Tips for an Easier Board Job

FORT MYERS NEWS-PRESS JANUARY 1, 2004

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Over the next three months, the vast majority of community associations in Southwest Florida will hold their annual meeting. In most cases, the primary purpose of the annual meeting is to elect a board of directors who will manage the community's affairs.

For those who have never served, the task of community association board service can seem daunting. No matter what your background, few have had business or life experiences comparable to community association governance.

In addition to the maze of legal and documentary rules that must be followed, typical issues that face a board on a daily basis range from sensitive personnel problems to making difficult choices in major construction projects. Perhaps most significant is the socio-political aspect of being a board member. Unlike running a business where profit is the only motive, many of the toughest problems faced by associations are steeped with politics and personalities.

For those brave enough to step into the fray, here are a few tips that may make your job a little easier:

- **Education:** There is a wealth of information available to board members who want to become educated and stay informed about association issues. Most attorneys who concentrate in community association law will provide their association boards with periodic newsletters and educational seminars. Also, the State of Florida sponsors educational programs through Community Associations Institute. Contact the local CAI Chapter at 239-466-5757 for information about upcoming programs. The best primer for laymen serving on condo boards is a book called The Condominium Concept, written by Peter Dunbar. It is available in major bookstores for about twenty dollars.

- **Understanding:** It is impossible to lead an organization into the future without knowing where it has been in the past. Ask the association manager or board secretary for the opportunity to review past minutes of board and membership meetings for at least the past three years, if not longer. Minutes, at least if they are well kept, are the best source of institutional history for a community association.

- **Information:** Unfortunately, at least in some associations, there are one or two board members who are the real decision-makers, while the rest of the board "goes along to get along." Prior to board meetings, prepare. A well-managed association should produce a monthly board packet, including financial information, and as may be applicable, committee reports, bids, management reports, and other information that will enable decision-making for scheduled agenda items.

- **Protection:** In my opinion, no one should serve on an association board that is not adequately insured. The association should, with the assistance of legal counsel, review the indemnification (hold harmless) provisions in the association's governing documents to ensure they afford the maximum protection permitted by law. Further, directors and officers liability insurance is a must. These days, at least one million dollars coverage should be the minimum, and particularly with larger associations, several million dollars worth of coverage may be in order. It is especially important to ensure that your D&O policy is not one where the exclusions swallow coverage. As an added measure of protection, it is a good idea to ask your personal insurance advisor whether your umbrella policy covers service on non-profit boards.

- **Participation:** While directors should not interfere in day-to-day management of the association, being a board member is more than an honorary post. The law imposes a fiduciary responsibility on each director, which is a legal position of trust and loyalty to all unit owners. Certainly no decision made by an association board member will please everyone. Remember, directors cannot abstain from voting unless there is a conflict of interest with respect to the subject matter of the vote. ⚖

Reserve Funds are Primarily for Capital Expenditures

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QUESTION: Our condominium association board, over the objection of our treasurer (but with the concurrence of our management company) has used reserve funds in a manner that I think is wrong. The reserve account is for replacing the awnings over our parking spaces. The board has used the money to clean the awnings. Is this illegal or inappropriate? J.K. (via e-mail)

ANSWER: Unless the owners have voted otherwise, reserve funds can only be used for capital expenditures or deferred maintenance pertaining to the item for which the reserve account has been established. Florida's administrate regulations applicable to condominiums defines deferred maintenance to include any maintenance that will extend the life of the asset by one year or more.

For example, if resealing a parking lot will extend the service life of the lot by a year or more, it is my opinion that reserve accounts can be used for that purpose. Cleaning presents a closer question. I suppose your board could argue that cleaning the awnings preserves the fabric and extends its useful life, although I would see routine cleaning of an item to be more in the nature of regular maintenance than deferred maintenance or capital expenditure.

QUESTION: I live in a community that is governed by a homeowner's association. For personal reasons, title to our home is held in my wife's name, and my name does not appear on the deed. Our governing documents state that you must be a titleholder to qualify for membership in the association and run for the board.

Is this legal? J.W.

ANSWER: Yes.

By definition, the only member of the homeowner's association is a person who holds title to property in the community.

As to board service, the law does not require one to be a parcel owner, although the governing documents may establish ownership as a pre-condition to eligibility to run for the board.

Many association bylaws permit non-titled spouses of property owners to run for the board, since it is not uncommon for real estate to be titled in only one spouse for a variety of family, estate, and tax planning reasons. However, if the documents limit board members to titleholders, you cannot run for the board.

QUESTION: My association will be having its annual meeting in January, and we will be voting on an amendment to our declaration of condominium. The proposed amendment says that a condominium unit owner cannot have overnight guests unless the unit owner is also there. If this amendment passes, is it legal? J.K. (via e-mail)

ANSWER: Amendments to condominium documents (as opposed to board-made rules) are clothed with a presumption of validity. In my opinion, assuming that proper voting procedures are followed and the appropriate number of affirmative votes are received, the amendment would be upheld.

QUESTION: We are considering building a swimming pool in our resident-owned mobile home park. What percentage of the owners is required to approve this issue? Also, should we contact a lawyer before entering into a contract to build the pool? D.A. (via e-mail)

ANSWER: It depends upon the legal structure of your community. Most "resident-owned" mobile home parks are set up as cooperatives, governing by Chapter 719 of the Florida Statutes. If that is the case, Section 719.1055(3)(a) of the law applicable to co-ops, says that material alterations of cooperative property require two-thirds of the total voting interests (there is typically one voting interest per membership).

The governing documents can provide stricter or more liberal voting requirements.

The other most common form of ownership in resident-owned parks is a homeowners' association governed by Chapter 720. If you are an HOA under Chapter 720, there is no statutory guidance, and the governing documents will solely control.

Before entering into a project of this magnitude, the board should obtain a written legal opinion as to the required voting procedures. Also, the board should definitely invest in both engineering and legal assistance in developing the specifications for the new pool, and drawing up the contract for its construction. Good luck.

QUESTION: Our condominium association bylaws state that the executive officers of the association shall be a president and vice-president, both of whom must be board members, and a treasurer, secretary, and assistant officers, who need not be board members. Is it legal to permit people who do not serve on the board to be officers of our association? K.F. (via e-mail)

ANSWER: There is no requirement in Florida law that officers of a corporation also be directors. In fact, in many for-profit corporations, most people who serve as directors do not simultaneously serve as officers.

In condominiums, the law is no different, and the bylaws control. There is no problem with your bylaws permitting non-directors to serve as officers, and such a provision is quite common. The benefit of such a clause is that there may be people who do not want to serve on the board, but may have special qualifications for a particular office, such as being your treasurer. Officers who are not directors are typically covered under your association's insurance policies and bonds. ⚖

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Seasonal Problems Come Back

THE NEWS-PRESS JANUARY 8, 2004

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The end of the holiday season starts a migratory pattern as predictable as the southern sojourn of Canada's geese or the return of the swallows to Capistrano: The Return of The Snowbird.

Over the next three and one half months, local communities will be filled to the brim with seasonal residents, their families, as well as transient vacation visitors.

While our inability to find a parking spot or get a preferred tee time may grate the nerves, associations can implement effective measures to fairly allocate the use of community resources and amenities during peak times. Remember, units which sit empty nine months per year pay the bills year round, and are equally entitled to their slice of paradise.

Here are some common problems encountered during "season," and some tips for effectively addressing them:

- **Parking:** While most American families own two cars, most local development ordinances only require one and one-half parking spaces per residential unit, which creates disputes waiting to happen. While there is no easy solution to chronic parking shortages, many associations attempt to achieve fairness by limiting each unit to having no more than two cars. Particularly in beach-front communities, parking by trespassers is also a common problem. A system of registration (including decals) can help identify and remove unauthorized vehicles. Towing parking scofflaws is effective, but be sure to comply with Florida Statute 715.07, which contains required procedures necessary to legally tow unauthorized vehicles.

- **Sound Transmission:** Although most condos have rules that require carpeting in above-ground floor units, this is one of the most unenforced rules in condominium living. With the assistance of a qualified consultant, the association should develop specifications for sound-deadening. Many associations have loosened up their rules by permitting hard flooring (wood, tile, marble, etc.) if an adequate sound barrier is laid beneath the hard flooring surface. Many associations still insist on carpeting or area rugs. Unenforced condominium regulations, at some point in time, become unenforceable. However, there may be a procedure for breathing life back into the regulation, which may require "grandfathering" particular violations. A qualified community association attorney can assist in reviewing the history of your community's situation and make recommendations for moving forward.

- **Unit Overcrowding:** While most associations are fairly liberal about visits by family members, a two-bedroom apartment is simply not equipped to handle ten overnight guests. In addition to the potential over-taxing of the common facilities (available parking, swimming pool, etc.), most condos share water and sewer costs equally among the unit owners. Through rule or deed restriction (amendment to declaration of condominium) associations can strike a reasonable balance between individual preferences and the interests of the community. A common clause I have seen limits overnight occupancy (perhaps excepting young children) to two persons per bedroom, plus two. Obviously, the size of the units will have some impact on appropriate density regulations.

- **Defined Use Rights:** While most association documents have a clause limiting use of the property to "single family" residency, many documents fail to define what that means. For example, under most local zoning codes, six college students living together in a two-bedroom unit would be considered

a "single family" for legal purposes. While most associations do not wish to "legislate" morality, defining the concept of single family usage may help avoid problems. Another problem occasionally encountered is when a large group of people own a unit, either in the name of a corporation or through co-ownership on the deed. In many cases, when multiple individuals or families "chip in" on a piece of property, they try to split up use rights in a manner many associations see as akin to time-sharing. While associations should permit flexibility in how title to real estate is held (for a variety of family, estate, and tax planning reasons), appropriate provisions in the governing documents (such as designation of a "primary occupant") can help avoid disputes before they are given the opportunity to occur.

Of course, every community is different and there is no one-size-fits-all prescription. What may be desirable in an owner-occupied project that does not permit rentals would not work in a beach-front resort condo which permits weekly rentals. The association should also keep in mind that Florida law prohibits treating tenants any differently than unit owners with respect to use rights involving condominium common areas which are generally available for use in the community.

When all else fails, the rule that will go furthest in avoiding discord was taught to us all in kindergarten, and is known as the Golden Rule. ⚖

Flood Insurance Requirement is a Gray Area

The News-Press January 8, 2004

QUESTION: Our association is confused about flood insurance. Most of us carry individual flood insurance due to requirements by the mortgage holders. One of our members is insisting that the association is required by Florida law to carry flood insurance on the building. Is this true? I can't get a straight answer from anyone, even the insurance companies. N.L. (via e-mail)

ANSWER: Florida's law is not at all clear on this point.

One section of the condominium statute states that an association "may" carry flood insurance, implying that it is permissive. Another section of the same law states that an association shall maintain "adequate insurance" which many commentators argue would require flood insurance if the community is located in a federally-designated flood hazard area.

The first step is to review the declaration of condominium. If the declaration requires flood insurance, then it must be carried on the building. If the declaration is silent, the answer would arguably depend upon your flood zone rating. Obviously, the association does not want to find itself in a situation where both the association and the individual unit owners are buying the same insurance, and therefore paying for it twice.

QUESTION: What happens if a condo association has absolutely no one who will take a position on the board? Does the State of Florida ever appoint people to be administrators when the owners cannot or will not serve on the board? P.G. (via e-mail)

ANSWER: Unfortunately, particularly in smaller associations, finding people willing to serve on the board can be a challenge.

First, if your association does not have a management company, you should think about hiring one. It is not necessary for the board to handle all of the day-to-day tasks of operating a condominium, and if there are no volunteers willing to do so, a management company would be a good alternative. While a management company will not eliminate the need for a board, it will substantially ease the burden.

Florida's law requires a minimum of three directors to serve on the condo board. If you cannot establish at least a quorum of the board, any unit owner may petition the local court to have a receiver appointed to operate the condominium. A receiver will typically be an accountant or property manager who will act as the board, under the direction of the court. Receiverships are very expensive and should be avoided.

QUESTION: We are part of a large condominium association. A certain group of our owners, who all live on the same street, would like to secede from the association and form our own association. Is this possible? R.M. (via e-mail)

ANSWER: You would need to terminate the existing condominium and create two new condominiums,

each with its own governing association. Pursuant to Florida law, unless the declaration of condominium provides otherwise, unanimous consent of all unit owners and their mortgagees is required to achieve this goal. I have seen some documents which require a lower threshold, such as eighty percent.

In my experience with condominium issues, especially when there are "political" overtones, it is usually impossible to achieve unanimous agreement.

QUESTION: There are five seats up for election on our condominium association board. We received four letters of intent from unit owners wishing to be candidates. Three of these are from current board members wishing to be re-elected. Our bylaws require five board members, and a minimum of three. Our question is whether the board must appoint all four of those who have submitted letters of intent, or whether an election can be held where the four candidates compete for three seats. S.K. (via e-mail)

ANSWER: An attorney would need to review your association's governing documents to give you an unqualified legal opinion.

I can tell you that Florida's arbitration bureau has held that if the bylaws state there shall be "three to five" directors, then five seats exist on the board. That is because the condominium statute provides that unless the bylaws specify another number, the "default" level of directors is five.

Since you have four candidates, I would recommend that all for be seated on the board. The four of them can pick a fifth person to fill the roster of five directors. ⚖

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Task Force Supports Mediation

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Last Friday (January 9, 2004), the Florida Governor's Task Force on Homeowners' Associations held the fifth of its six meetings in St. Augustine. Past editions of this column have looked at actions previously taken by the Task Force (see Task Force to Debate HOA Regulation, October 12, 2003; Task Force Still Has Work To Do, November 20, 2003; and Task Force Requests State Action, December 18, 2003).

The agenda for the meeting was the most ambitious so far. Surprisingly, and to the credit of Co-Chairman Professor William Sklar (University Miami School of Law), the group discussed and disposed of the following items:

Alternative Dispute Resolution for HOA's: In what will probably be the most significant recommendation issued by the Task Force, the members approved a recommendation to require use of alternative dispute resolution before going to court. Disputes involving elections and recalls would be handled through mandatory binding arbitration through the Department of Business and Professional Regulation (DBPR). Other HOA disputes, such as rule enforcement cases, would require pre-suit mediation through a program administered by the local courts, with DBPR providing assistance in training mediators to understand the unique aspects of community association law and disputes.

Warranty on New Homes: By a vote of seven to six, the Task Force defeated a motion which would have extended warranty rights to purchasers of new homes similar to the warranty of merchantability and fitness contained in the condominium statute.

