Board Must Learn how to Cover Assets

Fort Myers News-Press, January 5, 2003

By **Joe Adams**

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The next three months, the period roughly equivalent to the time-span between New Year's day and Easter marks the height of activity for local community associations.

Local rituals include snarled traffic and standing in line for everything. A ritual unique to the community association is the annual meeting. In my experience, the vast majority of associations hold their annual meeting in the months of January, February and March.

In addition to routine business conducted by associations, the primary purpose of the annual meeting is the election of directors. In a perfect world, every owner would take his or her turn at board service. For the uninitiated (and for that matter, even the experienced), serving on an association board can be a daunting task. In the next several editions of this column, I will pass on some tips for new board members which will hopefully be of assistance in effectively serving the community.

Today's tip: covering your assets. One of the biggest reasons some talented people refuse to consider board service is potential personal liability. Fortunately, Florida's Legislature has recognized that undue exposure to liability may dissuade owners from serving as directors of their respective community associations. The circumstances in which directors can be held personally liable are few and primarily limited to cases of self-dealing, reckless conduct and conscious violations of the law. Directors, however, are still individually sued with some frequency, and, particularly in discrimination cases, there is precedent for pinning financial liability on the individual director.

The two primary sources of protection for the director, which should be reviewed independently on a regular basis, are the indemnification (hold harmless) clause in the governing documents of the association and the directors and officers liability insurance policy maintained by the association.

Indemnification is the obligation of the association to provide a defense to a director if the director is named in a law suit, and pay any judgment ultimately rendered or any settlement ultimately reached. Directors are well advised to insist that the board authorize the association's legal counsel to review the indemnity provisions in the association's governing documents and provide an opinion letter confirming that such provisions are protective of the directors to the fullest extent permitted by current Florida law. If the association's director indemnification obligation under it's existing documents is not, the association's governing documents should be updated through amendment.

Directors' and officers' liability insurance coverage is a topic which involves many legal and insurance technicalities which cannot be adequately covered within the space limitations of this column. Suffice it to say that some director liability policies are so filled with exclusions from coverage that they are nearly worthless. Consultation with the association's insurance agent and attorney in order to confirm that customary association risks are covered is a smart move.

Finally, every person who serves on an association board would be well advised to talk to their personal insurance agent about the existence or availability of personal umbrella coverage which may provide an additional safety net in the event of a claim arising out of service on the association's board. ⚖

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Four Documents Important to Condo Board

FORT MYERS NEWS-PRESS JANUARY 12, 2003

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Today's column is the second part of our discussion of tips for new association board members (and perhaps some reminders for the veterans as well). Last week, we looked at director liability, indemnification, and insurance. Today, a primer on the association's governing documents.

For condominiums, there are four important documents that every board member should read, re-read and attempt to understand. They are the declaration of condominium, the articles of incorporation (sometimes called certificate of incorporation or charter), the bylaws, and the rules and regulations (sometimes called house rules, association policies, and various other names). The hierarchy (order of importance) of the documents is the declaration, then the articles, then the bylaws, then the rules.

The declaration is similar to a deed restriction, and covers the more substantial aspects of unit owner and association rights and responsibilities. Issues like who maintains what, who insures what, what happens when there is a casualty, easements, lease restrictions, sale restrictions, common expense sharing, and voting rights are typically addressed in the declaration.

The articles are customarily a fairly short form of document. The articles establish the existence of the corporation which operates the condominium (called the association), provide for its perpetual existence, its status as a not-for-profit entity, and the like.

The bylaws might be looked at as the association's housekeeping rules. Bylaws of a condominium association typically deal with association procedures, such as how many people sit on the board, how they are elected, how meetings are to be called, assessment procedures, board powers and duties, and the like.

The rules and regulations are usually the "do's and don'ts" for the community, typically regulating issues such as vehicle parking, pet policies, common area use, and the like.

For cooperatives, the cooperative documents are similar to the condominium counterpart, although there is no declaration of condominium. Rather, a "muniment of title" sets forth basic ownership rights and responsibilities. Such documents are usually called a proprietary lease or occupancy agreement.

For homeowners' associations, the documents are again very similar to the condominium model. The declaration is usually called a declaration of covenants, a deed of restrictions, or a similar name denoting covenants running with the land. In many HOA's, rules are limited to use of common areas, whereas condominium rules often regulate use of the unit (apartment) as well.

It is surprising to occasionally discover that association board members do not have a copy of the community's governing documents, or as is more often the case, do not have a complete set of the documents with amendments made over the years.

So, if ignorance of the law is no excuse, don't ignore your documents either, since they are the law of the land for your community.

Now on to reader mail.

QUESTION: I have heard that a condominium association cannot amend the amendment provisions in the declaration of condominium to require fewer owners to agree to future amendments to the declaration. For example, if the original declaration requires two-thirds of all owners to assent to an amendment to the declaration, an amendment cannot be made to reduce the number of owners needed to two-thirds of the owners present at a meeting. Does this also apply to homeowners' associations? - D.P. (via e-mail)

ANSWER: I believe you have been misinformed.

There is nothing in the Florida condominium law which prohibits an association from amending the amendatory provisions in any of the condominium documents. Customarily, developers make it difficult to amend condominium documents, primarily for protection of developer interests.

After the community is turned over from the developer, many associations come to learn that there is a fairly constant number of owners (sometimes a significant percentage) who do not participate in the community's affairs through exercising their right to vote.

In such cases, communities often do amend the original amendment clauses to base future amendments on those who vote, not the entire membership. As far as I am aware, the law is no different for homeowners' associations, and in fact the apathy problems that plague some condominium associations are often more pronounced in the HOA. ⚖

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Associations Should Review Insurance Needs

Finding Right Type, Amount Difficult Task

FORT MYERS NEWS-PRESS JANUARY 19, 2003

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Today's column is the third part of our discussion of tips for new association board members (and perhaps some reminders for the veterans as well). In the first installment, we looked at director liability and indemnification. The second installment was a primer on the governing documents. Today, a basic understanding of association insurance.

Undoubtedly, one of the most serious responsibilities of a board of directors is to insure that the community's physical property, as well as the liability exposures of the association, are properly insured. The following are the most common insurance products for associations:

Casualty Insurance
This is the insurance policy that pays to reconstruct the property after a calamity such as a fire. Windstorm losses usually require a separate policy. In homeowners' association communities, the governing documents usually (but not always) require the owner to insure the individual homes.

Flood Insurance
Many condominium associations carry a master policy of flood insurance. For communities located in federally designated flood hazard areas, mortgages can not be written unless adequate flood insurance is in place. HOA's are less often involved in flood insurance.

Liability Insurance
The general liability insurance policy (often called G.L.) is the insurance the association buys for most types of personal injury claims. For example, if someone trips on the community property and files a suit, the G.L. policy is the insurance that provides protection.

Workers' Compensation
Unless the association employs four or more employees, workers' compensation is not legally required. However, many associations which do not employ four or more people still purchase a "minimum premium policy" as a stop-gap protection.

Fidelity Bonding:
Sometimes called "crime coverage", "employee dishonesty coverage", or "fidelity bonding", this type of insurance is designed to protect against theft or embezzlement by employees, directors, management personnel, or others who might have access to association funds.

Directors and Officers Liability Insurance:
Usually called D&O insurance or E&O (errors and omissions) insurance, this is one of the most important policies for the association, and provides protection to the individuals who serve on the board. D&O insurance was covered in more detail in the first installment of this series.

Umbrella Coverage:
This is a "catch-all" policy, that is intended to provide a safety net when no other insurance is available for the problem, or if coverage limits have been reached.

The community association insurance market has changed drastically in the past ten years. Premiums have skyrocketed and coverage exclusions (for example, mold claim coverage) have mushroomed. Still, like most significant purchases that we make, an educated consumer is a good consumer.

Now on to reader mail.

QUESTION: The board of directors of our homeowners' association has decided to abolish our "roof reserve" account, and return the funds to the members.

The board's action is an attempt to limit the association's liabilities for making roof repairs. The reserve was originally established because our buildings, although not condominiums, share common roofs between two units. The members were not given the opportunity to vote on this matter. What are our options? - K.S.

ANSWER: The association's obligation to maintain roofs is not created by the establishment of a reserve fund, nor can eliminating the reserve fund take away an obligation that exists.

You need to review your association's deed restriction (usually called declaration of covenants), which will contain the answer. If the association is not obligated to maintain the roofs, it was probably not proper to establish the reserve account in the first instance, and return of the funds would appear to be appropriate (without addressing whether former owners who may have contributed to the fund would have a claim).

If the association is obligated to maintain the roofs, per your covenants, there is still no obligation to maintain a "roof reserve" fund, unless so required by the bylaws. This is one of the areas where the HOA law is much different that the stricter condominium statute.

Most "party roof" maintenance provisions I see in HOA declarations, which try to get the abutting owners to cooperate on maintenance, are ineffective at best. You may wish to approach the board about whether amendments to the covenants would be to the community's long-term interests. Good luck.

QUESTION: Where can I find information regarding the number of units that can be rented in a condo community without jeopardizing our "senior status"? - J.R. (via e-mail)

ANSWER: I believe you are referring to the Fair Housing Amendments Act of 1988 and the so-called "55 and over" exemption.

The exemption, which is the only way a community association can prohibit residency by families with children, has nothing to do with how many units are leased. Rather, it is occupancy of the units (whether by owners, renters, or others) that is important. In general, at least eighty percent of the occupied units must be occupied by at least one person age 55 or older for the association to qualify for the exemption. There are other requirements for the exemption as well. ⚖

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Don't Let One Bad Owner Spoil Meetings

Arm Yourself Against a Condo Commando

FORT MYERS NEWS-PRESS JANUARY 26, 2003

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Today's column is the fourth part of our discussion of tips for new association board members (and perhaps some reminders for the veterans as well). In the first installment, we looked at director liability and indemnification. The second installment was a primer on the governing documents. The third, a basic understanding of association insurance. Today, dealing with difficult owners.

Condo Commandos. Recreational Complainants. Avocational Dissidents. Known by such names, and a few that are not fit to print, many community associations are beleaguered, sometimes paralyzed, by the time commitment, resource expenditure, and emotional drainage affiliated with difficult owners.

Suggestions of fraud, self-dealing, conflict of interest, incompetence, and wickedness are amongst the Commando's arsenal of typical charges against the board and management. Constant letters, e-mails, telephone calls, records inspection requests, petitions, posted notices, calls to the condo bureau, and complaints to any governmental agency that will listen, are among the preferred weapons for the Commando's assault.

It is said that every community "has one." In my experience, fortunately, that is not true. Indeed, the vast majority of community associations operate with amazing efficiency, given the inherent challenges of a forced, not-for-profit real estate partnership amongst a group of people who have never met each other before. That is not to say that there are not bumps and bruises in a democratic decision-making process, there are, but letting all sides of a matter be aired forges the political consensus that makes the world of community associations go around.

The concept of majority rule has no importance to the Commando. Its his way or the highway. At least the Commando can be counted upon to participate in the community's affairs. However, when that participation consists of sitting in the front row at every board meeting, armed with a tape recorder, video camera, statute book, and a dog-eared copy of Robert's Rules of Order, little good ever comes out of the interaction. Rather, board members begin to dread meetings, and otherwise qualified potential volunteers decide that life is too short to put up with stress and anxiety, all for a non-paying job.

So, what tips can be offered if your community has a resident Commando:

Be wary of traps: All members have the right to inspect association records. Depending on the governing statute, the deadlines vary, but are generally five to ten days from the date of request. Penalties for non-compliance can be substantial. If inspection rights are abused, ask the association's lawyer to draw up a policy imposing reasonable limits on records inspection. Another trap for condo associations is the so-called "certified inquiry rule." Whenever an association receives a certified letter from an owner which constitutes an "inquiry", a "substantive response" must generally be given within thirty days. Penalty for non-compliance is potential inability to recover attorney's fees should litigation result. Again, this is an area where counsel can assist

in appropriately responding to inquiries, and stemming abuses of the right.

Never give up trying to mend fences: The Commando often started as a well-meaning person with bad interpersonal skills. New boards can look at mending relationships as a challenge, like rehabilitating an employee that you cannot fire.

Be polite and business-like. In many of the situations I have seen, the Commando is a personality type who thrives on conflict. Sometimes, denying him the adrenaline rush of battle will cause the Commando to look for another means to indulge his need for a fight.

Ignore what you can. In some cases, relationships reach the point where they cannot be salvaged. In such cases, the board and management are often best advised to consider the source, and ignore the insults and accusations. Of course, as noted above, there are certain rights that cannot be ignored. Further, every owner should be dealt with in a neutral fashion regarding routine association matters, such as maintenance requests. In some cases, it is appropriate to ask a particularly problematic individual to put his requests in writing.

For better or worse, Florida's courts have ruled that a condominium association cannot deprive an owner of his property, and even the most difficult owner cannot be forced to move or sell. While it is easier said than done, sometimes you just have to grin and bear it.

Now on to reader mail.

Q: Does a condominium association have any say as to how many units one person can buy? We have a situation where one person is buying up several units, and using them as rental property. Can we amend our documents to limit renting to three months per year maximum, and no annual rentals? We are concerned about turning in to an apartment complex.

N.L. (via e-mail)

A: In response to your second question, the Florida Supreme Court's Woodside decision (discussed at length in previous editions of this column) specifically held that a condominium association can amend its declaration of condominium to prohibit annual rentals.

Also, I see no reason why the declaration of condominium could not be amended to limit the number of units any particular person or group owned. Of course, you would have to "grandfather" any person or group owning more units than the limit permitted by the amendment. ⚖

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Trade Expo Chock-full of Information, Services

Event also Offers Credit, Noncredit Courses

FORT MYERS NEWS-PRESS FEBRUARY 2, 2003

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Before wrapping up our series on tips for new board members, today's column will take a break from that topic, to announce an upcoming local program that should be of interest to community association board members, unit owners, and managers.

The South Gulfcoast Chapter of Community Associations Institute (CAI) will be hosting its annual Trade Expo on Thursday, February 6, 2003, at the Seven Lakes Condominium Auditorium.

Seven Lakes is located on U.S. 41, across from the Bell Tower Mall, directly behind Edison National Bank. The purpose of the Trade Expo is two-fold. First, local vendors can hawk their wares. Over forty exhibitors have obtained booths. Service providers such as banks, management groups, accounting firms, engineering firms, insurance agencies, law offices, security providers, painters, and contractors are typical exhibitors.

In addition to the opportunity to see the latest in products and services, the Expo will provide a series of educational presentations. At 8:00 a.m., the "legal update" required for community association management (CAM) licensure will be presented. CAMs receive credit for this course, but those who are not managers are welcome to attend as well. I will be the instructor for this program.

From 9:00 a.m. to noon, a seminar from CAI, pursuant to its contract with the Florida's state condominium agency, will be presented. The course involves condominium operations and will be presented by Mark Benson of Benson's, Inc., a Fort Myers management firm. This program is not certified for CAM credit, and is primarily intended for the delivery of education to board members and unit owners. However, this course is also of extreme value to managers, even if educational credit is not received.

From noon to 1:00 p.m., CAI's Florida Legislative Alliance will hold an open forum for Expo attendees. This group is CAI's legislative affairs committee for community association issues in Florida. The program will include a presentation on legislation expected to be considered in Tallahassee in the upcoming legislative session. Legislation involving fire sprinklers, electronic notice (for example, e-mail) and responses to lender questionnaires are all potential issues for the upcoming legislative session. Further, an open forum time will be set aside to take input from interested parties as to potential legislative issues that might be worthy of future legislative treatment.

From 1:00 p.m. to 2:30 p.m., a legal/insurance forum will be held. Attorney Richard D. DeBoest II, along with me, will represent the legal side. Stan Plappert of Collier Insurance Services and Gino Littlestone of Oswald, Trippe and Company will represent the insurance industry side. This program is intended to serve as an update on legal/insurance issues, and will be presented in a question and answer format.

The legal update starts at 8:00 a.m., exhibitors at the Expo will open their booths at 9:00 a.m. The Expo will conclude at 3:30 p.m. Admission is free. Reservations are not required.

Over the years, I have heard many community association board members and managers express a desire for greater ac-

cess to educational opportunities. Here's your chance for an action-packed day and the opportunity to attend what promises to be a top notch program.

Now on to reader mail.

QUESTION: I am a board member in our condominium association and wish to understand our documents better. Our documents were written in 1967. I cannot interpret nor understand the language in most of the clauses. Is there a class I can take to help me understand these documents, so that I can begin to get things updated according to the modern day condo laws? - S.R. (via e-mail)

ANSWER: Florida's first Condominium Act was written in 1963, and was in its infancy when your community was created, some 35 years ago.

Most 60's-era condominium documents I have read are, at best, difficult to understand, and are filled with legalese. There is no class that I know of that would assist you in trying to interpret archaic documents. A competent lawyer could help, but the cost may not be worth the benefit, at least if you can change the documents.

It is probably time for your owners to invest in writing a new set of documents. An experienced community association attorney can guide you through the process. Typically, it is best to simply sit down with the attorney with your "wish list", including items you would like to see in the new documents. Rental restrictions, parking regulations, pets, business use of units, guest usage, maintenance provisions, insurance requirements, board terms, and financial issues are amongst the items that will typically be covered much better in a new set of governing documents.

The first thing you need to look at is is the amendability of your current documents. Unfortunately, I have found that many first generation documents are difficult (if not nearly impossible) to amend, often taking eighty percent, or even one hundred percent approval. If that is the case, you may have no choice but to live with what you have. Good luck. ⚖

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Shutters Among Top Pitfalls for Boards

Failure to do so is Common Mistake

FORT MYERS NEWS-PRESS FEBRUARY 9, 2003

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Today's column is the fifth and final part of our discussion of tips for new association board members (and perhaps some reminders for the veterans as well). In the first installment, we looked at director liability and indemnification. The second installment was a primer on the governing documents. The third, a basic understanding of association insurance. The fourth part looked at dealing with difficult owners. Today, the most common (and avoidable) mistakes made by condominium associations.

The following is my "top ten" list of the most common mistakes made by condominium associations and potential headaches inherited by new boards:

Hurricane shutter specifications: The condominium statute requires every board of directors to adopt specifications for the installation of hurricane shutters. Unit owners are entitled to install shutters in accordance with the board's specifications. In my experience, many associations (perhaps a majority) have never adopted the required specifications.

Notice posting location: The law requires the board to adopt a rule specifying where official association notices are posted. Although most associations have a set place where notices are posted, most boards have never adopted a formal rule specifying posting location, as required by the law. Recent code changes probably require updates for those associations which have adopted specifications.

Q&A Sheet: The law requires every condominium association to prepare a "Question and Answer Sheet", commonly referred to as the "Q&A Sheet". It is essentially a disclosure document. The Q&A Sheet must be updated annually. Many associations do not have a Q&A Sheet, and more yet fail to update it annually.

Fidelity bonding: The statute requires an association to have fidelity bonding (or similar insurance, sometimes known as employee dishonesty or crime coverage) in place, for the maximum amount of association funds exposed to theft. In many cases, associations are grossly underinsured with their fidelity coverage, and I have seen it come back to bite more than one association after an employee or agent dishonesty incident.

Rules and regulations: Assuming that the association is granted rulemaking authority in the governing documents, the condominium statute requires any rule regarding use of the units (apartments) to be publicly noticed fourteen days in advance, both by posting and mailed notice. There is no similar requirement for common element rules, the regular forty-eight hour posting typically suffices. Many associations adopt rules regarding unit use without the required public notice, which only becomes an issue when the association when has to enforce the rule in court or arbitration, or when attempting to collect a fine.

Board voting: Many associations continue to cling to the erroneous assumption that, under Robert's Rules of Order, the president of the board is not entitled to vote on matters before the board, except to break a tie.

If the president is a director (and he or she almost always is), then not only is he or she entitled to vote; he or she is obligated to vote, except in the event of a conflict of interest. The statute also requires the vote of each director, by name, to be recorded in the minutes for each vote that is taken.

Agendas: The condominium statute requires that any item of business that is to be taken up at a board meeting must be specifically included on the posted agenda for the meeting. Generic designations such as "new business" are not sufficient. Many boards routinely violate this law. There is a somewhat complicated procedure for emergency situations.

Sunshine requirements: The condominium statute requires that every board meeting be publicly noticed and open to unit owner observation and participation, except when meeting with association legal counsel. Many boards engage in "executive sessions" for potentially sensitive matters such as personnel, board political problems, etc. Although usually well-intentioned, any gathering of a quorum of the board for conducting association business, whether or not a vote is taken, is contrary to the law unless proper notice and participation rights have been given.

Fining procedures: The condominium statute provides that no fine may be levied until an opportunity for a hearing, before a committee of unit owners other than board members, has been provided. Many associations conduct their fining procedures outside of the bounds of the law, usually involving notice violations or the failure to provide the opportunity for the required hearing.

Special assessment procedures: Assuming that the board is given special assessment authority in the governing documents (and some documents require a membership vote), the public notice requirement is similar to rule-making, discussed above, requiring fourteen days posted and mailed notice. The notice must contain a statement of the purposes of the proposed assessment. Once the assessment is levied, a second notice must be sent out, which again indicates the purpose for which the assessment was levied. ⚖

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Condo Commando takes on the Dictator

Board Meetings Resemble Real-Life Wrestling Match

FORT MYERS NEWS-PRESS FEBRUARY 16, 2003

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Every once in a while, this column finds a topic that hits a raw nerve.

A couple of weeks ago, in a segment addressing difficult personality types, I identified the Condo Commando, a moniker that I am not clever enough to have coined.

Several of my clients told me they thought I was writing about a particular person in their community. Other association leaders, people I have never met before, remarked how I had so accurately portrayed the grating habits of their community's nemesis.

Other reactions suggested that criticizing people with differing points of view squelched debate, and was downright undemocratic. In fact, one writer of a letter to the editor called the column "juvenile, name-calling" (I will waive any protest that calling a middle-aged man a juvenile might be considered name-calling too).

To set the record straight, the column did not intend to suggest that disagreement is bad. The message intended to be conveyed is that one can disagree without being disagreeable.

Today, in the interest of fair play, I would like to explore a personality type which is in many ways similar to the Condo Commando, but in many ways different. The Dictator. Usually a board president or on-site manager, the Dictator also sees things one way. Like the Condo Commando, its his way or the highway.

Contrary to popular belief, the typical Dictator is not a retired CEO. People of that ilk normally ascend by considering opposing points of view, and building consensus. While in some cases financial perks may be the motivating factor, the typical Dictator gets his rush from the ability to control others in their most basic sanctuary, their home.

The Dictator scrupulously avoids any decision being made in the open, and most often acts unilaterally, relying on non-opposition rather than consensus. When push comes to shove, the Dictator does not hesitate to use the full arsenal of the association's financial and legal resources to get his way.

The Dictator rarely considers the requirements of the community's governing documents, unless it suits his purpose. Lawyers and legal advice are a waste of time and money, unless for defense or legitimizing a decision that has already been made and implemented.

In many communities, the political reality of the election process makes it difficult for the Dictator to get elected, or if elected, to get re-elected. However, in some communities (such as those with a high percentage of absentee owners), there may be no one else who will take the job, and the Dictator is supported largely by apathy, and based upon whether the budget is kept in check.

Every Condo Commando I have met will tell you that their association's board president and/or manager is a Dictator. Every Dictator I have met will label anyone who disagrees with them as a Condo Commando.

Everyone who disagrees with the majority is not a Condo Commando. Everyone who has been entrusted with decision-making authority is not a Dictator. But in some cases, on both ends of the spectrum, the shoe fits and should be worn accordingly.

Now on to reader mail.

QUESTION: Recently we deleted the Question and Answer Sheet (Q&A Sheet) from our association's "operating manual." We were advised that the Florida Statutes no longer required the Q&A Sheet. Were we wrong? - B.W. (via e-mail)

ANSWER: Several column readers posted this inquiry after last week's column, and there is apparently still some misunderstanding as to the effect of the 2002 amendments to the Florida condominium statute.

First, an association is still obligated to maintain a Q&A Sheet. The obligation for this undertaking may be found in Section 718.111(12)14 of the condominium statute.

