. F.S. Section 719.104(1): The association has the irrevocable right of access to each unit from time to time during reasonable hours when necessary for the maintenance, repair or replacement of any structural components of the building or of any mechanical, electrical, or plumbing elements necessary to prevent damage to the building or to another unit.

7. F.S. Section 719.128 (see handout) grants emergency powers to the board of directors (this statute now applies to pandemics)

III. Fiduciary Duties of Board: F.S. Section 719.104(9)

- A. Officers and directors have a fiduciary relationship to the unit owners.
 - 1. Officers and directors must keep the interests of the association above their personal interests
 - 2. Officers and directors must act in good faith, using the care an ordinarily prudent person in a similar position would use under similar circumstances and in a manner that each officer and director believes to be in the best interest of the association
 - 3. An officer or director may not solicit, offer to accept, or accept anything or service of value for which consideration has not been provided for his or her own benefit or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association.
 - 4. A director who is present at a meeting of the board at which action on any association matter is taken is presumed to have assented to the action taken unless the director votes against such action or abstains from voting in respect to that action because of an asserted conflict of interest. A vote or abstention for each board member shall be recorded in the minutes
 - 5. Directors may not vote by proxy or by secret ballot, but officers may be elected by secret ballot

IV. Role of Officers

- A. President
- B. Vice President
- C. Secretary
- D. Treasurer
- E. "Non-Executive Officers"
- F. Officers Are First and Foremost Board Members.

V. Meetings

- A. Meetings of the board at which a quorum of the board members is present must be open to all unit owners. Any unit owner may tape or videotape board meetings and speak on all designated agenda items. A board or committee member participating in a meeting by telephone, real-time video conferencing, or similar real-time electronic or video communication now counts toward a quorum and such member may vote as if physically

present. A speaker must be used so that the conversation of such members may be heard by the board or committee members attending in person as well as any unit owners present at the meeting (F.S. Section 719.106(1)(b)(5).

- B. The Division shall adopt reasonable rules governing audio and video taping and the association may adopt reasonable written rules governing the frequency, duration, and manner of unit owner statements. Refer to FAC Section 61B-75.004 for the Division's current rules governing audio and video taping and note the association may adopt additional rules regarding the placement and use of audio and video equipment that are not inconsistent with the Division's rules.
- C. Except as noted below, adequate notice of all meetings where a quorum of the board is present must be posted in a conspicuous place on the cooperative property at least 48 continuous hours before the meeting, except in an emergency and any such emergency action shall be properly noticed and ratified at the board's next regular meeting.
- D. Written notice of any meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered shall be mailed, delivered or electronically transmitted to the unit owners and posted conspicuously on the cooperative property at least 14 days before that meeting. Evidence of compliance with this 14-day requirement shall be made by an affidavit signed by the person providing the notice and shall be filed with the official records of the association. Notice of any meeting in which regular or special assessments are to be considered must specifically state that assessments will be considered and provide the estimated cost and description of the purpose for such assessments.
- E. The board, after providing proper notice to the unit owners, may designate a specific location on the cooperative property where notices of board meetings shall be posted.
- F. The association may adopt procedures for conspicuously posting and repeatedly broadcasting meeting notices and agendas on a closed-circuit cable television system serving the association in addition to or instead of physically posting the notice but if this procedure is to be used the provisions of F.S. 719.106(1)(c) must be followed.
- G. Written notice of the annual meeting, which must incorporate an identification of agenda items, must be posted in a conspicuous place on the cooperative property and given to the unit owners at least 14 days before the annual meeting. See F above and refer to F.S. Section 719.106(1)(d) for procedures involving broadcast notice.
- H. F.S Section 719.106(1)(d)(3) has been amended to allow for electronic transmission of most meeting notices if a unit owner consents to receiving notice electronically even if the governing documents do not provide for it. Any unit owner who consents to receiving notice by electronic transmission is solely responsible for removing or bypassing filters that may block receipt of mass emails sent to the members on behalf of the association.
- I. In addition to any of the authorized means of providing notice of a meeting of the board, the association may, by rule, adopt a procedure for conspicuously posting the meeting notice and the agenda on a website serving the cooperative association for at least the

minimum period of time for which a notice of a meeting is also required to be physically posted on the cooperative property. Any rule adopted shall, in addition to other matters, include a requirement that the association 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 e-mail addresses are included in the association's official records. F.S. Section 719.106(1)(c). A similar provision is now found in the provisions of F.S. Section 719.106(1)(d) relating to notices of meetings of the members.