Governmental Regulation of Homeowners' Associations: The Task Force was presented with a suggestion of creating an agency to enforce HOA regulations, similar to the program used for condominiums. Theoretically, the agency would intervene in disputes between associations and individual members and investigate complaints by residents against their board. By a margin of three to one, this proposal failed.

Liens and Fines: A motion to prohibit the foreclosure of association liens for unpaid assessments died for lack of a second. A subsequent motion to prohibit HOA's from filing liens to collect fines was approved by the group.

Inspection of Records: A motion was unanimously approved to recommend that the law be amended to broaden owners' rights to inspect records. Under the new proposal, any record of the HOA that is not exempted, would be subject to inspection rights. The proposal further permits the board of the association to adopt reasonable regulations regarding the manner, frequency, and duration of members' inspections, and to impose a charge (not to exceed fifty cents per page) for copying of records.

Fiscal Responsibility: A motion proposal was approved to recommend legislation which would require homeowners' associations to engage in "competitive bidding" for contracts involving the expenditure of more than ten percent of the association's annual budget. The association would not be obligated to accept the lowest bid. The motion also included a recommendation to provide that any officer, director, or manager of an HOA that accepts bribes, kickbacks, or any item of value from a third party in connection with the governance of the association would be guilty of a felony of the third degree. Minor amenities (food at meetings, trinkets at trade shows, business lunches and the like) would be exempt.

Timely and Accurate Financial Information: The Task Force approved a recommendation to amend Chapter 720 of the Florida Statutes to require more substantial year-end financial reporting from HOA's. The level of required report would be tied to the association's annual income. For example, like condominiums, ho-

meowners' associations exceeding $400,000.00 in annual revenues would be required to obtain an annual audit. Members would be entitled to vote to waive the increased financial reporting requirements. The proposal also includes a procedure for the members to petition the board to the audit of HOA finances, regardless of the statutory requirement.

Please keep in mind that these proposals are not "the law," rather recommendations that the Task Force will make to Governor Bush as part of the Governor's request to study problems and issues in homeowners' associations. The group holds its final meeting in Tallahassee on January 28, 2004. ⚖

Many Condos Prohibit Pickup Trucks, not SUVs

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QUESTION: My son has a pickup truck with a custom cap that resembles an SUV. After being parked in the driveway for the last eight months, I received a letter from my condominium association stating that its being parked in the driveway is a violation of the community rules (which prohibit pickup trucks). What is the law regarding this? D.F. (via e-mail)

ANSWER: Many communities have specific rules prohibiting pickup trucks from being parked in the neighborhood. With the recent popularity of SUVs and other hybrid-type vehicles, there has been some confusion as to what constitutes a "truck." Florida law defines a "truck" as any motor vehicle designed, used, or maintained primarily for the transportation of property. Most arbitration cases dealing with this issue have held that SUVs are not "trucks." However, despite how much a pickup truck with a custom cap may resemble an SUV, I believe that it would still be considered to be a "pickup truck." Accordingly, it appears that your son's vehicle would not be exempt from a properly enacted rule banning pickup trucks in your condominium community.

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

ANSWER: The association is not required to send you copies of the minutes from every meeting. Nevertheless, these records must be made available to you pursuant to Florida Statute 718.111(12). This section of the Florida Condominium Act requires that all records of your condominium association must be made available to any unit owner within five working days after receipt of a written request. The association is not required to send the records to you, but may comply with the Florida Condominium Act by having a copy of the official records of the association available for inspection and/or copying.

QUESTION: I am a condo owner and recently my new neighbors have begun stomping, running, and jumping above us. They have hardwood floors and I heard that this was illegal. Is that true? C.C. (via e-mail)

ANSWER: There is no Florida law prohibiting hardwood floors in a condominium. That being said, many condominium associations have rules prohibiting or restricting the use of hard surface flooring in upper-floor units. You should examine your condominium documents to determine whether there is such a prohibition in your community. If there is such a prohibition, you may wish to bring this violation to the attention of your board of directors. Whether the board would be able to require a change in the flooring is a matter of some complex legal debate. It will depend largely upon whether approval was given for the hardwood flooring, how long it has been there, and what actions the board may have taken to lead the residents to believe they could install it. Even if you or the association are powerless to act under the flooring regulation, if your neighbor's actions rise to the level of a "nuisance" you may wish to consult an attorney to assist you with a cause of action against your neighbors without the involvement of the association.

QUESTION: The rules and regulations of our condominium states that unit owners can have one pet under a certain weight limit. The property and buildings in our community have not abided by those rules since they were first written. I heard that if the rule was not enforced, as in this case, for between eighteen to twenty-one years, the association cannot just tell people they have to get rid of their pets. Is this true? C.U. (via e-mail)

ANSWER: You generally have it right. If your association has a rule prohibiting pets of a certain size, but it has not been enforced for (as you say) eighteen to twenty-one years, the association may not begin

enforcing it now against unit owners who have maintained oversized pets during this period. The association does, however, have the option of enforcing its rules prospectively. My advice to associations is that if they are going to have a rule on the books, the rule should be enforced consistently. Failure to do so may nullify the rule, at least for current violations. ⚖

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Insurance Changes are Some Help

FORT MYERS THE NEWS-PRESS, JANUARY 22, 2004

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The new insurance law for condominium associations which took effect January 1, like many new laws, seems to raise as many questions as it answers. The changes were adopted in the 2003 session of the Florida Legislature at the behest of the Florida Association of Insurance Agents (FAIA).

FAIA's main beef with the old law was that it was interpreted by most attorneys to allocate insurance responsibilities between the Association and the individual unit owner based upon the law that was in effect when the condominium was created. Obviously, insurance adjusters found themselves in no-man's land when trying to sort out claims by first having to figure out the legal history of the particular condominium and then attempt to interpret the condominium documents.

Conceptually, the new law eliminates any distinction between adjustment of condominium losses based upon the age of the property. Further, the new law provides that regardless of what the documents say, there are a list of items that an association cannot insure, and these must be insured by the individual unit owner. There were also a few add-ons in the new law to the old list of "excluded items."

Under the new law, the list of "excluded items" now includes floor coverings, wall coverings, ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundary of a unit and serve only one unit. Further, all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries, are to be insured by the unit owner, and not the association.

Among the other features of the new statute are the following:

Freestanding Buildings and Land Condominiums: Condominiums consisting of detached dwellings (such as single family home condominiums, mobile home condominiums, and the like) may require, through the declaration of condominium, that structures be insured by the unit owner rather than the association. This clarifies a gray area in the old law.

Amendments: The new statute provides that if the association is updating its documents, it can amend the insurance clause to conform to the new statute. The reason for this amendment is because many documents require approval of mortgagees to amend the insurance section, which is usually impractical, as well as expensive. Mortgagee approval is not required for amendments to the insurance clause to conform to the new law.

Deductibles: A much-needed clarification was added to the new law regarding deductibles. The law now provides that the association's duty to obtain "adequate insurance" is satisfied even though there may be a deductible under the policy.

I have been told that insurance agents have already perceived glitches in the new law, including whether the statue mandates individual unit owners to buy insurance (in my opinion, it does not).

I am also told that the agents are going to seek further amendment to this statute in the upcoming Legislative Session.

One interesting feature of the new law is that it requires the Office of Insurance Regulation to study the

effect of the new law on condo insurance rates, and to issue a report in 2005.

Undoubtedly, for the past decade, insurance rates for condominium associations have climbed by astronomical percentages, and now constitute the largest line-item in the budget for many condominium associations. Whether or not the new law has the effect of stabilizing rates remains to be seen, I certainly would not hold my breath. ⚖

Supermajority Would Have to Approve Limits

The News-Press January 22, 2004

QUESTION: Our condominium wants to become a 55 and over community. To change our condominium to a 55 and over community, what percentage do we need to make this happen? Several people made sure it was not a 55 and over community before they bought in. L.B. (via e-mail)

ANSWER: In order for a community to be designated a 55 and over community, it must provide "housing for older persons." The law requires that at least eighty percent of the units be occupied by persons who are 55 years of age or older. It is important to note that the law requires this age restriction of occupants, and not owners. With regard to changing your condominium documents, this would be a matter of specific reference to the amendment clauses in your governing documents. Most require a super-majority vote of the members, such as two-thirds or seventy-five percent. In order to answer that question specifically, you should have someone qualified to interpret these documents examine them for you.

QUESTION: May an association legally enforce a "no pet" provision for renters only? C.K. (via e-mail)

ANSWER: Under the Florida Condominium Act, associations may generally not treat renters and owners differently, with regard to access and use of common elements and association property. That being said, the Florida Condominium Act has been interpreted by the state to permit associations to prohibit pets for renters, while allowing them for unit owners.

QUESTION: Our condo board consists of five members. Except during the summer, it meets once per month. Before every meeting, the board president calls each of the directors and lobbies them to vote his way about things that will be coming up at the meeting. Isn't this a violation of the sunshine law? B.H. (via e-mail)

ANSWER: The sunshine provisions applicable to both condos and HOA's only apply to any gathering of a quorum of the board for the purpose of conducting association business. If the president is contacting fellow board members one on one, the Florida Condominium Act is not being violated.

QUESTION: Several people in our condo association are interested in removing the glass sliding doors that lead to their balconies. Is this permissible? R.L. (via U.S. Mail)

ANSWER: The first issue to consider is that this may be considered a "material alteration to the common elements." If this modifies the exterior appearance of the building in any way, or constitutes a structural modification, this could be considered to be a material alteration, and may require a unit owner vote. Also, if premises modifications of this magnitude are under consideration, an engineer should be engaged. The engineer should ensure that removal of the "wing-walls" will not compromise the structure of the building. Further, the engineer should review issues such as the need for additional fire sprinklers, air conditioning issues, and the like. It may be also be necessary to have unit owners who wish to perform this modification record an agreement which would run with their title holding the association harmless for maintenance of areas that the documents probably describe as common elements. A qualified community association attorney should be consulted to ensure that all of these bases are covered.

QUESTION: Our condominium association needed some additional landscaping. The association had no funds to do so, but the board of directors gave its permission to the owners most affected by the lack of vegetation to (at their own expense) plant trees of their choosing. Two homeowners got estimates, hired a landscaper, and enlisted ten families to participate in the planting. The cost to each family was about four hundred dollars. The board has now chosen to continue the planting that these families began and assess all of the unit owners for the cost. The original ten families believe that they

should not have to pay for the new planting, since they have already paid once. What do you think? C.G. (via e-mail)

ANSWER: The planting of this landscape was authorized by your board of directors and was essentially a gift to the association. However, unless the board of directors' agreement with the unit owners was that the unit owners would be reimbursed for their expenditures, this would not relieve unit owners from the responsibility to contribute their share of the assessment for additional planting.

QUESTION: Our board president contacted legal counsel twice without carrying a motion of the board to do so. He claims that directors serving as executive officers have a right under law to contact our organization's legal counsel without such a vote. To make matters worse, this director has not volunteered to reimburse the association for the funds spent. Do board members have such lawful blanket authority? M.H. (via e-mail)

ANSWER: Your board of directors has a right to contact legal counsel without a formal board resolution authorizing it. Look at it this way, your association is a corporation. If the president of a Fortune 500 company wants to call corporate counsel to inquire about matters of corporate governance, he or she may do so without calling for a meeting of the board of directors. If the member of your board contacted the association's counsel for purposes relating to the governance of your association, such contact was proper, and unless your bylaws or a resolution of the board states otherwise, the board does not need to hold a meeting and take a vote every time they wish to contact the association's attorney for advice.

QUESTION: Our condominium documents state that each unit is entitled to one vote at all meetings. However, it also states: "In the event of joint ownership of a unit, the vote is entitled to be apportioned among the owners as their interest may appear, or may be exercised by one of such joint owners by written agreement of the remainder of such joint owners." We want to change this provision so that our condominium association is governed by a "one unit - one vote" principle. How can we do this? G.K (via e-mail)

ANSWER: I agree that this should be changed. An amendment to your bylaws is probably required. I have never seen a condominium which permits fractional votes, not to say that it does not happen. If ten people own the unit as joint tenants, can they each exercise a one-tenth vote? That does not make sense.

The "one vote per unit" standard is by far the most common method of allocating condominium voting interests.

QUESTION: Five of five board seats are up for election in our condominium community. We received four letters of intent from owners wishing to be considered as candidates. Our bylaws require five board members. We understand that if there are more vacancies than letters of intent, then no election is necessary and all candidates are automatically appointed to the board.

Our question is, must the board appoint all those who have submitted letters of intent? One of the candidates is a "difficult character." May the association operate with three board members? S.K. (via e-mail)

ANSWER: Sometimes the best way to deal with a "difficult character" is to allow him or her to be on the board of directors. After seeing what a difficult job it is to serve on a condo board, the experience will sometimes mellow the sensibilities of such residents. As a practical matter, if your bylaws require five board members, and only four individuals are running, those four are automatically installed as members of your board of directors. They are not technically "appointed" but rather elected without opposition. As an additional matter, once those four are installed, they have the right to appoint a fifth board member to fill the last vacancy. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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.

Workshops Offer Chance at Ongoing Education

FORT MYERS THE NEWS-PRESS, JANUARY 29, 2004

By Joe Adams

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For those interested in keeping up on the latest information and increasing their knowledge about community association living, a couple of free programs are being offered in the Fort Myers area.

The South Gulfcoast Chapter of Community Associations Institute (CAI) will be hosting its annual Trade Expo on Thursday, February 5, 2004, at the Seven Lakes Condominium Auditorium.

Seven Lakes is located on U.S. 41, across from the Bell Tower Mall. 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.

At 9:00 a.m., local insurance agents Oswald Trippe & Company, Inc. will provide a two hour continuing education seminar for CAM licensed managers, community association boards of directors and interested association homeowners regarding issues in event of a hurricane here in Lee, Collier and Charlotte counties.

Also at 9:00 a.m., the State of Florida's Department of Business & Professional Regulation in conjunction with CAI will conduct a two hour seminar on "Condo Operations." This seminar focuses on the core responsibilities of community associations. I will teach this seminar.

At noon, a "CAM Manager Deregulation Forum" will be conducted with CAI representatives Bill White and Richard DeBoest. Also, on the panel will be Fort Myers Manager Mark Benson of Benson's, Inc., Reginald Billups, Chairman of the Regulatory Council of Community Association Managers, and Mary Foley-Healy CAI's Vice President of Government & Public Affairs.