The main affect of the change in the law is that the Q&A Sheet is no longer a necessary disclosure document in non-developer resale transactions. The Q&A Sheet is still required in initial developer sales and in all cases, must still be maintained as part of the official records of the association. ⚖

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Preserving Rights of Handicapped can be Tough Call for Associations

FORT MYERS NEWS-PRESS FEBRUARY 23, 2003

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A recurring topic in this column is the balance of rights between the rules association members agree to live by, and the rights of the handicapped.

Recently, in the sports world, a United States Supreme Court Case made headlines, holding that the PGA had to accommodate the interests of a handicapped golfer by permitting him to ride in a cart, when other golfers had to walk. The Court's rationale, at least at a policy level, is that it was not unfair to the other golfers, even though they have to abide by the established rules.

In the community association world, enforcement agencies and the courts often see things in the same light. From "prescription pets" to exterior modifications, the courts and enforcement agencies like H.U.D. have routinely held that association regulations must give way to handicapped rights, if the request is "reasonable," and is related to alleviating the handicapped condition.

While there may well be liberal and conservative policy viewpoints on this topic, it is certain that few question the need of association rules to occasionally bend for the handicapped. For example, I could not imagine a condo with a no-pet policy forbidding a bona fide seeing-eye dog. Unfortunately, most real life cases are not that easy. The big question is where you draw the line.

A recent case decided by Florida's Second District Court of Appeal (which has jurisdiction over Southwest Florida) arguably took judicially imposed rights for the handicapped to the next level.

Charles and Suzanne Dornbach own a home in the Lake Thomas Woods Subdivision, located in Polk County. The Dornbachs leased their home to a company which intended to use it as a group home for six developmentally disabled adults. The Dornbachs were sued by their neighbors, the Holleys, who claimed that the intended use violated the subdivision restrictions. The restrictions in question required lots to be used only for "single family" purposes. Further, the covenants limited use of lots to "residential" purposes and prohibited "business activity."

The judge at trial agreed with the Holleys, finding that the proposed use of the lot as a group home violated these restrictions.

On appeal, the reviewing court looked at both state and federal fair housing laws for guidance. Finding that enforcement of the covenant would be impermissibly discriminatory, and that the failure to waive the restriction would serve as a refusal to offer a "reasonable accommodation," the court invalidated the covenants, as applied to this case.

The court went on to say that even if the neighbors' objection was not motivated by an intent to discriminate against the handicapped, "incidental discrimination" resulted, which is also unlawful.

While the appeals court had no trouble in deciding where to draw the line, it was a different spot than marked by the trial judge, showing that even judges in the same case can disagree on how to balance competing interests. So if you, as a manager or a board member, are asked to draw the line, make sure you have plenty of input from others before you pick up the chalk.

Now on to reader mail.

QUESTION: My wife wants to run for our association's board of directors. The manager said she is not allowed to run because she is not named on the deed to our property. I bought the property two years before I met my wife and had a power of attorney drawn up. What is your opinion? - L.D. (via e-mail)

ANSWER: First, as always, the governing documents must be consulted. If the governing documents (typically the by-laws) do not require unit ownership as a condition of board service, anyone can run for the board.

Many documents limit board eligibility to unit owners or the spouse of a unit owner. Again, in such a case, your wife would be eligible to run.

If the documents limit board service to "unit owners," I do not believe that a general power of attorney would be sufficient to confer that status, and your wife would be ineligible to run. If that is the case, and it is important to you, you should consult with your family counselor about adding your wife's name to the title. ⚖

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Statute of Limitations a Problem in Disputes

Florida Law Provides no Clear Guidance

FORT MYERS NEWS-PRESS MARCH 2, 2003

By **Joe Adams**

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An issue which persistently confuses condominium and homeowners' associations is how long an association can wait before taking action to enforce rules of the condo or HOA.

Legal concepts carrying mysterious sounding names like laches and the statute of limitations are used. In general, these concepts are the legal equivalent of those who snooze, lose.

The law encourages parties with disputes to assert their rights in a timely fashion. The failure to timely pursue legal rights can result in rights being barred by the statute of limitations. The statute of limitations is a legal deadline by which a claim must be filed with a court. Many cases are decided on the statute of limitations, and parties with bonafide rights are denied their day in court, because they waited too long to act.

The statute of limitations can be particularly problematic in community association disputes. Most times, boards will attempt to resolve problems informally, without intervention by lawyers. When the matter is placed in the hands of counsel, there is often a period of letter-writing and negotiation attempts before a lawsuits is filed. Obviously, any matter that can be resolved without litigation, should be. However, if a statute of limitations is looming in a matter, the association may have no choice but to file suit to stop the running of the clock.

There is no clear guidance in Florida's law as to the statute of limitations in many community association disputes. In general, the statute of limitations for actions based on written contracts is five years, and four years for most "torts" (such as trespass) and actions based on verbal contracts. Certain matters, including "specific performance of contract", carry a much shorter statute of limitation, one year.

In all cases, the statute of limitations does not begin to run until the claim "accrues", which is rarely easy determine, even for lawyers.

A recent case released from Florida's Fifth District Court of Appeal, which has jurisdiction over the Orlando area, sheds some light on the statute of limitations in association matters.

Vernon Daugherty owned a unit at the Sheoah Highlands Condominium in Seminole County. Mr. Daugherty sued the condominium association and its board alleging that the association failed to enforce the declaration of condominium, by permitting certain unit owners to erect screened enclosures on the common elements, contrary to the provisions of the declaration of condominium.

The trial court ruled in Daugherty's favor, and ordered two of the five screen enclosures removed.

The association appealed to the higher court, claiming that Daugherty's claim was barred by the statute of limitations and that the court did not have jurisdiction over the unit owners who had installed the enclosures, as they were not named in the suit.

The reviewing court agreed with the association's argument that the trial judge should not have ordered the enclosures removed, since the owners of the involved units were not named as parties to the action. However, the court found that the board had

failed to enforce the documents, and ordered that the association would be required to take legal action against the subject owners to enforce removal of the improper enclosures.

The statute of limitations issue was the central issue in the case. Three owners had enclosed the areas in question when Daugherty had purchased his unit in 1981. A fourth enclosure was built in 1996 and a fifth in 1998. The association's board had approved all five enclosures.

Finding that there was room for debate as to whether the one year or five year statute of limitations should apply, the court concluded that the five year statute was applicable. Therefore, Daugherty had no legitimate beef about the 1981 enclosures, but did take timely action regarding the 1996 and 1998 enclosures.

The court noted that the Fourth District Court of Appeal (which has jurisdiction of the Palm Beach - Broward County area) has ruled differently, under somewhat similar circumstances, potentially paving the way for a conflict between appellate courts, and an eventual review of the question by Florida's Supreme Court.

While associations should never be too quick to jump into litigation, this case points up the lesson that every potential legal dispute, as soon as it hatches, should be viewed by the association with an eye toward potential statute of limitations issues. In most cases this will require legal review, but is probably the proverbial ounce of prevention that will be worth a pound of cure.

Now on to readers mail

QUESTION: Is a Florida homeowner's association (HOA) required to have a licensed community association manager (CAM)? R.M. (via e-mail)

ANSWER: There is no requirement that an Association (whether condo or HOA) have a manager, although many (perhaps most) do, particularly larger associations.

If you have a manager, he or she must be licensed by the State if your association operates more than 50 units or has a budget in excess of one hundred thousand dollars. ⚖

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Not-For-Profit HOAs Must Still File Tax Returns

Forms Required even if no Payment is Owed

FORT MYERS NEWS-PRESS MARCH 9, 2003

By **Joe Adams**

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As the old saying goes, the only certainties in life are death and taxes. Many condominium and homeowners' associations are surprised to learn that their not-for-profit organizations are required to file tax returns.

According to John Stroemer, a name partner in the accounting firm of Markham, Norton Stroemer & Co., community associations with a fiscal year ending December 31 must file their annual federal tax returns by March 15 of each year, unless an extension has been filed. (A six-month extension is automatically granted if IRS Form 7004 is filed by the return's filing deadline).

Stroemer notes that even for associations who earn little or no income, tax returns must still be filed, even if no tax payment is due.

Under Section 528 of the Internal Revenue Code, a homeowners' association (which, under IRS guidelines, includes condominium associations) may annually elect to file Form 1120H, if they qualify. Otherwise they must file Form 1120 (the regular corporation return).

The tax rate for 1120H filers is thirty percent of "non-exempt function" income minus "non-exempt function" expenses. Non-exempt function income is income other than membership dues, fees, or assessments from owners. There are certain criteria that must be met in order to file Form 1120H, generally having to do with characterization and sources of the association's income and expenses.

Associations that file Form 1120H are not required to file a Florida income tax return.

For filers electing Form 1120, associations are taxed on both net membership and non-membership income minus expenses. Filers electing Form 1120H are taxed on only non-exempt function income minus expenses. The rate, as opposed to the thirty percent for 1120H filers, is generally fifteen percent for 1120 filers.

Associations that file a Form 1120 federal tax return are required to file a Florida income tax return. For December 31 year end, the filing due date is April 1 of each year, unless an extension has been filed.

According to Stroemer, approximately 99 percent of his community association tax return clients elect for Form 1120H, for a variety of reasons. Stroemer notes that one of the most significant reasons why an association files an 1120H is to avoid potential litigation and tax problems with the IRS. Stroemer says that the industry is keenly watching pending litigation between the IRS and timeshare associations which have filed 1120 tax returns. The tax issues for 1120 filers, which are being contested by the IRS, do not apply to 1120H filers, thus creating a safe haven for 1120H filers.

So, if you are a procrastinator like many of us are with our personal tax affairs, there are still a few days left to take care of business.

Now on to reader mail.

QUESTION: I am a registered community association manager in Lee County, and also reside in a community operated by a homeowner's association. I am writing about the burden placed on associations by Lee County's swimming pool inspectors regarding the requirement for daily

testing of swimming pool water quality. I am told that Lee County is the only county in Southwest Florida that is enforcing this interpretation of the law.

A manager's education manual which I have states that daily testing for swimming pools only applies to "resort condos" which are those that allow short-term rentals. My own association, where I live, has had to add $3,000.00 to its annual budget for pool testing. M.H. (via e-mail)

ANSWER: I believe that the book, or at least your interpretation of it, is incorrect. Florida Statute 514.0115(2)(a) exempts condominium and cooperative pools from certain regulation, provided that the property consists of less than thirty-two units and is not operated as a transient lodging establishment. However, the statute specifically provides that "water quality" supervision is not exempt from state regulation.

Section 64E-9.004(13) of Florida's Administrative Code addresses water quality record keeping. The Rule requires a "daily record of information regarding pool operation," and specifies certain forms that must be used. The completed reports are required to reflect "pool water tests at least once every 24 hours" and are required to be retained at the pool or submitted monthly as required by the local health department.

The state agency with jurisdiction over swimming pools works with local health departments in enforcing the state's rules. It is unclear why Lee County's pool police have adopted a "get tough" attitude, but it is clear they have. Unless your legislators can be convinced that the law needs to be changed, it looks like increased pool care costs are here to stay, at least in Lee County. ⚖

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Pending Bills Affect Community Associations

Fire Sprinklers, Flags up for Consideration

FORT MYERS NEWS-PRESS MARCH 17, 2003

By **Joe Adams**

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On March 4, 2003, the annual session of the Florida Legislature convened. As always, while more socially relevant items get most of the press, there is no scarcity of proposed legislation affecting community associations. For an up-to-date status report on pending legislation, the best source is On-Line Sunshine, the website of the Florida Legislature, which is found at www.leg.state.fl.us/.

The following references to "HB" are short-hand for House Bill, and "SB" for Senate Bill:

HB 165/SB 1978: This bill affects a variety of issues involving community associations. The "hottest" topic (pun intended) is a provision that would allow certain high-rise condominium buildings to vote to "opt out" of a new law that requires them to retrofit fire sprinklers in the buildings. The bill recently faced a tough hearing before the House Judiciary Committee where the committee chairman, local State Representative Jeff Kottkamp, assisted in guiding the bill through committee passage. Among other relevant provisos in this proposed law are liberalizing service of process requirements in homeowner association lien foreclosure actions, providing protection to associations responding to certain questionnaires, and codifying the often-debated statute of limitations for resolving condo and co-op disputes.

HB 695/SB 592: This proposal, which seems to be headed down a less controversial path, addresses "electronic notice" in the conduct of the affairs of not-for-profit corporations, which would include condominiums, cooperatives, and homeowner associations. Matters such as e-mailing meeting notices are covered by this proposed law, which is intended to bring association practices up to date with current technology.

HB 861/SB 1410: This bill would confer "standing" on homeowners' associations similar to that of condominium associations for matters pertaining to the development of the community. This bill would also eliminate the "vested rights" proviso of the HOA statute regarding amendments, which many consider to be unintelligible.

SB 260: This bill would add military service flags to the United States flag in terms of flags that an association cannot prohibit being flown, at least at certain times. At press time, there is no known House companion bill.

SB 334: This bill would apply residential, instead of commercial, rates to telephones serving condominium elevators. At press time, there is no known House companion bill.

SB 1142: This is what is commonly called a "shell bill" relating to the Department of Business and Professional Regulation (DBPR). Tallahassee insiders speculate that this bill will be used as a vehicle by the DBPR, at the behest of the Governor's office, to deregulate the licensing and oversight of community association managers.

SB 2300: This is a bill that has popped up during the past three sessions, which would prohibit condominium associations from commencing significant litigation (the law appears to be aimed mostly at developer litigation) without engaging in

"disclosure" requirements that appear designed to eliminate the authority of the board of directors. The proposed law would also provide developers with immunity for fraud or misrepresentation if verbal statements made by the developer or its agents are contrary to what has been put in writing. At press time, there is no known House companion bill.

So, once again, we are off to the races and the winners and losers remain to be seen. Parties interested in community association legislation can influence the process by contacting their elected representatives. Personal letters, personal e-mails, and calls to the legislator's office are all effective. "Form letters" and "chain e-mails" are largely ineffective.

Now on to reader mail.

QUESTION: I am the treasurer of our association. Recently, we levied a fine against an owner of $100.00 per day, for eight days of violation, totaling $800.00. Can we put a lien on the property for the fine and foreclose on the lien to collect the fine? B.B. (via e-mail)

ANSWER: It depends. If your association is a condominium association, the governing statute specifically provides that a fine cannot be secured by a lien against a unit.

In homeowners' associations, the prevailing view is that the HOA can file liens to collect fines if the declaration of covenants for the HOA permits the recovery of fines to be secured by a right of lien.

Under either scenario, it is also important to ensure that the association has followed the "due process" requirements of the relevant statute as well as the community's governing documents. ⚖

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Now's the Time to get Your Condo Ready for Summer

Don't Anger Neighbors While You're Away

FORT MYERS NEWS-PRESS MARCH 23, 2003

By **Joe Adams**

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Easter traditionally marks the end of "season" in our area. Many of our winter friends are packing up to head for northern destinations, while the rest of us get ready to sweat out another Southwest Florida summer.

For those soon hitting the road, I would also like to pass on a few tips to avoid angering your neighbors or your association while you are away, ensuring a warm welcome when you return:

- If your unit is properly equipped, turn off the water while you are away. One of the largest pet peeves in condominium living, especially high-rises, is water damage incidents. Someone once told me that water follows two laws: the law of gravity and Murphy's law.

- If you are going to be having guests use your unit or home while you are away, check your association restrictions. Some associations permit it, some don't. In all cases, courtesy notification to the association is appropriate. This enables the association to ensure that those using your unit are properly there, and also serves a security and safety function.

- If you leave a car in Florida, and it is not garaged, check the regulations. Some associations do not like seeing cars left with plastic or cloth covers, some don't mind. Further, you should leave a key to the vehicle with management, in case the parking lot needs to be maintained while you are away. Obviously, leaving a car with flat tires, broken windows, etc. is not pleasing to your neighbors. Also, some associations try to control storage of absentee owners' vehicles, to avoid the property being perceived as "empty" by potential burglars or others with bad intent.

- Leave management with a phone number where you can be reached during the summer, including an emergency number if you are away on vacation, visiting family, travelling, etc. Remember, summer is hurricane season here, and there may also be a need to reach you if there is some emergency with your unit.

- Keep your unit at a temperature and humidity setting that will avoid mold or mildew taking hold. Although many people understandably wish to economize on energy bills, a few extra dollars spent on proper temperature and humidity control could save thousands for both the owner and the association. Mold knows no boundaries between areas which the association maintains and the unit owner maintains. These days, a single mold remediation claim can cost in the tens of thousands. Coupled with a constantly decreasing market for mold insurance coverage, this is one area where an ounce of prevention may be worth the proverbial pound of cure.

Your board or manager may also have some additional specific recommendations, developed from experience in your particular community, which will assist you in protecting your investment while you are gone.

Now on to reader mail.

QUESTION: Our association has recently elected a new board. The new president wants to make sure that owner complaints "are heard." He has instruct-

ed me (the manager) to add to the agenda for each board meeting, a time for unit owners to express their concerns and "vent." The owners' comments are then added to the minutes of the meeting, without a response from the board. Some ex-board members are questioning whether this procedure is legal. What is your opinion? - F.K. (via e-mail)

ANSWER: The condominium statute requires the posted notice for every board meeting to specifically incorporate an identification of agenda items.

As far as I am concerned, it is a good thing to allow owners to have their say at board meetings, and I see nothing unlawful or improper about the new procedure. I do not think that the board could vote on items brought up by unit owners unless the issue was subject to proper notice, through specific agenda identification, at a future meeting.

I would not think it wise to include the owners' comments in the official minutes of the board meeting. The purpose of a corporation's minutes is to document what was done, not what was said. Minutes are often used against associations in litigation, and in many cases, the less said, the better.

My view for cooperative associations is the same, as the law is the same.

For homeowners' associations, the law does not require as much specificity in the agenda, and the board would have broader discretion in terms of voting. The policy issues are the same as the condo counter-part. ⚖

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Don't be Confused by Year-end Financial Reports

Condominium Law More Complicated than HOA

FORT MYERS NEWS-PRESS MARCH 30, 2003

By **Joe Adams**

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One of the most confusing areas of condominium and homeowners' association operations involves the association's year-end financial reporting requirements. As is usually the case, the law for condominiums is substantially more complicated than the HOA counterpart.

In all associations the first source which must always be consulted is the community governing documents. For example, if the association's bylaws require a year-end audit, an audit must be performed, regardless of the law. Stated otherwise, the law sets forth minimum requirements which must be met, and the governing documents can always impose stricter requirements.

A condominium association's required year-end financial report depends on the magnitude of the association's annual revenues (including regular assessment income, special assessment income, and other forms of income). For associations exceeding the $400,000 mark, a year-end audit is required. For associations between $200,000 and $400,000 the required year-end report is known as a "review". For associations with revenues between $100,000 and $200,000, a "compilation" is the type of report required. For associations with less than $100,000 in revenue, and associations serving less than 50 units, a simple statement of revenues and expenses, prepared in accordance with good accounting practices (often called an "in-house" financial report), is what is required.

The timing for the completion and delivery of the year-end report is also somewhat complicated. Again, the bylaws may impose different standards.

In general, the association is obligated to prepare and complete, or contract for the preparation and completion of, the year-end financial report within 90 days of the close of the fiscal year. Since most associations use a fiscal year ending December 31, that deadline is a day or two away.

If the report is prepared by an outside party, such as an accountant, the association must deliver the report within 21 days of receipt of the "final" version (as opposed to "draft" version) of the report. Under all circumstances, the report must be delivered to the unit owners within 120 days of the close of the fiscal year.

By virtue of an amendment to the condominium law a couple of years ago, the association is no longer obligated to mail out copies of the year-end report. Rather, delivery of the report can be accomplished by providing each owner with mailed or hand delivered notice that the report has been completed, and that it is available from the association, free of charge, at the owner's request.

Condominium associations may, before the end of the fiscal year, vote to waive the year-end reporting requirements set forth in the law. The waiver requires a majority vote. For example, an association whose receipts require an audit, may vote only to have a review, a compilation, or an in-house report. However, even if a waiver vote is taken, some level of financial year-end reporting (an in-house report at the minimum) must be made available for the members within the statutorily prescribed time frame.

The law for homeowners associations is decidedly simpler. Pursuant to Section 720.303(7) of the statute applicable to HOAs, the year-end report, essentially equivalent to the condominium in-house report, must be made available to the members within 60 days of

the end of the fiscal year. Similar to condominium procedures, the HOA need not mail out the report, but only provide notice that it is available, within 5 working days, free of charge.

Now on to reader mail.

QUESTION: I am member of a homeowners' association. Recently, we received a notice from our association's manager stating that when we purchase insurance for our home, the association's name must also appear on the policy as part owner of the policy. Since the individual home owners pay for the insurance, wouldn't giving the association a copy of the policy be enough to prove that the house is covered by insurance? - B.M. (via e-mail)

ANSWER: The answer to your question depends upon the community's governing documents. If there is no provision in the documents so requiring, I do not believe there is a basis for the association to require that you name it as an "additional insured" under your insurance policy.

However, many governing documents for homeowners associations do require naming the association as an "additional insured". In most cases, the requirement will be found in a deed restriction, such as a declaration of covenants. Such requirements are most frequently found in attached structures, such as townhouses, villas, and other forms of single family home ownership involving common walls or roofs.

In my opinion, the association would have an insurable interest in the premises, and this would validate a requirement in the governing documents that the association be named as an "additional insured." Such a clause would most typically come into play in the unfortunate event that some calamity (fire, hurricane, tornado, etc.) caused damage to more than one home. In party wall or party roof situations, unless there is a mechanism for ensuring that all of the owners are adequately insured, it may be impossible to have the building re-built, such as in a case where only three of the four adjoining owners carried adequate insurance.

You should speak with your insurance agent, I would not think it to be a big deal to name the association as an additional insured on your policy. ⚖

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Florida May Stop Regulating Managers

Legislation Pending in State House, Senate

FORT MYERS NEWS-PRESS APRIL 6, 2003

By **Joe Adams**

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We've all chuckled at the famous actor, who tells us that he gets no respect. It sometimes seems like community association managers can use the same punch-line. For the third straight year, there appears to be a full court press in Tallahassee to eliminate the regulation of community association managers, including pre-license education, background investigations, testing, post-licensure continuing education, and discipline.

Prior to 1987, community association managers (commonly referred to as CAMs) were not subject to any type of regulation. The adoption of Part VIII of Chapter 468 in 1987 changed that.

Since that time, people who have managed associations of more than fifty units, or with a budget exceeding $100,000.00, have been subject to regulation. Prior to becoming licensed, a certain amount of course-work is required. Then, the person seeking to be licensed as a CAM must submit an application to the state, be fingerprinted, and is then subjected to a criminal and background check.

The applicant must also pass a test, demonstrating minimum qualifications in the various disciplines of management. Then, they can be licensed. After licensure, managers are required to attend various continuing education courses, focusing on association operations, financial matters, maintenance, legal updates, and the like.

Managers found guilty of violating the law, or who engage in other misconduct, are subject to discipline through the Department of Business and Professional Regulation, through its Division of Professions. Discipline can include penalties up to license revocation.

In 1994, managers were successful in getting legislation passed creating the Regulatory Council of Community Association Managers. The Council, primarily made up of industry peers, has primary oversight responsibility for CAM licensing and education. The current Chairman of the Council is Reginald Billups, a Fort Myers management consultant who is well-known for his leadership in the timeshare industry. Billups, who was appointed Chair of the Council in 2002, inherited something of a mess. The Council was running at a $600,000.00 deficit and found its way onto the Governor's radar screen for elimination. In response, the Council levied a special assessment of $200.00 per CAM, which eliminated the Council's deficit.

To the surprise of some, even though the 2002 special assessment appeared to eliminate the Council's financial problems, it became clear that CAM regulation was again targeted for the axe in 2003. The Department of Business and Professional Regulation, the agency with primary responsibility over manager regulation, made it known that the Department did not feel CAM licensure, education, or discipline served the public to the extent that continued regulation was desirable. The Department's focus has shifted somewhat from the fiscal side. The Department's current position is that associations can always screen the backgrounds of their managers, that licensure does not prevent theft, and that most of the disciplinary complaints received against CAMs involve "personality" issues, presumably involving disgruntled owners.

