PAVESE LAW FIRM est. 1949

COMMUNITY ASSOCIATION NEWSLETTER

WINTER 2021

ATTORNEY CHARLES CAPPS HAS BEEN APPOINTED TO THE CONDOMINIUM AND PLANNED DEVELOPMENT LAW CERTIFICATION COMMITTEE

Pavese Law Firm partner Charles Capps has been appointed to the Condominium and Planned Development Law Certification Committee. This committee is comprised of board certified condominium and planned development attorneys who are appointed by The Florida Bar to administer the screening and testing of candidates who are themselves pursuing board certification in condominium and planned development law.

Capps joined Pavese Law Firm in 2008 and became a partner in 2013. He is not only Florida Bar Board Certified in Condominium and Planned Development Law, he is Board Certified in Real Estate Law. Capps, along with his fellow partners, Christopher Shields and Charles Mann are 3 of only 28 attorneys in the entire State of Florida who hold this board certification in both Real Estate Law as well as in Condominium and Planned Development Law. Capps primary areas of focus are residential and commercial condominiums, cooperative and homeowners' association law, real estate law, and banking & finance.

ATTORNEY CHRISTOPHER POPE EARNS THE FLORIDA BAR BOARD CERTIFICATION IN CONSTRUCTION LAW

Pavese Law Firm partner Christopher Pope was recognized by The Florida Bar with Board Certification in Construction Law. In 2019, Mr. Pope also became Board Certified in Condominium and Planned Development Law, making him one of only two attorneys in Florida, and the only one in Southwest Florida, to have both of these specialty certifications.

Board certification is the highest level of recognition by The Florida Bar. Only about 7% of Florida's more than 107,000 lawyers have earned board certification. In the past 5 years, an average of only 39.3% of those seeking Board Certification in Construction Law qualified for this prestigious recognition.

"Becoming Board Certified is difficult. The process is designed to recognize only those demonstrating true expertise, backed up with successful construction law experience," explained Pope. "Earning my Board Certification gives my clients and

my prospective clients peace of mind knowing that they have an expert to guide and represent them. This is why I did it."

Lawyers certified in Construction Law deal with matters relating to the design and construction of improvements on private and public projects. To become Board Certified, lawyers are evaluated by their peers, must meet the highest standards for special knowledge, and demonstrate the skill, character, ethics, and reputation for professionalism. This evaluation requires passing a rigorous examination administered by The Florida Bar.

Pope, who joined Pavese Law Firm in 2012 and became a partner in 2018, practices primarily in the areas of condominium and homeowners' association law, construction law, and real estate law. He represents and advises clients, including top national homebuilders, contractors, developers, commercial associations, homeowners' and condominium associations, and individuals on a wide range of issues.

CONSTRUCTION CONTRACTS: "AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE"

BY: CHRISTOPHER L. POPE, ESQ.

Benjamin Franklin once said "an ounce of prevention is worth a pound of cure." The same principle applies with construction contracts, where a few hundred dollars spent to review or draft a contract now can prevent thousands of dollars of liability or the expenses of litigation later.

The most common mistake that we see is that community associations unwittingly bind themselves by signing the contractor's "proposal," which is far too simple (often only a page or two) and has nothing in it to protect the association. In almost all cases, an association's interests would be better protected with an actual construction contract that addresses potential issues that can arise during and after construction.

The contract does not need to be long or complex, but it should address issues such as the draw schedule, inspection and approval of work, time allowed to complete the work, insurance requirements, disclosures that are required by the Florida Statutes, indemnification clauses, warranties, and provisions to ensure compliance with Florida's complex Construction Lien Law (Chapter 713, Florida Statutes). When there is a dispute and these issues have not been addressed in the contract, the association is then subject to the posturing of the contractor or the unpredictable whims of a third party "fact finder" to determine what is reasonable under the circumstances, which leads to uncertainty and legal expenses.

At the other extreme, we see associations execute a contract that is far too complicated. This generally happens when the association has first hired a design professional, such as an architect or engineer, to design the project or prepare specifications. In turn, the design professional, for a steep fee, prepares a "form" contract published by their respective trade group, such as the American Institute of Architects (AIA) or the Engineers' Joint Contract Documents Committee (EJCDC).