- J. When can the Board or committee meet "behind closed doors"?
 - 1. Committees, when allowed by Bylaws and where no final action on behalf of the Board is being taken nor recommendations to the Board regarding the association budget are being made.
 - 2. Board or committee meetings held for the purpose of discussing personnel matters.
 - 3. Meetings between the Board or a committee and the association's attorney with respect to proposed or pending litigation if the meeting is held for the purpose of seeking or rendering legal advice.
- K. The bylaws must provide the method for calling meetings, including annual meetings.
- L. Emails, texts, chat rooms, and other "meetings". Board members may use email as a means of communication but may NOT cast a vote on an association matter by email (F.S. Section 719.106(1)(c)). Do emails between an attorney and board members containing communication on an association matter constitute "official records" of the association? What if those emails are not printed?
- M. Membership meetings in a COVID and post-COVID world: F. S. Section 617.0721(3) and the "virtual meeting" (see handout)

VI. Fees, fines, rules, and enforcement

- A. F.S. Section 719.104(6): The association has the power to make and collect assessments.
- B. "Common expenses" are defined in F.S. Section 719.103(9) as "all expenses and assessments properly incurred by the association for the cooperative". F.S. Section 719.107(1)(a) provides that "common expenses" include the expenses of operating, maintaining, repairing, or replacing the cooperative property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in F.S. Section 719.107(1)(a), that has been designated as a common expense elsewhere in Chapter 719 or the association's governing documents. F.S. Section 719.107(1)(b) allows associations to treat bulk contracts for "communication services," information services, or internet services as common expenses.
- C. A unit owner, regardless of how title is acquired, is responsible for all rents and assessments coming due while that unit owner is in exclusive possession of that unit. In a voluntary transfer, the unit owner in exclusive possession shall be jointly and severally

liable with the previous owner for all unpaid rents and assessments against the previous unit owner for his or her share of the common expenses up to the time of transfer.

- D. The association may collect interest on unpaid rents and assessments and installments on either under F.S. Section 719.108(3) and may also charge an administrative late fee in addition to interest not to exceed the greater of \$25 or 5 % of each installment of the assessment for each installment that the payment is late. Payments are to be applied first to interest, then to late fees, then to costs and reasonable attorneys' fees incurred in the collection and then to the delinquent assessment per F.S. Section 719.108(3). The association's right to place a lien on a unit for unpaid rents, assessments, interest, and authorized administrative late fees and its right to foreclose on that lien is provided for in F.S. Section 719.108(4) and (5). Note revisions to F.S. Section 719.108(3)(b) that change the collection process.
- E. Unless otherwise provided in the association's governing documents and subject to applicable provisions of Chapter 719, the Board of Directors has the power to create, delete, amend or otherwise modify or revise rules governing the cooperative.
- F. Fines and suspensions for failure to comply with governing documents and rules under F.S. Section 719.303(3) and (4).
 - 1. An association, through its board of directors, may levy reasonable fines on the unit owner or the unit owner's occupant, licensee, or invitee. The fine may not become a lien on the unit and may not exceed \$100 per day per violation nor a total of \$1,000. The fine may be levied on the basis of each day of a continuing violation with a single notice and opportunity for hearing.
 - 2. An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property but may not suspend the rights to use limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to that unit, parking spaces, or elevators.
 - 3. Fines or suspensions may not be imposed until the unit owner and, if applicable, the unit's occupant, licensee or invitee, have been given at least 14 days' written notice and an opportunity for a hearing before a committee of at least three (3) unit owners appointed by the Board, and if this committee does not approve the fine or suspension by majority vote, it may not be imposed. This committee may NOT include board members, officers, association employees, or the spouse, parent, child or sibling of a board member, officer, or association employee. The role of this committee is limited to determining whether to confirm or reject the fine or suspension levied by the board of directors. If the fine or suspension is rejected, it cannot be imposed by the board. If the committee approves the proposed fine or suspension, the fine payment is due five (5) days after the date of the committee meeting where the fine was approved. The association must provide written notice of such fine or suspension by mail or personal delivery to the unit owner and, if applicable, to any tenant, licensee, or invitee of the unit owner.

G. Suspensions for failure to pay monetary obligations under F.S. Section 719.303(4)-(6)

1. If a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until that monetary obligation is paid in full. The exclusions for limited common elements, access, utilities, parking spaces and elevators also apply to these suspensions.
2. The association may suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent and any such suspension does not end until there has been full payment of all obligations currently due or overdue from that unit or member. Any such suspension results in that suspended unit or member being removed from the total number of voting interests for any purpose, including the number needed for a quorum, to conduct an election, or to approve an action under Chapter 719 or the association's governing documents.
3. Suspensions for failure to pay monetary obligations do not require a hearing but may not be imposed by the board until approved at a properly noticed board meeting and the association must then notify the unit owner, and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