The pending legislation implementing the deregulation plan is found at HBR 03 on the House side and

SB 1142 and SB 2086 on the Senate side. All pending legislation can be viewed at the web-site of the Florida Legislature, On-Line Sunshine at **www.leg.state.fl.us**.

The House version of this bill is expected to be heard this week, in the Business Regulation Committee. The Senate bill's procedural status is a bit less crystallized.

Associations or managers wishing to put in their two cents should contact their local legislators by telephone, letter, or e-mail.

Now on to reader mail.

QUESTION: We have an ongoing problem in our mobile home park regarding people who fail to adhere to our fifteen mile-per-hour speed limit. Our roads are owned and maintained by our homeowners' association, and we do have posted signs. Our board seeks compliance through voluntary cooperation, which sometimes works, and sometimes does not. Short of installing speed bumps, does Florida law provide any other relief - R.C.E. (via e-mail)

ANSWER: Speed bumps are one way to go. They are often controversial. Have the board check with the community's attorney to ensure there is proper authority and that no third-party easements would be impaired.

Some associations contract with the local law enforcement agency for extra policing, which can be provided, at a cost. In some cases, the local law enforcement agency will agree to have a deputy patrol the roads as part of their routine, but that tends to be more hit and miss.

Several associations I deal with have purchased radar guns. They are available at a surprisingly reasonable price. If your community's governing documents permit the levy of fines for violation of posted rules, your internal fining process may be another way to skin the cat. ⚖

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Send questions to Joe Adams by e-mail to jadams@beckerlawyers.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.beckerlawyers.com.

Revamped Amendments a Disservice to Public

Voice Your Opinion Before Senate Meeting

FORT MYERS NEWS-PRESS APRIL 13, 2003

By Joe Adams
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Once snickered at as the mecca for swamp-land deals and other cons, Florida has made great strides over the past several decades to protect its consumers against unscrupulous operators. Every so often, the State hits a major bump in the road, like the widespread fraud and corruption affiliated with rebuilding after Hurricane Andrew. In general, the Legislature has made it a priority to address such abuses and correct them to the extent a law can ever do so.

Unfortunately, with what many Tallahassee insiders call one of the best orchestrated legislative initiatives of the year, there is a move afoot to turn back the hands of time.

House Bill 1755 and Senate Bill 1286 originally started as a proposal that would require pre-lawsuit notice when a homeowner (not just condos and HOA's, all residential homeowners) claim construction defects in their home or condo property. The proposal involves a procedure that permits the contractor to inspect the allegedly defective area, and offer to fix it or pay for the problem. So far, so good.

The intrigue enters with subsequent amendments to these bills, which were not the focus of the original sponsors. These amendments take away valuable rights, and attempt to "politicize" the process governing the remedy of construction deficiencies, to the benefit of the party responsible for the defective workmanship. Among the most onerous provisos of the proposed law are the following:

Workmanship Standards: In what can only be described as a brazen proposal, the law would provide that compliance with the applicable building code automatically means that the home was constructed in a workmanlike fashion, and in accordance with industry standards of good construction practices. If a contractor building your home runs out of red roof tiles, finishes the roof with blue tiles, and leaves hardened roof mud dripping off the building, as long as the roof complies with the building code, it is also "workmanlike." The absurdity of this concept is obvious.

Condominium and HOA Claims: The proposed law would require some type of majority or super-majority vote to bring an action against a developer or contractor for defective construction, whether original construction, or repair work (painting, roofing, concrete restoration, etc.). Setting aside the fact that many associations have trouble even getting quorums, this law appears specifically aimed at the "divide and conquer" theory of liability avoidance. No one likes lawsuits, and they should rightfully be a matter of last resort. However, this aspect of the bill (in addition to being arguably unconstitutional), treats condominiums and homeowners' associations like second-class citizens, certainly different than any other corporate board in the state. This is perhaps ironic since association boards are specifically charged with fiduciary responsibility in the applicable governing statutes.

Eliminating an Association's Attorney-Client Privilege: Again, on the apparent assumption that association boards are incapable of intelligently evaluating information to make their decisions, the proposal would require the association's lawyer to send every unit owner a letter outlining what the defects are (you would think this is an engineer's job), the chances of winning the case, the pros and cons of the case, etc. This would have the effect of abrogating one of the longest-standing privileges recognized in the law, that between the attorney and the client. Will devel-

opers and contractors now keep a unit so that they can get the inside scoop on your lawyer's plans? Will lawyers, for fear of liability arising from these letters, weasel-word them to the point where they become meaningless? Again, who is this helping?

To his substantial credit, Fort Myers Representative Jeff Kottkamp (the House sponsor of the original bill), when apprised of these concerns, ensured that the House Bill was amended at its second Committee stop and these onerous requirements were stripped out of the House Bill. However, it seems likely that the proponents of these requirements will mount another effort at amending these anti-consumer clauses back on to the House version.

On the Senate side, SB 1286 is being heard in the Senate Judiciary Committee, tomorrow (Monday, April 14, 2003) at 11:00 a.m. The names and e-mail addresses of the Committee Members are Senator Dave Aronberg, aronberg.dave.web@flsenate.gov; Senator Skip Campbell, campbell.walter.web@flsenate.gov; Senator Lisa Carlton, carlton.lisa.web@flsenate.gov; Senator Charlie Clary, clary.charlie.web@flsenate.gov; Senator Alex Diaz de la Portilla, portilla.alex.web@flsenate.gov; Senator Durell Peaden, peaden.durell.web@flsenate.gov; Senator Rod Smith, smith.rod.web@flsenate.gov; Senator Alex Villalobos, villalobos.alex.web@flsenate.gov; Senator Daniel Webster, drawdy.ann.so9@flsenate.gov.

Regardless of what happens at Monday's Committee Hearing, this fight is far from over. I spend enough time in Tallahassee to know that our local legislators do like to hear from their constituents, and do pay strong heed to their word. Whether you are for or against, your voice counts, and you have the right to be heard. The local delegation can be contacted as follows, Senator Dave Aronberg (Fort Myers), Aronberg.dave.web@flsenate.gov; Representative Mike Davis (Naples), Davis.mike@myfloridahouse.com; Representative J. Dudley Goodlette (Naples), Goodlette.Dudley@myfloridahouse.com; Representative Carole Green (Fort Myers), Green.carole@leg.state.fl.us; Representative Lindsay Harrington (Punta Gorda), Harrington.Lindsay @myfloridahouse.com; Representative Jeffery D. Kottkamp (Fort Myers), Kottkamp.jeff@ myfloridahouse.com; Representative Bruce Kyle (Fort Myers), Kyle.bruc@ leg.state.fl.us; Senator Burt Saunders (Naples), Saunders.burt.web@flsenate.gov. ⚖

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Fines First Way to Enforce Rules

Collection Procedures Vary; Amounts Limited

FORT MYERS NEWS-PRESS APRIL 13, 2003

By **Joe Adams**

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Today, I'll try to catch up on responding to the many interesting questions I received from readers of the column. Keep those e-mails coming!

QUESTION: Our association has various rules. Some are contained in our recorded documents, some are made by the Board. In general, we have a friendly community, and most people go along with the rules for the sake of harmony. However, we have a couple of people who feel that the rules are made to be broken, or applied to everyone else except them. Ironically, these are the same people who complain most loudly when someone else breaks a rule. How do we enforce our rules? C.S. (via e-mail)

ANSWER: Your question, as applied to an association, is akin to "what is the meaning of life." There is no simple nor singular answer, and a book could (and probably should) be written on the subject).

Assuming that the rule was properly enacted or adopted (and there are many dynamics on that issue) and that there are no defenses to its enforcement (the most traditional being selective enforcement and "estoppel"), there are two methods of enforcing covenants and restrictions applicable to an association.

Fining is the first method, very effective in some situations and largely worthless in others. Depending upon the governance scheme (condominium or HOA), slightly different procedural concepts apply, and in both cases the governing documents must provide the authority for the fine. There are limits on the permissible amount of a fine, and on the procedures for collecting it. In condominiums, the law specifically provides that a fine cannot be collected through a lien. For HOA's, a fine could be collected through a lien if so provided in the covenants. If lien and foreclosure is not available, small claims court is the only method of collection.

The second primary enforcement tool is litigation. Although litigation should always be used as a last resort, and only after having given the offending party written notice and opportunity to stop breaking the rule, it is sometimes the board's only choice. In condominiums, non-binding arbitration is often required before court action can be taken. For HOA's, there is no arbitration program.

In both condominium and HOA legal actions to enforce covenants and rules (including arbitration), the prevailing party is typically entitled to recover their attorneys fees from the non-prevailing party. This can be a substantial "sting" for your rule-breakers.

The best way to adhere compliance to the rules is through communication and education. Having an up-to-date set of understandable regulations, which are periodically reinforced with the owners, is your best bet.

QUESTION: I have a question that is very perplexing to me. As a new member to our condominium board, I have been told that petitions from unit owners do not need to be taken seriously. What should be done with petitions, shouldn't the board listen to owners? C.R. (via e-mail)

ANSWER: There are two answers to your question, the "political" answer and the "legal" answer.

Politically, petitions are the owners' means of formally presenting some opinion or wish to the board. If owners have gone to the trouble of seeking the board's consideration of an item through the petition process,

then I believe that the board should give the owners the courtesy of formally addressing the item at a meeting of the board.

On the legal side of the equation, the board's responsibilities depend upon the form of the petition, what is being asked for, and the provisions of the governing documents. In some cases, the board may be required to call a special members' meeting, and take an owner vote on a particular question. Again, depending upon the interplay between the facts and the documents, the vote may be binding or non-binding on the board.

In summary, I do not think that petitions should be "ignored," although what you should do or must do will need to be looked at on a case by case basis. ⚖

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Cigarette Use in Condominiums a Smoking Issue

Courts May not have Addressed Question Yet

FORT MYERS NEWS-PRESS APRIL 20, 2003

By **Joe Adams**

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During my recent trips to Tallahassee regarding condominium and homeowners' association legislation, I had the opportunity to observe some of the pitched battles going on in the Legislature over implementation of the recent constitutional amendment banning smoking in restaurants, and a more ambitious proposal to extend the ban to bars as well.

Coincidentally, at least according to the industry e-mail groups I subscribe to, the same debate is occurring all over the country regarding multi-family housing, including condominiums.

Smoking tobacco is, in and of itself, a lawful activity. If your "home is your castle," shouldn't you have the right to engage in lawful activity there? When your cigar or cigarette smoke wafts into the neighboring lanai or home, do you lose those rights?

The Florida Clean Indoor Air Act provides guidance for common areas, but is conspicuously silent when use of the homes (units) is involved. The law specifically defines "common areas" in a condominium to include the interior hallways, corridors, lobbies, stairwells, and conference rooms. These areas must always be "smoke free." All other indoor common areas must also be no-smoking, unless the board designates a smoking area. Smoking may occur outdoors, unless the board adopts a no smoking policy with regard to outdoor areas.

Although many have asked about the extent of an association's right to regulate smoking in private quarters, the courts have not, to my knowledge, addressed the question. According to a 1998 Georgia Law Journal article, cigarette smoking is believed to cause half of residential fires, and accounts for twenty-eight percent of household fire deaths. Since condominium restrictions involving "health, safety, and welfare" are routinely upheld, the argument in favor of authority to regulate can certainly be made.

Utah's condominium statute was recently amended to specifically permit restrictions involving tobacco use. Further, the Utah Legislature made a specific finding that tobacco smoke that drifts into any "residential unit a person rents, leases, or owns" constitutes a "nuisance."

In many types of housing, particularly condominiums, the act of smoking can frequently force second-hand smoke on non-consenting neighbors. The classic example is the unit dweller whose wife makes him smoke his stinky cigars out on the lanai, so as not to smell up the apartment. Unfortunately, the configuration of the building causes the smoke to billow up to the lanai of the neighbor above, making the upstairs neighbor a prisoner in their own home. Adding a bit more spice to the sauce, what if the upstairs neighbor suffers a respiratory condition (such as asthma) and demands that the association's board "accommodate" his "disability" by telling the downstairs neighbor to cut out the stogies?

Until these issues are addressed by the legislature and/or the courts, it is anyone's guess as to how the law will develop. In my humble opinion, a board-made rule prohibiting smoking within the private home would be suspect, or at least subject to strict scrutiny on review by a court. Conversely, an amendment to a declaration or other deed restriction would probably stand a reasonably high chance of being upheld. Of course, there is always the question of how to detect and verify violations, and the need for enforcement.

Maybe the next Surgeon General will need to start adding warnings on the side of cigarette packs that you can't do this at home.

Now on to reader mail.

QUESTION: Is it possible for our condominium association to post the names of those who are delinquent in the payment of maintenance fees? I realize that we cannot cut off their right to use amenities. Do you have any other suggestions how to deal with delinquent members? B.W. (via e-mail)

ANSWER: While it is certainly "possible" to publish a "dunning list," I very strongly recommend against it. Your association could be subject to potentially significant liability under fair debt/fair credit reporting laws, on the basis of defamation, or perhaps invasion of privacy. In my opinion, it is clearly not worth the risk.

Any unit owner who wishes to review the association's official records may do so, and that would include a ledger card for each unit that would show assessment payment status. If an owner requests access to this information, you must provide it to them, but do not go out of your way to embarrass those who are delinquent.

You are correct that a condominium association cannot suspend the right to use common facilities due to delinquency. As unfair as that may seem, that is the law. Conversely, a homeowner's association can suspend certain rights (including voting rights) for non-payment, provided that certain procedures are followed.

The best thing that an association can do to protect itself is to ensure that it has a good set of governing documents. The documents should provide a short "grace" period for delinquencies (I recommend no more than 10 or 15 days) and then provide for the assessment of interest at the maximum legal rate (eighteen percent) and also permit the charging of late fees. If so provided in the documents, a late fee for condominium assessments may be charged up to $25.00 per installment, or five percent of the installment due, whichever is greater.

If the association has good "teeth" in its documents, and takes timely action to enforce payment obligations, owners will learn that their obligations to the association must be taken seriously. Good luck. ⚖

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Battle Over Regulation of CAMs far from Finished

Managers Keep Guard up after Latest Decision

FORT MYERS NEWS-PRESS APRIL 27, 2003

By **Joe Adams**

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It appears that once again, licensing and regulation of community association managers (CAMs) has been saved from the axe.

As reported in a recent column (Florida May Stop Regulating Managers - April 6, 2003), the Governor and Department of Business and Professional Regulation had initiated a full-court press to eliminate CAM licensing and regulation.

According to Reg Billups, chairman of the CAM's governing body, though the pro-regulation proponents prevailed in this skirmish, the battle is far from over. Billups, a Fort Myers based timeshare executive, says: "The Legislature heard the voice of the consumers." However, in Billups' view, "managers can't let their guard down."

Travis Moore, the registered lobbyist for the Community Associations Institutes' Florida Legislative Alliance stated: "The Department has made it clear that everything is on the table again next year." In Moore's opinion, the only way to sustain the CAM program on a long-term basis is to ensure that it is economically viable (completely supported by fees from licensees) and that legislators understand the importance of licensure and regulation from the eyes of constituents, the association members and their boards.

As the old saw attributed to Mark Twain goes: "No man's life, liberty, or property are safe while the legislature is in session." While this may be true, it seems that CAM licensure is safe for another year.

Now on to reader mail.

QUESTION: Our condominium association recently had a large special assessment (over $7,000.00 per unit) for painting and repairs. Included in this work were painting and repairs to a free-standing structure containing eight garages, which are not owned in common, but by individual unit owners. After the work was completed, our board sent each garage owner a separate bill for the work performed on their garage. I own a garage. Does the association have the right to charge me for work done without my knowledge and consent, and am I being charged twice for the same thing? M.B. (via e-mail)

ANSWER: It depends. I assume that the garage structure is what is called a "limited common element." What this means is that although all unit owners actually "own" an undivided share of the structure, only eight units are given the right to use it.

The exclusive right of use to a limited common element is what is called an "appurtenance," and is part of the "bundle of rights" that is transferred along with the title to your unit.

The Florida condominium statute, at Section 718.113, addresses maintenance, repair, and replacement of limited common elements. The short answer is that the declaration of condominium can allocate limited common element maintenance in one of three ways.

First, the cost can be allocated to all unit owners, and the cost is shared by all (regardless of whether or not they have the right to use the garage).

Secondly, the declaration of condominium require only those who benefit from the use rights to be responsible for doing the maintenance work.

Thirdly, the declaration of condominium can require the association to maintain the structure, but only at the expense of the benefiting owner(s). This is sometimes referred to as a "limited common expense." If

your documents provide for this third option, then, assuming proper procedures set forth in the statute and administrative rules were followed, the board's actions were proper. Otherwise, they were not, as the expense would have been passed on to all owners, or it would have been your responsibility to do the work.

QUESTION: Our condominium association wishes to install a flagpole on the common elements. Would this require board action or a unit owner vote? R.R. (via e-mail)

ANSWER: Good question. Although the Florida condominium law permits unit owners to display the American flag on condominium property, there is no corresponding authority granted to the board of directors. As bizarre or unpatriotic as it may seem, the installation of a flagpole on common property would probably be considered a "material alteration or substantial addition" to the common elements. Under Florida law, the declaration of condominium must specify the procedure for altering or adding to the common elements. Most modern or updated declarations will give the board of directors a certain level of authority (typically a dollar amount or a percentage of budget) before a unit owner vote is required.

Some older documents are either silent on the issue of material alterations (in which case seventy-five percent of the entire voting interests must approve the alteration) or require a high percentage vote.

Your association's attorney should be able to quickly review the condominium documents and render an opinion on this. Even if a vote is required, I would think this to be one issue where obtaining unit owner support should not be too difficult. ⚖

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Legislature Pledges Allegiance to Flag

In Today's World, any Flag Bill is Going to Fly

FORT MYERS NEWS-PRESS MAY 4, 2003

By **Joe Adams**

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As the old saw goes, fanciers of the law and sausage should watch neither being made.

At press-time, it appears that the slug-fest known as the 2003 Session of the Florida Legislature will adjourn on time, on Friday, May 2. What is unclear is whether the most significant bills affecting community associations will clear both legislative chambers, the Senate and the House, and if they do, whether they will be approved by the Governor.

Over the next several weeks, this column will focus on the results of the 2003 legislature. For community associations, the new laws (and the proposed laws which did not pass) can be dubbed the good, the bad, and the ugly.

Last week, we reported on the de-railing of efforts to eliminate licensure for community association managers. Today, we will take a look at a piece of no-brainer legislation, this year's "flag bill" for community associations.

While most support the right to fly Old Glory in our communities, it seems that legislators have been tripping over themselves to get "more patriotic" flag laws applied in associations. Between the World Trade Center tragedy and the current war in Iraq, even if there are legitimate comments about the scope of legislative proposals, no one seems to be willing to speak up, for fear of being painted as "anti-flag." Thus, it is a near certainty that any "flag bill" is going to fly.

This year's flag bill is found at House Bill 181 and Senate Bill 260, and has passed out of both chambers. There is little doubt that it will be signed by the Governor and will become law on July 1, 2003.

Currently, Section 718.113(4) of the condominium statute provides that any unit owner may display one portable, removable United States flag in a respectful way, regardless of any declaration, rule, or other requirement dealing with flags or decorations.

The new law adds certain armed service flags as permissible flags that may be flown by unit owners. Specifically, provided that it is no larger than four and one half feet by six feet, flags representing the United States Army, Navy, Air Force, Marine Corps, and Coast Guard may be flown on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day.

So the next time someone in your condo says there ought to be a law, if they are talking about flags, there probably is.

Now on to reader mail.

QUESTION: I love your column, I never miss it. My question is what is the eighteen percent penalty fee allowed by the condominium law, is it for late payment of assessments? Also, have you ever heard of a "supervisory fee" that an association can charge to owners who rent their units, since the association must spend extra time and money looking after the investors' interests? - B.L. (via e-mail)

ANSWER: Thanks Mom, keep those e-mails coming.

The eighteen percent "penalty" you have referred to is the statutory rate of interest that can be charged when an owner does not pay their assessments on time, whether the regular (monthly or quarterly) assessment, or special assessments. In order for interest to be charged, the assessment must be "delinquent."

When delinquency occurs will depend upon how your condominium documents are written. Most modern documents only permit a ten day "grace period," al-

though older documents often permit lengthier grace periods. Also, the eighteen percent rate of interest is the "default" rate set by statute, and many older documents set a lower rate of interest, which would be applicable.

It is also important to note that if the condominium documents so provide, on top of interest, an association may charge an administrative "late fee" (different than interest) for delinquent payments. The late fee cannot exceed $25.00 per installment, or five percent of the installment amount due, whichever is greater. In most cases, the administrative late fee is a substantially heftier incentive for timely payments than per-annum interest, even when interest is at eighteen percent.

With respect to your question about a "supervisory fee," many condominium boards feel that rental units require more servicing, are responsible for more damage to common property (moving trucks, etc.) and have a greater financial impact on the community.

Whether that is true or not I will leave to others. However, the law is clear that no type of "renters' fee," even if authorized by the governing documents, is permissible. The association may charge a fee in connection with lease approvals (if permitted by the condominium documents) up to $100.00 maximum per lease transaction. No other fee is permissible, nor are differential assessments for those who rent, "rental surcharges," and the like. ⚖

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Bill Enforces Disclosure of Deed Restrictions

Law Would add Penalty for Failure To Comply

FORT MYERS NEWS-PRESS MAY 11, 2003

By Joe Adams
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Today is the third part of a series regarding the 2003 Florida legislative session. In our first installment, we looked at the defeat of efforts to eliminate licensure of community association managers. Last week's column involved a discussion of the new "flag law" for condominiums. Today, we will take a look at disclosure laws applicable to homeowners associations.

CS/HB 1551/CS/SB 1220 has been approved by the legislature and will amend Section 689 of the Florida Statutes. Like last week's "flag bill," all new community association laws are still awaiting action by the Governor, and are subject to veto. Like the "flag bill", this one is not likely to be vetoed.

The new law would become effective July 1, 2003, and is intended to increase a prospective purchaser's knowledge that he or she may be buying into a deed restricted community.

For more than ten years, the Florida condominium law has contained substantial pre-sale disclosure obligations. The condo law includes a three day "cooling off period," which begins to run after signing a contract for purchase of a unit, and the delivery of certain documentation to the prospective purchaser. (Interestingly, that is the same cooling off period for buying a handgun, perhaps recognizing that a condominium unit can be a dangerous instrumentality if it falls into the wrong hands.)

For non-condo communities encumbered by covenants (usually generically referred to as homeowner associations, or HOA's), disclosure laws have been much less meaningful. Although Chapter 689 was amended a number of years ago to require purchase agreements to disclose the existence of restrictive covenants, there has never been a penalty in the law for failure to comply with it.

The new statute, paralleling the condominium counterpart, requires all agreements for the sale of property encumbered by covenants to contain a clause, in conspicuous type, indicating that if the disclosure summary required by the law has not been provided to the prospective purchaser before executing the contract for sale, the contract is voidable by the buyer by delivering to the seller notice of intent to cancel within three days after receipt of the disclosure summary, or prior to closing, whichever occurs first. Closing the deal waives any objection by the buyer, although any other purported waiver of voidability rights is ineffective, under the law.

If you listen to association boards, one of their biggest gripes is that owners never read the governing documents to educate themselves about what is permitted and prohibited in the community. Homeowners in disputes with their associations often lament that no one ever told them there were so many rules. Perhaps this law will serve as an ounce of prevention in a case or two, and unlike some of the laws foisted on associations, prevent more problems than it creates.

Now on to reader mail.

QUESTION: My husband and I recently moved into a condominium consisting of eight units, only three of which are occupied by full-time residents. My husband and I reluctantly agreed to serve on the board and have learned that every owner seems to have a different opinion on every issue. We want to know how to learn the proper procedures and the best source for information. Any advice would be greatly appreciated. C.G. (via e-mail)

ANSWER: This column runs every week, and covers a variety of issues that are of interest to association directors. Past editions of the column, archived for

the past two years, are available on the Internet, as noted below.

The best primer on condo board service is a book called The Condominium Concept, written by Attorney Peter Dunbar. It is available at major book stores and on line book-sellers for about $20.00.

Even a small association can establish a relationship with a law firm which handles community association law. There are several such firms in this area, and most of them provide their clients with a monthly newsletter, seminars, and other opportunities to keep up-to-date with the laws.