These form contracts appear to be simple, innocuous contracts that are only two or three pages long, but what is not readily apparent is that they incorporate numerous other documents to create a massive set of contract documents. One of the incorporated documents is the General Conditions (AIA 201-2017 or EJCDC C-700 which, unmodified, can be up to 60 pages long) that form the backbone of the contract documents, setting forth in detail the rights and obligations of the owner/contractor/architect or engineer relationship.

Most of the provisions in the General Conditions will likely never be read or understood by the parties, including the design professional that charged a fee to prepare the contract. Failing to understand these contracts can be disastrous. For example, the association might not understand that it may waive all of its rights to bring a claim if it does not demand mediation within 30 days of a decision by the design professional. Another example is, if there is a dispute and the association looks to its trusted design professional for answers (who, again, is charging a fee to administer

the contract it prepared), often times the only answer the association receives is a reminder that it signed a contract a year prior wherein it agreed that the design professional would be neutral, with no individual liability and a disproportionately small limit on its firm liability. Furthermore, since these are "form" contracts that are designed to be used nationally with a bias toward protecting the design professional, they must be reviewed by Florida counsel and revised to conform with the nuances of Florida law and in order to serve and protect the interests of the association.

Community associations can easily avoid these pitfalls and all the associated liability and legal expenses, by investing in a little prevention by seeking legal counsel prior to entering any construction contract, including one with a design professional.

A SECOND LOOK AT CONDUCTING COMMUNITY ASSOCIATION MEETINGS VIA REMOTE MEANS

BY: CHRISTOPHER J. SHIELDS, ESQ. & VANESSA FERNANDEZ, ESQ.

On December 29, 2020, by Executive Order 20-316, Governor Ron DeSantis extended the state of emergency (Executive Order 20-52) over the State of Florida in response to COVID-19 for another 60 days, or until February 27, 2021.

Our Summer 2020 Newsletter went out with an article called, *A Primer for Conducting Community Association Meetings via Remote Means*, which has proven to be useful for many of our clients. Even so, Associations continue to contact our office on a daily basis to determine what to do about Board Meetings, Committee Meetings, and Membership Meetings in light of the coronavirus pandemic. As previously addressed, each Association's governing documents may provide particular parameters for Association Meetings, so the first step is to confirm the language of your Association's governing documents. If you have specific concerns about the language of your governing documents and any specific "location" required for particular kinds of meetings, consider reaching out to your Association's legal counsel for advice. This article serves as a follow up to the previous one with special attention to concerns that have come up in the last few months.

Section 617.0820(4) of the Florida Statutes allows a Community Association Board of Directors to conduct meetings through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting and provides that directors participating in such a manner are deemed to be present "in person" at the meeting. Section 617.0721(3) of the Florida Statutes allows members and proxyholders who are not physically present at a meeting to participate and vote in the meeting by means of remote communication under certain conditions. Specifically, Section 617.0721(3) indicates as follows:

> "If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, members and proxy holders who are not physically present at a meeting may, by means of remote communication:
>
> (a) Participate in the meeting.
> (b) Be deemed to be present in person and vote at the meeting if:
>
> 1. The corporation implements reasonable means to verify that each person deemed present and authorized to vote by means of remote communication is a member or proxy holder; and
> 2. The corporation implements reasonable measures to provide such members or proxy holders with a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrent with the proceedings.

> If any member or proxy holder votes or takes other action by means of remote communication, a record of that member's participation in the meeting must be maintained by the corporation in accordance with s. 617.1601." (emphasis added).