H. Additional remedies for failure to comply are found in F.S. Section 719.303(1).

VII. Amending the cooperative documents and altering and acquiring property

- A. F.S. 719.1055(1): Unless otherwise provided in the original cooperative documents, no amendment to any of those documents may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of a unit, or change the proportion or percentage by which the owner of the unit shares the common expenses and owns the common surplus, unless the record owner of the unit and all record owners of liens on that unit join in the execution of that amendment and unless the owners of all other units approve the amendment. Cooperative documents in cooperatives created after July 1, 1994, may not require less than a majority of total voting interests for amendments of this nature unless the amendment is required by any governmental entity.
- B. F.S. 719.1055(2): Unless a lower number is provided in the cooperative documents or unless such action is expressly prohibited by the association's articles of incorporation or bylaws, the association's acquisition of real property, and material alterations or substantial alterations to such property by the association to such property by the association shall not be deemed to be a "material alteration" or modification if the action is approved by 2/3 of the association's total voting interests.
- C. F.S. 719.1055(3)(a): Unless other procedures are provided in the cooperative documents or such action is expressly prohibited in the association's articles of incorporation or bylaws, the association may materially alter, convert, lease, or modify the common areas of the MOBILE HOME cooperative if the action is approved by 2/3 of the association's total voting interests.

- D. F.S. 719.1055(3)(b): The association may change the configuration or size of a unit only if the action is approved by the affected unit owner or owners and by 2/3 of the association's total voting interests.
- E. F.S. 719.1055(4)(a): If the cooperative documents fail to provide a method of amendment, the documents may be amended as to all matters (other than those described in F.S 719.1055(1)) if the amendment is approved by the owners of not less than two-thirds of the units.
- F. F.S. 719.1055(4)(b): No provision of the cooperative documents shall be revised or amended by reference to its title or number only. Proposals to amend existing provisions of the cooperative documents shall contain the full text of the provision to be amended, new words shall be inserted in the text and underlined, and words to be deleted shall be lined through by hyphens. However, if the proposed change is so extensive that the underlining and striking through would hinder the understanding of the proposed amendment, the notation "Substantial rewording of document. See provision for present text" (or substantially similar language) may be inserted immediately before the proposed amendment instead of using underlines and hyphens.
- G. F.S. 719.1055(4)(c): Nonmaterial errors or omissions in the amendment process will not invalidate an otherwise properly approved amendment.
- H. The New and "Improved" Estoppel Certificate statute—F.S. 719.108(6).

- a. See Handouts

IX. Unit owner inquiries

- A. According to F.S. Section 719.106(1)(a)(3):
 - 1. The written inquiry must be sent by certified mail
 - 2. The board must respond in writing within 30 days of its receipt of the inquiry
 - 3. The board must either give a substantive response to the unit owner, notify the unit owner that a legal opinion has been requested, or notify the unit owner that advice has been requested from the DPBR's Division of Florida Condominiums, Timeshares, and Mobile Homes (the "Division"). The board has 60 days from its receipt of a unit owner request to provide that unit owner with a substantive response if a legal opinion has been sought and if the board has requested advice from the Division, the board must provide a substantive response to the unit owner within 10 days of its receipt of that advice.
 - 4. Failure to respond as required prevents the board from recovering attorney's fees and costs in regards to any procedure or action arising from the inquiry
 - 5. The Board may adopt reasonable rules governing frequency and manner of response to unit owner inquiries, one of which may be that the association is obligated to respond to only one written inquiry per unit in any given 30-day period. In any case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, if applicable.

X. Maintenance and retention of Association records

A. F.S. 719.104(2)(a): "From the inception of the association, the association shall maintain a copy of each of the following, where applicable, which shall constitute the official records of the association:"

1. Plans, permits, warranties, and other items provided by the developer under F.S. 719.301(4).
2. A photocopy of the cooperative documents.
3. A copy of the current rules of the association.
4. A book or books containing the minutes of all meetings of the association, (including committee meetings?), the board of directors, and of the unit owners.
5. A current roster of all unit owners and their mailing addresses (including forwarding addresses for seasonal residents?), unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the email addresses and fax numbers designated by unit owners for receiving notice sent by email for those unit owners consenting to receive notice by email. These email addresses and numbers shall be removed from the association records when consent to receive notice by email or fax is revoked. The association is not liable for an erroneous disclosure of the email address or fax number for receiving electronic transmission of notices.
6. All current insurance policies of the association.
7. A current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility.
8. Bills of sale or transfer for all property owned by the association.
9. Accounting records for the association and separate accounting records for each unit it operates, according to good accounting practices. These records shall include, but shall not be limited to: (a) accurate, itemized and detailed records of all receipts and expenditures; (b) a current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due; (c) all audits, reviews, accounting statements, and financial reports of the association; and (d) all contracts for work to be performed (bids for work to be performed are also official records and must be retained for 1 year).
10. Ballots, sign-in sheets, voting proxies, and all other papers and electronic records relating to voting by unit owners, which shall be maintained for a period of 1 year after the date of the election, vote, or meeting to which the document relates.
11. All rental records where the association is acting as agent for the rental of units.
12. A copy of the current question and answer sheet as described in F.S. 719.504.
13. Affirmative acknowledgments of unit owners if the association changes its method of delivery of assessment notices.
14. Copies of any inspection reports relating to a structural or life safety inspection of the cooperative property (must be retained for 15 years but note that a report is not required by Florida Statutes Section 553.899 for any building with less than 3 stories).