Another good source of information is the local chapter of Community Associations Institute. The local chapter's information, including membership information, can be obtained from its web-site at www.southgulfcoastchaptercai.com.

The local CAI chapter, local law firms, and the state's regulatory agency sponsored numerous workshops on various association issues (law, accounting, insurance, maintenance, management, etc.). Most of these are publicized in business announcements in the local newspaper. Good luck. ⚖

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Law Catches Up With Technology

Meeting Notices can be Posted by E-Mail, on TV

FORT MYERS NEWS-PRESS JUNE 8, 2003

By **Joe Adams**

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Today is the seventh part of a series regarding 2003 community association legislation.

Past installments have looked at activities of the 2003 Florida Legislature involving community association manager licensing, the new condominium "flag law," new disclosure obligations in homeowner associations (HOA's), amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, and amendments to the condominium statute regarding mortgagee questionnaires. Today, we will continue our review of the year's major condo bill, Senate Bill 592, which became effective on May 21, 2003.

Today's focus involves the initiative of the Community Associations Institute in the passage of legislation permitting the use of "electronic" notice in the affairs of community associations. The new law applies to all forms of community associations, condominiums, HOA's, and cooperatives.

Obviously, the advent of e-mail, faxes, chat rooms, message boards, and interactive web-sites has forever changed the face of communication in our society. The law, a creature of custom and tradition, typically tends to lag behind the rest of society when dealing with matters of technological advancement. For example, you will not find a clear statement anywhere in the condominium statute that facsimile (fax) proxies are valid, although they are routinely accepted as such.

The benefits of electronic communication in community associations are self-evident. Some day, associations will collectively be able to save millions of dollars in paper and postage costs, using electronic media instead of "snail mail."

However, the philosophy of the current legislation is that "baby steps" must be taken before more substantial leaps are appropriate. Therefore, for example, the new law does not address more complex matters, such as "electronic voting," which is now common in publicly traded corporations.

Rather, the new statute deals with "one-way" notice, that is notice from the association to its members (homeowners or unit owners). Electronic notice is defined as any form of communication not directly involving the physical transmission of paper, but which may be directly reproduced to paper, in a comprehensible and legible form. Facsimiles and e-mails are the most obvious examples of electronic notice.

In order for electronic notice from an association to its members to be permissible, the member must consent in writing to the receipt of electronic notice. Such consent may be revoked at the discretion of the member. Electronic notice is deemed delivered when actually transmitted. Electronic notice addresses must be maintained among the official records of the association, and are to be removed from the official records when permission to receive electronic notice is revoked by the member.

The new law applies to all members' meetings, such as special meetings or annual meetings. Further, in situations where owners are entitled to be mailed notice of board meetings (in condominiums, special assessments and certain amendments to the rules), electronic notice may be used in lieu of mailing.

The second significant change to the community association statutes involves the use of electronic media for posting notice of board meetings. Although the laws are slightly different in each governing statute, every community association in Florida is generally required to post notice of board meetings on the property.

The new law permits the board to adopt a rule that would allow posting notice of board meetings on closed circuit television, rather than (or in addition to) the traditional paper notices posted on bulletin boards. Many community associations, as part of their cable television package, receive a dedicated "community channel" which could be used for this purpose.

The board's rule must provide for broadcasts of the notice and agenda at least four times every broadcast hour, in a manner that would enable the average reader to read and comprehend the documents. The same procedure can be used for notices of owners' meetings that are required to be posted.

It is important to note that the bylaws for the association must authorize the use of electronic notice. For most associations, this will require an amendment, which may be something to look at during the dog days of summer, while getting ready for the upcoming "season," and the plethora of meetings that go along with that time of year.

Now on to reader mail.

QUESTION: The president of our condominium association recently resigned from the board. A question has arisen as to whether the board can appoint this person as our association's treasurer, even though he is not on the board. What is your opinion. O.B. (via e-mail)

ANSWER: There is no requirement that an association's officers also be directors, unless the bylaws require otherwise. In the absence of a bylaw restriction, there is no problem with having a non-board member serve as an officer. You should check to make sure he or she is added to the association's fidelity bond and all other applicable insurance policies.

QUESTION: Can a homeowner's association, through its board, violate the provisions of the HOA statute with impunity, or will courts enforce these provisions? I understand that there is no state agency that enforces HOA documents, as is the case with condominiums. R.K. (via e-mail)

ANSWER: You are correct, there is no enforcement agency that oversees HOA's. The pros and cons of an HOA enforcement agency have been debated for years. I personally doubt that it will ever come to pass.

In general, provisions of the governing statute for HOA's can be enforced through court action, and the winning party is entitled to recovery of their attorney's fees from the losing party. ⚖

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Fire Safety Law a Study in Compromise

Association under no Legal Obligation

FORT MYERS NEWS-PRESS JUNE 22, 2003

By **Joe Adams**

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Today is the ninth part of a series regarding 2003 community association legislation.

Past installments have looked at activities of the 2003 Florida Legislature involving community association manager licensing, the new condominium "flag law," new disclosure obligations in homeowner associations (HOA's), amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, and amendments to the condominium statute regarding mortgagee questionnaires, electronic notice of association meetings, and condominium insurance. Today, we will continue our review of the year's major condo bill, Senate Bill 592, which became effective on May 21, 2003.

Today's focus involves amendments to the "fire safety" clause of the condominium statute, Chapter 718 of the Florida Statutes.

As part of the sweeping changes to Florida building codes which were enacted by the Legislature in 1998 (and deferred until 2000), National Protection Fire Association (NFPA) 101 Life Safety Code was adopted as the law of Florida. NFPA's Life Safety Code requires high-rise buildings (defined as buildings exceeding seventy-five feet in height) subject to limited exemptions, to retrofit fire sprinklers throughout the building, no later than the year 2014.

During the past couple of years, fire districts across the State began applying the new law to condominium buildings, requiring associations to sign letters committing to the retrofitting within the statutorily prescribed deadline.

As associations began to realize the significant costs affiliated with retrofitting fire sprinklers in condominium buildings, as well as potential disruption of residents' living quarters, a movement to seek relief from the law was hatched. Suffice it to say that the so-called "fire safety issue" became one of the hottest topics (pun intended) during the 2003 Legislative Session. Television news stations across the State reported on the issue with regularity, as did many major newspapers.

Condominium owners sought the right to "opt out" of the law by taking a vote. Firefighters' unions, plumbers' and pipe-fitters' unions, and the State's Fire Marshalls Association fought any effort at change.

Several versions of proposed laws wound through legislative committees, each with numerous amendments and rancorous hearings. To put it mildly, it was something of a circus. Finally, a "compromise bill" was passed.

As the old saw goes, fanciers of the law and sausage should watch neither being made. The final version of the fire safety bill is definitely an interesting piece of sausage, the highlights of which are:

Opt-Out Vote: Retaining the original concept of the proposed law, unit owners may vote, by a two-thirds vote, to "opt out" of the retrofitting law. The vote is based upon all voting interests in the affected condominium (for multi-condominiums) not just those who vote.

Common Area Retrofitting: Notwithstanding the right to opt-out of retrofitting fire sprinklers in units (apartments), associations cannot opt out of retrofitting in "common areas," which are defined as any enclosed hallway, corridor, lobby, stairwell, or entryway.

Voting Procedures: A vote to forego retrofitting may not be obtained by proxy, but must be ob-

tained by votes personally cast a meeting or by execution of a written consent of the member.

Recording Notice of Opt Out: If an association opts out of the fire safety laws, it must record, in sixteen point type, a notice to that effect in the local public records, within twenty days after the vote.

Disclosure to New Owners and Tenants: The sixteen point type notice referenced above must be provided to a new owner prior to closing, and must also be provided by a unit owner to a renter prior to signing a lease.

There are many idiosyncrasies in the final version of the law both technical and practical In litigation, they say a good settlement is one whether neither side is happy. Using this standard, the new fire safety law is definitely a good piece of legislation.

Now on to reader mail.

QUESTION: When a person rents out his condominium unit, does he or she give up their rights to use the common element facilities, like the swimming pool? Can the board permit use of such amenities simultaneously by the unit owner and the tenant? I thought there was a rule that once you rent out your property, you give up your right to use the common facilities. M.L. (via e-mail)

ANSWER: This issue is addressed by the condominium law at Section 718.106(4) of the Florida Statutes. The law provides that when a unit is leased, a tenant shall have all use rights in the association property and those common elements otherwise readily available for use generally by the unit owners, and the unit owners shall have no rights, except as a guest, unless such rights are waived in writing by the tenant. The law goes on to provide that the association shall have the right to adopt rules to prohibit dual usage by a unit owner and a tenant of association property or common elements.

There are a couple of loopholes in the law, as written. First, the tenant can presumably invite the unit owner to use the common facilities as the tenant's guest, subject only to whatever rules generally apply to residents having guests, and guest usage of common amenities.

The second loophole is the provision which states that if the tenant waives the right to use a particular common area, then the unit owner retains the right of use. Thus, you could have a situation where a tenant can swim but not use the tennis court, and the owner can play tennis but not swim. Try policing that.

The law clearly evidences an intent to prohibit dual usage, presumably to avoid over-taxing the facilities, including potential parking problems. ⚖

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Amendments Clear Up Condo Statute "Glitches"

Issue-Specific Sections Clarify Ambiguous Laws

FORT MYERS NEWS-PRESS JUNE 29, 2003

By **Joe Adams**

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Today is the tenth part of a series regarding 2003 community association legislation.

Past installments have looked at activities of the 2003 Florida Legislature involving community association manager licensing, the new condominium "flag law," new disclosure obligations in homeowner associations (HOA's), amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, and amendments to the condominium statute regarding mortgagee questionnaires, electronic notice of association meetings, insurance, and fire sprinkler retrofitting.

Today, we will continue our review of the year's major condo bill, Senate Bill 592, which became effective on May 21, 2003. Today's focus involves amendments to several "miscellaneous" sections of the condominium statute. These amendments are fairly issue-specific and address certain "glitches" in the condominium statute:

- **Waiver of Financial Reporting Requirements:** Depending upon the level of annual income, most condominium associations are required by law to have a year-end financial report which is either compiled, reviewed, or audited. This year-end financial report can be waived (excused) by a majority vote of the members (although some minimal level of year-end financial report must be produced under any circumstances). Due to a technical error, a 2000 "Reviser's Bill" eliminated the provision in the law that said that financial reporting requirement waiver votes could be conducted by use of a limited (sometimes called directed) proxy. The amendment made it unclear whether only owners attending meetings in person could vote on financial report waivers, or if general proxies could be used. The 2003 amendment restored the inadvertently stricken language, and clarified that financial reporting waivers must be conducted by votes made either in person, or through the use of a limited proxy.

- **Charges for Estoppel Certificates:** The condominium law provides that there can be no charge in connection with the sale or transfer of a unit, except when a transfer approval fee is authorized by the governing documents, and then the fee is limited to $100.00. A standing question has been whether this limitation on transfer fees applies to charges by associations (or their management companies) in issuing so-called "estoppel certificates." An estoppel certificate is basically a statement of the unit's financial account status, and must be produced by an association within fifteen days of a written request. Typically, estoppel certificates are used when units are sold, for pro-rating assessments on the closing statement. Many associations and management companies have routinely charged an administrative fee for preparing estoppel certificates. The 2003 amendment to the condo statute clarifies that an association may charge a "reasonable" fee for the preparation of such a certificate. Obviously, what is "reasonable" is in the eyes of the beholder, although it seems that charges in the one hundred dollar range are the industry custom in many areas of the state.

- **Statute of Limitations:** There has always been a debate as to the applicable statute of limitations for enforcing the provisions of condominium documents (declaration of condominium, by-laws, or rules and regulations). Some courts have ruled that enforcing documents is the

legal equivalent of "specific performance of contract," which carries a one-year statute of limitations. Other courts have ruled that most association actions are subject to the general five-year statute of limitations for actions based upon a written contract. This amendment to the condominium statute specifically states that actions to enforce condominium documents are not actions for "specific performance" and therefore do not carry a one-year statute of limitations. It is important to note that an association's time limit to act in a particular situation may be shorter than the applicable statute of limitations, and that different statutes of limitations apply to different types of disputes.

These amendments, while a mixed-bag, are all helpful changes from the perspective of associations, their managers, and their boards.

Now on to reader mail.

QUESTION: I am the president of a thirty-three unit condominium. One of our owners recently purchased three units, bringing his total ownership to eight. Are there any laws limiting this owner's voting power, or how many units he can purchase? Many members and our board have become concerned about this issue.

ANSWER: In most condominiums, each unit is allocated one vote, and this owner would be entitled to cast eight votes. These voting rights could not be diluted without the affected owner's consent (which is obviously unlikely), plus the consent of all other unit owners (and their mortgage holders).

There is no law that I am aware of which limits how many units any particular person may own.

If concentrated ownership has become a matter of concern, your board should consult with your legal counsel about an amendment to the condominium documents. In my opinion, as long as this owner's right to maintain ownership of his current eight units is "grandfathered," a prospective limit on the number of units any one person (or entity) can own is enforceable. This would have the effect of prohibiting this particular owner from buying any more units, and also prevent similar situations in the future. As there are many potential loopholes in such an amendment, it should be drawn by qualified legal counsel, who should also guide your association through the adoption process. ⚖

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Tough Clean Air Law Affects Associations

If it has One Part-Time Employee, it's Subject to Act

FORT MYERS NEWS-PRESS JULY 6, 2003

By **Joe Adams**

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Today is the eleventh part of a series regarding the 2003 legislative session and its effect on community associations. Past installments have looked at activities of the 2003 Florida Legislature involving community association manager licensing, the new condominium "flag law," new disclosure obligations in homeowner associations (HOA's),amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, and amendments to the condominium statute regarding mortgagee questionnaires, electronic notice of association meetings, insurance, and fire sprinkler retrofitting.

Today's column looks at new changes to an old law that have received a lot of press, but might not immediately come to mind as important to your community association. I am referring to the latest version of the Florida Clean Air Act. This Act implements Section 20, Article X of the State Constitution, which was supported by more than 70% of Florida voters.

Florida is the latest state to enact an aggressive clean air law, aimed at protecting people from dangers associated with secondhand smoke. The new law became effective July 1, 2003, and includes sweeping changes including a total ban on smoking in restaurants and bars where more than "incidental" food is served. As expected, the majority of the debate and press on this issue has been devoted to its impact on restaurateurs and bar owners. However, this new law reaches beyond your local watering hole and creates matters of immediate concern for condominiums, cooperatives, and homeowners' associations.

The old Act prohibited smoking in any enclosed common areas such as hallways, lobbies, or elevators. The new Act expands this prohibition to include smoking in any "enclosed indoor workplace." While this obviously bans smoking in your association's management office, the Act includes any place where one or more persons engages in work, and which place is predominantly or totally bounded by physical barriers.

This means that if your neighborhood association has even one part-time employee, it is subject to the Act. Even a private office, where only one person comes and goes, is covered under the Act. It doesn't matter if work is occurring at the same time as the smoking takes place. Once an area is used for "work," it is covered under the Act. Also, don't think that just because your groundskeeper is a volunteer that the Act doesn't apply. The Act applies to employees, independent contractors, agents, partners, proprietors, managers, officers, directors, apprentices, trainees, associates, servants, volunteers, "and the like."

Additionally, the definition of "enclosed" doesn't necessarily mean that the area must be bounded by solid walls and a ceiling. The "physical barriers" enclosing the workplace can be open windows and even screens. Therefore, a maintenance shed or garage is covered under the Act. Although the Act has not yet been tested in the courts, the most conservative interpretation of the Act would be to prohibit smoking anywhere that could be considered to be a "workplace" and that is "enclosed" (as defined by the Act). That means that if your association has a volunteer maintenance person who works part-time and cleans a screened-in lanai area adjacent to your swimming pool, then that screened-in lanai may no longer be used as a smoking area -- even if the maintenance person has that particular day off.

Your neighborhood association may have a clubhouse with a bar inside it. Although this may technically be a "private club," if anyone works there, anyone at all, even cleaning people, then this becomes a closed indoor workplace. The only way that this could be

exempt from the law is if the clubhouse bar area could be considered a "stand alone bar." By the Act's definition, this means that the area must be a licensed premises devoted predominantly or totally to serving intoxicating beverages, and any serving of food is merely incidental to alcohol sales.

The Act does not reach so far as to prohibit smoking in private residences unless the residence is used commercially to provide child care, adult care, or health care. Therefore, if a resident smokes in his or her own residence, the fact that a home health care professional visits to treat the resident does not transform the residence into a "workplace" under the Act.

Neighborhood associations should take careful notice of the new Act. It provides for fines that increase with each violation. With all of the expenses associated with running a neighborhood association, no board of directors wants to be in the position of levying a special assessment on its residents to pay for Clean Air Act violations. ⚖

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Notify Builder 60 Days Before Suing

FORT MYERS NEWS-PRESS JULY 13, 2003

By **Joe Adams**
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Today is the twelfth (and final) part of our series regarding the 2003 Legislative Session and its effect on community associations. Past installments have looked at community association manager licensing, the new condo "flag law," new disclosure obligations in homeowners associations (HOA's), amendments to the HOA statute, amendments to the Florida Marketable Records Title Act, amendments to the condominium statute regarding mortgagee questionnaires, electronic notice of association meetings, insurance, and fire sprinkler retrofitting, and the effect of Florida's new smoking ban on community associations.

Today's column looks at a new law which requires individual homeowners and community associations to promptly notify builders and developers of any claims for residential construction defects prior to initiating a lawsuit for damages.

Under the new law, Section 558.001 of the Florida Statutes, a "claimant" (homeowner or community association) claiming damages due to a construction defect must provide the "contractor," with written notification of the alleged defect at least 60 days before filing a lawsuit, setting forth the alleged construction defects in reasonable detail. Under the scope of the law "contractor" is defined as anyone engaged in the business of selling a dwelling and would therefore include a developer, builder, general contractor, or design professional. Within 5 business days after receiving notice of the claim, the contractor has the right to inspect the premises and (subject to mutual agreement) perform what is known as "destructive testing." Any subcontractors that the contractor feels may be responsible must then be notified and they too have rights to inspect the premises.

Following this opportunity to inspect, and not later than 25 days after receiving the notice of a claim, the contractor must serve a written response to the claimant. The contractor's written response must either (a) include a written offer to repair the alleged defect at no cost to the claimant; (b) include a written offer to compromise the claim by monetary payment within 30 days; or (c) dispute the claim. An association is then given 45 days to accept or reject the offer. If an individual homeowner files a claim, they are provided with 15 days to accept or reject an offer. It is only after this process is exhausted that a party can initiate legal action against the contractor. If a claimant files an action without first complying with the statutory requirements, the statute requires the trial court to "abate" or stop the action, without prejudice. If this occurs, the lawsuit may not proceed until the claimant has complied with the requirements of the law.

It is also noteworthy that the statute encompasses not only original construction but also "remodeling," which could mean repair work to association buildings and improvements such as concrete restoration, re-roofing and painting. There are no dollar thresholds on what work falls within the scope of the statute and, therefore, it appears that **any** residential construction work would be subject to the requirements of the statute.

As a result of the new law, every construction contract between an association and a developer, contractor, design professional, supplier and subcontractor must contain a disclosure statement explaining the law.

An association must be mindful of the time deadlines associated with the statute. Once a claim letter is served, the association must be prepared to arrange for access to enable the recipients of the claim letter to inspect the dwelling. Efforts should be undertaken to resist requests to perform destructive testing unless parameters for testing have been established such as

arrangements to repair the areas, arrangements for security to guard against theft and damage during the testing process, and requiring the testing party to carry necessary insurance. These issues must be agreed upon between the parties prior to testing.

Based upon the statutory time deadlines, it is likely that the recipients of the claim letter will be unable to conduct an inspection in 5 business days. Consequently, in many instances, the inspection will likely not take place. However, there is likely to be some response to the offer and care should be undertaken by an association or homeowner to timely accept or reject it. Accordingly, boards of directors should be prepared to meet on an immediate basis to timely decide on what action will be taken with respect to an offer. This is especially true during the summer months.

Someone recently asked me to sum up the 2003 legislative session as relates to community associations. Immediately, an old movie title came to mind. I hereby dub legislation from this session as "The Good, The Bad, and The Ugly."

Now on to reader mail.

QUESTION: Can a homeowner's association make a ruling that yellow ribbons are allowed at the club house entrance, but not allowed by homeowners in their yard? Can the Homeowner's Association make decisions like this without a vote from the homeowners? **P.F. (via e-mail)**

ANSWER: You might have read my recent article, **Legislature Pledges Allegiance to Flag**, 5/4/03. In it, I reported that the latest Florida Flag Bill expanded the list of items that neighborhood associations could not prohibit homeowners from displaying to include the U.S. Flag (in a respectful manner) and armed services flags (on certain holidays). Despite the legislature's patriotic intent, they did not expand the law to include yellow ribbons. As long as your association's governing documents give the Board the authority to regulate what residents display in their yards (as many do), then the Board's actions are probably permissible. ⚖

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Take Time to Review Laws on Budget, Reserve Funds

State has Pared Down Manual on the Topic

FORT MYERS NEWS-PRESS JULY 20, 2003

By **Joe Adams**
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Southwest Floridians who are sweating out another sweltering summer are always looking for ways to beat the heat. Chilling out in the air-conditioned indoors, chipping away at the summer reading list is a favorite past-time for many.

For condo board members and managers, a new book recently released by the state agency which regulates condominiums should be added to the list of summer reading materials. Budgets and Reserve Schedules, A Self Study Manual for Beginners was originally published by the Division of Florida Land Sales, Condominiums and Mobile Homes in 1995. The original version was 202 pages and could be obtained from the Division at a cost of $5.00.

The Division has issued a revised version of the manual, which has been pared down to about 75 pages. Better yet, the new edition is available to condominium associations free of charge (or at least, for no additional charge than the four dollar per unit per year fee paid to the state by each association).

Check the Division's web-site at www.state.fl.us/dbpr/lsc/condominiums/publications (where the manual can be downloaded) or contact the Division's Customer Service at 850-488-1122 for a hard copy.

Now on to reader mail.

QUESTION: We own a condo unit in Southwest Florida. The building is a "55 and over building." One of the Condo Association rules is that children under the age of 16 cannot be permitted as permanent residents. A local realtor with whom I am about to list the unit for rental purposes told me that she could not list it with this rule because the rule is discrimination on the basis of age. The Condo board said that this is not true and that the realtor is wrong. Who is correct? C.M. (via e-mail)

ANSWER: The Fair Housing Amendments Act of 1988 (FHAA) makes it unlawful to engage in housing discrimination on the basis of familial status. Familial status discrimination includes any rules that would make children unwelcome in a neighborhood association. However, Congress left a narrow exception known as the "55 and over" exemption, which permitted communities "primarily operated as housing for older persons" to continue to exclude families with children, and younger residents.

The pertinent portion of the exemption defines "housing for older persons" as "housing intended and operated for occupancy by persons 55 years of age or older and (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older."

Therefore, if your community meets this requirement, if it has properly declared itself to be a 55 and over community, and if it engages in required age verification procedures, then it may engage in conduct that might otherwise be considered to be "age discrimination."

QUESTION: As president of a 12 unit townhouse association, in March of 1996 the Association voted and had the board assign parking spaces to each unit. As unit owners change, no changes have been made. One owner who moved in after the association assigned the parking spots wants to change his since he has been an owner longer than some other owner. At the last meeting, it was agreed upon that it should be worked out between the owners. The owner requesting the change is demanding that the

board do something. Are there any legal guidelines that could assist us? S.G. (via e-mail)

ANSWER: Parking spaces are frequently a contentious issue. Whether the Board can reassign them (or assign them at all) is a matter that is governed by the association's governing documents and the applicable law. The important questions to ask are, 1) does the Board have the authority to assign spaces under the governing documents? 2) are the parking spaces "common elements," "limited common elements," or "appurtenances" to each unit. If they are appurtenances, they might not be able to be reassigned without 100% unit owner approval.