Exhibitors at the Expo will open their booths at 10:00 a.m. The Expo will conclude at 3:30 p.m. Admission is free. Reservations are not required.

Case Review

The Law Firm of Becker & Poliakoff will also be presenting a free program involving condominium, cooperative, and homeowners' association law. The program will be held on Saturday, February 7, 2004 at the Barbara B. Mann Performing Arts Center. The seminar runs from 8:30 a.m. until noon and is certified for continuing education credits for community association managers by the State of Florida. Members of the public are welcome to attend. Topics that will be presented include review of recent court cases affecting community associations, legislative changes made during the past year, and a presentation focusing on drafting workable documents for your community, including the amendment process and practical enforcement tips.

Over the years, I have heard many community association board members and managers express a desire for greater access to educational opportunities. Here's your chance for two programs in the same week. ⚖

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Quorum is Magic Threshold for Sunshine Law

The News-Press January 29, 2004

QUESTION: Would you clarify the sunshine law for me? It states that two or more members of the board of directors cannot meet and discuss an issue that eventually may come to a vote, correct? K.F. (via e-mail)

ANSWER: You have it partially right. The Florida Condominium Act requires that any official business be conducted in the open. What that means is that any time a quorum of the board of directors meets to discuss association business, that meeting must be properly noticed and open to the membership. Therefore, if your board of directors has only three members, then you are correct. If your board of directors is five, then two directors may meet and discuss association business, but three may not. The same concepts apply to homeowners' associations.

QUESTION: Since leaving my condo board, I have been trying to keep abreast of association affairs. Our management company insists on charging me twenty-five cents per page plus postage for sending me copies of minutes and monthly financial statements. Is this allowed? B.H. (via e-mail)

ANSWER: As a member of a condominium association, you have a right to view and access all official association records. The association's agreement to mail you the minutes is more than the law requires. This includes meeting minutes and financial statements. Nevertheless, the association has a right to charge a reasonable fee for photocopying and postage. Twenty-five cents a page is within the limits of what I would consider to be reasonable.

QUESTION: I am on the board of a condominium. We are currently reviewing our pet rule and I wish to know whether we should ban dogs based on breed, weight, and size, or if we should create a rule regarding pets on a case-by-case basis. What is your advice? L.W. (via e-mail)

ANSWER: Many communities choose to ban animals of a certain breed (for example, pit bulls) or have a maximum size and weight restriction. Other communities choose to allow all animals provided that they do not constitute a "nuisance" to other residents. Most communities have a rule which is hybrid of these two schools of thought. There are conflicting opinions on whether certain animal breeds are truly inherently more dangerous than others, and some communities choose to err on the side of caution. Other communities are concerned not so much with safety, but with the annoyance that a neighbor's dog can cause (for example, incessant barking). When drafting your rule, you should be certain to address your community's key concerns, but be careful not to create more problems than you already had. For example, I have heard it said that some small dog breeds tend to be the kind that bark on a constant basis, thus causing more annoyance to neighbors than a large dog. But then again, a twelve-pound Pekinese is unlikely to cause any serious injury to one of your residents should it get out of control.

QUESTION: Our condominium rules were drawn up when our association was built in 1972. Should we revise them? I.G. (via e-mail)

ANSWER: Developer-drafted documents rarely consider the day-to-day operation of an owner-controlled condominium community. For that reason, no matter how recently your documents were drafted, it is my advice that associations consider amending and restating their condominium documents after turnover. With documents as old as yours, you should be aware that the Florida Condominium Act has been amended, revised, and updated numerous times in the past 32 years. As such, your documents may not only be less effective than they can be, but they may actually contain provisions which are illegal under the current laws. For example, in 1972 it was perfectly acceptable for a condominium association to exclude people with children from purchasing a unit in the building. That kind of provision would constitute unlawful discrimination today. ⚖

Task Force Proposes Changes

FORT MYERS THE NEWS-PRESS, FEBRUARY 5, 2004

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The Governor's Task Force on Homeowners' Associations held its sixth and final meeting on January 28, 2004. The Tallahassee meeting culminated several months of riding the circuit and listening to problems and concerns expressed by residents governed by homeowners' associations.

The Task Force adopted a 46-page recommendation, which will be issued as a report to Governor Jeb Bush. The recommendations include numerous proposed changes to the statute governing homeowners' associations (Chapter 720). Presumably, after the Governor's review, some or all of the proposals will be submitted to the Legislature for consideration in the 2004 session. Here's a look at the highlights of the group's recommendations to the Governor:

Election and Recall Disputes: Under the proposed plan, HOA election and recall disputes would be handled by the agency which currently administers condominium arbitration. Expedited binding arbitration would be the forum for resolving election and recall disputes.

Kickbacks: The acceptance of bribes or kickbacks in connection with association operations would be classified as a felony of the third degree. Any person adjudicated guilty of receiving bribes or kickbacks would be permanently disqualified from serving on the association's board.

Board Meetings: The Task Force's proposal would confer the right to speak at board meetings regarding designated agenda items, a law that currently exists in condominiums. The board could limit speakers to three minutes per topic.

Petition Rights: The proposal calls for an amendment to the law that would allow twenty percent of the members of the HOA to petition the board to take up an action item. Although the board would not be mandated to vote on the item one way or the other, this proposal provides a method for concerned owners to bring issues of concern before the board for action.

Disclosure: In one of the more significant aspects of the group's recommendations, the new law would allow a three day "cooling off" period after signing a contract to purchase a home that is governed by a homeowner's association. Further, the new law would require substantial pre-sale disclosure, including providing a copy of the governing documents, the most recent budget, and a disclosure of whether the association is involved in litigation.

Official Records: The law would be broadened to include all written records of the association, which would be subject to inspect and copying at the request of the member, at a maximum cost of fifty cents per page. Legal records, health and insurance records, and personnel records would be exempt from inspection.

Financial Reporting: The Task Force's recommended legislation would require HOAs to obtain compiled, reviewed, or audited financial statements at the end of the

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fiscal year, depending upon the size of the organization and its annual receipts. The members could vote to waive the requirement.

Owner's Right to Petition for Audit: This proposal would permit twenty percent of the association members to call for a special meeting to decide whether an audit should be obtained, regardless of the association's size or income level. If approved by a majority vote, the audit would be due within ninety days.

Recall of Directors: In addition to the requirement for the arbitration of recall disputes mentioned earlier, Chapter 720 would contain detailed recall procedures similar to what is found in the governing statute for condominiums.

Fines: The proposal, if adopted, would prohibit homeowners' associations from filing liens against property to collect or secure fines levied by the HOA.

Competitive Bidding: If passed, the new law would require competitive bidding for any contract for products or services which involves the expenditure of ten percent or more of the association's annual budget.

Pre-Suit Mediation: Routine disputes in homeowners' associations, such as architectural and rule-oriented disputes would be required to be addressed by a neutral mediator prior to the filing of a lawsuit. Theoretically, bringing the parties together at an early stage will facilitate resolution of disputes before the parties become entrenched.

Common Area Warranties: The Task Force's recommendation would obligate developers to grant a three-year warranty for common area improvements. A motion considered by the Task Force to also extend warranties to individual home purchases failed by one vote.

Jurisdiction: The proposed new law would grant county courts concurrent jurisdiction to hear HOA disputes. Because county court cases tend to move faster than those in the circuit court, this proposal would presumably provide for faster resolution of disputes that cannot be resolved in mediation. ⚖

Law Allows Appointment of a New Board Member

The News-Press February 5, 2004

QUESTION: One of our condominium association board members has resigned. The remaining board has decided to appoint another member instead of holding an election. Is this allowed? L.H. (via e-mail)

ANSWER: The board's decision to appoint a board member to fill a vacancy rather than hold an election is appropriate under the Florida Condominium Act. This, of course, assumes that nothing in your association's bylaws requires otherwise.

QUESTION: I live on the sixth floor in a ten floor condo building. The owner of the unit on the ninth floor had a water leak and did damage to the units below his all the way down to mine on the sixth floor. I have no insurance. What should I do? G.L. (via e-mail)

ANSWER: First of all, you should purchase insurance. While the Florida Condominium Act requires certain elements to be insured by the association, it seems that many unit owners are under the impression that they do not need to insure their unit or own personal property. Nothing could be further from the truth. With respect to your specific problem, the unit owner on the ninth floor may be liable for damage to your property, if they are held to be negligent. Additionally, some of the damaged elements in your unit may be the responsibility of the association to replace and repair. The interplay between negligence, maintenance responsibility, and insurance responsibility in Florida condominiums is quite complicated. Without specifically examining your association's governing documents and knowing the full facts of the case, I cannot give you an evaluation of who is responsible for what. For this I recommend that you contact a member of the Florida Bar who is experienced in handling community association legal matters.

QUESTION: We live in a deed-restricted community that bans trucks. The spirit of the ban is for commercial vehicles and it was written probably twenty years ago. As you know, mini-vans, SUVs, etc. are hybrid trucks. Does this mean that they

are "trucks" for the purposes of the rule? For example, a Chevy Avalanche is advertised as an SUV, but some people think it is a truck. Many of the SUVs and expensive new "pickup trucks" are nicer and cost more than many of the cars in the neighborhood. I am favor of allowing them, as long as there is no commercial advertising on them. Because we have a board member that does not like trucks, many thousands of dollars are being wasted in enforcing this antiquated rule. What are our options? N.R. (via e-mail)

ANSWER: Without reading your rule, I cannot comment specifically upon it. Nevertheless, I can say that many communities have a rule banning "trucks." Florida law defines a "truck" as any motor vehicle designed, used, or maintained primarily for the transportation of property. Most cases dealing with the issue have held that SUVs and minivans are not "trucks." However, a new and "luxurious" pickup truck is still a "truck." Despite what the spirit of your rule may have been twenty years ago, the plain language of the rule controls the current situation until you amend your rule to reflect how you wish for it to be enforced today. While I appreciate your sentiment that perhaps this rule is being enforced by a board member who does not like trucks, the board member is doing his job and doing it properly. If the association did not enforce this rule evenly, according to the plain language of the rule, and made exceptions for "nice trucks," then the association would find itself in a position of having to allow all trucks.

QUESTION: Can you give me information on the process for recalling board members in my condominium community? C.T. (via e-mail)

ANSWER: The Florida Condominium Act and the Florida Administrative Code have detailed instructions regarding how to recall a board member or the entire board. Essentially you need to have fifty-one percent of the unit owners' consent to recall a board member. This recall may be for cause or for no cause at all.

QUESTION: I am a first time home buyer, and I am considering buying a condominium. I was wondering if I should have an attorney look at my condominium documents before I purchase the unit. What do you think? J.D. (via e-mail)

ANSWER: I think that it would be a good idea for you to review your condominium documents carefully before you purchase a unit in a condominium association. If you do not think that you have the expertise to adequately understand them, or if you need some clarification, I would certainly advise you to consult an attorney experienced in these matters. Many associations wind up having an adversarial relationship with a new homeowner, because the homeowner claims that they did not understand the rules of the community. Condo living is not for everyone. It is very important to understand the rules and regulations of your community before deciding to purchase there. Remember, when you are buying a condominium, you are not just buying an apartment, but you are becoming a member of a community. ⚖

Law Offers Liability Protection

FORT MYERS THE NEWS-PRESS, FEBRUARY 12, 2004

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As reported in this column previously, more than 350,000 Americans die of cardiac arrest each year. According to the statistics, every minute spent waiting for paramedics to arrive reduces the chance of survival by ten percent. By the time help arrives, it may be too late.

As a result of a big push by the American Heart Association, many community associations have considered the purchase of automatic defibrillators for on-site use. High-rise condo buildings and golf clubs typically express the most interest in acquiring the machines, which have also become commonplace in airports, hotels, and shopping centers.

As previously reported, Florida's Good Samaritan Act (Section 768.13(4), Florida Statutes) provides a limited degree of protection against legal claims arising out of the administration of defibrillation treatment. Apparently feeling that the law did not go for enough, Florida's Legislature then enacted the Cardiac Arrest Survival Act, which is found at Section 768.1325 of the Florida Statutes. This law went into effect in 2001. The Cardiac Arrest Survival Act provides broader liability insulation than the Good Samaritan Statute. There is essentially complete immunity from liability for a person who administers defibrillation treatment, without objection from the victim.

The owner of the defibrillation equipment (i.e. the association) also enjoys certain immunity from claims, although the immunity is not absolute. Among the exceptions to immunity are failure to properly notify local emergency services personnel of the acquisition of the device, failure to properly maintain the device, and failure to properly train those who use the device. Further, willful or flagrant disregard for safety is not immune from liability claims.

Obviously, one of the most important issues for consideration by the board is whether a claim will be insured, and whether the association has enough insurance to meaningfully address a suit. According to the only pronouncement I have on this matter from Florida's Insurance Commissioner, they recommend that associations which own medical equipment purchase a separate medical malpractice coverage policy. Whether defibrillator claims will or won't be covered under the typical general liability policy apparently remains a moving target. I have heard of some major carriers which flatly state that there will be no coverage. Others say they will cover a claim, but if it is made, will drop the association's insurance. Others are reportedly looking at coverage more liberally now.

Fortunately, the Florida Legislature, which convenes on March 3, 2004, is considering two measures that would further provide sanctuary to defibrillator owners.

Senate Bill 404/House Bill 369, with a stated goal of encouraging training in lifesaving first aid, would set standards for the use of automated external defibrillators.

Of greater relevance to community associations are Senate Bill 1184 and House Bill 411. These measures would provide community associations with complete immunity from liability if the association offers periodic training in the use of such devices. Further, the proposal would prohibit an insurer from requiring an association to purchase a medical malpractice rider as a condition of the association's ownership of a defibrillator.

Defibrillators save lives. However, for better or worse, liability suits are a way of life in America. Until the Legislature can make the immunity absolute, it seems that associations should continue to use caution when considering the merits of purchasing an automatic defibrillator, and should definitely get all the facts before acting. This also seems like a good issue to bring up with your local legislator. ⚖

Handicap Accommodation Request Touchy Situation

The News-Press February 12, 2004

QUESTION: Our board of directors passed a rule banning pets from our building. We are now faced with a situation whereby a resident has requested a "prescription pet" to help with an "emotional handicap." Can you offer any references by which we could more fully research this topic and respond? J.C. (via e-mail)

ANSWER: Whenever a resident presents a "handicap accommodation" issue, even if it seems to be without merit, your association should consider that federal and state fair housing laws are involved. Handling these issues without seeking legal advice is a dangerous proposition at best. If you make the wrong call, the association could find itself on the losing end of a housing discrimination case. Defending these kind of cases can be a nightmare both emotionally and financially. Many government agencies (particularly with community associations) take a very tough stance and if your association wound up in such a case, it would be fighting against the government and its unlimited resources. Discrimination cases usually allow for prevailing party attorney's fees for the plaintiff without such fees being available to the defendant. Many discrimination claims are not covered by insurance, and are also one of the few areas where association board members are routinely subject to personal liability. Therefore, although I would like to point you in the right direction to conduct your own research, the best advice I can give you in a situation like this is to contact a member of the Florida Bar who is experienced in these matters.