15. All other written records of the association not specifically included above which are related to the operation of the association.

B. Exempt official records that are NOT accessible to unit owners:

1. Any record protected by attorney-client privilege or the “work product” privilege including any record prepared by an association attorney or prepared at the attorney’s express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or in anticipation of such litigation or proceedings, until the conclusion of the litigation or proceedings.
2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.
3. Personnel records of association and management company employees, including, but not limited to, disciplinary, payroll, health and insurance records. “Personnel records” does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.
4. Medical records of unit owners.
5. Social security numbers, driver’s license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the Association’s notice requirements and other personal identifying information of any person, excluding the persons named, unit designation, mailing address, property address, and any address, e-mail address or facsimile number provided to the association to fulfill the association’s notice requirements.
6. An association may print and distribute to unit owners a directory containing the name, unit address, and all telephone numbers of each unit owner. An owner may exclude his or her telephone numbers from the directory by providing a written request to the association. In addition, an owner may now consent in writing to the disclosure of other contact information described in paragraph 5 above.
7. An association is not liable for the inadvertent disclosure of information included in section 5 above if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.
8. Electronic security measures that are used by the Association to store data, including passwords.
9. The software and operating system used by the Association which allows the manipulation of data, even if the owner owns a copy of the same software used by the Association. The data is part of the official records of the Association.
10. All affirmative acknowledgments made pursuant to F.S. Section 719.108(3)(b)(3).
11. An outgoing board or committee member must relinquish all official records and property of the association in his/her possession or control to the incoming board within 5 days after the election. The division shall impose a civil penalty (see F.S. Section 719.501(1)(d)) against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property.

- A. F.S. Section 719.104(2)(b): The official records of the association shall be maintained within the state for at least seven (7) years and shall be made available to a unit owner within 45 miles of the cooperative property or within the county in which the cooperative property is located.
- B. The association records shall be made available to a unit owner within 10 working days after receipt of written request by the board or its designee. The association may not require a reason or purpose for the request.
- C. F.S. Section 719.104(2)(b) may be complied with by having a copy of the official records available for inspection or copying on the cooperative property, or the association may offer the option of making the records available to a unit owner electronically by the Internet or by allowing the records to be viewed in an electronic format on a computer screen and printed upon request.
- D. The association is not responsible for the use or misuse of the information provided to an association member or his or her authorized representative pursuant to the compliance requirements of Chap. 719 of the Florida Statutes unless the association has an affirmative duty not to disclose such information pursuant to this Chapter (i.e., medical records or other “exempt” official records).
- E. F.S. Section 719.104(2)(c): The official records of the association shall be open to inspection by any association member or the authorized representative of such member at all reasonable times. A renter of a unit has a right to inspect and copy only the association’s bylaws and rules and the inspection reports referenced in F.S. Sections 553.899 and 719.301(4).
- F. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member.
- G. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying.
- H. The association shall maintain an adequate number of copies of the cooperative documents (including the question-and-answer sheet and year-end financial information required by the Division) on the cooperative property to ensure their availability to unit owners and prospective purchasers and may charge its actual costs for preparing and furnishing these documents to those requesting them.
- I. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records instead of the association providing the member or his or her authorized representative with a copy of such records. The association may not charge a member or his or her authorized representative for the use of a portable device.
- J. F.S. Section 719.104(2)(d): The association or its authorized agent (for example, its management company) shall not be required to provide a prospective purchaser or

lienholder with information about the cooperative or the association other than the documents required by Chapter 719 to be made available or otherwise disclosed. A reasonable fee may be charged to the prospective purchaser, lienholder, or the current unit owner for the association's or its agent's time in providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than those responses required by law, provided that such fee is not greater than \$150 plus reasonable copying costs and any attorney's fees incurred by the association in connection with the association's response,

- K. The failure to permit inspection entitles any person prevailing in an enforcement of action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records that are required by Chapter 719 to be maintained during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty under F.S. 719.501(1)(d).
- L. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with the request.
- M. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with the request to inspect and/or copy, and the minimum damages are \$50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request.

XII. Basic insurance requirements: F.S. Sections 719.104(3) and 719.106(1)(m)

- A. The association shall use its best efforts to obtain and maintain adequate insurance to protect the association property
- B. The association may also obtain liability insurance for directors and officers, as well as insurance for the benefit of employees, and flood insurance.
- C. The association shall obtain and maintain adequate insurance or fidelity bonding of all persons who control or disburse association funds, including the president, secretary and treasurer and all other persons authorized to sign checks. The policy or bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time.
- D. F.S. Section 719.104(3)(a) and (b): Windstorm coverage and self-insurance.

XIII. Dispute resolution

- A. Refer to F.S. Section 718.1255.