In condominiums, there is a procedure (created by a 2000 amendment to the governing statute) which permits reassignment if authorized by the declaration of condominium, and with the consent of the affected assignee. If the parking spaces are not "appurtenances," and the board is granted general rule-making authority in the governing documents, the general law is that the board would have broad discretion over the assignment of parking space use rights. ⚖

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Failing to File Timely Report can have Big Consequences

Corporation Could be Dissolved by State

FORT MYERS NEWS-PRESS JULY 27, 2003

By **Joe Adams**

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The vast majority of community associations (condominiums, cooperatives, mobile home associations, homeowners associations, master facility associations, and country clubs) are chartered as not-for-profit corporations under Florida Statute Chapter 617. As a not-for-profit corporation, the association is obligated to comply with a myriad of reporting and filing requirements. Today, we will take a look at the necessity of the annual filing of the Florida Uniform Business Report (UBR).

The UBR is supposed to be filed by May 1 of each year. However, the state usually extends a "grace period" until early September for filing. The UBR informs the State and members of the public of the identity of the current directors and officers, the official legal address of the corporation, and the identity of the association's registered agent. The registered agent is an agent appointed by the association, as required by law, to be served with lawsuits and other official papers involving the legal affairs of the association.

Failure to file the UBR will result in what is known as administrative dissolution of the corporation. Unfortunately, each year, a few associations I deal with forget to file their UBR (most often due to transition between management companies, internal board disruptions, etc.).

A corporation that has been dissolved may be reinstated. There is a penalty ($175.00) plus the requirement that all past filing fees be paid (the filing fee is $61.25). While a corporation is dissolved, it cannot maintain or defend legal actions in the state courts. What this means is that if there is a lawsuit filed against an association which has been dissolved, the directors of the association are often named individually as parties to the suit. While this does not necessarily translate to personal liability for the director, it is obviously a situation to be avoided.

Information about UBR filing, checking on your corporation's current status, and the like, can all be reviewed through Florida's Secretary of State, through its Division of Corporations. Web access for the Division of Corporations is found at http://www.sunbiz.org/. If you've missed the boat, there's still time to file your report.

Now on to reader mail.

QUESTION: We have a 6 unit condominium complex. We have been setting the condo dues to cover all current monthly obligations, the condo management fee and a modest $10 monthly to build up our depleted reserves. We have one resident who is severely delinquent and owes the association the equivalent of 15 months dues. Without reserves and this delinquency, when we have a repair or a large monthly bill such as annual flood and property insurance, we have to rely on the other property owners to cover our debts. Needless to say this has created a financial nightmare and great animosity to the defaulting resident. The problem is, we understand we can impose a lien, but that does not pay our bills. The unit is homesteaded and mortgaged and our question is, can we force payment in any way to allow us to pay our bills as an association? Could you explain our options? T.E. (via e-mail)

ANSWER: There are many benefits to living in a small condominium. In many of the smaller associations I deal with, there is a near family-like sense of community.

There are also drawbacks. The purchasing power and economies of scale that go along with larger groups are absent. As applied to your situation,

one owner not paying their assessment has a major impact on your financial condition, here nearly twenty percent.

First, I think the association needs to face the reality of the situation and include a "bad debt" component in your budget. While this does not mean that you have to write off what you are owed, the other unit owners need to chip in and make sure that the association can operate on a financially solvent basis, which is required by the state's condominium laws.

Unfortunately, there are typically few alternatives available to an association other than lien foreclosure. Although the unit may be subject to homestead protection, homestead protection does not shield against foreclosure of the condominium association's lien.

There are some cases (particularly mortgage foreclosures and bankruptcies) where the association may not be able to collect the full amount it is owed. However, in the majority of cases, the initiation of foreclosure proceedings will result in the owner finding a way to meet his or her obligation to the association. If not, then the unit can be sold at foreclosure, and the current owner replaced with one who can meet the financial obligations affiliated with your community.

If nothing is done, the likelihood is that things will only get worse. I would recommend that the association retain legal counsel to address the problem. ⚖

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State Appeals Court Ruling will Change Pet Ban Rules

Enforcing Ban Against Just Dogs was Arbitrary

FORT MYERS NEWS-PRESS AUGUST 3, 2003

By **Joe Adams**
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According to a recent front page article in the New York Times, it is estimated that some fifty million Americans live in housing that is subject to a mandatory membership community association. Most typically, condominium associations and homeowners' associations (HOA's) are the organizations that serve as a private form of government for one in six Americans. For Floridians, that percentage is undoubtedly higher.

While community associations perform many substantial functions (including maintenance of the community infrastructure and insurance), most of the headline-grabbing stories deal with wars between an owner and their board over flags, swimming pools, "service animals," and the like.

If the truth be known, while such "human interest" cases are part of the mix, most association boards express an intense disdain for taking a hard-line stance on what many perceive as petty or minor rule violations. After all, will one elderly woman having an "indoor cat" in a hundred unit complex with a no-pet policy drag down property values? Unlikely. Of course, the question then becomes what the board can or should do when the second owner asks to bend the rules, and the third, and the fourth, and the fifth.

The law is clear that, at some point in time, an association's non-enforcement of a rule will cause it to become unenforceable. The legal concepts are couched in mysterious sounding legal terms like estoppel, waiver, and selective enforcement.

It is probably impossible to find any association which has not let some rule violations slip by. When the board decides it is time to enforce the rules, the owner now being targeted cries selective enforcement. Florida's law has traditionally been interpreted to mean that in order for selective enforcement to be shown, there needs to be some similarity between the rules at issue. For example, the fact that the board has never enforced the no-tile rule is not a good defense for someone who wants to break the no-pet rule.

A recent court decision released from the Palm Beach-based Fourth District Court of Appeal has called this conventional wisdom into question. The Forest Villas Condominium, located in Broward County, filed a lawsuit against a unit owner for keeping a dog in contravention of the association's pet restriction. The trial court ruled in favor of the association.

On appeal, the question reviewed by the court was whether the association's enforcement of the "no pet" policy against dogs, but not against cats, constituted selective enforcement. The unit owner presented an affidavit from another unit owner, who claimed to have owned two cats for the past nine years. The affidavit also said that a board representative told the owner that the cats would be grandfathered, and that the association would not take action against her. The affidavit also claimed that this owner had seen cats in the windows and on the balconies of many other units, and that their presence was "open and notorious."

The trial court had ruled "cats are not the same as dogs" and that associations "allowing a cat on

the premises does not equal disallowing a dog." The high court saw it differently.

The appellate court found the restriction in the declaration, which provided for "no pets whatsoever" (except for fish and birds) to be unambiguous. The reviewing court, without citing any rationale, went on to state: "The fact that cats are different from dogs makes no difference. What does matter is that a cat nor a dog is a fish or a bird, so both should be prohibited." Thus, in the court's eyes, the association was guilty of selective enforcement.

This case is at odds with the previous position of the state's condo arbitration department. The department has recently announced that it will now review future selective enforcement defenses in pet cases in light of the appellate court's mandate.

So if it looks like a dog, walks like a dog, barks like a dog, and bites like a dog, it just might be a cat.

Now on to reader mail.

QUESTION: Our condominium documents state that regular amendments to the condominium documents require a "sixty-six and two-thirds percent vote" for passage. Our question is whether this is two-thirds of those present at a meeting, or two-thirds of all the units. B.B. (via e-mail)

ANSWER: Depending upon the exact language used in the documents, the result could be quite different. The language you have cited implies that two-thirds of all voting interests (there is typically one voting interest per unit) would need to approve any amendment. I am aware of one local case, which went all the way to an appeals court, where similar language was found to require two-thirds of all voting interests for approval. ⚖

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Restriction Wording can be Loophole

Homeowners Often Win Battles with Associations

FORT MYERS NEWS-PRESS AUGUST 10, 2003

By **Joe Adams**

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Among the most often-waged battles between homeowners and their governing boards is the interpretation and application of vehicle parking restrictions. As the old saying goes, one person's junker is another's classic. Further complicating the mix, any shopping trip to buy a new vehicle will quickly teach you that the line between "cars" and "trucks" has become rather blurred in modern-day society.

Today's column involves the saga of a typical neighborhood parking dispute which wound its way through the Florida courts.

The Wilsons and the Vignas are residents in the Crown Pointe subdivision, located in Polk County, Florida. Both families moved into the community in 1997.

Mr. Wilson drives a Chevy Astrovan that bear, in several places, the words "Enjoy Coca-Cola", painted in red. Mr. Vigna drives a Chevrolet S-10 pick-up truck, bearing the words "Precision Termite & Pest Control" followed by "679-BUGS".

The deed restrictions for Crown Pointe provide that "no sign of any kind shall be displayed to the public view on any lot." The restriction contains exceptions for one "professional sign" of not more than one square foot, and one for sale/for rent sign, of not more than five square feet.

Another clause in the deed restrictions provides that "no commercial trucks (except small pick-up trucks) shall be permitted".

The Association sued the Vignas and Wilsons over their right to park these vehicles in the driveways of their homes. The trial court ruled in favor of the Association. The court found that although there might be conflicting interpretations on the "no commercial truck" rule, the sign rule was a sufficient basis for the Association to ban both vehicles from parking in the driveways.

The case was appealed to the Second District Court of Appeal, which has jurisdiction over Southwest Florida, and is highest appellate court "of right" in Florida (appeals to the Florida Supreme Court are discretionary with the Court in cases of this nature).

The appeals court reversed the trial judge, and ruled in favor of the homeowners (against the association). The court started its opinion by quoting the often-cited rule in association covenant enforcement cases. The court said: "Any doubt as to the meaning of words must be resolved against those seeking enforcement". The court also noted Florida's general rule that: "Restrictive covenants are not favored and are to be strictly construed in favor of the free and unrestricted use of real property".

The appeals court found that the deed restriction's prohibition against signs "on lots" did not apply to signs "on vehicles".

With respect to the "no commercial truck" rule, the court found that "commercial vehicles" were not prohibited, only certain "commercial trucks". Therefore, in the court's eyes, no prohibition against the van's parking existed. With respect to the pick-up truck, the court found that the "except small pick-up trucks" language qualified the restriction against commercial truck parking, thus permitting this vehicle as well.

This is one of those cases where the "intent" of the community was fairly plain to see. However, because courts tend to disfavor restrictions on the free use of property, the appellate court microscopically examined the wording of the covenants and came down on the side of the owner.

While many athletic endeavors are referred to as games of inches, it seems that enforcement of association restrictions can be characterized as a game of parentheses and commas. The lesson of this case, consistent with most other holdings from Florida courts, is that if there is any doubt as to the intention of the restriction, it will not be enforced. ⚖

Free Course on Florida Condominium Association Operations to be Held in Ft. Myers

A free course on Florida Condominium Association Operations will be held on Thursday, September 11, 2003 from 1:00 pm until 4:00 pm at the Seven Lakes Condo Association, 1965 Seven Lakes Blvd. in Ft. Myers (across from the Bell Tower Shops). The course will be taught by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes.

The course focuses on the core responsibilities of associations. It touches on practical operational needs such as self-management, the bidding process for outside service providers, maintenance issues, accounting and legal services and how to plan for and conduct board meetings. Please note that this course does not count for CEUs.

Registration is not required, but space is limited. To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail FLeducation@caionline.org. To see a complete list of classes in your area, visit www.caionline.org/florida.

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Questions & Answers

FORT MYERS NEWS-PRESS, AUGUST 17, 2003

By **Joe Adams**

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Today, I will try to catch up on some back-logged reader inquiries. Keep those letters and e-mails coming!

QUESTION: Our condominium is wired for cable television. Owners who wish to have cable pay individually. It has been that way for many years. The Board is talking about including cable television for all unit owners, as part of our monthly maintenance fees. Should this not require approval of all owners? J.D.

ANSWER: This issue is governed by the Florida Condominium Act. Section 718.115(1)(d) is the applicable clause.

The law provides that if so provided in the declaration of condominium, bulk cable television is a common expense. If the declaration does not provide for bulk cable television as a common expense, the board may enter into such a contract, and the cost of the service is a common expense.

The unit owners have the right to cancel a bulk agreement made by the board at the first annual meeting after the agreement is entered into. Unit owners who are legally blind or hearing impaired may opt out of bulk cable television, as can owners who receive certain types of public assistance.

Therefore, as a practical matter, the board of directors has the authority to decide whether bulk cable television is in the best interests of the condominium.

QUESTION: We are owners in an eight unit, "55 and over" condominium. Assigned parking spaces are limited to "private passenger vehicles". Boats and trailers are prohibited by our documents. One of our new owners parks a motorcycle on the property. The owner contends that the motorcycle is a "private passenger vehicle". What is your opinion? M.K.

ANSWER: Since motorcycles are not specifically prohibited by your condo documents, it is likely that the unit owner's interpretation would be upheld. Courts disfavor restrictions on the free use of property, even the common elements of a condominium.

Section 316.003(22) of the Florida Statutes (the State Uniform Traffic Control Law) defines a "motorcycle" as "any motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground". Thus, it seems that a motorcycle is a "motor vehicle". While you can argue that a motorcycle is not a "passenger vehicle", I would not consider that to be a very strong position. Your association might consider amending the rules or the condominium documents. If you pursue that route, I would recommend that legal assistance be sought to determine whether the owner in question must be or should be "grandfathered".

QUESTION: For the last two years, our condominium association has not spent all of the money that was included in the budget for those years. Some of the balance was transferred to reserve accounts. The rest was added to the "equity" section of our balance sheet. Our manager states that "equity" cannot be spent. It seems to me that this money should be available for needed projects at the condominium. Your advice would be appreciated. C.C. (via e-mail)

ANSWER: Excess operating funds left over at the end of a fiscal year are typically referred to as "common surplus". The law does not contain any limits on the use of common surplus, and unless your condominium documents contain such limits, it is typically left to the Board as to how the funds should be allocated.

Many associations do apply excess funds to reserve accounts. Some associations offset the following year's budget with the surplus, thus reducing the monthly or quarterly maintenance fee.

If the money is carried as a "contingency reserve", it is considered part of the operating side of the budget, and could be used at the Board's discretion. Your manager is not correct about the right to spend "equity". Unless the money is designated as "statutory reserves" (in which case a unit owner vote is required to spend the money on anything other than that for which it was set aside), the money is part of the funds generally available to the Association.

Your Board should also consult with its accounting representative. Under certain tax filing scenarios, surplus can be subject to taxation, and procedures typically exist for avoiding adverse tax consequences.

QUESTION: Am I allowed to videotape my HOA meeting? J.F. (via e-mail)

ANSWER: Section 720.306(8) of the law applicable to homeowners' associations provides that any owner may tape record or videotape meetings of the Board and meetings of the membership. The Board is permitted to adopt reasonable rules governing the taping or recording of meetings. ⚖

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Board Members Broke Their Trust

State Finds that Pair Willfully Violated Law

FORT MYERS NEWS-PRESS, AUGUST 24, 2003

By **Joe Adams**

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Over the years of writing this column, I have received a multitude of questions from readers asking what they should or should not do in certain circumstances. A recent recommended order by the State of Florida Division of Administrative Hearings reads as a virtual guide to what not to do as a condominium board member. In the case *Department of Business and Professional Regulation v. Richard Walters and Arcenio Carabetta*, two board members were accused of breach of fiduciary duty to the condominium association; failure to respond to written inquiries made of the board of directors; failure to properly notice a meeting at which regular assessments were discussed; failure to excuse payment of common expenses for all unit owners after doing so for one unit owner; and, willfully violating Florida Statute 718, the Florida Condominium Act.

It all started in October of 2001 when two unit owners, who owned fifty-three percent of the voting interests in the condominium, used their majority voting interests to elect themselves as members of the board of directors. One unit owner, Mr. Walters, allegedly owed the association about fifty thousand dollars in back assessments and interest. The other, Mr. Carabetta, allegedly colluded with Walters in order to grant him a "sweetheart deal" for settling the assessment claim.

According to the reported decision, with Carabetta's support, the board forgave four-fifths of Walters' past due assessments, without reducing assessments for other unit owners similarly. The forty thousand dollar shortfall was paid for by a special assessment levied on the rest of the unit owners.

As a result, the hearing officer opined that Walters and Carabetta's actions were a violation of their fiduciary duty to the Association.

To spice things up a bit, Walters and Carabetta, reportedly acting in concert with another board member, approved this sweetheart deal at a board meeting without posting proper notice of the meeting.

When the rest of the unit owners complained, via certified letters, the board of directors largely ignored these letters. The Division of Administrative Hearings found that it was abundantly clear that Walters and Carabetta considered the flood of inquiry letters from the minority unit owners to be of no more than "nuisance value." Therefore, in the eyes of the hearing officer, the board members made a conscious decision to ignore them, and thus violated Florida Statute Section 718.112(2)(a)2.

The hearing officer found that Walters and Carabetta did not simply make honest mistakes, but rather violated the Florida Condominium Act in a willful and knowing manner. The agency sent Walters and Carabetta warning letters in April of 2002, to which they responded, but took no corrective action.

As a result, Walters was ordered to make restitution to the condominium in the amount of $68,710.92 in past due assessments and interest. Walters and Carabetta were also ordered to pay a civil penalty of $10,000.00 each.

The moral of this story is that, as a board member, your duty is to act in the best interest of the condominium association as a whole. Should a situation arise wherein a board member may stand to personally benefit, in order to remove all appearance of impropriety, a board member should excuse him or herself from the decision-making process. Even an "honest mistake" could wind up being reversed, or could be quite expensive.

Additionally, when unit owners make an inquiry of the board of directors by certified mail, even if the board of directors believes that it is a mere nuisance, the board of directors must respond within thirty days of receiving the inquiry (there can be extensions granted under certain circumstances). Should the board fail to do so and litigation ensues, the association will be unable to collect its attorney's fees from the unit owner (even if the unit owner loses the suit). At worst, if the board is found to be knowingly and willfully ignoring the requests, there could be harsher penalties, as Mr. Walters and Mr. Carabetta learned the hard way.

The Florida Condominium Act has, for a number of years, contained a provision which allows the Division to fine directors for "knowing and willful" violations of the law. It is generally believed that "knowing and willful" is a difficult standard to prove. I am often asked by people, hesitant to serve on boards, about potential personal liability. In general, my reply is that Florida's law uses an "empty head, clean heart" standard. Stated in more direct terms, directors can make bad decisions, perhaps downright stupid ones, and should not unduly fear the specter of personal liability or fines.

However, when the director has a personal interest in the outcome of the actions of the board, the line has been crossed.

Since this case is still in the status of a "recommended order," it is not necessarily over. However, the enforcing agency's view of conflicts-of-interest situations is quite clear. Forewarned is forearmed. ⚖

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Ad Valorem Taxes Start to Hit Home for Owners of Condos

Lee County Appraiser Mailed out Notices

FORT MYERS NEWS-PRESS, AUGUST 31, 2003

By **Joe Adams**

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As they say, there are two certainties in life: death and taxes. While most of us probably try not to think about the former more than we have to, the latter permeates our day-to-day existence.

Florida's Constitution prohibits income tax. Therefore, it is not surprising that taxes on real property (usually called ad valorem taxes) are the primary source of revenue for many governmental entities within the State.

Last week, Lee County Property Appraiser Ken Wilkinson mailed out over a half million tax notices, including notices for the 65,000 or so condominium units in Lee County. No one keeps track of other types of "community association units" (such as homeowners' associations), but every owner of property in the county will receive one of these notices. These notices, called "TRIM Notices" (an acronym for Truth In Millage) tell property owners how much the Property Appraiser feels the "assessed value" for their property is.

Florida law requires the property appraiser to assess property at "market value." There are several different appraisal methods of calculating market value, including replacement cost, comparison of direct sales, and the "capitalization of income" approach.

According to the Appraiser's Office, most condominium units and single family homes in Lee County are appraised based upon the "direct sales comparison approach."

Florida's Constitution was amended in 1992 and includes the "Save Our Home Amendment" (SOH). SOH means that if property is your "homestead", no matter how fast the "market value" might rise, there is a limit of three percent, or the Consumer Price Index (whichever is lower) on any annual valuation increase. SOH does not limit tax increases, only increases in assessed (market) valuation for establishing the tax base on a piece of property. SOH was an effort to counter the deleterious effect of escalating property values in certain areas (e.g. the barrier islands) where long-time residents were being driven out, because they could no longer afford to pay their tax bills.

In condominiums, the Appraiser sends the TRIM Notice to each individual unit owner. Any unit owner may contest the valuation of their property by filing, within the deadline specified in the TRIM Notice, a petition with the Value Adjustment Board (VAB). The VAB is comprised of three members of the Lee County Commission and two members of the School Board. The VAB appoints "special masters" who hear most of the cases, and make recommendations to the VAB.

Florida law prohibits the separate taxation of condominium common elements. The legal theory is that the value of the common amenities (such as clubhouse, swimming pool, tennis courts, roadways and the like) are already included in the value of the individual units, and separate taxation of those items would constitute unlawful double taxation.

Some Property Appraisers around the State, including Lee County's, struggle with the issue of how to tax the value of "limited common elements" (for example, assigned covered parking spaces, and boat docks), since in almost every case the law precludes separate taxation of these items. Lee County's Property Appraiser often sends letters to condominium associations, asking for a list of limited common element assignees. The law does not

mandate a response from the association, although, Lee's Property Appraiser has previously taken the position that applicable provisions of the Florida Administrative Code allows the Appraiser to obtain this information through a subpoena-type legal process.

Florida law permits the condominium association, on behalf of all of the unit owners, to protest the assessed valuation of all condominium units within the project. The law requires that the association notify unit owners of its intent to contest the valuation, and allow them the opportunity to opt out. Associations wishing to contest assessed evaluations of the units in the complex must file (not mail) appropriate paperwork no later than the deadline indicated on the TRIM Notice.

The law for homeowners associations is slightly different. First, there is no statutory provision for the association representing all of the homeowners in a tax appeal. Secondly, common areas in communities governed by homeowners associations were historically not specifically exempt from ad valorem taxation in the same manner as condominium common elements.

As mentioned in this column several weeks ago, Florida's law, as applies to taxing common areas of subdivisions, has been amended effective January 1, 2004.

Under the new law, taxes may not be assessed separately against subdivision common elements utilized exclusively for the benefit of lot owners within the subdivision, regardless of ownership. Like the condominium counterpart, and as is probably the case from a practical standpoint anyway, the individual lots are supposed to be assessed include the value of use rights in the common areas. ⚖

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Technology can Lead to Problems

E-gatherings may be Violation of State Law

FORT MYERS NEWS-PRESS, SEPTEMBER 7, 2003

By **Joe Adams**

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I once heard it said that if you ask three lawyers the same question, you will get three different answers. Recently, a question was posted on an e-mail list to which I subscribe, primarily comprised of attorneys throughout the State of Florida who focus their practice in condominium and homeowners association law. The question asked: can board members vote by e-mail and are e-mail communications subject to the "sunshine" requirements of the condominium statute? Predictably, every lawyer who expressed an opinion gave a slightly different opinion, each with its own twist.

The prevailing view seems to be that since e-mail communications are like writing letters (although much quicker), the sending of e-mails does not in and of itself constitute a "gathering" of a quorum of the board so as to constitute a "meeting."

Presumably, a different result would apply if "real-time" communications (such as "Instant Messaging" or "Chat Rooms") were involved. Is this a distinction with a difference? Undoubtedly, this is an issue which Florida's Legislature will need to wrestle with over the next few years.

A related question involves the relatively common practice of a board president or association manager "polling" members of the board and seeking their opinions as a means of facilitating the association's decision-making process, especially during summer months when many of the other board members are "up north."

In many situations, the action in question lies within the executive authority of an officer or agent (such as the president or the manager), and seeking the support of other board members through "polling" does not appear to violate any law, since board approval was not required for the action in the first instance.

On the other side of the coin, certain actions (such as adoption of a budget) clearly require approval of the board, as a voting body. In such cases, "polling" is probably not sufficient to enact the item, and may (or may not) constitute a violation of the governing statute.

Coincidentally, in the same week as the great debate about e-mails, the Division of Florida Land Sales, Condominiums, and Mobile Homes' arbitration department issued an order addressing similar issues.