Nearly all of our Association clients have held meetings by remote means to some extent or another during the pandemic. For meetings in which anticipated attendance is low, for example Board Meetings or smaller Association Membership Meetings, teleconferencing or videoconferencing platforms have proven to be effective. For larger Associations or larger Membership Meetings, video conferencing has presented an efficient way to ensure that all members have an opportunity to participate without the chaos of hundreds of members on a phone conference. Keep in mind, participation by proxy is strongly encouraged. Members who participate by proxy are included in the quorum count without having to be present by phone or video. Additionally, **Associations should encourage the submission of proxies or written ballots**, even if a member wishes to dial in during the virtual meeting, in order to have a more accurate written record of the votes cast on any particular matter. Voice votes may be taken during the meeting, and in some cases must be accepted where a member has not submitted a proxy or other ballot, but they should not be encouraged, especially for larger Associations.

As previously discussed, the statutes allow for different kinds of remote means to be utilized so long as the participants can simultaneously hear each other. So an Association may use one platform for Board Meetings and another for Membership Meetings. However, Associations will greatly benefit from choosing a single platform for remote participation going forward. Based upon the level of success and efficacy many of our Association clients have experienced with conducting meetings by remote means, it appears that virtual meetings are here to stay—especially for communities with large populations of part-time or seasonal residents.

When choosing a platform for remote participation, our office generally advises the use of videoconferencing platforms that allow the host of the meeting to mute participants during the meeting until it is a participant's turn to speak. This prevents the cacophony that often accompanies telephonic meetings where the host has to rely on individual participants to mute themselves. Remember that with many videoconferencing platforms, the participant does not actually have to join the call with video, but the platform will give the host a better handle over the progression of the meeting. Another thing to remember is that not all videoconferencing platforms are the same. Some of the free or low-cost platforms are limited in the number of participants or length of time for the meetings, so when the Association is making its choice, make sure it will be a good fit for the particular needs of the Association.

Once the Board of Directors decides on a platform to use for remote participation in Association meetings, the Board should set up instructions and guidelines for the meetings, either by resolution or by rule. For example, some Associations have requested (but not required) that members submit questions or comments on the specific agenda items prior to the meeting so that the Board can be better prepared for the discussion. Members must still be allowed to participate in the meeting itself, but this kind of request allows for guided discussion on the agenda items.

As a practical matter, in the case of a Membership Meeting voting and maintaining accurate voting records are serious concerns for Associations to be aware of. **Our office strongly encourages the continued use of limited proxies for voting on agenda items which must be submitted to the Association prior to the meeting**. Remember that the statutes have very specific requirements for electronic voting under Sections 718.128, 719.129, and 720.317 of the Florida Statutes. You should consult your Association's legal counsel before an election if there are concerns with proxies and electronic voting.

Below we have provided some basic considerations for Associations that want to conduct meetings via remote means:

1. Comply with the applicable notice requirements for the type of meeting being held. Post the Notice and Agenda for the meeting as required by the governing documents with instructions for how to access the meeting remotely. The instructions should include information a member would need to access the meeting, such as a dial in number or meeting identification number. In our professional opinion, the Association should also include the password for the meeting in the instructions.

2. Make sure that there is someone standing by to take phone calls on the day of the meeting to guide members through the process of getting connected. Consider scheduling a test run for individuals with concerns before the day of the actual meeting.

3. Have the Secretary or other designee take accurate meeting minutes indicating who is speaking at any given point and what is being spoken (or typed into a chat feature) by that individual. Ask members to identify themselves when participating in the meeting.

4. Make sure that the meeting is password protected and that the participants in the meeting are authenticated. Some meeting platforms allow for registration which also adds a layer of security to the meeting. If your chosen platform has a waiting room feature, this is a great way to screen participants to make sure they are members of the Association. Require members to identify their Unit or Lot number or their names when they join the meeting so that participants can be screened by the host with more accuracy. Roll calling at the beginning of the meeting is also helpful, but in order for this to be effective, the membership would have to be unmuted during the roll call so that they can be heard.

5. Make sure that members can access the meeting at any point during the meeting, in other words make sure the host refrains from "locking" a meeting since this will prevent participants that wish to join the meeting once it has already started. Keep in mind, the quorum should be determined at the beginning of the meeting, or just before formally commencing the meeting. In some cases, members choose to submit proxies and dial in on the day of the meeting without the concern of having to actually participate in the meeting when it comes time to vote on Association matters.