- B. "Disputes" subject to resolution.
- C. Voluntary mediation is encouraged, and the association and the unit owner are now able to choose to mediate certain disputes. F.S. Section 719.106(1)(n).
- D. Procedures
- E. Disputes involving election irregularities.
- F. Termination of leasehold interest not a "dispute"?
- G. Resolution Guidelines under Florida Administrative Code Chapter 61B-78

XIV. Election of Board Members

A. Eligibility – Condominium Associations v. Cooperative Associations

1. Florida Statute 719.106(1)(a)2 now provides that a unit owner who is a felon and whose rights have not been restored for at least 5 years from the date he or she seeks election to the board, who has been suspended or removed from the board by the DBPR, or who is not current in his or her payment of assessments and other amounts due to the association is **not** eligible to run for and serve on the board of a cooperative association. Directors or officers charged or indicted with felony theft or embezzlement offenses involving association funds or property are suspended from office and the board shall fill the vacancy according to general law until the end of the period of suspension or the end of the director's term in office, whichever occurs first, and no unit owner facing such criminal charges may be appointed or elected to the board. A suspended board member shall be reinstated if the charges are resolved without a finding of guilt or the acceptance of a "no contest" or guilty plea. The validity of an action of the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony. Co-owners of a unit are all eligible to run for and serve on the board simultaneously even if they all own only that one unit ONLY IF there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy or in residential cooperatives with ten (10) or less units.

B. Nominating committees are prohibited but "search committees" that do not have the authority to nominate any candidate but may encourage qualified persons to become candidates for the board are permitted

C. Terms and term limits – Condominium Associations v. Cooperative Associations

1. While board members in condominium associations must stand for re-election either every year or every other year, the bylaws for a cooperative association can provide for terms of more than two years

- 2. The bylaws can also provide for staggered terms
- 3. The bylaws can also provide for term limits

D. Regular elections for board members must occur on the date of the annual meeting.

E. Conducting the election (NON-ELECTRONIC VOTING)

1. At least 60 days before a scheduled election, the association shall mail, deliver, or transmit, whether by separate association mailing, delivery, or electronic transmission or included in another association mailing, delivery, or electronic transmission, including regularly published newsletters, to each unit owner entitled to vote, a first notice of the date of election which must contain the name and correct mailing address of the association
2. Any unit owner or "other eligible person" desiring to run for the board must give written notice to the association at least 40 days before the scheduled election by (a) certified mail, return receipt requested, directed to the association, (b) by personal delivery to the association, or (c) by regular U.S. mail, fax, telegram, or other method of delivery to the association. Certified mail is suggested by FAC Section 61B-75.005(6).
3. Upon receipt by the association of any timely submitted written notice by personal delivery, the association shall issue a written receipt acknowledging that delivery.
4. Together with the written notice and agenda for the meeting at which the election is being held, the association shall mail, deliver, or electronically transmit to all unit owners entitled to vote at the addresses listed in the official records, a second notice of election, along with a ballot that lists all candidates. This notice and the accompanying documents shall not contain any communication from the board which endorses, disapproves, or otherwise comments on any candidate(s).
5. Upon request of a candidate, the association shall include an information sheet, no larger than 8 ½ inches by 11 inches, to be included with the mailing, delivery, or electronic transmission of the ballot, with the costs of the mailing, delivery, or electronic transmission to be borne by the association. The original information sheet becomes an official record of the association. Candidates may also campaign for office.
6. The association is not liable for the contents of the information sheets provided by the candidates and may reduce costs by printing or duplicating the information sheets on both sides of the paper. The candidate may include the candidate's background, education, and qualifications, and the association shall not edit, alter, or otherwise modify the content of the information sheet. If two or more candidates consent in writing, the association may consolidate into a single side of a page the information sheets submitted by those candidates.
7. The ballot shall indicate in alphabetical order by surname each and every unit owner or other eligible person who desires to be a candidate for the board and who gave written notice to the association not less than 40 days prior to the election, unless such person has withdrawn his or her candidacy in writing prior to the mailing of the ballot. The ballot cannot indicate which candidate(s) are incumbents and no write-in candidates shall be permitted. No ballot shall provide a space for a signature or any other means of identifying a voter. With the exception of fractional or class voting, all ballots must be uniform in color and appearance, regardless of whether those ballots are mailed to voters or cast at the meeting.