QUESTION: May a condo board reject a potential resident because of a criminal history? R.F. (via e-mail)

ANSWER: Your question cannot be answered without examining your condominium documents. Many condominium declarations provide that a potential resident must be screened by the condominium board. Documents often provide that persons convicted of crimes involving violence or felonies constitute grounds for rejection. I would say that a condo board seeking to reject a potential applicant due to minor misdemeanor convictions would be treading on thin ice. There are no cases where the Florida courts have explored the limits of an association's authority in this area. In many cases, if a condominium association wishes to reject a potential purchaser, the documents require the association to furnish an alternate purchaser or purchase unit itself.

QUESTION: I live in a condominium with my wife. My condo association is proposing an amendment which would prevent my wife and I from being able to have children and remain living in our home. They want the motion to implement restrictions allowing only two occupants in a one-bedroom condominium. Would not an amendment of this type essentially violate my rights? I.T. (via e-mail)

ANSWER: The law on this matter has been somewhat unsettled over the past decade. Generally speaking, it is illegal for a condominium association to pass a rule discriminating against residents on basis of familial status (having children), unless you live in a "55 and over" community. That being said, even if there is somewhat of a disparate impact upon families with children, housing providers may enact reasonable restrictions upon the number of persons who may occupy a unit. The Department of Housing and Urban Development has declared two person per bedroom restrictions as presumptively reasonable. However, in certain cases (for example where a den could be converted into a bedroom), the rule may be discriminatory.

QUESTION: My mother moved to Florida and was telling us that she is being made to pay $8,000.00 to the condominium association for a "special assessment." She said that it has to be paid in a lump sum. Is this legal? M.E. (via e-mail)

ANSWER: Your mother has apparently been asked to pay a special assessment to cover costs and expenses, which were not previously budgeted for. Special assessments are specifically permitted under the Florida Condominium Act, however, they must be enacted in accordance with the condominium's governing documents. As long as the association has imposed a special assessment in line with the governing documents, it is most likely permissible.

QUESTION: Is it possible for us to make our entire condominium a non-smoking condominium, including inside the apartments? L.P. (via e-mail)

ANSWER: There are two kinds of regulations which govern condominiums. The first type is rules which are found in the recorded documents, which

are presumed to be valid by any court or arbitrator reviewing them. Rules and regulations enacted by the board of directors, on the other hand must pass the "rule of reasonableness."

To my knowledge, there are no court cases which have dealt with this issue. Remember, your home is your castle and smoking is not illegal. As I am certain you are aware, passions run high in the smoking debate and any board-made rule is certain to be challenged as unreasonable.

An amendment to the recorded documents, approved by the unit owners, may stand up in court (or you could be the test case). ⚖

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Sunshine Law Raises Questions

FORT MYERS THE NEWS-PRESS, FEBRUARY 19, 2004

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In the past thirty days, I have participated in three seminars aimed primarily at providing education for community association board members. A total of about 500 people attended the events, all of which were held in Fort Myers.

As a consequence of that experience, it remains clear to me that the most misunderstood (and most frequently violated) area of Florida's community association laws is the so-called "sunshine law."

Although Florida's Sunshine In Government Act does not apply to community associations, the statutes applicable to condominiums, cooperatives, and homeowners' associations each contain their own "sunshine" requirements. The law is the same for condominiums and co-ops, slightly different for homeowners' associations. Today's column is part one of a two-part primer for community association board members on the application of Florida's sunshine laws for associations.

All of the relevant laws define a "meeting" of the board as any gathering of a quorum of the board for the purpose of conducting association business. In almost every association, a quorum is defined as a majority of the board, so if there are five directors, three constitute a quorum. If there are seven directors, four would constitute a quorum, and so on.

A frequently misunderstood issue is what constitutes "conducting" association business. There are no reported Florida appellate court cases involving community associations. There are interpretations for condominiums by the state agency which regulates condos. As HOAs are not regulated, there are no administrative interpretations available for homeowners' associations.

Based upon the rulings of the condo agency, court cases that have arisen under sunshine laws for governmental entities, and the opinions of nearly every attorney I have ever spoken with about the topic, a "meeting" occurs when association business is even discussed, regardless of whether or not a vote is taken. Therefore, a "workshop" meeting would be subject to the "sunshine" requirements if it involves a quorum of the board, since business is being "conducted." Otherwise, associations could skirt the law under the auspices of "workshop" or "information-gathering" meetings, and rubber-stamp their decisions at the public meeting.

There are some substantial differences between the law for homeowners' associations and that for condominiums and cooperatives. Here's a look at the major issues in the sunshine law, and the difference between HOAs and condominiums (all references to condominium procedures apply to cooperatives as well):

Agendas: In condominiums, there must be a specific agenda posted for the board's meeting. Generic agenda designations such as "new business" are not sufficient. There is an exception for emergency situations, and a somewhat complicated procedure which must be followed in emergency cases. For HOAs, generic agendas are still acceptable, with the only exception being that board meetings where assessments will be considered must contain a specific disclosure to that effect.

Posting of Notices: Notice of condominium board meetings must be posted forty-eight hours in advance on the condominium property, in a conspicuous location as designated by board rule. Fourteen days notice (actual notice to the owners plus posted notice) is required for meetings regarding assessments, and board meetings where certain rules and regulations will be considered. For HOAs, the general forty-eight hour posting is sufficient. If the HOA does not have a location where notices can be posted, mailed notice is acceptable, and must be sent out seven days in

advance. For both condos and HOAs, the association may permit the posting of notice through a community television channel, if authorized by the bylaws.

Owners' Right to Speak: In condominiums, unit owners are conferred by law the right to address the board with respect to each designated agenda item. The board may adopt rules regarding the manner, frequency, and duration of unit owner statements, but the rule must be reasonable. Many associations adopt a "three minute per topic" limit, and require anyone wishing to speak to fill out a card before the start of the meeting. In HOAs, the laws does not confer a right to speak at board meetings, although the Governor's Task Force on Homeowners' Associations has recommended a change on this point.

Recording Meetings: In both condominiums and HOAs, association members have the right to record meetings, either through audio-tape or video means. Again, the board can adopt reasonable regulations regarding the set-up of the equipment, prohibitions against distracting conduct, and the like.

Next week we will wrap up this topic with a discussion of minute-keeping requirements, the application of the law to committees, exceptions to the general rules, and penalties for breaking the law. ⚖

No Quorum, No Action is Rule at Owner Meeting

The News-Press February 19, 2004

QUESTION: I live in a condominium community in which the board of directors did not record proposed amendments because no quorum was met at the unit owner meeting. Does this mean that the amendment is not effective? G.M. (via e-mail)

ANSWER: That is precisely what it means. If a quorum is not met, then no action may be taken at the meeting.

QUESTION: Can a Florida cooperative that is a "55 and over" community sell memberships or rent lots to prospective candidates who are less than 55 years of age (but older than forty) who plan to live in the unit? All park residents agree that we want to make sure that it continues to be a 55 and over community. We need to sell shares though, and we want to sell some to a candidate who is less than 55 but older than forty. Is this legal, and can they live in the park as long as eighty percent of the residents are over 55? V.G. (vie e-mail)

ANSWER: A 55 and over mobile home cooperative may legally sell units or rent lots to prospective candidates who are less than 55 years of age, assuming that your documents do not prohibit it, which would be a question for your Park's legal counsel. However, I believe that doing so, is highly inadvisable. If the community's dynamics change, and for some reason your number of units occupied by persons over 55 years of age drops below eighty percent, you will immediately lose your status as a 55 and over Park.

QUESTION: In June 2002, my husband and I bought a building lot in a deed-restricted community. We have not built on it yet, and we are trying to sell it. A few months ago, our realtor told us that if we did not start building on our lot within two years from the date of purchase, the developer could force us to sell it back to them at the price we paid when we initially purchased it. We do not want to do this as the lot has appreciated by fifty percent. I do not recall this being disclosed to me at the time of purchase, but the realtor faxed me a page from the homeowner's association's covenants and, sure enough, it is stated in this document. My question is, can this rule be enforced since it was not disclosed to us upon purchase of the lot? J.E. (via e-mail)

ANSWER: Many communities have a provision in their documents requiring purchasers to begin building within a certain period of time. I believe that this provision, if enforced by the homeowners' association, would be upheld as a reasonable and legal provision of your governing documents. With regard to your question as to whether the rule would be enforceable because it was not "disclosed," I believe that you may have a problem. If the rule is contained in the community's recorded governing documents, you are presumed to have read them, and are charged with what the law calls "constructive notice."

There may be a question whether the developer's option to repurchase is valid under Florida law. You should consult with a real estate attorney as

to whether the covenant to re-sell at the price you paid constitutes an unreasonable "restraint on alienation."

QUESTION: At my condo, a few residents and some board members want to construct a clubhouse, which most residents feel is unnecessary and too costly. Our documents require the board to get approval for any expenditures over $10,000.00. This will cost more than $10,000.00, but the board says that they can spend the $10,000.00 to begin, and then levy a special assessment on all owners for the remaining costs without first obtaining a majority vote. Is this allowed? B.H. (via e-mail)

ANSWER: Without reading the specifics of your governing documents, I cannot give you a concrete answer. However, it appears that what the board is trying to do is circumvent the governing documents' prohibition on expenditures of over $10,000.00 without unit owner approval. I do not believe that a board could circumvent this kind of rule by simply "spending in stages." Additionally, the construction of a clubhouse would be considered a "material alteration of or substantial addition to the common elements." As such, your governing documents probably provide for the procedure by which such a material alteration must be approved. If they do not, the Florida Condominium Act then provides that such alterations must be approved by seventy-five percent of the unit owners.

QUESTION: A quorum of the directors met to discuss landscaping and they did not post the meeting nor did they keep minutes. When I questioned them on it, they told me they did not have to because these meetings are called "review meetings." Is this correct? R.H. (via e-mail)

ANSWER: In my opinion, any time a quorum of the board of directors is together and they discuss association business, this is a "meeting" which must be noticed, and minutes must be taken.

QUESTION: I am a homeowner in what I believed until recently was a condo association, which should follow Statute 718. But, now we have a new manager that believes our master association is actually an HOA and should follow Florida Statute Chapter 720. We are a community built in eleven phases, therefore, we have eleven separate condo associations with one master association. What are we governed by? D.A. (via e-mail)

ANSWER: This question can easily be resolved by an attorney looking at your governing documents (the Florida Supreme Court has specifically admonished community association managers against giving legal advice). If all of the subassociations are condominium associations, then it is likely that the master association is also considered to be a condominium association. However, if there is one or more subassociations which are not condominiums, then the master association is probably considered to be a homeowner's association. ⚖

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Sunshine Restrictions Explained

FORT MYERS THE NEWS-PRESS, FEBRUARY 26, 2004

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Today's column is the second installment of a two-part look at the "Sunshine" laws applicable to Florida's community associations.

Last week we looked at the definition of "meetings," quorum issues, and agenda and posting requirements (see Sunshine Law Raises Questions, February 19, 2004).

Today's discussion focuses on the keeping of minutes, committees, and possible consequences of not complying with the law:

Minutes: Both the condominium and homeowners' association statutes require minutes of board meetings to be kept. There is no deadline in any of the statutes as to when minutes must be reduced to writing after a meeting. An old rule from the condo agency required minutes to be put in writing within thirty days of the meeting, although that rule was repealed. I recommend that minutes be reduced to writing as soon as possible after the meeting (no more than a few days) since that is when the memory of the person responsible for the minutes is the freshest.

HOA Committees: The "sunshine" provisions of the law for homeowners' associations does not apply to committees of the association except in two circumstances. First, any committee given architectural review authority is subject to all of the aforementioned laws. Secondly, any committee that is empowered to spend money on behalf of the HOA is bound.

Condominium Association Committees: The law on this topic is downright strange. The budget committee and any committee empowered to take final action on behalf of the board (such as an executive committee) are commonly called "statutory committees." All other committees (typical examples would include social committee, landscape committee, and personnel committee) are commonly called "non-statutory" committees. Statutory committees must always comply with the sunshine laws. Non-statutory committees must comply with the sunshine laws unless exempted by the bylaws. Many older condominium association bylaws are silent on committees, and in such cases, their non-statutory committees need to comply with the sunshine law.

Exceptions: Contrary to popular belief, there are no exceptions to the sunshine laws for discussing "sensitive" matters, whether personnel-related, sticky "political" issues, or otherwise. I believe that there should be exceptions in some cases, particularly involving employer-employee relations. The only exception that exists, which applies to both condominiums and homeowners' associations, involves meetings with association legal counsel for the purpose of discussing pending or proposed litigation, and when the meeting is sought for the purpose of obtaining legal advice.

Many association board members are used to life in the business world where shareholders elect the board, and the board is entitled to act how and when it pleases in furthering the best interest of the corporation. In community associations, the law is more akin to governmental agencies such as a city council or county commission.

Violation of the sunshine laws in condominiums can result in fines of up to $5,000.00 per violation. In HOAs, directors guilty of violating the sunshine law are theoretically subject to court action for breach of fiduciary duty or a court order enforcing compliance with the laws, with a successfully complaining homeowner being entitled to compensation for their attorney's fees. ⚖

Handicap Accommodation Request Touchy Situation

The News-Press February 26, 2004

Question: Our bylaws state that we must hold an election for our board every year. This year, the candidates ran unopposed. Is there any process by which we can forego the election process and have the candidates declared as elected? P.P. (via e-mail)

Answer: It depends. If your association is governed by the condominium law, then no election needs to be held. Florida Statute Chapter 718 specifically provides that if there are only as many or fewer pre-qualified candidates as open board seats, no election need be held and those who have sought the post are automatically elected.

For homeowners' associations, the law is a bit different. The HOA statute states that self-nominations from the floor must be accepted at the annual meeting. Accordingly, until the meeting is actually called, the election process is not closed, and therefore appropriate voting documents should be prepared for the election.