Even with the prevalence of videoconferencing platforms such as Zoom, WebEx, or GoToMeeting, Associations face unique challenges when it comes to holding meetings via remote means. The information above is not exhaustive and each Association has specific circumstances that should guide the Board in deciding how to conduct Association meetings in the future. Our office is always available to discuss any questions or concerns you may have with your Association's upcoming meetings.

WHEN RESIDENTS EXHIBIT SIGNS OF DEMENTIA

BY: ALEXANDER J. MENENDEZ, ESQ.

Southwest Florida is a very popular retirement destination, and many planned communities are developed and marketed to attract senior residents. In these communities, we find that seniors often develop and retain strong, local support from friends and family. However, there are still many seniors who unfortunately find themselves living alone in their communities without any next of kin and without anyone to occasionally check-in on them. As such, we are occasionally approached by association clients who are aware of, and concerned for, a senior resident who is living alone and struggling to cope with dementia. These senior residents will usually exhibit abnormal behavior and signs of confusion, and this can sometimes result in very dangerous situations. For example, a confused resident may wander into a busy private street or fall into a lake embankment or a pool.

In these circumstances, we are often asked what responsibility our association clients have to intervene, and what potential liability our clients can face if they fail to take proactive action. Generally speaking, condominium, homeowners', and cooperative associations have a duty to ensure the health, safety, and welfare of their communities to the extent feasible within the scope of their limited powers. What this actually entails depends upon each unique situation. This is often a balancing act that takes into account how urgent a situation is and how critical the association's role is in fixing a problem.

When it comes to residents with dementia, the Association's duty might be to simply warn motorists on the association's roads to be on the look-out for anyone known to be exhibiting symptoms of confusion or disorientation.

The Association can also consider taking one or more of the following additional steps (if applicable) to improve the situation and to demonstrate that the association is taking appropriate action to satisfy its duty of care:

1. Reporting incidents to the Alzheimer Association, Florida Gulf Coast Chapter.

2. Reporting Self-Neglect to the Florida Department of Children and Families (DCF). The department has a hotline for reporting abuse (1-800-962-2873), and elder abuse/exploitation can also be reported online at: https://reportabuse.dcf.state.fl.us/.

3. Contacting the United Way of Lee, Hendry, Glades, and Okeechobee Counties 211 hotline (239-433-3900) for non-emergency assistance and this social referral service will funnel this case to the proper resources. The hotline is open 24/7/365 and every call is confidential.

4. Requesting that a well-being check be performed by the Lee County Sheriff's Office Communications Department or by the local municipal police force. In these situations, the association should explain that the board is concerned about a resident's welfare and perhaps the habitability of the resident's home. A Deputy or an Officer will then go out to the property and try to make contact with the resident. Depending upon the result of the well-being check, a Special Victims Unit and/or the Florida Department of Children and Families may be brought in.

5. To the extent that a resident is violating the governing documents by putting themselves and motorists at risk on any streets that the Association owns, an association does have the right to levy fines and levy a suspension. While this may not be the best approach in most cases, levying a fine and/or a suspension can often grab the attention of a relative or a care giver to intervene.

6. If a situation deteriorates significantly, to the point of being a dangerous emergency, and all other recourse has been exhausted, then a director of an association, or a friend or neighbor, may file a petition seeking an *ex parte* order for a judge to have a resident involuntarily examined under the Baker Act. This requires firsthand evidence that a person is posing a threat to himself or to others. Further, this is a very extreme option of last resort.

ARE GOLF CARTS ALLOWED IN YOUR COMMUNITY?

BY: CHRISTOPHER J. SHIELDS, ESQ. & VANESSA FERNANDEZ, ESQ.

The answer might surprise you. Under Section 320.01(22) of the Florida Statutes, a golf cart is defined as a motor vehicle that is designed and manufactured for operation on a golf course for sporting or recreational purposes and that is not capable of exceeding speeds of 20 miles per hour. Anything with a top speed of above 20 mph but below 25 mph will be considered a low-speed vehicle. Under Section 316.212 of the Florida Statutes, golf carts do not require headlights, brake lights, turn signals or a windshield if operated between sunrise and sunset.