If a picture paints a thousand words, a direct quote from the arbitrator might be instructive as well. In his ruling against the association, the arbitrator said: [T]he board is shown to have been meeting informally and voting via the device of a written poll whereby each individual board member who is consulted on a particular matter outside a board meeting is allowed to vote on a particular matter that will come before the board at a future official meeting. In this manner, discussions and voting have occurred outside the context of an official open duly noticed board meeting. The board shall cease from conducting its informal polling and instead shall conduct its meetings in accordance with the statute and documents, with due notice, open to all unit owners. Board meetings are intended to embrace the discussion of matters coming before the board for consideration, deliberation, and an eventual vote, and the association shall honor the letter and spirit of the law. The board is a public body that is charged with having its deliberations and decisions made in the sunshine. A board can-

not conduct board business at meetings that are not duly noticed, for the sake of expedience. Also, a board cannot vote by proxy."

So, if you ask three lawyers their opinion and get three answers, if one of them is a state condominium arbitrator, remember its his or her opinion that counts.

Now on to reader mail.

QUESTION: Would you please tell me the Florida Statute that states when a condominium association must have a paid manager? F.H. (via e-mail)

ANSWER: A condominium is not obligated to have a manager, although I would say that most do (either an on-site manager or a management company).

If the association operates more than fifty units, or has a budget in excess of $100,00.00, any manager it hires must be licensed.

QUESTION: In one of your recent columns, you stated that condominium associations may charge a fee of up to $100.00 per lease transaction, if permitted by the condominium documents. Does that mean $100.00 can be charged each year, or each time the lease is renewed, or is this just for the original lease? C.C. (via e-mail)

ANSWER: The fee cannot be charged for lease renewals, only the original lease. There is a question whether "repeat tenants" who occupy the unit on a "seasonal" basis (for example, a couple who stays in the same unit every March) can be charged processing fees. I believe that they can.

QUESTION: Could you please give me the correct address and phone number for the Bureau of Condominiums. G.L. (via e-mail)

ANSWER: The agency is no longer called the Bureau of Condominiums, it is called the Bureau of Compliance. The Tallahassee mailing address for the Bureau of Compliance is 1940 N. Monroe Street, Tallahassee, FL 32399-1031. The telephone is 850-488-7149. Also, check out the agency's website at www.state.fl.us/dbpr/lsc/division. ⚖

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State Law Allows Board Minority to Appoint New Majority Members

But Bylaws may Call for Members to Vote

FORT MYERS NEWS-PRESS, SEPTEMBER 14. 2003

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Today, I will try to catch up on some backlogged reader inquiries. Keep those letters and e-mails coming.

QUESTION: The documents for our homeowners association states that we must have at least three, but not more than five board members. Recently, three of our five board members resigned. The two remaining members plan to appoint the three vacant seats. Is it illegal for two to appoint three, or do we need a general meeting of the members to elect the new directors? C.W. (via e-mail)

ANSWER: Assuming that your association is a not-for-profit corporation (most are), the law provides that the remaining members of the board, even though less than a quorum, can fill vacancies on the board. The law is found at Section 617.0809(2) of the Florida Statutes.

Accordingly, it would not appear that a special membership meeting would be necessary, only board action. Although the law is not entirely clear on the point, it is arguable that if your association's bylaws contain a different provision (which would be rare), the bylaws might control.

QUESTION: Is the addition of a pool heater in a condominium swimming pool a "material alteration of the common elements," requiring seventy-five percent unit owner approval? A.E. (via e-mail)

ANSWER: It depends. In a ruling involving a North Fort Myers condominium association, the Department of Business and Professional Regulation ruled that the addition of a pool heater was a "material alteration" thus triggering the requirement for a membership vote.

However, not every situation where a pool heater is added would necessarily be considered a "material alteration." For example, if an existing heater were being replaced, different considerations might apply.

Material alterations do not always require seventy-five percent unit owner approval, you must look to the declaration of condominium. Only when the declaration of condominium is silent on the procedure for authorizing "material alterations," does the seventy-five percent "default" threshold in the statute kick in.

QUESTION: Our condominium documents stipulate that assessments must be levied according to percentages, generally based on the size of our apartment. Our board recently levied a "flat fee" special assessment for each unit. Is this lawful? Shouldn't special assessments be allocated on the same percentage as the regular monthly assessments? A.T. (via e-mail)

ANSWER: A review of your community's governing documents would be required to answer the question without qualification.

However, in virtually all of the condominium documents I have read, special assessments are allocated on the same basis as regular assessments, and for condominiums, the law appears to require same (cable television charges are an exception to this rule).

Therefore, if I were a betting person, I would bet that your board needs to take a second look at how this matter is being handled.

QUESTION: I would appreciate it if you could give me a web-site that would give me all the rules and regulations for a board of directors for a Florida homeowners association. N.P. (via e-mail)

ANSWER: For those who like to keep abreast of the Florida laws affecting your community, the State of Florida provides its citizens with easy access to the Florida Constitution, Statutes and Administrative Code. The Florida Senate's home page, which may be found at www.flsenate.gov, allows internet users to access bills from any session, conduct text searches of all bills and statutes, find their House Representative and Senator, view streaming video of action on the House and Senate floors, and access all kinds of information relating to government in the Sunshine State.

If you're not internet savvy, Florida citizens may call the Division of Statutory Revisions at (850) 488-8403 with questions about Florida Statutes and the State Constitution. Additionally, citizens can purchase printed copies of Florida Statutes through the web-site or by calling (850) 488-2323. Chapter 617 of the Florida Statutes (the Florida Not-For-Profit Corporation Act) and Chapter 720 (unofficially dubbed the Florida Homeowners' Association Act) are what you are looking for.

Of course, many of an association's requirements will be contained in your governing documents, which are available as part of the association's official records. ⚖

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Filing Deadline Looms for "55 and Over" Housing

Registration Paperwork due to State by Oct. 1st

FORT MYERS NEWS-PRESS, SEPTEMBER 21, 2003

By **Joe Adams**

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Deadlines, deadlines. They never seem to end.

For community associations, missed deadlines are one of the most frequent sources of legal problems.

A few weeks ago, this column mentioned the deadline for filing your association's annual corporate report (see *Failing to file timely report can have big consequences*, July 27, 2003). Several months ago, tax filing deadlines were discussed (see *Not-for-profit HOAs must still file tax returns*, March 9, 2003).

For communities which are held out as "55 and over" housing, another deadline looms. By October 1, 2003, the association must file its bi-annual report with the Florida Commission on Human Relations certifying that the community is registered as "housing for older persons" (otherwise known as "55 and over" housing).

A community with "55 and over" status is permitted to exclude residents and potential residents on the basis of age or familial status. Without 55 and over status, a community which attempts to keep out children or younger people may find itself at the losing end of a very expensive discrimination suit. Filing the necessary paperwork with the Florida Commissioner on Human Relations does not confer a presumption of qualifying with all the legal intricacies of the law, but failure to file this paperwork in a timely manner can result in the levy of penalties.

The form which the community should fill out is available on the Florida Commission on Human Relations' website located at: http://fchr.state.fl.us/fchr/2003news18.htm. On that site, there is a link entitled "Renewal Link." This link will bring you directly to a simple one-page form, which must be submitted by October 1, 2003. Please note that as of the date of writing this article, there was language on the FCHR website suggesting that communities would need to renew their registration on the anniversary of their original registration. The general counsel's office for the FCHR has advised that this may not be accurate, and therefore all 55 and over communities should consider October 1, 2003 to be the appropriate deadline.

Now on to reader mail:

Question: I live in a rental community which is being converted into a condominium facility. Under my lease, I am not permitted to have a pet. However, under the new ownership plan, two pets per unit are allowed. My building has not yet been converted to condominiums, but I recently got a kitten and my landlord has demanded that I remove it from the premises. I offered to purchase my unit then and there, but he said it was not for sale yet. My building will be the last to be sold. What alternative do I have other than giving up my kitten or being evicted? L.R. (via e-mail)

Answer: It appears that at this time, your community is still a rental community, and not a condo community. As your community is being converted to condominiums in phases, and your building has not yet become a condominium, you are still required to abide by the terms of your rental lease. If your rental lease prohibits pets, then you are not permitted to have a pet in the building. Once your building converts to condominium, this will change. Until then, you do not have rights under the condominium documents for other buildings.

Question: We have a lanai attached to our grill room at our golf club. This lanai has a solid surface roof and is completely enclosed with screen. It

is primarily used for dining, but it serves alcohol as well. Does this sound like it would fall under the new Clean Air Act and thus should it be designated as no smoking? L.E. (via e-mail)

Answer: The Florida Clean Air Act prohibits smoking in any "enclosed indoor workplace." The description of your lanai as having a solid surface roof and complete screen enclosure which serves food and alcohol, sounds like "an enclosed area." Under the law, any physical barrier enclosing a workplace will subject it to applicability under the Clean Air Act. Even open windows and screens are considered to be "physical barriers." If the area has a roof over it that covers more than fifty percent of the open area, then it will be considered to be an "enclosure." Under the Clean Air Act, a "workplace" is any place where one or more persons engage in work. It sounds like this area is a place where persons serve food and alcohol, therefore it would be a "workplace." Even if a part-time volunteer cleans the area, it is a "workplace." It is my opinion that this lanai area is subject to the Clean Air Act, and if you permit smoking on the lanai, you will expose your association to fines which increase with each violation.

Question: My condominium community has a troublesome member who flaunts our community rule prohibiting glass in the pool or pool area. The main offender drinks beer from a beer bottle while in the pool. He has been asked to cease and desist from this practice several times, both verbally and in writing. We have considered fining him, but as he is also in arrears on his quarterly assessments, we do not believe that this will deter him. Is there any action we can take to stop him from breaking our reasonable rules? J.H. (via e-mail)

Answer: It sounds like this is a problem resident, but you do have legal rights to rein in his behavior. As you are aware, you are able to fine him (provided there is fining authority in your governing documents). Although you state that this may not deter him, and you might have great difficulty in collecting the fines, it can be more troublesome for the resident than you think. If you fine him, you will be able to take him to Small Claims Court to collect the fine, and he will be forced to pay any attorney's fees incurred in enforcing the fine against him. Additionally, you have the right under Florida Statute 718 to file a Petition For Arbitration against this unit owner, and again any attorney's fees incurred in attempting to enforce the governing documents are recoverable by the association if the association wins. I recommend that you contact your association's attorney to begin the appropriate enforcement procedures. ⚖

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Legislature Already at it Again

Committee Targeting Community Associations

FORT MYERS NEWS-PRESS SEPTEMBER 28, 2003

By **Joe Adams**

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Although I have heard it expressed in different ways and attributed to different sources, there is an old saying that no person's life, liberty, or property are safe while the legislature is in session. Although Florida's legislature will not convene for another six months, it seems that its House of Representatives is already preparing to take a swing at condo association boards.

Under the benign designation as a "Select Committee" to review condominium issues, Speaker Johnnie Byrd has empanelled a group of legislators, primarily from South Florida (none from Southwest Florida) who are to report back to the House on the need for additional condominium legislation.

It appears that the genesis of this "select" committee is a dispute between a member of the legislature and his individual condominium association. Perhaps without realizing that most individual problems can be resolved "locally" (by amendment to the governing documents for the particular community), rumor has it that this committee is poised, Tallahassee-style, to kill the proverbial fly with nuclear bombs.

Among the ideas supposedly on the table are term limits for board members and requiring all association board members to file financial disclosure forms.

On the term limit issue, most of the associations I deal with have a decidedly difficult time in finding an adequate number of volunteers to operate the community. If someone wishes to volunteer their time and talents in this endeavor, and if their neighbors are willing to elect them, why should the Florida Legislature interfere? Keep in mind that the old days of general proxy voting are gone, and all elections are conducted by secret ballot, where everyone wishing to run is given an even-handed opportunity to do so.

On the question of requiring association board members to lay bare their personal finances, I will borrow a term from the younger generation: "HELLO???"

If you think it is difficult finding qualified people to serve your community now, wait until you tell them that their neighbor would like a peek at their balance sheet and tax returns.

Fortunately, we in Southwest Florida have some legislators who are key players in community association legislation, including Representative Dudley Goodlette who chairs the House Rules Committee and Representative Jeff Kottkamp who chairs the Judiciary Committee.

Stay tuned for further developments. *Now on to reader mail.*

QUESTION: May a unit owner contact the association's attorney about a questionable act by the board of directors? R.L. (via e-mail)

ANSWER: In a condominium or homeowner's association, the association attorney represents the corporation, not its board, nor its individual members. However this representation is traditionally channeled through the board of directors and authorized agents, such as management personnel. As a member of a condominium association, you are like a shareholder in a corporation. If you owned a number of shares in a publicly traded company, and you had questions about the conduct of the company's board, you would not have the authority to seek an opinion from the corporate counsel for the company. The same situation exists with a condominium board. I recommend that complaints to or about the board be put in writing and addressed to the board. If you feel counsel should be consulted on the issue, include that request in your written inquiry.

QUESTION: Our condominium documents are twenty-eight years old. I want to present to the board the idea of having them revised and brought up to date by a condominium attorney. My feeling is that this project needs to be done, no matter what the cost is. F.C. (via e-mail)

ANSWER: You are probably correct that it would be of substantial benefit to your association to update your condominium documents. If these documents are twenty-eight years old, there are likely a number of problems with them. First of all, the Florida Condominium Act has changed greatly in the past twenty-eight years. You may have provisions in your documents which are no longer enforceable. Additionally, a number of other laws which could apply to your community have changed.

For example, twenty-eight years ago, it was permissible for a condominium association which wished to prevent families with children from living in the community to do so by mandating this in their governing documents. Since the enactment of the Fair Housing Amendments Act, if a community wishes to do this it must be designated as a "55 and over" community. The potential expense of defending a discrimination suit alone would outweigh, by an astronomical factor, the typical cost of updating your condominium documents.

Finally, if these documents are twenty-eight years old, I presume that they are the original documents drafted by the developer's attorney, for the developer. As you may well imagine, documents drafted by the developer's attorney for the developer are geared toward protecting the developer and not necessarily geared toward the effective day-to-day governance of your community. An attorney who focuses in community association law should be able to complete such an engagement for a reasonable price. ⚖

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55 and Over Compliance Causes Confusion

Audit Should be Done, Brief Checklist Followed

FORT MYERS NEWS-PRESS, OCTOBER 5, 2003

By **Joe Adams**

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My recent column regarding registration of "55 and over" communities with the Florida Commission on Human Relations spawned a tremendous number of inquiries. Although federal law has made provision for "55 and over" communities for some fifteen years, there remains great confusion on how to comply with the law.

Due to the staggering cost of defending a discrimination claim, or even a HUD investigation, every "55 and over" community should have its legal counsel periodically audit its compliance with the laws. The following is a brief checklist of compliance requirements.

Bi-annual registration with the Florida Commission on Human Relations: This is basically a tax, and requires filling out a form with the state agency charged with preventing housing discrimination. (See Filing Deadline Looms for "55 and over" Housing - 9/21/03). Compliance with the law does not mean, however, that your community otherwise qualifies as a "55 and over" association.

Periodic age verification procedures: Even for communities which have long held themselves out as "55 and over" communities, HUD's regulations require periodic censuses and age verification. In general, age verification requires the ability to prove a particular occupant's age through reliable means. Typically, photographic identification with birth dates (such as drivers' licenses) are the best source. By law, the census must be updated at least every two years, and needs to be adjusted in connection with every change in a unit's occupancy.

Eighty percent occupancy thresholds must be met at all times: The laws establishing "55 and over" communities do not address who owns property, rather who resides in the community. At least eighty percent of the occupied units must be occupied by at least one person age 55 or older. Vacant units are not counted in the mix. Temporarily vacant units (typical "snowbird" homes) are counted in the census, provided that the unit is reserved for occupancy by the age-qualifying resident (rather than being on the rental market).

Policies and procedures: Associations should make an effort to hold the community out as a "55 and over" community to the general public. Community entry signs, letterhead, rental application forms, and similar means by which the community is held out to the public are all relevant.

Establishment of age restrictions in governing documents: With limited exception, the only way a Florida community association can establish age restrictions is through provision in the governing documents, typically a declaration of condominium, a declaration of covenants, or deed restriction. Although there are limited exceptions, amendments to bylaws or board-made rules will rarely suffice.

Although there are many steps that must be taken (and unfortunately, repeated) to attain age-restricted status, failure to comply with the law can definitely spoil your day.

Now on to reader mail.

QUESTION: When I bought my condo, it was not a 55 and over community. Several years after my purchase, the community voted to become 55 and over housing. Since I was forty years old at the time, I was grandfathered in and was able to remain in the community. I am moving out of this

condo, and I have a potential tenant who is 52 years of age. The board has told me that this resident may not move into the unit because they are not over the age of 55 or over. Can the board do this? R.C. (via e-mail)

ANSWER: The board can deny you the right to rent your unit to someone who is under 55 years of age, if the community has been properly declared a 55 and over community. Although you are the owner, and you may be grandfathered in, the laws surrounding 55 and over communities are concerned with occupancy and not ownership. Accordingly, anyone may own a unit in a 55 and over community, but if eighty percent of the units are not occupied by residents who are 55 years of age or over, the community will lose its 55 and over status and will likely be subjected to discrimination suits if it attempts to enforce its rules beyond that. I would look for a different tenant.

QUESTION: We have a person operating a business from their home, it is against our homeowners association rules to do so. Who do we contact to get this person to stop? The management company does nothing, as this person runs the board in our association. This manager and this board member are not working in the interests of the residents, we need some advice on what our options are.

We are a small association, mostly retired, and feel that litigation is not an option, as we are mostly all on fixed incomes. J.H. (via e-mail)

ANSWER: Often times, not only will a neighborhood declaration of covenants, conditions and restrictions prohibit the operation of a business out of a residence, but so will local ordinances and/or codes. If this is the case, a call to the code enforcement office of your local government might initiate an investigation at no cost to you.

Often all that is required is an address where the violation is occurring and a description of the violation. (You are not even required to give your name in some counties.) After you file a complaint, a case number will be assigned and interested parties may call code enforcement to check on the status of the investigation. ⚖

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Task Force to Debate HOA Regulation

Carr's Effort Shows Desire to Resolve The Conflict

FORT MYERS NEWS-PRESS, OCTOBER 12, 2003

By **Joe Adams**

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In the past, this column has squared-off with Florida's Department of Business and Professional Regulation about proposed policies which those affected have thought ill-conceived. Deregulation of community association managers and past efforts by the DBPR to eliminate arbitration for routine condominium disputes also drew substantial opposition from various affected parties, including boards, individual homeowners, and managers.

It seems that the DBPR's recently-appointed Secretary, Dianne Carr, has made a conscious effort to change the way the Department does business with the industry it regulates, and seek balanced input from affected parties before decisions or policies are made.

For example, recently, at the request of Governor Jeb Bush, Secretary Carr appointed a Task Force on the need for additional homeowners' association legislation. I was privileged to have been appointed to that committee, which held its organizational meeting in Tallahassee on September 24, 2003. The group consists of people with widely differing points of view about different issues, which promises the opportunity for spirited debate. The Task Force's mission statement is: "The Homeowners' Association Task Force, a cross-section of representatives involved with homeowners' associations, was created at the Governor's request to harmonize and improve relations between homeowners, homeowners' associations and other related entities. The members will provide input and make recommendations for legislative change consistent with his vision for government and regulation."

The bottom line for the Task Force will ultimately boil down to whether government regulation of HOA's, similar to what occurs in condominiums, is desired or desirable. The process should be interesting. Stay tuned for further developments. For those who will be affected, don't miss your chance to be heard.

Now on to reader mail.

QUESTION: I am a homeowner in what I believed until recently was a condominium association which should follow Florida Statute 718. But now, we have a new manager that believes we are actually a homeowners' association and should follow Florida Statute 720.

We are a community built in eleven phases. We have eleven condominium associations and a master association called the "Community Association" with a representative from each condominium association on the board of directors. The Community Association's budget exceeds one hundred thousand dollars.

Are we not governed by Florida Statute 718? Are we not supposed to have a licensed manager? I eagerly await your response. D.A. (via e-mail)

ANSWER: If you are confused as to whether your community is governed by Chapter 718, Florida Statutes which is applicable to condominiums, or Chapter 720, Florida Statutes, which is applicable to homeowners' associations, you are not alone. This issue has vexed community association lawyers and the state agency with regulatory authority over condominiums for more than a decade.

Based upon the ruling of the appeals court in a 1988 case called Downey v. Jungle Den, the Florida condominium statute was amended in 1991 (and

again in 1992) to re-define "condominium associations" to include not only traditional associations, but what are commonly called "condominium master associations."

It sounds to me as though your association is a "condominium master association" and is therefore governed by the Florida Condominium Act, Chapter 718. Unfortunately, the law applicable to condominiums does not neatly fit the operation of condominium master associations. There are numerous instances where the provisions of the condo act simply do not work, including elections, recalls, authority for cable television expenses, the right to adopt hurricane shutter specifications, and a host of other items.

In 1998, the Department of Business and Professional Regulation empanelled a Study Group to specifically review this issue. Although a very detailed "master condominium association" bill was produced from the Study Group, the proposal ultimately died on the vine.

Your association is well advised to have a competent community association attorney express an opinion with respect to this issue, as it can have substantial impact on your operational procedures.

On the manager issue, no association is required to have a manager. However, if you do have a manager (regardless of whether you are a master condominium association or an HOA), that manager must be licensed if your association has a budget of more than one hundred thousand dollars, or administers more than fifty units, which appears to be the case on both counts. Good luck.

QUESTION: Is it illegal to have "for sale" signs on condominium common areas? If so, to whom do you report the violation if talking to the realtor doesn't work? B.H. (via e-mail)

ANSWER: Nothing in the condominium laws, or any other law I know of, prohibits the placement of "for sale" signs on a condominium's common area. However, either through recorded documents or a board-enacted rule (assuming the documents properly delegate rule-making authority to the board), an association could prohibit the placement of such signs, and most in fact do.

The violation of a covenant or rule should be reported to the association's board of directors or the manager, preferably in writing. The board can thereafter take appropriate action to address the matter. ⚖

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Associations can Restrict Sovereignty

FORT MYERS NEWS-PRESS, OCTOBER 23, 2003

By **Joe Adams**

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Community living is a lifestyle of trade-offs. It was perhaps said best by a court some thirty years ago: "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."

As Americans, we are engrained with a strong sense of "individual rights" and "freedom of choice." Among those inalienable rights are freedom of speech and freedom of worship.

A nagging question is whether, once you move into a community association setting, you check your constitutional rights at the gate. The courts have been far from consistent in addressing this issue.

Over twenty years ago, the Florida Supreme Court held that condominium age restrictions, which prohibited occupancy by children (prior to the 1988 fair housing laws) did not violate constitutional rights of privacy or procreation. In a later case, a Florida appellate court ruled that a homeowners' association's ban against "for sale" signs in front yards did not violate free speech, since the actions of the HOA were not "state action," which is necessary to invoke the protections of the Constitution.

In contrast to the sign ruling, one Florida-based federal court has ruled that the actions of an association can constitute "state action," and found the association's prohibition against flying the U.S. flag to be unconstitutional. (This case arose before the amendment to the condominium statute conferring the right to fly the flag, and was actually the catalyst for the amendment to the law).

Can an association ban political signs in yards? Can an association prohibit door-to-door solicitation by religious groups? Can an association regulate exterior decorations celebrating religious holidays? These questions remain largely unanswered.

However, last week, a Florida appeals court did address one dispute involving these weighty questions. A group of unit owners in a condominium had requested the right to use the association's auditorium for the conduct of religious services. The board of directors had enacted a rule that prohibited any type of organized religious services being conducted on the common elements.

The unit owners who disagreed with this decision sued the association, claiming that the "right of assembly" contained in the condominium statute, gave them the right to assemble for religious purposes.

The appeals court disagreed, finding that the right of assembly in the statue applied only to civic and governmental types of gatherings, such as inviting candidates for public office to speak. The court went on to hold that even if the "right of assembly" in the law applied to religious organizations, the board's rule was reasonable, since it applied equally to all religious groups, not just the group in question.

According to recently published statistics, it is estimated that by the year 2010, some forty percent of Floridians will reside in communities governed by

a mandatory membership association. As more people flock to this life-style, these issues are sure to remain in the focus of public opinion. Until somebody comes up with a better idea, it looks like these tough questions will continue to be slugged out, on a case-by-case basis, in the courts.

Now on to reader mail.