Question: I am a realtor and am always needing to get copies of covenants for deed restricted communities. Is there a private or government repository which has a current copy of HOA covenants? D.W. (via e-mail)

Answer: There is no central resource for obtaining covenants and restrictions applicable to deed restricted communities. The documents are almost always recorded in the public records of the County where the property is located. In some counties, the documents are available through the Internet. In others, you must go to the courthouse. Of course, the owner should have a copy and is entitled by law to obtain a set of documents from the association.

A realtor who is listing properties in a deed restricted community is well advised to start the listing relationship with a complete set of documents for the community. Since more potential buyers these days are interested in the level of regulation applicable to a particular development, you might wish to have several sets of documents on hand for each of your listings.

Question: Recently you wrote a column about the Governor's Task Force on Homeowners' Association. Were any of the meetings held in Southwest Florida? C.S. (via e-mail)

Answer: Meetings were held in Tallahassee, Miami, Tampa, Orlando, and St. Augustine.

The Department of Business and Professional Regulations has just released the final report of the Task Force, which can be viewed on-line at www.myflorida.com/dbpr, the DBPR's homepage. Click on the report under the segment of the homepage entitled "HOT TOPICS."

Question: I live in a mobile home park which has just gone through a change in management. Previously, employees of the company which own and operate the park were also allowed to perform after-hours services for park residents. For example, one of the employees who works on the grounds crew has done private landscaping work for me, and I have been very satisfied. The new management has told its employees that they can no longer do after-hours work for residents. Does an employer have the right to tell employees what they can or cannot do on their own time? G.C. (via e-mail)

Answer: Subject to certain conditions, yes.

While there may be limits to what an employer can regulate in terms of off-duty conduct, I believe that the policy you have described would be upheld.

Among the reasons an employer may want to limit after-hours employment include avoiding divided loyalties, or the need to debate whether the employee was on company time or working after hours should some mishap, such as an injury, occur.

Question: In your recent article regarding Sunshine laws, you stated that there is an exception regarding agenda posting requirements for "emergency" situations. What are these procedures and what constitutes an "emergency"? R.J. (via e-mail)

Answer: In my opinion, an emergency is an unexpected set of circumstances posing imminent potential harm to the corporation or its assets. Obvious examples would include hurricanes or severe weather events. Other examples might include legal situations where a statute of limitations or other deadline is looming.

Section 718.112(2)(c) of the condominium statute provides that if an item has not been placed on the agenda for a board meeting, it may be taken up on an emergency basis by a vote of a majority of the board, plus one. Therefore, if you had five directors, four would need to agree to take up the item on an emergency basis. The law also requires that the item then be placed on the agenda for the next meeting of the board and duly ratified at that meeting. An item is clearly not an emergency because the association forgot to place it on the agenda. ⚖

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Rental Bill Creates Some Problems

FORT MYERS THE NEWS-PRESS, MARCH 4, 2004

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It appears that the controversial issue of rentals and a condominium association's ability to retroactively restrict rental rights will get some play in the current session of the Florida Legislature, which convened for its annual sixty-day session on March 2, 2004.

One proposed measure, House Bill 1223, would all but eliminate an association's ability to address concerns in the community when rentals become a problem. House Bill 1223, along with all other proposed legislation considered by the Legislature, may be viewed on the Internet at www.leg.state.fl.us.

According to widely published news reports, the impetus behind the proposal arises from a couple from northern Florida who were upset because their neighbors voted to change the rental policy in the condominium which they had purchased with the intention of renting. The couple owning this unit felt that they should be "grandfathered," and proceeded on a successful crusade to bring enough attention to the issue to have it brought up before the Legislature.

The language of H.B. 1223 provides that unless a proposed amendment to the condominium documents specifically provide otherwise, unit owners who own property as of the date of the amendment are "grandfathered" with respect to rental rights. Personally, I do not think most associations would have a problem with this, as it provides each association with local choice on whether grandfathering is the best way to address the issue. In my opinion, that is the law already, so this change does not appear necessary.

The more troublesome aspect of the proposal is a clause which states that an association not wishing to confer grandfather status may only do so by a vote of seventy-five percent of the entire membership, or such greater number as is set forth in the condominium documents. This idea presents both practical and constitutional problems.

From a practical standpoint, many condominium associations have a difficult time even getting enough votes represented at a meeting to establish a quorum. Under the proposed scenario, owners who do not participate would be voting against the measure, and could thwart majority sentiment simply by apathy.

The constitutional infirmity of the proposal involves the issue usually referred to as "impairment of contract." Both the federal and state constitutions prohibit the Legislature from impairing contract rights between parties. Condominium documents are contract rights between the unit owners. By imposing a voting threshold which may be different than what the owners have agreed upon between themselves, the proposed law appears to tread on thin constitutional ice.

As has been discussed in this column on many occasions, the issue of what rights you purchase when you buy a condo unit, and how those can be changed after the fact, go to the heart of the condominium concept.

As of this writing, there has been no counterpart to this proposal filed in the Florida Senate. This will be an interesting debate, and one associations should definitely keep an eye on. ⚖

Documents Control Specifics on Door Replacement

The News-Press March 4, 2004

QUESTION: My condominium association is discussing replacing the exterior doors on all units. The current doors have small "peepholes" and the board is proposing a larger, diamond-shaped insert. The board also wants to assess each owner $1,800.00 per door. Does the board have the right to change our doors and assess us, or is a unit owner vote required? C.G. (via e-mail)

ANSWER: All three of your questions will depend upon an interpretation of your declaration of condominium. The first question to address is whether the documents define the door as part of the units or common elements. If the door is part of the common elements, then the declaration typically gives the board the authority to determine when it is time to change the doors. Conversely, if the door is part of the unit, this is usually delegated to the unit owner as an individual responsibility.

Changing the aesthetic appearance of the doors is probably considered a "material alteration" of the common elements. Again, the documents control. In some cases, the board is given broad discretion. In other condominiums, the documents severely restrict the board. The law states that if the documents are silent, then seventy-five percent of the entire membership must approve the aesthetic change.

Finally, the question of financing the new doors is again driven by the documents. Typically, if a function of the condominium association is properly exercised by the board, then the documents will also give the board the authority to levy a special assessment. Certain notice procedures must be followed. However, I have seen documents which limit a board's assessment authority, and in my opinion, such limitations are generally valid.

QUESTION: Our condominium association would like to charge unit owners that rent out their units more than ten months per year a monthly fee of $200.00 to cover the cost of problems created by some of the tenants. Can the board impose this charge without a membership vote? E.K. (via e-mail)

ANSWER: The board cannot impose such a fee, even with a membership vote. The Florida Condominium Act specifically provides that the only charge that an association can make in connection with rentals is a transfer approval fee, which must be authorized by the documents, and which cannot exceed $100.00 per applicant.

An association can also require a security deposit, not to exceed one month's rent, which can be held as security for damage to common property. The security deposit must also be authorized by the condominium documents, and may be a good option in your case.

QUESTION: I am a member of a homeowner's association. I have requested a balance sheet and an income and expense statement from the board of directors. I have asked the president twice and the treasurer once. The board members said they would provide me the documents, but never did. What should I do? J.L. (via e-mail)

ANSWER: First, members of homeowners' associations are entitled to inspect official records within ten days of receipt of a written request. Therefore, you should request records in writing, not verbally.

The association's year-end financial reports are part of the official records, and you are entitled to see them. However, the law applicable to homeowners' associations does not necessarily require the preparation of a balance sheet and statement of revenue and expenses. Pursuant to Section 720.303(7) of the statute applicable to HOA's, an association must either present financial statements in conformity with generally accepted accounting principles, or a financial report of actual receipts and expenditures, using the cash-basis method of reporting.

QUESTION: Our homeowner's association meetings are always scheduled at a very inconvenient time, usually between noon and 4:00 p.m. Homeowners who work during normal business hours cannot attend. A petition was signed by more than sixty percent of the homeowners requesting that the meetings be held at more convenient hours. Our bylaws state that our annual meeting is to be held at 8:00 p.m. during the second week of February, but there is no specific reference to the time that board meetings must be held. What can we do? K.E. (via e-mail)

ANSWER: Obviously, your board should be sensitive to the will of the majority. Setting aside

the legalities, if more than fifty percent of the entire membership has requested that board meetings be held at a different time, it seems that the board should do so.

Legally, your petition may or may not have been sufficient. In all likelihood, if you wanted to force the board to hold meetings during what you determine to be reasonable hours, you would have needed to present a petition to seek a vote of the members to amend the bylaws. Your petition would need to set forth exactly what time board meetings should be held.

Given community sentiment, it would be my suggestion that the board and the group leading the petition drive come to a compromise that is acceptable to all concerned.

QUESTION: We are a small condominium, consisting of only six units. We heard that associations of our size are not subject to the Florida Condominium Act. Is this true? J.L. (via e-mail)

ANSWER: No, it is not true. Every condominium created in the State of Florida is subject to Chapter 718.

There are various provisions of the Condominium Act that permit associations of smaller sizes to "opt out." Competitive bidding is one example. Certain year-end financial reporting requirements do not apply to associations of less than fifty units.

Otherwise, the entire law applies to your operation. ⚖

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Bill Would Limit Some Voting Rights

FORT MYERS THE NEWS-PRESS, MARCH 11, 2004

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As mentioned in last week's column (Rental Bill Creates Some Problems, March 4, 2004), House Bill 1223 takes aim at some weighty issues that go to the core of condominium governance. Today's topic, an exploration of the proposals in HB 1223 regarding proposed limitations on voting rights.

By way of update from last week's column, a Senate counterpart to HB 1223 has been filed, which is known as Senate Bill 2498. As also noted, all proposed legislation can be reviewed at the web-site of the Florida Legislature at www.leg.state.fl.us.

Perhaps one of the most radical initiatives in HB 1223 is a clause that would prohibit a person or entity which owns multiple units from exercising more than one vote in condominium affairs. Under current condominium law, voting rights are allocated by the documents. In nearly every case, each unit is allocated one vote, and is likewise allocated the obligation to pay maintenance fees for each unit.

The new proposal is tantamount to taxation without representation, a battle that was fought and won well over two centuries ago.

The proposed law, as written, appears to apply to existing condominiums and associations. In my opinion, the application of this law to existing condominiums would be patently unconstitutional. In fact, for the 40 years Florida's condominium law has been in existence, voting rights assigned by the declaration of condominium have been considered a right which can only be changed by unanimous approval of all unit owners and mortgage holders.

Although I do not know for sure, it appears that the aim of the proposal is to discourage single investors or investor-groups from buying up large blocks of units in a condominium, which often results in degradation of maintenance standards, falling property values, and in extreme cases, the creation of crime-ridden slum neighborhoods. Clearly, protecting unit owners in communities which are susceptible to those problems, which often involve a high percentage of fixed-income retirees, is a laudable goal.

Unfortunately, this proposal does not, in my opinion, accomplish the task.

I am aware of a number of condominium associations which have amended their governing documents to prohibit a single individual (or related individuals and investor groups) from owning more than a set number of units, often two or three. In my view, such an amendment to the documents would be valid and enforceable. If the Legislature wants to lend assistance in this area, and I think it should, a simple amendment to the statute stating that amendments limiting the number of units a person or entity can hold are a valid exercise of association authority is all that is needed.

Like the rental situation, most problems affecting particular condominium communities are unlikely to be solved by piling yet more statewide rules on how condos are operated. Enabling each community to take control of its own destiny seems far preferable.

Next week we will examine HB 1223/SB 2498 regarding a proposal to place two-year term limits on board members, and a proposed requirement that each board member be subjected to a criminal background check. ⚖

Condominium Owners Have to Accept "Turnover"

The News-Press March 11, 2004

Question: My question concerns the turnover of a condominium association from the developer. Do unit owners have to accept turnover by the developer at the time of the developer's choosing, or can we wait until a time of our choosing? L.D. via e-mail

Answer: Transition of control of operation of the association is commonly referred to as "turnover". At turnover, the developer no longer has the right to appoint the association's board, the board is elected by unit owners other than the developer. The developer can still vote for, or appoint, a minority of seats on the board in some instances.

The timing of transition of control is governed by Florida Statute, Chapter 718. The law provides that the developer must turn over control of the association when certain "trigger events" occur. The most common event is when ninety percent of the units have been sold, and when that happens, the developer must call for transition within ninety days of the trigger event. Other trigger events include three years from the date of sale of fifty percent of the units, seven years from recording the declaration of condominium, and any point in time at which the developer stops offering units for sale in the ordinary course of business.

Since the time of transition is set by law, I believe that the unit owners must accept turnover when the transition meeting is called by the developer. In most cases, the condominium documents also give the developer the authority to select an earlier turnover date, and in my opinion, the owners must also accept control of the association under those conditions.

Contrary to the fears of some, accepting control of the association is not a waiver of rights of the unit owners or the association. In fact it is the period in time in which the association obtains "standing" to pursue matters of common interest.

The transition process is probably the most important time in the legal life of a condominium association, and experienced legal counsel should be consulted to provide advice on important items. These include warranty rights, the developer's obligation to provide a post-turnover audit, and the applicability of the statute of limitations to claims the association may have.

Question: I recently purchased a home in a very nice community, where I came to relax and be left alone. My home includes a two-car garage. However, because I have a large amount of person items stored in the garage, I can only fit one car in the garage. I park my second car in the driveway. It is a nice car, nearly new, and I park it a few feet from my garage. Recently, I received a letter from the association citing a provision in our "Declaration of Covenants and Restrictions" which states that motor vehicles must be parked inside the garage, and may be parked outside only temporarily. This documents was signed back in 1985 and seems ridiculous to me. What can I do about it? J.H. via e-mail.

Answer: Your situation involves a common source of tension in communities. Some people find cars parked in driveways high offensive. Others say that is what driveways are for.

In your case, if there is a recorded covenant, you are best advised to comply with it. You should clean out your garage and make room for your second car.

Even though the restriction is nearly twenty years old, most restrictive covenants run with title to the property, and were presumably part of the official land records when you bought your home. Therefore, you have "constructive notice" of the rule, and are bound to abide by it.

Failure to comply with a restrictive covenant in a homeowners' association can invoke potentially serious consequences. Sometimes, restrictions are enforced through court action, and the party who wins the suit is entitled to recover their lawyers fees from the losing party. As you might imagine, the attorney's fees can become quite stiff in hotly contested cases.

Your covenants probably contain an amendment procedure, as well as a method for petitioning for the consideration of a change. If you feel that the restriction no longer serves the needs of your community, you may wish to ask your neighbors to support a petition for a vote to change it.