The distinction between a golf cart and a low speed vehicle is that a low speed vehicle requires a driver's license and must be equipped with headlamps, stop lamps, turn signal lamps, taillamps, reflex reflectors, parking brakes, rearview mirrors, windshields, seat belts, and vehicle identification numbers. Low-speed vehicles must also be registered and titled. Low speed vehicles may be operated on public roadways where the posted speed is 35mph or less, subject to certain conditions and so long as county ordinances do not indicate otherwise.

Golf carts, on the other hand, must be equipped with brakes, steering wheel, tires, a rearview mirror, and red reflectors in the front and back of the cart in order to be operated on public roadways. Golf carts do not need to be registered/titled, and they may be operated on public roads where the posted speed limit is under 25 mph, barring any municipal ordinances that indicate otherwise. A driver's license is not required to operate a golf cart so long as the operator is over 14 years of age. You read that correctly.

It may very well be the case that minor children, or unlicensed teenagers, are driving around your community in a golf cart. In many cases, your Association may have little authority over the matter. As long as the operator of a golf cart is over 14 years of age, the golf cart meets the requirements of the statute, and there are no other provisions preventing such a practice in your community, the operator may continue to drive a golf cart around your community.

The Association's authority only extends so far as the governing documents (and the law) allows. The Association's interpretation of its governing documents should be reasonable and should be uniformly applied, or applied equally among individuals in the community. The Association has a reasonable interest in preventing/addressing unlawful activity within the community, but, the use of a golf cart on the roadways by a minor may not be unlawful. And so, the Association may be left with only what is contained in its governing documents.

There is a wrinkle in the foregoing information concerning public and private roadways. The distinction is important. Many Associations have private roads, meaning the roads have been dedicated to the Association and are regulated by the Association, and not local law enforcement. In this scenario, Association Boards are encouraged to promulgate additional rules and regulations for the use of golf carts, low speed vehicles, and other similar vehicles in the community such as restricting the hours of use and restricting speeds, or completely prohibiting the operation of the vehicles within the community. It is important to consult with your Association's legal counsel to ensure that the regulations are properly drafted so that they may actually be enforced. Remember, if your documents only prohibit golf carts, but the vehicle is legally a low speed vehicle, you may not be able to enforce the documents against that vehicle or operator.

If the roadways in your community are public roadways, the Association will have a hard time prohibiting the lawful or proper use of golf carts and low speed vehicles thereon. Keep in mind, that if the vehicle is being operated in a reckless manner or in a manner that presents a nuisance to the community, the Association may be within its right to restrict the use of that particular golf cart, or at least fine that particular operator (or the owner of the unit/parcel associated with that operator), especially if the vehicle is being operated on common element property. Additionally, drinking while operating a golf cart can may subject an operator to a DUI in Florida, regardless of whether the roads are private or public. So, if your roadways are public and you have a problem with the use of golf carts or similar vehicles in your community, consider consulting with your Association's legal counsel to see if there is any way to address the activity under the governing documents of the Association, or with local law enforcement.

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Pavese Law Firm provides a wide array of legal services and is particularly experienced and capable in all aspects of Community Association Law. These matters include the following topics:

- Planning, Drafting, and Creating the Community Projects
- Developer Representation and Regulatory Approvals, Vendor Contract Review and Preparation
- Transition on the Board and matters pertaining to Turnover from the Developer
- Construction Defect Claims and Litigation
- Rule Compliance, Covenant Interpretation and Enforcement
- Amendments of Governing Documents
- Collection of Assessments, Liens, Foreclosures, and Defense of Mortgage Foreclosures
- Insurance and Maintenance/Repairs/Replacement and Reconstruction Issues
- HOA Pre-Suit Mediation, Arbitration, and Litigation

With the exception of 2 other law firms, no other law firm within the entire State of Florida has more lawyers who are board certified in Condominium and Planned Development Law

We are a full service law firm and capable of handling all of your legal needs

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