8. Accompanying the ballot shall be an “outer” envelope and a smaller “inner” envelope
9. The exterior of the “outer” envelope shall be pre-addressed to the person or entity authorized to receive the ballot and shall indicate the name of the voter and the unit or unit numbers being voted, and shall contain a signature space for the voter.
10. Once the ballot is filled out by the voter, the voter places the ballot in the “inner” envelope and seals that envelope. The “inner” envelope is then placed within the “outer” envelope.
11. Each “inner” envelope shall contain only one ballot, but if a person is entitled to cast more than one ballot, the separate “inner” envelopes can be placed within a single “outer” envelope.
12. The voter places the “inner” envelope(s) within the “outer” envelope, seals the “outer” envelope, and signs the exterior of the “outer” envelope in the space provided for his or her signature.
13. That “outer” envelope is then mailed or hand delivered to the association.
14. Once the association receives that “outer” envelope, the ballot(s) inside may not be rescinded or changed.
15. The board of directors of an association that wishes to verify “outer” envelope information in advance of the election meeting may appoint an impartial committee (whose members do not include current board members, officers, candidates for the board, or the spouses of any of these persons). On the day of the election, at a properly noticed meeting of this impartial committee that is open to all unit owners, the signature and unit identification on the “outer” envelope shall be checked against the list of qualified voters and the voters shall be checked off on the list as having voted. Any “outer” envelope not signed by the eligible voter shall be marked “Disregarded” or with words of similar import, and any ballots contained inside that “outer” envelope (even if properly sealed inside the “inner” envelope) shall not be counted.
16. The envelopes containing ballots shall be collected by the association and shall be transported to the location of the meeting. Additional blank ballots must be available at the meeting for eligible voters who have not yet cast their ballots. “Inner” and “outer” envelopes must also be available as these voters must also follow the “inner/outer” envelope procedure described above.
17. The first order of business at the election meeting is to collect all ballots not yet cast. Then the impartial committee described in paragraph 15 above verifies the information on any “outer” envelope that has not already been verified earlier in the day in the manner described paragraph 15. Any other business to be conducted at the meeting may continue during this inspection process and the counting of the ballots.
18. The impartial committee next removes the “inner” envelopes from the “outer” envelopes and places those “inner” envelopes in a “receptacle”. This is done in the presence of any unit owners attending the meeting regardless of whether a quorum is present. Once the impartial committee begins to open the “outer” envelopes, the polls are closed and no more ballots shall be accepted.
19. The inner envelopes are then opened and the ballots are removed and counted—again, in the presence of the unit owners. Any “inner” envelope containing more than one ballot shall be marked “Disregarded” or with words of similar import,

and any ballots contained therein shall not be counted. All envelopes and ballots, whether disregarded or not, shall be retained in the official records of the association.

20. Unless the association's bylaws provide otherwise, if two or more candidates for the same position receive the same number of votes and that would result in one or more candidates not serving or serving a lesser period of time, the association shall conduct a runoff election following the election procedures set forth above. The notice of a runoff election must be mailed or personally delivered to the unit owners within 7 days after the election where the tie vote occurred, and the only candidates eligible for this runoff election are the candidates who received the tie vote. The notice shall inform the voters of the date scheduled for the runoff election, shall include the ballot, the "inner" and "outer" envelope, and copies of any previously submitted information sheets submitted by the candidates for the election that resulted in the tie vote. The runoff election must be held not less than 21 days nor more than 30 days after the election at which the tie vote occurred.
21. There is no "quorum" requirement for an election meeting—however, in order for the election to be valid; at least twenty per cent of the eligible voters must cast a ballot.
22. Unless otherwise provided in the association's governing documents, any vacancy occurring prior to the expiration of a term, except in the case of a vacancy caused by recall, may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. The board may in its discretion hold an election to fill the vacancy in which case the election procedures described above apply. A board member appointed or elected pursuant to F.S. Section 719.106(1)(d)(6) shall fill the vacancy for the unexpired term of the seat being filled.
23. Any person requiring assistance to vote because of blindness, other disability or inability to read or write may request the assistance of a member of the board or another unit owner in order to cast his or her vote.
24. For a regular election, no balloting is needed to fill any vacancy unless there are two or more eligible candidates for that vacancy. However, if there are three candidates and three vacancies, two of which are for three years and one of which is for two years, unless one of those candidates specifically expresses an interest in only the two-year term, an election would be required with the candidate receiving the least number of votes being elected to serve the two year term.
25. A cooperative association may, by the affirmative vote of a majority of the total voting interests, provide for a different election procedure in its bylaws, which vote may be by proxy specifically detailing the different voting and election procedures. These different voting and election procedures may provide for elections to be conducted by limited or general proxy.

F. Any challenge to the election process must be commenced within sixty (60) days after the election results are announced.

- G. A newly elected or appointed board member must, within 90 days after his or her election or appointment, certify in writing to the association's secretary that he or she has read the association's bylaws, articles of incorporation, proprietary lease and current written policies and that he or she will work to uphold such documents and policies to the best of his or her ability and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In the alternative, within that 90-day period, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered by a provided approved by the Division during a period from 1 year before to 90 days after that board member's election or appointment. This certificate is valid and does not have to be resubmitted as long as the director continuously serves on the board. A director who fails to comply with this requirement is suspended from service on the board until he or she complies and the board is allowed to temporarily fill the vacancy during the period of suspension. Failure to have such written certification or educational certificate does not affect the validity of any otherwise valid board action.
- H. A director or officer 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 to be filled according to law.
- I. Electronic Voting—New F.S. Section 719.129 (handout)