Question: What recourse does a condominium association board have when its management company fails to perform contractual obligations in a diligent and timely manner? R.M. via e-mail

Answer: As with any contractual relationship, the association has the right to insist on performance, and seek money damages for breach of the agreement.

In my experience, unless money has been stolen, or significant financial damage inflicted upon the association, litigation between an association and a management company is rarely productive.

The best protection for the association is to have a written management contract that is terminable by either party, with or without cause, upon reasonable notice. I recommend thirty days, or sixty days at the most.

There are many management companies throughout Florida and many of them will work for your business. If you are unhappy with the current arrangement and cannot make it work through normal efforts, then a change may be in order.

Question: I am the president of a condominium association, and we have a personnel committee. The committee recently had a closed meeting regarding our employees, where wages, conditions of employment, and other sensitive information was discussed. Must this type of meeting be open to the membership. E.W. via e-mail

Answer: I would recommend that you go to my recent two-part series on "Sunshine Laws" ("Sunshine Law Raises Questions", February 19, 2004; and "Sunshine Restrictions Explained", February 26, 2004) Past editions of this column may be viewed on my Firm's website, www.beckerlawyers.com.

The personnel committee is not a "statutory committee". As such, its meetings are not required to be open to owners if the bylaws exempt non-statutory committees from the sunshine provisions of the Condominium law. If the bylaws do not contain such an exemption, the meetings must be open.

Question: Our condominium association is relatively new. Our first president worked very hard and helped us through some very difficult negotiations with the developer. He has sold his unit and the new board wants to give him a parting gift for his hard work. We were thinking about a plaque and a one hundred dollar gift certificate. Is the board allowed to do this under Florida law. B.R. via e-mail

Answer: While I am all for recognizing volunteer contributions, I do not think association treasury funds should be used for this purpose. Under Florida law, the association may only spend mandatory assessment income on "common expenses", as defined in the law.

I think that a plaque and a gift are a wonderful idea, and would recommend that your board take up a voluntary collection from the neighbors, in recognition of your parting president's hard work. ⚖

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Term Limits Appear too Restrictive

FORT MYERS THE NEWS-PRESS, MARCH 18, 2004

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Today's column continues a review of one of the most significant, if not bizarre, proposals to amend Florida's condominium statute that has been filed during the past forty years.

In the first two installments, we looked at House Bill 1223/Senate Bill 2498 from the perspective of proposed limitations on the ability of an association to control rentals through amendment (see Rental Bill Creates Some Problems, March 4, 2004) and the bill's proposed confiscation of some unit owners' voting rights (see Bill Would Limit Some Voting Rights, March 11, 2004).

Today's column takes a look at the proposed law's intended imposition of draconian term limits for association board members, limits on family members simultaneously serving on a board, and perhaps strangest of all, residency requirements. By way of late-breaking news, the Bill was recently passed out of the House of Representatives' Committee on Business Regulation. The term limit proposal was scrapped in the House, but remains in the Senate version of the Bill.

The proposed new law, if passed in the Senate version, would limit any person's right to sit on a condominium board to two consecutive years, and then a break would have to be taken.

The idea of term limits is hardly a new one in condominiums. The state agency charged with enforcement of the law has long said that an association wishing to impose term limits can do so through its own bylaws. Although the right to establish term limits has been the law for many years, I am aware of only one or two cases in the real world where owners have found it desirable to impose term limits.

Notwithstanding what happens in the real world, this "government-knows-best" proposal would saddle the state's twenty thousand condominium associations with a law that would preclude owners choosing who is best qualified to protect their investment. Most of the representative governments with which we are familiar do not impose term limits. Where term limits do exist, even our nation's President can serve eight years, as can members of the Florida Legislature.

Although there are undoubtedly a few power mongers who look at condo board serve as a chance to fulfill all of life's spoiled expectations, the reality is that most people who volunteer to serve do so out of a sense of civic duty, often reluctantly, and to help protect their investment. Many associations, particularly smaller ones, have a decidedly difficult time in finding enough people willing to do the job. The term limit idea seems tailor-made to exacerbate that problem. Although the law does create an exception to term limits in some cases, the procedure required is cumbersome and unworkable.

Curiously, according to the proponents of this legislation, one of the biggest problems in condominium living is undue influence and control by management companies over the operation of associations. While I may have missed the point somewhere, it seems to me that having associations run by boards which constantly turn over, with no on-the-job training, is hardly the way to reduce reliance upon management companies in association operations.

The proposed law would also prohibit any two members of an immediate family from simultaneously serving on a condominium board. While I would support an amendment limiting the right of

one unit to field more than one candidate for the board (for example, prohibiting a husband and wife representing the same unit from simultaneously serving), this proposal applies to children, spouses, aunts, uncles, nieces, nephews, and various degrees of cousins, and is not limited to single unit ownership. Thus, if a mother and daughter each owned separate units in a condominium, they could not serve on the board at the same time, even though they pay separate maintenance fees. In addition to constituting taxation without representation, this proposal may well be unconstitutional by denying some unit owners equal protection of the law, and discriminating against them simply based upon their familial relationships.

Finally, HB 1223/SB 2498 provides that no person can serve on a condominium association board unless they have been in residence for three months in the year prior to the annual meeting at which he or she is elected. This proposal disenfranchises new association members, investor owners, and perhaps some seasonal residents. There is also a serious question as to how this would be policed. What if an owner was in the hospital recuperating from an illness in the year prior to the election, can he or she qualify to run?

There is an old saw that fanciers of the law and sausage should watch neither being made. So, either express your opinion to your elected representatives, or keep your eyes closed. ⚖

"Exotic-looking" is Not Reason to Give Pets the Boot

The News-Press March 18, 2004

QUESTION: I recently moved into a community that has a homeowners association. In the governing documents it states you can have dogs, cats, or other household pets. It does not state anything about breed, size, or weight. I own two cats that are "exotic looking." One has spots and the other has pointy ears. The homeowners association now says that I have to get rid of the cats because they look different. These cats are declawed and never go outside my house. The homeowners association wants to take me to court. Do you have any recommendations? J.W. (via e-mail)

ANSWER: It sounds as if the Board may be under the impression that these cats are not just "exotic looking," but may be exotic breeds. If your documents state that you may have a "household pet" I believe that the Board would be within its rights to exclude exotic breeds such as tigers, lions, lynxes, osceolots, or panthers (for example). However, if the only dispute is that your cats "look like" exotics, it sounds like the documents create an affirmative right for you to have what a normal person would consider to be a "house cat."

QUESTION: We hung a bird feeder outside of our condo unit, as have many other condo unit owners in our community. At a recent meeting, a neighbor complained that animals, attracted by the birdseed, destroyed her flowers. As a result, the Board passed a rule stating that no bird feeders could be filled due to the fact that they attract unwanted animals. We didn't think that this was right, so we kept our bird feeder. Now they have told us that they are going to fine us every day that we leave it up. We still want to refuse to take it down since there is nothing in the By-Laws that says we can't have a bird feeder. P.B. (via e-mail)

ANSWER: Absent a limitation in the condominium documents, the board has broad discretion to pass rules for the health, safety, and welfare of the residents. It sounds like this is a proper rule for the board to pass and it was passed for a proper reason. While you may disagree with the rationale, it does not appear that the rule was wholly arbitrary or unreasonable. With regard to the fine, the Florida Condominium Act permits condominium associations to fine unit owners for violations of governing documents, including rules and regulations. The authority to fine must be contained in the association's documents, and you would first be entitled to ask for a hearing. If fines are authorized in your community, and you fail to comply with the rule, you may well end up paying a fine, and also be subject to the association's attorney expenses.

QUESTION: I live in an association where many of the units are rental units. Is it considered harassment to send letters to the renters when they

are breaking the rules? For example, none of the renters pick up their dog waste and the condo association manager says that they have to notify the owners (and not the renters) because it would be considered harassment. Why would this be considered harassment? K.M. (via e-mail)

ANSWER: It is not considered harassment to send letters to the renters if they are breaking the rules. In fact, this is an advisable course of action. Before the association can take any further action, it must place the violator on notice, via letter (sent preferably by certified mail). When a unit is rented, I typically recommend that both the unit owner and tenant receive the violation notice letter.

QUESTION: Our homeowners association documents state "to qualify to be a Board member, your name must appear on the deed to your property, you must be a resident of the State of Florida, and you must reside in the subdivision." We have a Board member who was elected to a 2-year term, but when I looked at his information on his deed, I noticed that his house is listed in the name of a Trust. Can he remain a Board member for the remainder of his term? V.A. (via e-mail).

ANSWER: There are a couple of problems here. First of all, the answer to your question is that if a home is owned by a trust, either the grantor or the beneficiary of that trust would be a "member" of the homeowners association. That being said, it appears that your homeowner's association documents have an illegal provision in them. The Florida Homeowners Association statute states that all members of the association are eligible to serve on the board of directors. Accordingly, residency in the State of Florida and residency in the subdivision are not required, and any such prohibition on non-Floridians or non-residents is against the law.

QUESTION: Our homeowners association board of directors holds a monthly "executive meeting of the Board" at which no homeowners are allowed. Is this legal? When we questioned them about this, our Board's corporate counsel wrote "if the Board meets without providing notice to the membership, no action may be taken unless the meeting was called in case of an emergency and sufficient time did not exist to notify the membership. The Board, however, may meet as a committee of the whole at which items of business may be discussed, but no formal vote taken. Also, the Board may meet with the HOA attorney at any time to discuss pending or contemplated litigation without notice to membership." Is this legal? What is a "committee of the whole?" V.A. (via e-mail)

ANSWER: The law applicable to HOA's requires that notice of all board meetings be posted at least 48 hours in advance of a meeting, and that the meetings be open to observation by the homeowners. It is true that emergency meetings may be held without such notice, but these must be a bona fide emergency. The letter from the corporate counsel is correct in that the Board may meet with its attorney to discuss pending or contemplated litigation, and such meetings may be closed to the membership. Finally, with regard to the "executive session" or the "committee of the whole" these meetings are, in my opinion, in violation of the law. You can access my recent two-part series on sunshine laws through the Internet, as indicated below. (See Sunshine Law Raises Questions, February 19, 2004 and Sunshine Restrictions Explained, February 26, 2004.) ⚖

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Legislature Tackles Aggressive Agenda

FORT MYERS THE NEWS-PRESS, MARCH 25, 2004

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The Florida Legislature has reached the approximate half-way point in its annual sixty day session. Pundits claim that during election years, the Legislature rarely tackles anything controversial.

As noted in the past several editions of this column House Bill 1223/Senate Bill 2498, the proposed condominium statute "reforms," certainly seem to be an exception to that rule.

Today, we will look at some other proposals pending before the Legislature, which are a bit more on the mundane side:

HB 411/ SB 1184; Miscellaneous Community Association Issues: As reported previously (Law Offers Liability Protection, February 12, 2004) this Bill would provide additional immunity to associations which provide automatic external defibrillators. Further, the Bill would tighten up notice procedures for homeowners' associations. Under the new law, if passed, HOA boards would be required to give fourteen days actual notice (both mailed and posted) to homeowners before special assessments could be levied, or before rules could be enacted regarding use of the parcels. This is similar to the condo law. Finally, HB 411/ SB 1184 would provide associations who respond to "lender information requests" with immunity from liability, provided that the associations' response is made in good faith and after reasonable diligence.

HB 1663/ SB 1990; Q&A Sheet: Several years ago, the Florida Legislature deleted the requirement that the "Question and Answer Sheet" be used as a required disclosure document in condominium unit re-sales. Apparently feeling that this was a mistake, the Legislature has now proposed to institute the requirement for the Q&A Sheet.

HB 589/ SB 1438; MRTA: The intention of this proposed law is to address the severe effects felt by some communities when they learn that their covenants and restrictions have been extinguished by Florida's Marketable Record Title Act. Unless a vote has been taken to extend the covenants against MRTA extinguishment, many communities can no longer enforce restrictions after a period of thirty years. The new law would permit associations which have covenants that have been terminated by MRTA be able to take a vote to re-instate them.

SB 2984; HOA Task Force: This column has reported on the recommended legislation from the Governors Task Force on Homeowners' Associations. This proposed legislation would implement those recommendations. I am told that a similar measure will be introduced in the House of Representatives, as a "Committee Bill," which should soon bring the Task Force's proposed legislation up for debate in both chambers of the Legislature.

HB 747/ SB 1938; Fire Sprinkler "Opt Out" Vote: This is a "glitch bill," intended to address certain items enacted by the Legislature in 2003. This law has to do with high-rise buildings (those defined as seventy-five feet or higher) which are required to retrofit fire sprinklers by the year 2014. One change would allow the use of proxies when the "opt out" vote is taken.

HB 1017/ SB 1728; Guard Rails: This Bill would permit unit owners in a condominium to vote not to retrofit the condominium property with handrails and guardrails.

HB 1507/ SB 298; Condominium Construction Litigation: Although the currently-filed version of the proposed law goes overboard, sponsors have recently submitted an amendment which will limit the effect of the Bill. Basically, the new law would require any condominium association making a claim against a developer to rely on an opinion from a licensed professional, such as an architect, engineer, or licensed consultant, before a suit for construction defects could be brought.

At mid-term in the Legislature, it is nearly impossible to predict how these Bills (and several others affecting community associations) will fare. It appears that some are headed for smooth sailing, others for a brick wall.

Those with an interest in community association legislation can stay up to date, by the day, by reviewing the web-site of the Florida Legislature www.leg.state.fl.us/. ⚖

Condo Owner Advised to Pay Tax Bill, Plus Interest

The News-Press March 25, 2004

QUESTION: Recently we received an invoice for the 2004 fees and charges for our condominium association. Included were 2004 property taxes. We submitted payment in full for all fees and charges except the 2004 property taxes, since they are billed in arrears by the County, and are not due until the end of the year. We received a phone call demanding we pay, and then an invoice that invoked a late fee and interest for the amount withheld? Is this legal and can a condominium association force owners to prepay property taxes? J.L. (via e-mail)

ANSWER: In general, condominium associations do not own property, and therefore do not pay real estate taxes. The only exception I am aware of is timeshare condominiums, where the association actually collects and remits the taxes on the individual time-share interests.

Apparently your association owns some property for which it pays real estate taxes. In that case, the taxes are an operating expense, like any other expense of the association. Even though they may not be due until the end of the year, many taxpayers do pay prior to the end of the year, since early payment discounts are available. Thus, assuming the association is properly paying (and therefore collecting) taxes in the first instance, this would appear to be an appropriate operating expense, and you should pay it. It is no different than an insurance bill which may not become due until November or December.