QUESTION: Our homeowner's association has recently instituted a "curfew rule." Security guards have been instructed not to allow any visitors to enter the community after 11:00 p.m. if they are under age eighteen. Our rules also state that children must be off the streets by 11:00 p.m., or they will be escorted home and their parents notified. Is our community entitled to determine curfew hours in this manner? K.M. (via e-mail)

ANSWER: There are two different concepts which come into play. The first is the general authority of the HOA to make rules and regulations. Assuming there has been a problem with marauding children, it is my sense that the rule would probably be upheld as reasonable.

The trickier question involves potential discrimination. Assuming that your community is not a "55 and over" community, the association needs to tread very carefully to avoid running afoul of fair housing laws, which prohibit discrimination against families with children. Any time an across-the-board rule is directed at children, your association may be looking for trouble. Your board would be well advised to have the association's retained legal counsel review the specific rules and provide a written opinion as to their enforceability.

The defense of discrimination suits can be a nightmare. Not to mention the fact that you will be dealing with governmental agencies (with unlimited resources), many insurance policies exclude discrimination claims, and it is one of the few areas in community association governance where board members face realistic exposure to personal liability. ⚖

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Annual Meetings Coming Up

FORT MYERS NEWS-PRESS, OCTOBER 30, 2003

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In two short months, another year will have passed us by. Most community associations will soon hold their annual meeting, and pass the torch of community governance on to a new group, or at least a board with some new faces.

In order to ensure a smooth handoff to those who follow, here are some year-end planning tips for your association:

Annual Meeting Preparation: For condominiums, remember that two notices must be sent before the annual meeting. The first notice must be sent to each unit owner at least sixty days in advance of the meeting. Any unit owner desiring to stand for election to the board may file their name into candidacy at least forty days before the annual meeting. The second notice, which must be sent no less than fourteen days before the annual meeting (some bylaws require thirty days minimum notice), must include a ballot naming all candidates who have run, along with the appropriate voting materials for the business meeting (election envelopes, notice, proxy and documentation involving specific voting items). For homeowners' associations, one notice for the meeting is typically sufficient, unless provided otherwise in the bylaws.

Waiver of Audit Requirements: For condominiums with annual receipts in excess of $400,000.00, a certified audit performed by an outside CPA must be performed for each fiscal year. If receipts are $200,000.00 to $400,000.00, a "Review" must be performed. "Compilations" are required when receipts fall between $100,000.00 and $200,000.00. These requirements can be waived by a majority vote of the unit owners. However, the vote must take place prior to the end of the fiscal year. Since most associations' fiscal year ends December 31, the vote must be taken before the end of the year in order to be effective. Homeowners' associations, and condos which have waived the formal reports, must still provide basic year end financial reports to the membership.

Budgets and Reserves: Again, since most associations operate on a calendar fiscal year, the budget should, optimally speaking, be in place no later than late November or early December. Condominium association budgets must include fully funded reserves unless a vote of the unit owners has been taken, and a majority have approved the reduction or waiver of funding of statutory reserves. Do not forget that the law was recently amended to permit a vote to permit the "pooling" or "cash flow" method of reserve funding (see December 22, 2002 article titled "Reserve Rules in Effect Monday"). For homeowners' associations, reserves are optional (although a good idea) unless otherwise required by the governing documents.

Contract Review: One of the biggest liability traps for associations is legal problems arising from self-renewing contracts. Many contracts run on a calendar year basis and automatically renew unless cancelled a set time before the next renewal date, often thirty or sixty days. Even if the association intends to stay with the same provider, it is sometimes advantageous to cancel a contract, so that it does not automatically self-renew, and bidding and negotiations can take place.

Update Official Records: One of the greatest disservices that an outgoing board can do to its successors is to leave the official records of the association in a state of disarray. Make sure that all charts of accounts are up to date, that a current owners' list is turned over, and that the records are organized in some useful fashion.

Have Insurance Policies Organized: Community associations carry many forms of insurance, such as casualty, liability, worker's compensation, flood, directors and officers, fidelity bonding, and umbrella coverage. Typically, these are separate policies and will have different expiration dates, usually one year from the purchase of the initial policy. Make sure that the new board has a chart indicating what policies are in place, the amounts

of coverage, and when the policies are up for renewal. Obviously, the day you are served with a lawsuit is not the time to learn that a previous board dropped the ball in renewing the association's insurance policy.

Prepare a Written Summary of Outstanding Action Items: Particularly with communities which are not professionally managed, unresolved items such as unit owner complaints often "fall through the cracks." If the new board has to rely solely on minutes of past meetings to determine the status of unresolved matters, it is likely that something will slip past. The outgoing board would greatly benefit the incoming board by preparing a list of unresolved action items, such as owner complaints, contracts in-progress, pending legal matters, and the like.

If you follow these few simple guidelines, and do unto future board members as you wish your predecessors had done for you, your neighbors will thank you when it is their turn at the helm.

Now on to reader mail.

Restrictive Covenants Confusing

QUESTION: The declaration of covenants for our community, which is governed by a homeowner's association, states: "the provisions of this declaration shall affect and run with the land and shall exist and be binding upon all parties claiming an interest in the development until January 1, 1995, after which time the same shall be extended for successive periods of ten years each." Since the language specifies the ending, is that where they end, or does the thirty year Marketable Record Title Act provision you mentioned in your previous column apply? Is a vote required to extend the covenants, or are they automatically extended? J.H. (via e-mail)

ANSWER: Your question is a good one, as it demonstrates a very fundamental and common misunderstanding between three separate concepts that apply to restrictive covenants.

The first concept is the duration of the covenants. Since covenants running in perpetuity are disfavored in the law, most covenants run for a specified time (usually twenty-five or thirty years) and then are automatically extended for successive periods (usually ten years), unless a vote is taken to amend or terminate the covenants. In most cases, this is simply an "automatic extension," and requires no action by the homeowners or the homeowners' association to keep the covenants alive.

The concept of amendment is different, it is when the homeowner wants to change something. Most modern covenants contain a separate amendatory clause and procedure (usually a super-majority vote such as two-thirds or seventy-five percent). Older covenants often do not contain a separate amendatory clause. At common law, covenants which do not contain an amendment can only be amended by unanimous approval of the property owners. However, covenants without amendment clauses can sometimes be amended during the "renewal periods," discussed above.

To confuse things a bit more, the Florida statute applicable to homeowners' associations provides that covenants which do not contain an amendment clause may be amended by a two-third vote.

The application of the Marketable Record Title Act (MRTA) exists separately from issues of extension or amendment. The Marketable Record Title Act is intended to extinguish stale claims against property, and to assist in simplifying real estate transactions. Florida's courts have held that the law applies to covenants within a homeowner's association. Generally speaking, the safest yard-stick to use for potential extinguishment by MRTA is thirty years from recordation of the original covenant, although the law is a bit more complicated than that. By virtue of the 2003 amendments to the law, MRTA extinguishment can now be prevented by a vote of two-thirds of the board, provided that certain procedures are followed.

The basic nature of your deed restrictions (their duration, how they are amendable, and the effect of MRTA), are very fundamental questions for every community, and should be reviewed by legal counsel familiar with these issues. Good luck. ⚖

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Records, Meetings Too Open

FORT MYERS NEWS-PRESS, NOVEMBER 6, 2003

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Each year, the University of Miami School of Law sponsors a seminar known as the Cluster Housing Institute. The Institute draws hundreds of participants, primarily attorneys involved in Florida community association law, from both the developer side and the unit owner-controlled side (usually called post-turnover associations).

Each year, there seems to be recurrent themes at the Institute, both from the perspective of the lecturers, as well as questions asked from audience participants. One question that surfaced several times in the presentations and audience questions at this year's Institute, which was held on October 30 and 31, is whether the "sunshine" rights of unit owners in condominium associations have gone too far.

The specific area of concern involves access to potentially sensitive information involving employees of the association. If personnel or employee matters are being discussed at a board meeting, unless the meeting involves attorney-client privileged information and takes place directly with the attorney, unit owners are entitled to attend those meetings. Obviously, by discussing sensitive personnel issues at an open meeting, the association opens itself up to a host of potential problems, including exposure to claims for defamation (libel and slander).

Take the following example as an easy illustration: The board receives a letter from a unit owner alleging that one of the men who cuts the lawn smokes marijuana on condominium property every day, and may be creating a danger to himself (or a liability to the association) while operating dangerous equipment under the influence of illegal substances.

Obviously, the board would be ill advised to ignore the situation. However, especially if the allegation is not true, it is easy to envision the types of legal hassles that could arise from a public discussion of the matter.

A similar concern involves official records of the association. Basically, every piece of paper kept by a condominium association is an "official record." The only exceptions are attorney-client privileged documents, medical records of unit owners (if they are kept for any reason) and information obtained in connection with the approval of applications for the sale or lease of a unit.

Let's look at another example: The association's on-site manager confesses to the board president that he has a severe alcohol addiction problem. He wants to know if the association's health insurance will pay for appropriate counseling and treatment. The president says she will check with the health insurance agent. Subsequent paperwork (applications, medical records, etc.) become part of the association's files, documenting the insurer's agreement to pay for the alcohol addiction treatment. By strict definition, all of the documents are "official records" of the association.

In our latter hypothetical, there is no doubt that every business on the face of the earth would find it unwise to allow anyone to review this information unless they were on a strict "need to know" basis. Unfortunately, in the condominium realm, there is no "need to know" qualification. If a unit owner with malicious intent (for example, someone who wanted to have the manager fired because they did not like them) used this information inappropriately, it is again easy to predict legal disaster. In fact, the giving of the information itself could give rise to claims involving state or federal privacy laws, although I am aware of no specific legal precedents directly on point.

I heard several Institute participants state that an amendment to the statute needs to be immediately considered to address this ever-increasing problem. I agree. As always, however, the devil is in the details. There is no doubt that restricting a unit owner's rights to attend board meetings or

review records can be abused, and no doubt will be by the ill-intentioned few. However, I believe the law should serve the interest of those who obey it, and this is definitely an area where a call to change should be pursued by those affected, the associations and their boards.

As to homeowners' associations, the same problem exists regarding open board meetings, although the definition of "official records" in HOA's` is more narrow than the condominium counterpart, and personnel records can presumably be withheld from parcel owner inspection requests. ⚖

Document Condo Maintenance Concerns

QUESTION: Several years ago I purchased a condo in Southwest Florida. I have lived there on a full time basis since then. Shortly after I moved in, I discovered a flooding problem. I submitted to the association a written request that repairs be made. Shortly thereafter I received a letter stating that the work would be done within the year. To date n work has been done and I have received nothing but promises that repairs on my unit would be scheduled soon. What I would like to know, is there any way that I can withhold my monthly maintenance fee from the Board by depositing it in an escrow account until the work is completed? V.M. (via e-mail)

ANSWER: The old saying "two wrongs do not make a right" is definitely applicable in this case.

In the event that you withhold your assessments, whether in an escrow account or not, most condominium documents provide a penalty for late payment and interest on any outstanding assessments at the highest rate allowed by law. Typically, that would involve interest at 18% per annum, and late fees in the amount of $25.00 per late payment.

The prevailing view of Florida law is that an association's failure to perform necessary maintenance (even if that allegation is true) does not constitute a valid defense in an assessment foreclosure action.

Although a "rent strike" would no doubt get the Association's attention, it creates too much exposure to losing your home. In addition to the penalties and late fees noted above, you could also be held responsible for attorney's fees incurred by the Association.

Therefore, I would recommend that you pay your assessments in a timely fashion and address your maintenance concerns separately. In many cases, the best thing the owner can do is document their concerns in writing, and send it to the Association by certified mail. The Association then must provide a substantive response within 30 days, or else it is subject to potential penalties under the law.

If the certified letter does not result in the resolution of the problem to your satisfaction, then the only choice is to consult with an attorney about taking the matter to arbitration or court. If you are seeking the recovery of damages, court is your only option.

QUESTION: A quorum of our HOA's board recently met to discuss landscaping issues. They did not post notice of the meeting. They told me that they do not have to post notice when no votes are taken. R.H. (via e-mail)

ANSWER: I disagree. Section 720.303(2) of the statute applicable to HOA's provides that all "meetings" of the board must be open to member observation. There is an exception for attorney-client privileged meetings.

A "meeting" is defined in the statute as any gathering of a quorum of the board where association business is "conducted." Although the law does not define what "conduct" of a meeting is, it is my opinion that formal votes need not be taken in order for a meeting to be held. By reference to decisions arising under the condominium law, and the Sunshine In Government Law, believe that the mere discussion of association matters creates the "meeting." Otherwise, directors could make all of the hard decisions "out of the sunshine," and the posted meetings would be nothing but a "rubber stamp" event. ⚖

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Task Force Still Has Work to Do

FORT MYERS NEWS-PRESS, NOVEMBER 20, 2003

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On November 14, Governor Jeb Bush's Task Force on Homeowner's Associations completed the third of its six scheduled meetings. The fifteen Task Force members were appointed by Department of Business and Professional Regulation Secretary Diane Carr. Carr's marching orders from the Governor in appointing the Task Force were to find "a cross-section of representatives involved with homeowners' associations... to harmonize and improve relations between homeowners, homeowners' associations and other related entities."

In addition to three delegates representing the interests of homeowners, the group consists of representatives of the development industry, resort and timeshare interests, attorneys, realtors, and an expert in alternative dispute resolution. I was privileged to have been appointed to the Task Force representing the Community Associations Institute, an Alexandria, Virginia-based nonprofit organization, whose membership consists of a broad-based consortium of homeowners, community association managers, attorneys, insurance professionals, accountants, association directors and officers, developers, vendors of goods and services, and public officials.

With half the meetings under its belt, the Task Force has spent fifteen hours in session, debating issues ranging from the right to fly the American Flag to the ability of HOA members to remove their elected officials from office.

Although the Task Force will not issue its report to the Governor until January or February, and several issues have not even yet been addressed, here's a look at the decisions which have been made:

Flying the American Flag: There is unanimous support for the proposition that members of all community associations should be afforded liberal rights to fly the American Flag and even other types of flags, such as certain armed-services flags. Of course, the devil is in the details. Does a homeowner in a deed-restricted community have a right to install a hundred foot flag pole in his or her front yard? Does he or she have the right to install a spotlight so that the flag can be illuminated at night, even if the light disturbs the next door neighbor? What about affixing flags to property that is maintained by the association, and not the homeowner? Hopefully, the group will be able to hash out these items.

Recall: There appears to be unanimous support for the idea that HOA members, like their counterparts in condominiums, should be able to recall directors by majority vote. There also appears to be broad support for including more user-friendly procedures in the law, and perhaps some form of resolving recall disputes short of court action.

Disclosure: Again, there is near unanimous agreement that having potential buyers be informed of the obligations that go along with membership in an association is a good idea. Unfortunately, the most recent legislative effort to beef up HOA disclosures has created as many uncertainties as it has solved. The consensus of the Task Force is to see the law favor disclosure in a meaningful fashion.

Voluntary associations: The actual genesis of the Task Force was the Governor's veto of a measure passed by the Legislature which would have permitted special taxing districts to enforce covenants and restrictions where mandatory membership associations do not exist, basically imposing a governmentally-created association. The Task Force is in unanimous agreement with

the Governor's philosophy which led to the veto, that being that obligations of an association should not be imposed on someone who has not agreed to it.

It seems that the most controversial topic facing the Task Force is whether HOA's should be regulated by a governmental agency like condominiums are. Stay tuned. ⚖

Members Should File Petition About Holiday Gift Surcharge

QUESTION: The General Manager of the association which administers our recreational facilities (master association) has charged our accounts for an employee-Christmas fund. If we choose not to donate, we are supposed to write a letter, and the account is then credited. What is your opinion of this? R.S. (via e-mail)

ANSWER: That is a new one on me.

Many country club communities do "pass the hat" to show staff year-end appreciation for a job well done.

However, placing a charge on a member's account which is not authorized by the bylaws or the member himself seems to be a practice that most people would find objectionable. If other members feel like you do, I would recommend that you present a petition to your association's board, and ask the board to instruct the manager to change his practice.

QUESTION: In regard to your recent column involving personnel and employee issues, is an oral or written performance evaluation of an employee part of the "official records" of the association? K.M. (via e-mail)

ANSWER: I do not believe that oral reports, unless they are documented in some type of written form, constitutes "official records."

In condominiums, it is clear that written performance evaluations are part of the official records. In HOA's, where the list is more restrictive, a performance evaluation is not part of the official records.

QUESTION: Our association is demanding a $2,000.00 deposit before any work can be performed in an owner's unit. The check will be cashed by the association, and the monies returned after the work is completed if no damage is done by the contractor. My contractor has liability insurance and I think this is unfair. The cost of remodeling my bathroom has gone from $3,500.00 to $5,000.00 overnight. What do you think? G.O. (via e-mail)

ANSWER: That is an interesting question, and is not addressed in the condominium statute.

Obviously, I do not know what your community's governing documents say, and those documents need to be consulted as the primary source of authority.

If the declaration of condominium confers the right to charge the deposit, then there is little doubt that it would be upheld.

If the deposit is enacted through a board-made rule, I believe the board would be required to demonstrate reasonableness of the deposit. Certainly, a deposit nearly equal to the contract price seems high. However, if the contemplated work includes your contractor excavating common elements, $2,000.00 worth of damage can be done to association property at the drop of a hat.

Short of challenging the validity of the rule (which will probably cost you more than the amount of the deposit), you might want to ask your contractor if he would put up the deposit, or defer getting paid the deposit amount until he has finished the work and the association has signed off, agreeing there is no damage.

QUESTION: My mother just moved into a Florida condo unit. She was greeted by a lump sum assessment for $8,000.00 for "under funding." Can this be true? M.E. (via e-mail)

ANSWER: Your mother's story is one I hear every day.

Presumably, the "under funding" arises because your mother's association has not kept a proper level of what are called "statutory reserves" over the years. It's like the grinning transmission mechanic in the commercial, you can pay him now or you can pay him later.

Many associations have measured the success of their boards on whether they can keep maintenance fees low. Where this mentality exists, reserve funds are usually the first to go.
Florida law requires than an association's most recent

year-end financial report must be made available to a purchaser as part of their disclosure documents. Although water over the dam in your mother's case, her experience is an object lesson for those considering buying a condominium unit. Look at the financial statements and particularly the reserves. Ask the selling unit owner to provide you with minutes of board meetings so you can see what maintenance projects have been under study, and whether funding exists for the projects.

In all likelihood, unless the seller of the unit failed to disclose a known fact to your mother in connection with her purchase, she will need to find a way to pay the assessment.

QUESTION: Does the Florida Condominium Act or any Florida law prohibit one from being the manager of the condominium where they live. S.F. (via e-mail)

ANSWER: No. However, if the condominium consists of more than fifty units, or has annual receipts in excess of $100,000.00, the manager must be licensed whether they live there or not.

I am aware of some associations where the manager lives in the complex, and in fact some communities provide housing for the on-site manager as part of their compensation package. This usually does not present serious problems, as long as the manager does not mind being summoned at all hours of the night, when there is a water leak or someone has lost their keys.

I have seen a few situations where the manager also serves on the board of directors. In general, although not illegal, this is a bad idea.

QUESTION: In regard to one of your recent columns, the board of our homeowner's association has concluded that it can meet in "executive session" to discuss personnel matters. I disagree with the board's interpretation. Can you clarify this matter? K.M. (via e-mail)

ANSWER: Your board should re-read the column. As stated in that report, there is no exception for "executive session" meetings for HOA boards.

The only exception for board meetings from the "sunshine" requirement is when the board is meeting in closed session with the association's legal counsel, regarding proposed or pending litigation.

The same rule applies to condominium associations. ⚖

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Change to Reserve Law Explained

FORT MYERS NEWS-PRESS, NOVEMBER 27, 2003

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Nearly a year after its enactment, the change to the condominium law regarding reserve funding remains largely misunderstood, misinterpreted, and misapplied.

Found at Rule 61B-22.003(f) of the Florida Administrative Code (available on-line at http://fac.dos.state.fl.us), the intent of the regulation is to permit so-called "pooling" or "cash flow" funding of reserves.

Under previous law, the only option for a condominium association was "straight line funding" of reserves for roof replacement, building repainting, pavement resurfacing, and any other item of capital expense or deferred maintenance exceeding $10,000.00 (typical examples would include swimming pools, tennis courts, irrigation systems, clubhouse buildings, plumbing, windows, and structural preservation/concrete restoration).

Of course, unit owners are always given the prerogative of voting to reduce or even completely waive the funding of reserves. However, when straight line funding of reserves is used, reserve monies may only be used for the specified purposes, unless a vote is taken and the unit owners give the Board permission to tap into the fund. For example, even though the building roof may not need to be replaced for another fifteen years, the Board could not use the roof reserve fund for the building's re-painting.

The pooling method of reserve funding attempts to predict when a particular item will require replacement or deferred maintenance, and reserves are scheduled and funded so as to ensure that the necessary amount of funds are on hand when the work needs to be done. Theoretically, monthly or quarterly reserve contributions can be lowered, while still avoiding special assessments.

Of course, what works in theory does not always work when placed in the hands of humans. In addition to needing a crystal ball to exactly predict when reserve expenditures will need to be made, reserve contributions may be substantially higher in certain years, such as when a fund for one item is depleted, and there is a short useful life of the net asset on the list.

I neither encourage nor discourage my condo association clients from switching from straight line funding of reserves to the cash flow method. There are pros and cons, and it ultimately boils down to a matter of choice. Clearly, straight line funding is the more conservative funding mechanism.

The switch from straight line funding to cash flow funding requires a vote of the unit owners, and cannot be enacted by the board. However, once the association switches to cash-flow funding, no further votes of the owners are required.

When the membership vote is taken to change from straight line to pooled funding, the meeting notice must include proposed reserve schedules containing the legally required line-items (they are rather complicated and set forth in the state's regulations) on both the straight line and cash flow basis. In subsequent years, only cash-flow reserve schedules need to be presented.

Remember, whether straight line or cash flow reserve funding is used, any funding at less than the fully-required amount requires unit owner approval (majority vote) as does the use of reserves for non-scheduled purposes. ⚖

Proxies not Allowed in Elections for Directors

QUESTION: Our condominium annual meeting is coming up soon. We have many owners who live out of the country. Can they send in their votes to the association by facsimile? Would you explain a proxy vote? It appears in our documents that proxy votes cannot be used in the election of board members. B.F. (via e-mail)

ANSWER: Unless your association has specifically voted to "opt out" of the procedures set forth in the condominium statute, proxies cannot be used in the election of directors. Rather, a system of two envelopes and secret ballots must be used, and these votes cannot be sent in by facsimile or other means of electronic transmission.

The proxy is in effect an "absentee ballot" and is used for voting by owners who cannot attend the annual meeting for items other than the election of directors. Items typically considered by proxy at association annual meetings include document amendments, budget and reserve voting, and waiver of financial reporting requirements. Curiously, the Condominium Act does not say whether or not proxies can be sent in by fax, although I believe the prevailing view is that fax proxies are acceptable, unless prohibited by the bylaws.

QUESTION: I purchased a condominium unit a couple of weeks ago. I had a home inspector inspect the property, and was told everything was in good shape.

I was understandably distressed to learn that the freon line that runs from my unit's air conditioner to the air handler has caved in, and needs to be replaced. The home inspector tells me that this was not his responsibility, since it is part of the outside of the building. The freon lines run underground, and then up to the air handler in my apartment. C.C. (via e-mail)

ANSWER: Air-conditioners are almost always located outside of the condominium unit. If your home inspector was responsible for checking the a/c system, I think you should demand satisfaction from the inspector. You may want to take your contract to your attorney and invest an hour or so of time to determine whether your lawyer thinks you have a good case to take to small claims court.

QUESTION: Many of your columns focus on changes in the law, including new laws passed by the Legislature and ideas that are debated, but do not become enacted into law. In your opinion, what is the greatest need for change in the laws affecting community associations? B.H. (via e-mail)

ANSWER: The condominium law has become far too complicated. Now over fifty pages in length, every perceived slight against the "wrong person" (someone who knows an influential politician) results in a new clause in the law.

The condo statute and its supporting regulations has reached such a point of complexity that many lawyers, are unwilling to assist laymen in navigating through the maze, for fear of liability. For volunteers on a board, forget it.

For homeowners' associations, the biggest flaw in current law, at least in my opinion, is the lack of meaningful consumer protections for home-buyers. One's home is the largest financial investment of most Americans. Although Florida has many good developers, it has also had its share of scam artists over the past four decades of growth and development.