XV. Budgets and Reserves

- A. Requirement of annual budget
 - 1. The association prepares an annual budget showing the revenues and expenses for the upcoming year
 - 2. The budget is a guideline that helps the board make decisions throughout the year. It is not etched in stone but rather is the board's educated written estimate of the association's future revenues and expenses
 - 3. Both the proposed and adopted annual budgets constitute official records of the association and should be maintained along with the affidavit evidencing that the proposed budget and the notice of the budget meeting have been mailed, hand delivered, or electronically transmitted to each unit owner.
 - 4. Florida Administrative Code Section 61B-76.003 requires that the estimated operating budget include the following:
 - a. The estimated common expenses or expenditures on at least an annual basis
 - b. The beginning and ending dates of the period covered by the budget
 - c. The total assessment for each type of unit in the proportions or percentages of sharing the common expenses provided in the governing documents on a monthly basis, or for any period for which assessments will be due
 - 5. FAC Section 61B-76.003 also requires that the budget contain all estimated common expenses or expenditures of the association including, but not limited to, those that are applicable and set forth in F.S. 719.504(20)(c), including the following expenses for the association and the cooperative:
 - a. Administration of the association
 - b. Management fees

- c. Maintenance
- d. Rent for recreational and other commonly used areas
- e. Taxes upon association property
- f. Taxes upon leased areas
- g. Insurance
- h. Security provisions
- i. Other expenses that may or may not be reoccurring
- j. Operating Capital
- k. Reserves
- l. Fees payable to the Division
- m. Expenses for a unit owner (including rent for the unit if subject to a lease and rents payable by the unit owner directly to the lessor or agent under any recreational lease or lease for the use of commonly used areas in certain situations)
- n. If the estimated common expense for any category set forth in F.S. Section 719.504(20) is not applicable, the category shall be listed followed by an indication that the expense is not applicable

6. Revenues must include, if applicable:
 - a. Assessments
 - b. Interest
 - c. Insurance proceeds
 - d. Any other form of income

B. F.S. Section 719.106(1) (e): Budget procedures

1. The Board delivers to its members, not less than 14 days prior to the meeting where the Board is to vote on the budget, the meeting notice and a copy of the proposed budget.
2. The proposed budget must include the reserve schedule with reserves shown as fully funded in that budget. This budget should be delivered to the members along with the budget that will be adopted in the event that the association votes to waive or underfund its reserves.
3. All meetings of a committee that makes recommendations to the Board regarding the budget must be open and properly noticed. (719.106(1)(c)).
4. Unless the association's documents require the unit owners to adopt the budget, it is the Board's responsibility to adopt a budget with fully funded reserves unless the reserves have been properly waived or reduced by the unit owners
5. F.S. Section 719.106(1)(e): When can the board's budget be "overruled"?
 - a. If the board's budget requires assessment against the unit owners in any fiscal or calendar year which exceeds 115% of the assessments for the previous fiscal or calendar year, and
 - b. 10% of unit owners request a special meeting of the unit owners, which shall be called by the board within 30 days and upon not less than 10 days' written notice to each member and
 - c. The budget proposed by the unit owners is passed by majority of all voting interests unless the bylaws require a larger vote
 - d. Otherwise, the board's budget goes into effect
6. Calculating for the "115% Rule"

- a. From the total budget assessment, subtract those portions that result from (a) reserves, (b) expenses not anticipated to be incurred on a regular or annual basis, (c) betterments to the cooperative property—and then determine whether the assessments are still more than 115% of the corresponding net assessments from the previous year.

C. FAC 61B-76.005: Reserves

1. Reserves required by F.S. Section 719.106(1)(j), for capital expenditures and deferred maintenance including roofing, painting, paving and any other item for which the deferred maintenance expense or replacement cost exceeds \$10,000, must be included in the budget.
2. The association may consider each of its assets separately for the purpose of determining whether the deferred maintenance expense or replacement cost of an item exceeds \$10,000. In the alternative, the association may group similar or related assets together.
 - a. For example, an association responsible for maintaining two swimming pools, each of which will separately require \$6,000 of total deferred maintenance may establish a pool reserve but is not required to do so.
3. A purchase or replacement of an asset with a life of more than one year or an addition to an existing asset to extend its life more than one year is regarded as a "capital expenditure".
4. Any maintenance or repair that will be performed less frequently than annually and will result in maintaining the useful life of an asset is regarded as "deferred maintenance".
5. Any funds, other than operating funds, which are restricted for deferred maintenance and capital expenditures, including the items required by F.S. Chapter 719, and any other funds the use of which is restricted by the association's governing documents or by the association itself are regarded as "reserves".
6. Reserves required by F.S. Section 719.106(1)(j) are calculated using a formula that will provide funds equal to the total estimated deferred maintenance expense or total estimated replacement cost for an asset or group of assets over the remaining useful life of the asset or group of assets. Funding formulas for these reserves are based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.
 - a. If the association maintains separate reserve accounts for each of the required assets, the amount of the current year contribution to each reserve component shall be the sum of: (a) the total amount necessary, if any, to bring a negative account balance to zero and (b) the total estimated deferred maintenance expense or total estimated replacement cost of the reserve asset less the estimated balance of the reserve account as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the asset.
 - b. This formula may be adjusted annually for changes in estimates and deferred maintenance performed during the year and may consider factor such as inflation and earnings on invested funds.