If my assumptions are correct, then your best bet is to also pay the interest and late fees. Otherwise, you risk this matter escalating, including attorney involvement and a possible lien.

QUESTION: Four years ago, my wife and I purchased a condo unit in Florida. We put the title in my wife's name, for family estate and tax reasons. Two years later, I was asked to serve as a member of our board, and agreed to do so. One of the unit owners has now complained that I should not be on the board. Although my wife's name is on the deed for financial reasons, we are both the "true" owners of the property. Please advise. R.S. (via e-mail)

ANSWER: In order to be eligible to serve on an association board, it is not necessary under Florida law that you be a record title holder.

However, many condominium documents provide that only record owners are entitled to stand for election for or serve on the board. If your association's documents contain such a provision, you are not qualified to serve on the board, and should immediately resign.

QUESTION: Our condominium maintenance fees are different for each unit, based upon the square footage of the units. Our manager uses this formula for all expenses, including maintaining the streets, pool, and landscaping. This does not make sense to me. While I understand that the maintenance of our homes should be keyed to the size, we all put equal strain on the pool, streets, and other common elements. M.O. (via e-mail)

ANSWER: In condominiums, maintenance fees (technically known as "common expenses") can only be allocated in one of two ways. First, the declaration of condominium may provide that all owners pay equally. The other option is for common expenses to be shared on a weighted basis, based upon size of the unit. Your developer apparently chose the latter option.

The so-called "weighted" method of allocating common expenses must be applied to all expenses of the association, which would include street and pool maintenance. Unless your documents are very unusual, the allocation of common expenses can only change with unanimous approval of all unit owners and lienholders (such as mortgagees), which is usually a political impossibility.

QUESTION: We live in a gated community where we are required to pay a monthly maintenance fee, and are governed by a seven-member board. Our financial records have never been audited and the current board is not in favor of an audit. The bylaws do not require an audit. Is there anything we homeowners can do to force an audit. V.S. (via e-mail)

ANSWER: The law applicable to homeowners' associations only requires a minimal year-end financial report. Accordingly, unless your bylaws require an audit, your board is under no obligation to obtain an audit (not to say that an audit from time to time is not a good idea, I think it is).

Your bylaws presumably contain a petition process for amendment. I would recommend that you review the bylaws and if you feel a sufficient number of your neighbors would support an annual audit, petition for a bylaw amendment to that effect.

QUESTION: If a husband and wife reside in the same unit, and both serve on the board, do they both have the right to vote on an issue that comes before the board? We have two married couples serving on our board, and they vote on all issues, giving them four of nine votes on the board. K.C. (via e-mail)

ANSWER: The Florida Condominium Act does not prohibit multiple representatives from a unit serving on the board simultaneously, including husband and wife. Accordingly, if your owners have elected two married couples to serve on its board, they get four votes.

QUESTION: In one of your columns, you mentioned that a transfer approval fee is limited to $100.00 per transaction. The country club community where we reside charges a "transfer of privileges" fee of $150.00 when a unit is rented. We rent the unit from our children, who are the title-holders. If such a fee legal under Florida law? B.V. (via e-mail)

ANSWER: The $100.00 limitation only applies to condominium associations. Most master facility associations are governed by the law applicable to homeowners' associations (Chapter 720 of the Florida Statutes) which does not prohibit such a fee. Therefore, if the fee is authorized by the governing documents, it is likely valid. ⚖

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Bill Assumes Many Boards are Corrupt

FORT MYERS THE NEWS-PRESS, APRIL 1, 2004

By Joe Adams

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Today's column continues a review of one of the strangest pieces of proposed legislation affecting condominium associations to ever have been considered by the Florida Legislature.

Past editions have looked at the Bill's desire to take away voting rights, disenfranchise owners from serving on the board, impose term limits, and take away association rights to amend documents regarding rentals. (See *Bill Would Limit Some Voting Rights*, March 11, 2004; *Term Limits Appear Too Restrictive*, March 18, 2004; and *Legislature Tackles Aggressive Agenda*, March 25, 2004.)

Today's twist, the proposal to create an "ombudsman" which might be more appropriately characterized as the Wolf in Sheep's Clothing. Webster's Dictionary defines an ombudsman as a "government official appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials."

Under the "all association boards are corrupt" philosophy of House Bill 1223/Senate Bill 2498, the ombudsman would possess Gestapo-like authority that would have made Senator Joe McCarthy salivate.

The primary purpose of the ombudsman is to "assist any unit owner in the operation and filing of a complaint" against their association. In addition to other powers, the ombudsman could conduct "surprise" inspections of condominium associations and rummage through their books and records. Call me old-fashioned, but I thought our forefathers spilled their blood over two centuries ago to stop the abuses that inevitably flow from unbridled governmental power.

The proposal also grants the so-called ombudsman the authority to prefer criminal charges against condominium association directors. While the small percentage of association directors or managers who steal should obviously be prosecuted by appropriate authorities, the clear flavor of this Bill is that rampant corruption is part of Florida's current condominium governance culture.

Perhaps the most Orwellian proposal is a clause that would permit the ombudsman (an un-elected, unaccountable agent of government) and the agency which employs him or her, to remove directors from office for the act of "electoral fraud," which is nowhere defined in the statute. Petty details like due process of law apparently will not stand in the way.

Miraculously, this Bill is still alive and well in both chambers of the Legislature and will likely become law unless the silent majority rises to be heard. If you don't take the time to protect yourself now, don't complain when your resident condo commando has a free prosecutor to drag your association through the mud. ⚖

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Lee County Presents Fair Housing Forum

Fort Myers The News-Press, April 1, 2004

On Thursday, April 8, the Lee County Office of Equal Opportunity, in conjunction with the city of Fort Myers Community Redevelopment Agency, will present a forum called "Simplifying Fair Housing Issues."

The seminar will run from 8:00 a.m. to 10:30 a.m. at the Royal Palm Yacht Club, 2360 W. First Street, Fort Myers. Attendance is free, but registration is limited to 110 participants. Reservations may be made by calling the Lee County Office of Equal Opportunity at 335-2221 and placing your reservation with Sandra.

Presenters will include attorney Michael Whitt and Kami Corbett and Cecile Johnson from the Lee County Office of Equal Opportunity. I will also speak on "55 and over" housing. Topics will include the "Three A's" - ADA, Accessibility, and Accommodations. Reservations will be closed when 110 registrants have been confirmed. ⚖

To Qualify as Association, Two Tests Must be Met

Fort Myers The News-Press, April 1, 2004

QUESTION: *I am a newly elected member of a homeowners association. We are set up as a not-for-profit corporation. Membership in the association is mandatory, and if you do not pay assessments, the association can file a lien against your home. Does this bring us under Chapter 720 of the Florida Statutes? Also, there are weekly meetings at the clubhouse with a quorum of directors attending, along with the manager. The board will not post notice of these meetings, and claim that they do not have to because there is no agenda for the meeting. What is your opinion.* S.P. (via e-mail)

ANSWER: To qualify as a "homeowner's association" under Chapter 720 of the Florida Statutes, your association must meet two "tests." First, membership in the association must be mandatory. Secondly, if a parcel owner does not pay assessments, the association must have the right to file a lien for nonpayment. Accordingly, your association is governed by Chapter 720.

Under the statute, notice of any meeting of the board must be properly posted, and parcel owners must be permitted to attend (except attorney-client privileged meetings). The fact that no agenda has been prepared for the meeting does not change the application of the law. Your board should conform its practices to the law.

QUESTION: *At a recent board meeting, allegations were made by a unit owner who claimed that improper favors were given to board members by the manager. These accusations were included in the draft of the minutes but subsequently "expunged" when the minutes were adopted by the board. The reason given is that the accusations were too "inflammatory." Was the board acting correctly in doing so?* J.M. (via e-mail)

ANSWER: In general, minutes of a board meeting should reflect what was done, not what was said. Therefore, remarks from the floor are typically not included in a properly kept set of board minutes.

If a homeowner has made charges against members of the board which, if false, could prove defamatory, I would typically recommend not publishing those accusations in the minutes. Otherwise, the association could be subject to liability.

QUESTION: *The declaration of covenants for our homeowner's association states that two-thirds of the members must approve "capital improvements." However, the law defines a "quorum" as thirty percent of the "members." Which controls?* R.H. (via e-mail)

ANSWER: A quorum is the minimum number of voting interests which must be represented at a meeting in order for business to be lawfully

conducted. As you have noted, Florida's law applicable to HOA's states that thirty percent is an adequate quorum.

However, the governing documents may also require higher levels of approval for various types of action. For example, the clause you have cited appears to state that approval for a "capital improvement" requires approval from two-thirds of the total voting interests (there is typically one voting interest per parcel). Therefore, you would need the larger number of votes for that item to succeed.

QUESTION: *Does the president of our board have the authority to meet with the management company representative without inviting any of the board members?* P.U. (via e-mail)

ANSWER: There is no prohibition in the law against meetings between the board president and the management company representative. In fact, that would be a common occurrence. Most associations designate a single point of contact with the management company, and that is usually the association's president. Obviously, the president could not make decisions with the manager that would otherwise require action of the board of directors.

QUESTION: *I recently inherited a condominium unit from my mother. The condominium is a "55 and over" condo. I had been living there with my mother for over four years prior to her death, and am now age 51. The association says that I cannot live there alone. What is the law on this issue?* J.D. (via e-mail)

ANSWER: It depends on how your association's "55 and over" clause is written. The law only requires that eighty percent of the units be occupied by one person age 55 or older. The remaining twenty percent is typically set aside as a "cushion" to address hardship situations, including the death of a non-age qualifying spouse, inheritances, purchase of a unit for caretakers, and the like.

Your case would appear to present a classic "hardship" situation and you should ask the board if the association has a hardship application procedure. ⚖

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Summer-ize Condo Before Leaving Area

FORT MYERS THE NEWS-PRESS, APRIL 8, 2004

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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. We wish you safe travel.

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.

Leave a key. Most condominium associations require unit owners to leave keys to their apartments, for access in the event of an emergency. Even when the association does not mandate a key, I think it is a good idea to leave one with someone in a position of trust, such as the association manager or a neighbor.

Make sure your insurance is up to date. Remember that insurance laws have changed effective January 1, 2004 (See Insurance changes are some help, January 22, 2004). Make sure that all of the items you should be covering under your individual insurance policy are now covered, since the association will no longer take care of them.

Arrange for periodic inspection of your unit. Most associations do not offer "care-taker" services. However, experience has shown that summer-time is prime time for water intrusion incidents and mold. Florida's high heat and humidity, combined with a high percentage of absenteeism, all add to the mix.

Take responsibility for temperature and humidity control in your unit. Many owners, wishing to "save money" turn off air-conditioning while they are away for the summer. Even without an exterior leak involved, poor climate control in individual apartments can generate mold and mildew, and potentially significant remediation costs.

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. ⚖

Failed Candidate has Right to Inspect the Ballots

The News-Press April 8, 2004

QUESTION: Recently, I ran for one of the open seats on my condominium association's board. Unfortunately, when the votes were counted, I was out of the country and unable to attend the meeting. I am told that the annual meeting did not attract a quorum of members. However, the votes were counted at the meeting, and I did not win a seat. I asked to look at the ballots, and was told that they are not given out. What is your opinion? D.K. (via e-mail)

ANSWER: First, the Florida condominium law states that only twenty percent of the eligible voters need to cast a vote in order for an election to be held. Therefore, even though there was no quorum at the annual meeting, it was proper for the election of directors to proceed.

The voting documents, including all ballots and envelopes, are part of the official records of the association and must be maintained for a period of one year from the date of the annual meeting. You are entitled to inspect all of these documents, and the association is subject to various penalties if it refuses you the right to do so.

QUESTION: The owners' manual for our condominium association contains an election flow chart which shows how the annual meeting and ballot counting is to be handled. Our manual states that the "polls are closed and the inner envelopes are separated from the outer envelopes." Then, the manual goes on to state that the "inner envelopes are opened, ballots counted, and results announced at the annual members' meeting." Despite these instructions, our association manager opens the outer envelopes in his office. He claims that he is looking for proxies and wishes to ensure a quorum for the annual meeting. Is this the correct procedure? J.W. (via e-mail)

ANSWER: Unless your association has opted out of the voting procedures contained in the condominium statute, your manager is not handling the ballots correctly.

The procedure for voter verification and ballot counting is contained in Rule 61B-23.0021 of the Florida Administrative Code. You can find this law by going to the web-site of the Florida Division of Florida Land Sales, Condominiums and Mobile Homes at www.state.fl.us/dbpr/lsc. From there, you can navigate to the Administrative Rules and Rule 61B.

As you will note from reading the rule, the election committee must verify the outer envelopes at the time of the annual meeting. The only exception is when the board calls a special meeting to verify outer envelope information, which must then be handled in the same manner as a board meeting (posting required, owners entitled to attend, and the like).

QUESTION: My wife and I recently purchased a condominium unit. Two days after closing, the board met and enacted a four hundred dollar assessment, which we are told was for a deficit incurred by the association in 2003. I was never told about the pending assessment prior to closing, even though the management company had sent out a letter to every owner fourteen days prior to the board meeting where the assessment would be considered (twelve days prior to my closing). What are my rights? J.R. (via e-mail)

ANSWER: First, the obligation to pay assessments runs with title to the unit, and therefore becomes your responsibility the day you take title. Further, the association has no obligation to inform prospective purchasers about pending or proposed actions, only assessments which have actually been levied. Therefore, your beef is with the seller of your unit or the real estate agent involved.

Florida's law states that a seller of property (and in some cases their agent) have a duty to disclose known matters affecting the value of the property. Most of the reported court cases involve construction defects. I am not aware of any cases involving disclosure of potential assessments.

Since most real estate contracts are signed at least thirty days before closing, I assume that the notice of the board meeting was not sent out until after you had signed your contract. Therefore, it is questionable whether the seller of your unit had any control over the situation, or had enough information in hand giving rise to a duty to disclose.

I would chalk this one up to bad timing.

QUESTION: We are trying to sell our home, which is located in a deed-restricted subdivision. Our current real estate agent says that it is difficult to sell the home because we cannot put a "for sale" sign in the yard, and the "weekend lookers" do not know it is for sale. What are your thoughts? N.K. (via e-mail)

ANSWER: I have heard both sides of this argument, and I suppose both points of view have merit.

Sign proponents will tell you that a high percentage of home sales arise from "drive bys." Their argument would be that higher sales prices will result from having more people interested in a home, thus improving neighborhood property values.

