senate bill 118

Regarding Community Association Records

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This article focuses on the main points of Senate Bill 118: record requests within all forms of community associations, clarification of the requirements for amending your governing documents, and the penalties for violations of these newly established record requests and open board meeting laws, which are described in full detail in House Bill 99.

After May 12, 2015, Titles 57-8-17 and 57-8a-225 will require that associations keep and make documents available for copying or inspection by members or their agents. This leads to the question of: "What documents need to be kept and produced?" The new law states that those documents required under the Revised Non-profit Corporation Act are the applicable to all associations even if your association is not incorporated. The documents described in Title 16-6a-1601, et seq., are the records which you must keep and produce if there is an inspection request.

There are two categories of records that owners may inspect or copy. One category requires no justification or reason at all. A member may obtain or make a copy at any time. Documents in this category include: minutes of all meetings of members and minutes of all meetings of the board, records of all actions taken by the members or board without a meeting, records of actions taken by committees, appropriate accounting records, an association member list (names and addresses only), Articles of Incorporation, Bylaws, Resolutions, written communication from the association to members generally, financial statements for the last three years kept in the regular course by the association, and a list of business or home addresses of board members and officers. The other category is "all other records" of the association. This term is very broad and not entirely defined but it presumes that if your association has kept records (receipts, letters, contracts, etc.), those are "other records." These types of records require a written request, must be made in good faith and be made for a proper purpose. "Proper purpose" is very broadly defined so that almost any reason given to look at association records will be deemed proper, unless the records are being used for an unlawful purpose (which you would have to prove).

SB 118 clarifies that an owner's request can be 1) to personally inspect records; 2) to personally copy records themselves (if they opt for this, the association must provide an adequate place, power source, lighting, table, etc., if the individual brings their own equipment for copying); 3) request that the association make the copies at $0.10/page and $15/hr.; or 4) request that a copying service make copies of the records, for which the owner will pay for the cost. Remember, this law does not take away the requirement that a request must be proper. I do not believe that every record request is proper and intended to be used for a proper purpose. However, that analysis is complicated and should be made with your association's legal counsel before a records request is ever denied.

The reason consulting with your attorney is important is because the new law states that if an attorney is retained to help an owner obtain records, and presuming the records request is proper, a penalty is imposed of the association having to pay the cost of inspecting and copying the documents and the reasonable attorney fees incurred in obtaining the records. This implies that the requesting owner will be entitled to compensation for their attorney and other fees if they are required to hire such help in obtaining the records without legal involvement.

Please note that prior to the existing penalties for not producing complete or timely records (again, assuming they are proper), the owner could recover their attorney fees and costs should they have to sue the association for records. That law has not changed. However, the minimum fine is now set at $500 or actual damages, whichever is greater, plus attorney fees. In addition, should a lawsuit be filed, a hearing on a motion filed by a requesting owner's attorney to compel turnover of records, shall be heard 30 days after filing the motion.

In short, there are more defined penalties for failing to abide by a proper records request.

The take away from this article is that your association should contact your attorney promptly, make sure it understands the law correctly, and simply comply with any records request that is proper so that you do not find yourself facing penalties and the payment of attorney fees.

The next part of SB 118, which is applicable to both condominiums and non-condominium associations (Titles 57-8-39 and 57-8a-104), clarifies that after Declarant control has ended, your governing documents cannot require an amendment approval threshold that:1) requires the vote of more than 67% of the voting interest in the association; 2) the requires vote of any specific unit owner; or 3) requires the vote or approval of lien holders holding more than 67% of the first mortgage. There are some limited exception to the voting threshold for changing unit boundaries and voting rights.

In other words, once turnover has occurred, given some narrow exceptions for voting privileges and unit boundaries in a condominium (as mentioned), a maximum percentage threshold for amending the governing documents, including obtaining lender votes, is 67%. Although this law was in effect prior to this legislative session, SB 118 clarifies that the 67% threshold is retroactive and applicable to all associations, regardless of when they were created.

Another article will discuss HB 99 and the new open meetings requirement for board meetings. For various reasons, HB 99 did not contain a penalty if board meetings were not open to the members per the terms of that bill. Therefore, part of SB 118 added a penalty for associations that do not comply with the open meetings bill. SB 118 states that if board meetings are not held pursuant to HB 99 then owners must give the association 90 days written notice of their demand that the board follow the new open board meetings law. The complaining owner must express what part of the law, in their opinion, was violated. Then, only if the association does not comply with the written demand of non-compliance, can the owner file a lawsuit to compel the association to comply with the open board meeting law. If the association is found in violation of this law, it is subject to damages of $500 or more, whichever is greater, and attorney fees, in addition to being ordered to hold open board meetings.

The moral of the story regarding avoiding penalties for both record requests and open meeting issues, is to make sure that you have been properly advised by your counsel, that you are not hesitant to ask them questions to clarify these important changes in the law, and that you have policies and procedures in place to safe guard your association from any allegations of not following these requirements.