- c. The association is allowed to have a single source of funds to pay for two or more categories of reserve expenses. If the association maintains any such “pooled account” of two or more statutorily required reserve assets, the amount of the contribution to the “pooled account” as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful lives of all of the assets that make up this “reserve pool” is equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up this “reserve pool,” based on the current reserve analysis. This “pooled account” funding formula shall not include any type of balloon payments but the projected annual cash inflows may include estimated earnings from investment of principal.
- 7. Reserves included in the budget are common expenses and must be fully funded unless properly waived or reduced under F.S. 719.106(1)(j)(2). Reserves must be funded at least as frequently as assessments are due from the unit owners (for example, monthly or quarterly). Limited proxies may be used to waive or underfund reserves and the proxy does not need to include the “cautionary” language required for proxies for waiving or underfunding reserves in condominium associations. Any vote to waive or underfund reserves shall be effective for only one annual budget—in other words, an association that wishes to waive or underfund its reserves must approve that waiver or underfunding annually. The waiver or underfunding may be accomplished by a majority vote **of the total voting interests of the association**.
- 8. Expenditures of unallocated interest income earned on reserve funds are restricted to any of the capital expenditures, deferred maintenance, or other items for which reserve accounts have been established.
- 9. Reserves that are not required by F.S. 719.106(1)(j) (for example, insurance deductibles, hurricane clean up or deferred maintenance and capital expenditures not falling within the statutorily “required” definition) are not required to be based on any specific formula but the calculation should be shown in a separate reserve section of the budget.
- 10. Associations that collect operating and reserve assessments as a single payment shall not be considered to have commingled the funds provided the reserve portion of the payment is transferred to a separate reserve account, or accounts, within 30 calendar days from the date such funds were deposited.
- 11. It would appear that reserves for limited common areas are handled just like reserves for other common areas and the reserve assessments are applied only to those unit owners specified in the cooperative documents as sharing in the cost of those limited common areas.
- 12. Expense categories that are not restricted as to use shall be stated in the operating rather than the reserve portion of the budget.
- 13. Budgets and Reserves post-Surfside legislation: The “Milestone Inspection” and the “Structural Integrity Reserve Study” **do not apply to community associations where there are no buildings three stories or higher.**

XVI. Financial reporting for non-finance majors

- A. References: F.S. Sections 719.104(4) 719.501(1)(j) and FAC 61B-76.006.
- B. Proxies should specify whether the association is proposing a complete waiver of financial statements for the fiscal year in question or merely a “step down” to the next level of financial statements. This is now clearly spelled out in F.S. Section 719.104(4)(e) which allows for a “waiver” at all levels but still requires, at a minimum, a report of cash receipts and expenditures. The unit owner meeting to waive the financial reporting requirement must be held prior to the end of the fiscal year and the waiver is effective for only one fiscal year. F.S. Section 719.104(4)(b) now provides that associations with total annual revenues between \$150,000 and \$299,999 shall prepared compiled financial statements, those with annual revenues between \$300,000 and \$499,999 shall prepare reviewed financial statements and those with total annual revenues in excess of \$500,000 shall prepare audited financial statements, but now removes the requirement that these financial reporting requirements may not be waived for more than 3 consecutive years. F.S. Section 719.104(4)(c) now provides that associations with total annual revenues of less than \$150,000 shall prepare a report of cash receipts and expenditures and associations with less than 50 units, regardless of their annual revenues, shall prepare a report of cash receipts and revenues instead of any of the financial statements described above, unless any of the association’s recorded governing documents provide otherwise. The report of cash receipts and expenditures must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including those classifications set forth in Section 719.104(4)(c)3. F.S. Section 719.104(4)(d) now provides that, if at least 20 per cent of the unit owners petition the board for a greater level of financial reporting than required, the board must hold a membership meeting within 30 days of its receipt of that petition to vote on raising the level of reporting for that fiscal year.
- C. Within 90 days following the end of the fiscal or calendar year or annually on such date as provided in the bylaws of the association, the board must prepare and complete, or contract with a third party to prepare and complete, a financial report covering the preceding fiscal or calendar year. Within 21 days after the financial report is completed by the association or received from the third party, but no later than 120 days after the end of the fiscal year, calendar year, or other date provided in the bylaws, the association must provide each unit owner with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the unit owner. The Division shall adopt rules setting forth uniform accounting principles, standards, and reporting requirements.

XVII. Additional Resources from “the Division”

- A. For review and printing at this website:

www.myfloridalicense.com/DBPR/condominiums-and-cooperatives/forms-and-publications/