The inclusion of warranty rights for single family home buyers, similar to those conferred upon condominium purchasers, would certainly be a good starting point. However, unless the dynamics of state government change radically, I would rate the chances of significant changes as slim. ⚖

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Makeup of Boards Still Contentious

FORT MYERS NEWS-PRESS DECEMBER 4, 2003

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Although Florida's condominium law has been in effect for over 40 years, and has been interpreted through hundreds of reported decisions by courts and state agencies, there remains a surprisingly large number of unresolved issues in this area of the law.

Today's gray area is the right to be elected to a condominium association board. The condominium statute presumably resolves the issue with some degree of finality where it states that "any unit owner" may run for the board. The unsolved question is whether any exceptions are permissible, or if the exceptions actually swallow up the rule.

The first exception is contained in the statute itself, providing that persons who are convicted felons and who have not had their civil rights restored are not eligible for service on the board.

What about term limits? The state agency responsible for arbitration of condominium disputes has previously ruled that term limits, if contained in the association's bylaws, are enforceable.

Conversely, the same agency has ruled that "residency" requirements are not permissible. For example, an association cannot restrict board members to unit owners who reside at the condominium, or for that matter, in Florida or even the United States.

A twist on this theme involves the validity of a bylaw provision which provides that a director who is delinquent in the payment of their assessments is deemed to have automatically resigned from the board.

The state arbitration department issued an order on November 7, 2003, finding that such a bylaw provision was valid. Apparently after further consideration of the statutory scheme, the arbitrator in the case reversed himself, struck down the bylaw, and issued a new order on November 24. After reconsideration, the arbitrator found that since the unit owners elected the board member, only the unit owners could remove her from the board. The arbitrator further ruled that the owner's alleged delinquency in the payment of assessments could not be deemed an "involuntary resignation."

Although not presented as an issue in the case, the arbitrator also observed that the agency would likely invalidate a bylaw provision which provides that a member's missing a certain number of board meetings constitutes resignation.

The arbitrator also offered the opinion that a bylaw provision which limited the right to run for the board to one person per unit would likewise be found invalid.

While arbitration decisions do not carry the force of law in the same manner as appeals court cases, most condominium disputes are adjudicated in the arbitration program, where past decisions are usually relied upon as precedent. Here, the state has come down on the "strict constructionist" side of reading the law.

I think most people would agree that someone who never shows up for a board meeting should not take a valuable spot that someone else may be willing to fill. However, until the law is changed, it appears that just about anything goes when it comes to the right to run for the association's board.

Although there is no arbitration program for homeowners' associations, the law applicable to HOA's also permits any parcel owner to run for the board, so the conclusions reached by the condominium agency are probably applicable in the HOA context. ⚖

Seminar offers guidance to new board members

Fort Myers News-Press December 4, 2003

QUESTION: I am a new member of my condominium association's board. I was wondering if you could tell me about any good educational programs in the Fort Myers area. B.H. (via e-mail)

ANSWER: A free course on Florida condominium and cooperative association regulation will be held on Thursday, December 11, 2003 from 12:30 pm to 4: 30 pm at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Ft. Myers, FL (across from Bell Tower Shops). The course will be taught by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes. I am the assigned course instructor.

The course focuses on how federal and state statutes and regulations impact associations. Participants will review guiding documents such as Florida statutes and legislation including the Condominium Act and Cooperative Act, the Fire Safety Act, and the Florida Administrative Code. The course will also touch on federal laws such as the Fair Housing Amendments Act of 1988, the Housing for Older Persons Act of 1995, the Telecommunications Act of 1996, and the Fair Debt Collection Practices Act. Please note that this course does not count for manager CEUs.

Registration is not required, but space is limited. To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail FLeducation@caionline.org. To see a complete list of classes in your area, visit www.caionline.org.

QUESTION: I live in a four-unit condominium which was built eleven years ago. The property is well maintained and we all get along. My question is how we should figure the proper amount of reserves. I feel the current reserves are too low and this may become an issue down the road. K.H. (via e-mail)

ANSWER: The Florida condominium law requires reserves for building repainting, pavement resurfacing, and re-roofing. Reserves are also required for any other item of the community's infrastructure with the replacement cost of $10,000.00 or more. Typical items include plumbing, windows, and exterior improvements.

Reserves are to be calculated based upon a formula which takes into account the remaining useful life of the asset and its replacement cost. For example, if it is will cost $10,000.00 to re-roof your building, there is currently $5,000.00 in the roof reserve account, and the re-roofing needs to be done in another five years, you would need to set aside $1,000.00 per year to "fully fund" that account.

There are companies which specialize in reserve studies, and you can get their names from your local chapter of Community Associations Institute.

QUESTION: Our association meets in executive session on a monthly basis an hour before the open board meeting. There is never any legal counsel present. After reading many of your columns, I do not feel this is correct. What is your assessment? R.M. (via e-mail)

ANSWER: "Executive session" meetings for both condominium and homeowner association boards are improper. If a quorum of the board is present, a "meeting" is being held and must be open to the owners. The only exception is meeting with legal counsel regarding certain privileged matters.

QUESTION: In a recent column you mentioned that if a condominium consists of more than fifty units, or has an annual budget in excess of $100,000.00, the community's manager must be licensed. Is that true if the manager is a volunteer and does not receive any type of compensation for his or her services? J.D. (via e-mail)

ANSWER: No. Chapter 468 of the Florida laws defines community association management as various practices which are performed in exchange for remuneration. Accordingly, a "volunteer manager" need not be licensed. However, since a person who takes on the duty of "manager" arguably assumes higher duties (and liability) than a volunteer board member, licensure may be a good idea.

QUESTION: Can the board of my HOA apply my quarterly maintenance fee toward an unpaid fine? A.N. (via e-mail)

ANSWER: Unless provided otherwise in the association's governing documents (and I would even then question its legality), the collection of assessments and

fines are two entirely separate issues, and should be accounted for differently. I do not believe it is proper to divert assessment monies toward payment of a fine. ⚖

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Free Course on Condo, Co-Op Laws

State Agency Proposing Few Changes in Sprinkler Rules

FORT MYERS NEWS-PRESS DECEMBER 11, 2003

By **Joe Adams**

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For procrastinators and others who did not get the word, a four-hour seminar on condominium law and operations is being held today in Fort Myers.

A free course on Florida condominium and cooperative association regulation will be held on Thursday, December 11, 2003 from 12:30 pm to 4:30 pm at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Ft. Myers, FL (across from Bell Tower Shops). The course will be taught by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes. I am the assigned course instructor.

The course focuses on how federal and state statutes and regulations impact associations. Participants will review guiding documents such as Florida statutes and legislation including the Condominium Act and Cooperative Act, the Fire Safety Act, and the Florida Administrative Code. The course will also touch on federal laws such as the Fair Housing Amendments Act of 1988, the Housing for Older Persons Act of 1995, the Telecommunications Act of 1996, and the Fair Debt Collection Practices Act.

Registration is not required, walk-in registrations are accepted

Please note that this course does not count for manager CEUs. Speaking of manager education and regulation, many will be pleased to learn that the Department of Business and Professional Regulation has advised industry lobbyists that it does not intend to seek legislation attempting to deregulate community association managers in the 2004 Legislative Session. Various CAM groups and other interested parties have apparently been successful in convincing the Department that some level of oversight is appropriate for people who often handle millions of dollars of other peoples' money. It remains to be seen whether the current regulatory council will be the preferred method of oversight of CAMs, or whether movement to another agency, or private outsourcing is considered the most effective means of regulation.

Readers of this column will also recall that the Florida Condominium Act was amended during the 2003 Legislative Session addressing the retrofitting of fire sprinklers in condo buildings of 75 feet or more. The new law permits the unit owners in the affected condominium, by a two-thirds vote, to "opt out" of the retrofitting requirement as pertains to the units (apartments). Retrofitting cannot be waived for common areas.

The new law also requires state monitoring of retrofitting activity. The Department of Business and Professional Regulation has promulgated a proposed rule which would require each association that votes to forego retrofitting fire sprinklers to file a form with the state within 60 days of recordation of the retrofitting waiver certificate.

The proposed rule also provides that there is no limitations on the number of times an association may conduct a vote to waive the fire sprinkler retrofitting requirement. The rule is still in draft form and is subject to public comment. Interested parties can review the rule at www.state.fl.us/dbpr/lsc/condominiums and then clicking on notice of the proposed rule, 61B-23.002. ⚖

Strong Letter May get Owner to Provide Key

Fort Myers News-Press December 11, 2003

QUESTION: I am a board member for a fourteen-unit condominium association. We have one unit owner who recently changed the lock on his door and refuses to provide the board with a key for access in case of an emergency. Our rules clearly state that the board shall be provided with a pass key to all units. What can we do now? P.G. (via e-mail)

ANSWER: The Florida condominium statute specifically provides that the association has an irrevocable right of access to units at reasonable hours, and at all hours in the event of an emergency.

Although the statute does not specifically require owners to give the association a key, the state's condo arbitrators have consistently upheld such rules as being valid.

The first step is for the association to send a "cure letter" to the unit owner. This letter gives the owner the opportunity to "cure" (or correct) his violation. The letter must also advise the owner of the potential consequences of not complying. This letter should be prepared by your association's legal counsel.

In many cases, a strong letter from a lawyer will solve the problem. If not, the next step is to go to arbitration.

If the association prevails in arbitration, it will be entitled to recover any attorney's fees it incurs in connection with the association's action to enforce compliance.

QUESTION: We have lived in our new condo for three years and we are noticing deterioration of the steps going up to the second floor. They are starting to rust and also some of them have slight shaking or movement when someone goes up the stairs to the units. Could you tell me what the statute of limitations are on a structure roll defect such as this? I was told that it was five years, but this is hearsay. K.M. (via e-mail)

ANSWER: In general, condominium structures are covered by a warranty of fitness and merchantability imposed by the condominium statute. Accordingly, these warranties are often referred to as "statutory warranties."

Statutory warranties begin with the issuance of a certificate of occupancy (C.O.) for the building. As to the developer, the warranty is three years from C.O. or one year from transition of control (turnover), whichever is later, but in no event longer than five years from the C.O. As to the general contractor, subcontractor, and other responsible parties, the statutory warranty is three years from C.O.

The warranty period is not to be confused with the statute of limitations. The statute of limitations is the time-frame in which a suit must be brought to address legal rights. The statute of limitations in Florida for construction defect claims is four years from when the claim "accrues."

In condominiums, no claim of the association "accrues" until turnover, and that is the general yard-stick for computing the statute of limitations. There is also an exception for "latent defects," which are defects not readily discoverable in the exercise of due diligence. In most cases, the statute of limitations for claims involving latent defects is four years from discovery of the defect, or four years from when it should have been discovered.

Therefore, it sounds as though your association may still have legal rights. I would strongly urge you to consult with an attorney and an engineer to review the situation. The first few years after construction are often the only "bite at the apple" that the association and unit owners usually get. The engineer should review the stair problem, and should also review the other structural, mechanical, and electrical components of the building to ensure that your construction meets applicable building codes and industry codes of good design and workmanship.

Your attorney will advise you on the precise statute of limitations and also assist in providing the statutorily-required notice which must now be given to developers regarding construction deficiencies, which was enacted by the Florida Legislature in the 2003 Session. He or she should also review the offering documents for any special clauses involving warranty claims.

In most cases, responsible developers will attempt to resolve bona fide problems in their product without need for litigation or excessive attorney's fees. Good luck. ⚖

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Task Force Requests State Action

FORT MYERS NEWS-PRESS DECEMBER 4, 2003

By Joe Adams
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On December 8, 2003, the Governor's Task Force on Homeowners' Associations held the fourth of its six meetings in Tampa. As noted in a previous column (see Task Force Still has Work To Do, November 20, 2003), I serve on that Task Force.

About fifty members of the public turned out for the gathering, with approximately twenty-five people addressing the Task Force about their HOA problems.

Many of the speakers addressed challenges experienced by voluntary HOAs. The speakers were seeking support for legislation that would permit municipal taxing units (MSBU's) to enforce deed restrictions, when there is no mandatory membership association in place.

The remaining speakers addressed a variety of topics regarding issues in HOAs. The most common themes were lack of disclosure, misrepresentations, construction problems, and other problems related to the development of the community and the developer's control of the association during the sales process.

A large group of homeowners from the Nature's Watch development in Pinellas County testified before the committee. Each of the homeowners related similar horror stories about major construction deficiencies in that development. Apparently, while some homes are not affected by the problems, other homes are at a near state of collapse. The residents complained that although the homeowners had elected their own board, a court has apparently taken over the situation. The judge has appointed a receiver to operate the Community, and at least in the eyes of most of those who testified, the receiver has acted with little regard for the wishes of the homeowners or its board.

After hearing public input, the Task Force set out on its mission to address the day's agenda. The Task Force formally adopted the following positions:

- **Use of MSBUs for Enforcement of Private Deed Restrictions in Voluntary Associations.** With one dissenting vote, the Task Force voted against using governmental entities for private contract disputes, including enforcement of deed restrictions.

- **Remedies for Misrepresentations.** By unanimous vote, the Task Force voted to recommend legislation which would provide home purchasers with a statutory right of rescission (contract cancellation) or the right to recover damages, when the purchaser has relied upon false and misleading representations of a developer. The group voted to recommend legislation similar to that found in the condominium statute, which permits rescission, or an action for damages, if misrepresentations are made in sales brochures, newspaper advertisements, and similar promotional materials. Such a law would improve the current situation in two respects. First, the proposal includes the right for the prevailing party in a misrepresentation action to recover attorney's fees. Secondly, unlike a claim for fraud (which is available under current law), the homeowner would not need to prove intent by the developer.

- **Warranties.** By unanimous agreement, the Task Force approved a motion that would require developers to grant warranties of fitness and merchantability for the common area improvements of an HOA community, similar to the provisions of the condominium law. Presumably these warranties would extend to common improvements like roads, drainage infrastructure, and recreational facilities. Significantly, the Task Force does not appear to have the inclination to extend similar warranty rights to the home itself, as is the case in condominiums. However, the issue of home warranties was not submitted to a vote, and was placed on the agenda for a formal vote at the January 9, 2004 meeting of the Task Force, which will be held in St. Augustine.

With the last two of its six hearings scheduled for January (January 9, 2004 in St. Augustine and January 28, 2004 in Tallahassee), the Task Force has come a long way, but at least in my opinion, there is much left to address.

Perhaps the most significant issue before the Task Force is alternative dispute resolution in HOAs, such as arbitration and mediation. I expect this to be the feature topic at the January 9 meeting in St. Augustine.

Other issues that are scheduled to be debated before the group submits its report to the Governor include: whether the state should begin regulating HOAs as it does for condominiums; rights of HOA owners to receive official records and financial information; fiscal duties of the HOA board; and possibly re-visiting the details surrounding the permissible extent of control, if any, over the right to fly the American Flag.

Stay tuned. ⚖

Assessment Refund goes to Owner at Time of Issue

Fort Myers The News-Press December 18, 2003

QUESTION: My condominium association levied a special assessment of $7,000.00 per unit for the structural renovation. Fortunately, the work was completed for less than the assessed amount, and the board ultimately refunded $2,000.00 to each unit owner. I sold my unit during this process and the buyer of my unit got the $2,000.00. What is your opinion in this type of situation? G.G. (via e-mail)

ANSWER: Section 718.116(10) of the Florida Condominium Act says that proceeds collected from a special assessment may only be used for the purposes for which the assessment was levied. After the work is done, the board has two options. The Board can either refund the money to the unit owners, or credit the surplus toward future assessments. Apparently, your board chose the former option, the refund.

In my opinion, the refund proceeds are "common surplus," and run with the title to the unit. Accordingly, whoever held the title on the date the refund check was issued would be entitled to the money.

In cases where it is expected that a special assessment may be due in the future, or when a refund is expected, the parties can allocate responsibility and entitlement in their contract and closing documents. If that is not done, whoever holds the title when the right to the refund or obligation to pay the assessment vests is the party responsible for payment of the assessment, or entitled to receipt of the refund, as the case may be.

QUESTION: We live in a duplex with a neighbor who lives here two or three weeks a year. We live here six months a year. We are each responsible for maintaining our side of the home, including the roof and some of the grounds. There is a 20-foot high black olive tree on our common property line. The roots of the tree are lifting and cracking both of our concrete driveways. Leaves and bird droppings fall on both driveways. We would like to replace the tree with less-damaging shrubbery. Do we have any recourse? E.P. (via e-mail)

ANSWER: I am assuming from your question that the tree sits on or near the property line between you and your neighbor.

Florida's courts have held that the owner of land is privileged to trim back his neighbor's tree to the property line, both as to overhanging branches and subterranean roots, even if it kills the tree. I am not aware of any case law which holds the "tree owner" liable for damage to a neighboring property, since the neighbor is given the right to trim at the property line. Obviously, the best solution is to call your neighbor and see if you can work something out.

QUESTION: My question concerns the turnover of a condominium association from the developer. At my previous condominium, it was like pulling teeth trying to get the developer's attention on certain items after turnover. My question is whether unit owners have to accept turnover by the developer at the time of the developer's choosing, or can we wait until engineering inspections and financial audits have been made? L.D. (via e-mail)

ANSWER: Transition of control of the association (called turnover) is the point where unit owners other than the developer elect the board. An audit of the association's financial records is required ninety days after turnover, and must be paid for by the developer. Therefore, there is no reason to delay turnover waiting for an audit, since the audit cannot be commissioned until turnover occurs.

With respect to warranty items, accepting a condominium turnover does not mean that you accept the property "as is." In fact, under Florida law, that is when the association obtains "standing" (legal authority) to address any deficiencies with the developer.

Accordingly, although there may be exceptions to the rule, unit owners should not seek to delay turnover. In fact, if the developer is obligated by law to turn over the association (based upon the number of units sold), the owners could not legally reject the turnover anyway.

QUESTION: Is it common practice in a small homeowners association to list candidates for the board on a proxy? Although we still take nominations from the floor at the annual meeting, we did list on the proxy form those who submitted their names into nomination. Now, some owners are crying foul play. D.C. (via e-mail)

ANSWER: Unlike condominiums, where proxy voting in the election of directors is prohibited, the use of proxies in HOA elections is permissible, and in fact the norm.

Unfortunately, the current statutory election procedure in homeowners' associations can wreak havoc at annual meetings, since nominees from the floor rarely stand much chance at election due to the use of proxies in the vote. Unless your bylaws prohibit proxy voting in the election of directors, it appears that your procedures are proper. ⚖

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Resolutions can Assist Associations

FORT MYERS NEWS-PRESS DECEMBER 25, 2003

By **Joe Adams**

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The New Year marks a chance to reflect on past successes and failures. Of course, the customary way to shoot for success in the upcoming year is the New Year's Resolution. Here are ten proposed New Year's Resolutions for community associations, five for owners and residents, five for the Board.

For the owners and residents:

- Remember that the association is not a landlord and the board members are not the building superintendent. They are volunteers. They are human beings who will make mistakes.

- Volunteer to do one thing for your community during the upcoming year. Whether it is typing up an edition of the community's newsletter, or soliciting bids for some planned project, every little bit helps.

- The next time you get upset about something that has happened at the association, wait twenty-four hours to address it. It is amazing how a night's sleep sometimes puts a new perspective on things.

- Follow the rules. There is at least one rule in every community that some resident despises, or thinks is silly or outdated. However, that rule may be very important to your next door neighbor.

- Sit down and read the association's governing documents. In the flurry of activity involved in buying a new home, very few people have the time or inclination to read through a thick stack of condominium or homeowner's association governing documents. One of the most common complaints I hear from boards when a dispute erupts in a community, is that the problem would have never happened if the owner would have read the documents.

Now, for the board:

- Remember that an owner questioning what is being done, or suggesting another approach, is not necessarily an attack on the board. Great ideas sometimes come from the most unexpected sources.

- Try to create an environment that encourages community participation. Sometimes it is easier and faster to just do things yourself. However, the more your association is perceived as a partnership, the smoother things will go.

- Read your governing documents. Owners are not the only ones guilty of not knowing the community's governing documents. If there are archaic or un-enforced rules, it is time to look at changing them.

- Review all of your relationships. Take a look at each vendor providing goods and services to your association. Are they meeting your expectations? Keeping in mind that you often get what you pay for, the cheapest is not always the best. For example, the cheapest lawyer often ends up costing you the most money.

- Don't sweat the small stuff. While board members should take their obligations seriously, some things just are not life and death matters. Keeping things in proper perspective and good balance (admittedly easier said than done), makes board service much more rewarding.

If you are like most of us, you will probably break most of these resolutions, but at least it is worth a try. ⚖

Associations Must Accommodate Disabled

Fort Myers The News-Press December 25, 2003

QUESTION: A homeowner in our community sought a variance from our protective covenants because of a claimed disability. The Architectural Review Board (ARB) denied the request. However, the owner appealed the denial to the board and was granted the variance. Is this discrimination on the basis of disability? D.F. (via e-mail)

ANSWER: An association is obligated to make "reasonable accommodations" for the benefit of the disabled. Typically, what is "reasonable" is at the center of legal disputes involving these matters.

Although I do not know all of the facts of your case, it seems that the disabled owner ultimately got what he or she wanted, and would be hard-pressed to claim discrimination.

QUESTION: I have lived in a condominium for five years and have never received a copy of the minutes from any of the meetings. Are we supposed to get them? D.W. (via e-mail)

ANSWER: Minutes of all meetings of the board and the membership must be kept by the association and are part of the "official records." Any unit owner is entitled to review the records, including minutes, where they are kept (typically the association office).

There is no requirement in the law that minutes of board or members' meetings be mailed to the owners, and for cost reasons, most associations do not do so. However, communication is important in associations and your board should endeavor to keep owners informed about what is going on. If mailing out the minutes is too costly, a newsletter or web-site might be a good idea. Perhaps you should consider volunteering to assist the association in getting such a project going.

QUESTION: Our association entered into an agreement with a contractor to do some repairs. The repairs were completed and the association paid the contractor in full. Now we find that a lien has been filed against our condominium units due to the fact that the contractor has financial problems and never paid his supplier. Isn't there some form that is available that protects the associations in these cases? A.R. (via e-mail)

ANSWER: Florida Statutes Chapter 713, known as the Construction Lien Law applies to this situation. Under the law, an association can end up paying twice for the same work if steps are not taken to comply with the law.

The first step is to record a document known as a "Notice of Commencement" in the public records. Subcontractors and persons who provide materials to the job are then placed on notice of the owner's identity. Subcontractors and suppliers must then file what is known as a "Notice to Owner" with the property owner.

Then, as payments are made, lien waivers are obtained from those who have filed "Notices to Owner" and certain affidavits can also be relied upon during the process.

The Construction Lien Law is a relatively complex statute, and an association board is well advised to have competent legal counsel in addressing construction lien issues.

As an individual unit owner, you are conferred by law the right to pay off your individual share of the lien, if you wish to do so.

QUESTION: What is the difference between a general proxy and a limited proxy? D.L. (via e-mail)

ANSWER: A general proxy can typically only be used for establishing a quorum and voting on procedural items, such as approval of minutes.

A "limited proxy" (sometimes called a directed proxy) is more in the nature of an absentee ballot. The absentee unit owner "directs" the proxyholder how to vote, and thus the proxyholder's powers are "limited."

Limited proxies are required for most votes in condominiums. For HOA's, the law is a bit more liberal.

QUESTION: You recently wrote an article stating that board members must vote unless there is a conflict of interest. At a class for parliamentarians, we were told that only state officials must vote, and that members of not-for-profit boards do not have to vote and should not state why they are not voting. We are confused. S.C. (via e-mail)

ANSWER: Your parliamentary procedure instructor was incorrect.

If your association is a condominium, Section 718.111(1)(b) of the law states that a director of the association who is present at a meeting of the board is presumed to assent to action taken unless he or she votes against such action or abstains from voting with respect thereto because an asserted conflict of interest. A vote or abstention for each member of the board must be recorded in the minutes.

In Section 720.303(3) of the law applicable to HOA's, it is stated that the minutes of board meetings must include "a vote or abstention from voting on each matter voted upon for each director present at the board meeting." ⚖

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