Sign detractors will tell you that the proliferation of yard signs can create an eyesore, or make it look like everyone is trying to bail out of the community (thus creating the impression that the community is undesirable).

I am aware of no formal study on the issue. The bottom line is that this is why covenants are recorded, putting both sign-lovers and sign-haters on notice of what they are getting into before they buy. Therefore, if the covenant prohibits signs, that is what you agreed to, and you are legally obligated to follow up. Of course, there is a procedure for amending most covenants, and that is the best way to seek change.

I would also point out that Florida's courts have upheld yard sign restrictions against claims of infringement upon free speech. ⚖

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Hard to Stop Condos From Going Rental

FORT MYERS THE NEWS-PRESS, APRIL 15, 2004

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Summertime is project time for community associations.

As we approach another summer, many associations are working on amendments to their governing documents, in the hopes of being ready for a membership vote when "season" (generally considered to be the period between Thanksgiving and Easter) once again arrives.

In my opinion, every association should, at some point, tackle the project of updating its governing documents. Over the next several weeks, this column will look at some typical issues confronted by associations in updating the community's governing documents. Today, two hot issues that are on many associations' minds: fractional ownership and preventing investor takeover of the community.

As was reported in a recent News-Press article (Timeshare Trend Raises Questions, March 7, 2004), the concept of "fractional ownership" has been getting more popular in the United States, particularly in luxury housing and resort areas.

The concept is fairly simple. A group of people buy a condo unit or home as "tenants in common" (where all of their names are placed on the deed), or they buy it in the name of some entity, such as a trust, corporation, partnership, or limited liability company.

The operating documents for the entity or investor group usually name all of the investors as co-owners for occupancy purposes. Typically, there is a side agreement between the investors where use rights are split up. For example, Investor A (and his family) gets to use the unit from Christmas through New Years, while Investor B gets the months of January and February, Investor C gets Spring Break, and so on.

Although the Florida Condominium Act prohibits amendments to a declaration of condominium that "time-share" a unit (unless the amendment is approved by one hundred percent of the unit owners), most fractional ownership situations do not involve an amendment to the declaration of condominium.

Many associations are surprised, when confronted with this scenario, that there is little that they can do, especially if the community is operating under developer-generated documents, which rarely address such issues.

The investor domination issue usually arises in communities with more moderate price-points, or those which are a target for redevelopment. The typical case involves an investor group buying up units or blocks of units, until they own enough units to control the board of directors. While not every such case turns out badly, many involve rental dominated uses, which is typically considered to place increased maintenance strain on the property.

Since the units are investments and not their homes, the investor owners are often known to skimp on maintenance, causing many resident owners to bail out before property values plummet. Those who cannot or will not leave often find themselves in an undesirable situation.

When investors take over condominium communities, there are usually one of two strategies involved. The first involves operation of property as a rental complex. In many cases, this will make mortgages more difficult to obtain, and

disenfranchise resident-owners who no longer have enough political clout to elect members to the board.

Secondly, some investors seek to buy out the whole community for redevelopment. The acquisition for redevelopment usually involves an effort to acquire aging infrastructure in areas prime for re-development, such as beachfront property or large tracts bordered by navigable water bodies. In most cases, unanimous approval of the owners is required to terminate the existing ownership structure and tear down the existing infrastructure for redevelopment. This can often present a win-win situation.

Too often, associations wishing to address potential problems through amendments feel that a "one size fits all" form of "boilerplate" amendment will address their problems. This is rarely the case. This is one area where investment in a moderate amount of attorney's fees will usually pay dividends in the long run. Preparation of amendments by community association managers is considered the unlicensed practice of law. The use of amendments generated by volunteer board members usually creates problems when it comes time to enforce the amendment. ⚖

Association has to Bill Fees Monthly or Quarterly

Fort Myers The News-Press, April 15, 2004

QUESTION: Florida Statute 718 states that maintenance fees must be assessed "not less frequently than quarterly." What does this mean? D.Y. (via e-mail)

ANSWER: It means that the association could not, for example, require maintenance fees to be paid once per year or once every six months.

Rather, a condominium association must bill its annual assessments periodically, which is typically either monthly or quarterly. The condominium documents should also be examined, as many condominium documents also specify the frequency of assessments. For example, if your condominium documents require monthly assessments, the board could not choose to levy quarterly assessments.

For homeowners' associations, there is no similar law. The governing documents control. Many HOA's do levy their assessments on a yearly basis.

QUESTION: I am the president of a condominium association, which operates a single building. Each of the buildings in our Community has its own association. Each association appoints a representative to a self-created group that we call the "President's Council." My question is whether the sunshine laws apply to such a group. J.P. (via e-mail)

ANSWER: No.

The "sunshine" provisions of the Florida condominium statute (Chapter 718) and the statute to HOA's (Chapter 720) only apply to quorums of the board of directors and certain specified "committees," as defined in each of the relevant statutes. The President's Council you have described does not appear to fall into either of those categories.

QUESTION: Our neighborhood was turned over to us in November of 2000. The homeowner's association paid property taxes on the common area in 2001 and 2002. We found out in 2003 that, since we are a not-for-profit corporation, we do not pay property taxes. We were told by the developer that all of the pertinent paperwork and documentation would be put in our possession at transition of control ("turnover"). This did not happen. What is your take on this? D.S. (via e-mail)

ANSWER: Contrary to popular belief, homeowner's associations (even though not-for-profit corporations) are not exempt from paying real property taxes (commonly referred to as ad valorem taxes).

In most cases, the county's Property Appraiser assigns a nominal value (or sometimes a "zero value") to the common areas of subdivisions operated by a residential HOA. In such cases, the tax obligation is minimal or there is no payment due at all.

The deeding of common areas is one of the issues that commonly "falls through the cracks" in HOA turnovers, and that is why it is important for an association to invest in legal representation when accepting control of the community from the developer.

The law has changed effective January 1, 2004, and for future years most common areas of residential subdivisions will no longer be subject to ad valorem taxes.

QUESTION: In one of your recent columns, you stated that the "sunshine law" applicable to homeowners' associations applied to architectural review boards.

Our ARB does not give notice of its meetings, nor are members invited to attend. Is this legal? G.S. (via e-mail)

ANSWER: The law for homeowner's associations includes within its "sunshine" provisions, "any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel."

Assuming that your ARB has approval/disapproval rights (and is not merely advisory to the board), then the "sunshine" laws apply. In general, this requires 48 hours posting of notice of ARB meetings in a conspicuous location in the Community (or alternatively, seven days advanced mail notice) and permitting parcel members to attend meetings of the ARB.

QUESTION: Our homeowner's association charges owners of unimproved lots (lots with no homes built on them) a different amount than what we charge for improved lots (lots with homes). Is this legal? W.T. (via e-mail)

ANSWER: Assuming that your association is not governed by the condominium laws, then the arrangement you have described is not illegal.

However, it is very important that the authority to charge differential assessments be contained in the deed restriction, sometimes called a "declaration of covenants" or "declaration of covenants, conditions, and restrictions."

If the deed restrictions simply provide that each parcel owner pays an assessment, then it is probably not proper to charge differing amounts. If the document specifically permits differential assessments, then the laws applicable to HOA's would not preclude that practice.

QUESTION: Our association charges a processing fee when a unit is leased. Recently, a new owner decided he did not have to pay the fee for his winter renters, since they had rented last year. He feels that once they were "screened," it is unfair and unreasonable for the association to charge a second processing fee. What is your opinion? J.W. (via e-mail)

ANSWER: In my opinion, it is perfectly appropriate for an association to charge a separate processing fee each time a new application is processed. The purpose of the fee is to compensate the association for some of the administrative time required. Although the association may not need to once again engage in per se "screening" of the tenants, the association does gather information for use in the event of an emergency, vehicle information, and the like.

The condominium statute prohibits charging a separate processing fee for the extension or renewal of a lease. However, the situation you have described appears to involve separate leases, since there is a hiatus (where the unit could be made available for rent to another party) between this tenant's occupancies. ⚖

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Guests Can Wear Out Welcome Fast

FORT MYERS THE NEWS-PRESS, APRIL 22, 2004

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Following last week's column (Hard To Stop Condos From Going Rental, April 15, 2004), we will continue to explore issues that are often addressed by associations when it is time to update the community's governing documents.

Today's topic, guest occupancies.

In my opinion, a well-written set of condominium documents will predict what types of guest situations present the potential for problems or abuse in the community. It is always easier to prevent a problem, than fix it after it has surfaced. These same observations apply, although perhaps to a lesser extent in typical single family home subdivisions, to homeowners associations.

There are basically four types of guest occupancy which come into play:

Non-overnight guest occupancy while owner or tenant is in residence: Having temporary (non-overnight) visitors is usually not a significant source of problems, although occasionally friction does arise. For example, some condominium communities are plagued by insufficient parking. In some cases there is not even enough parking for residents' vehicles. Obviously, having eight couples over for a cocktail party who steal your neighbors' parking spots can create an unpleasant situation. Another pet peeve involves a single owner having so many "day guests" using the condominium facilities (such as the community swimming pool) that no one else is able to enjoy it. These types of concerns can usually be addressed in board regulations, and need not necessarily be dealt with in the declaration of condominium or covenants.

Non-overnight guests when the owner or tenant is absent from the premises: Many absentee owners have their units inspected by caretakers, which is a good thing. The rub usually arises when a unit owner permits a friend or acquaintance to use the condominium facilities (but not the apartment). I have seen many cases where unknown persons show up at the condominium and use the pool, beach access, and tennis courts, although they never enter a building. When challenged as to their right to use the common property, they respond that they are "Mr. Smith's guests." Most associations that I have dealt with do not permit day use of the common facilities by outside parties when the owner or tenant is absent. This is best addressed through the declaration of condominium or covenants.

Overnight guests while the owner or tenant is in residence: Having houseguests, in the traditional sense, is a right that most people would consider fundamental. The interests of the association, as the managing entity for the community, are occasionally implicated. The most common problem involves overcrowding of units. For example, having twelve people sleep overnight in a two-bedroom condo unit is the type of situation that is typically frowned upon by associations. Not to mention the potential for noise and nuisance, the common facilities can be overtaxed, including the amount of trash generated and the amount of water consumed. Another area where abuse occurs with guests is when people want to sublet or "rent share" in violation of the documents. The scofflaw can simply claim that the occupant is a "guest" and that the association is powerless to deal with it. In this area, protection of the collective good can be accomplished through appropriate language in the declaration of condominium or covenants. For ex-

ample, many association documents contain limits on the number of persons who can occupy a unit on an overnight basis, as well as regulations regarding the permissible duration of stay.

Overnight guests when the owner or tenant is absent from the premises: This is probably the most frequent source of contention in associations. Many people feel that if they spend their hard earned money to buy a Florida condo unit and only use it a few months a year, they ought to be able to permit their friends and family to enjoy a bit of paradise as well. On the other hand, unbridled guest rights can be used to circumvent lease restrictions and other practices which often create consternation in the community. For example, when a company buys a unit and uses it as a reward for customers and employees, there are often complaints by the neighbors when a new party group cycles through every week. In my experience, many associations strike the balance by prohibiting tenants from allowing use of the premises while the tenant is away. As to owners, the most common solution seems to be to permit guests who are family members to occupy the unit, and either limit or prohibit non-family members from occupancy while the unit owner is not in residence. This is a matter of choice to the particular association, and should definitely be in the declaration of condominium or covenants.

Like all other aspects of community association living, the freedom to do as you please and accommodating the wishes of other co-owners are in a constant state of tension. Having well-written documents is definitely an area where an ounce of prevention is worth a pound of cure. ⚖

Submit your Plans for Hurricane Shutters to Board

Fort Myers The News-Press, April 22, 2004

QUESTION: I am a "snowbird" and live in a single family home governed by a homeowner's association. I have gone through our documents and find no mention of shutters. I would like to install shutters on my sliding glass doors. Our community is still under control of the developer. Am I able to install shutters? R.S. (via e-mail)

ANSWER: It does not matter whether your association is under control of the developer or the homeowners. Alterations to the appearance of the property are typically governed by the covenants and restrictions. Although there may not be a specific clause regarding hurricane shutters, there is probably something that deals with altering the exterior appearance of the home.

In condominiums, the law prohibits boards from denying the right to install hurricane shutters. Unfortunately, there is no similar law in the homeowners' association context. This is one issue which the Florida Legislature ought to give some attention.

I would recommend that you submit your request, in writing, along with a set of plans to the board of directors of your association. Even though the board is under developer control, there should be a procedure for review of exterior change requests. If the board approves your request, then you can go ahead. If not, you may want to have your own counsel review the documents to ensure that the board has acted within the confines of the authority delegated to it by the governing documents.

QUESTION: I am the property manager for a small association. A new board has been elected and wants to "shake things up." This means that they want to do all of the maintenance work themselves, to "save money." Examples include cleaning dryer vents (which requires climbing up on the roofs) and changing electrical circuit boxes. What is your opinion? T.G. (via e-mail)

ANSWER: Condominium associations and homeowners' associations could not operate without some level of volunteer participation.

Obviously, the association's insurance agent needs to be brought into the picture as to the association's practices, to ensure that appropriate risk management procedures and insurance policies are in place.

Under no circumstances would I recommend volunteer board members engaging in any action which requires a licensed contractor, or any action which would reasonably pose a danger to those doing the work. Obvious examples include working with electricity, and climbing on a ladder or otherwise working at heights. The potential cost savings to the association may pale in comparison to the exposure in the event of a mishap.

QUESTION: I am on the board of a "55 and over" community. I have read many articles regarding eighty percent occupancy requirement for people age 55 or over. I want to know who can make up the other twenty percent. My other question involves the census we are supposed to take on the units' occupancy. I do not understand why owners who rent their units do not count. D.C. (via e-mail)

ANSWER: The twenty percent available for non-age qualifying occupants is a subject of great confusion and debate.

The rules issued by the Department of Housing and Urban Development (HUD) state that HUD does not care what an association does with the twenty percent, that is a decision for the association.

The manner in which the twenty percent is treated depends upon how the documents for the association are written. In my opinion, the best approach is for the twenty percent to constitute a "cushion" in the event of a hardship. Typical hardships would include the death of an age-qualifying spouse, an inheritance situation, or a family emergency.

Some communities treat the twenty percent as a "set-aside" which is more liberal than the "cushion" concept. Here, anyone can live in the "set-aside" units, as long as the eighty percent threshold is met. This can create problems if the association hovers close to the twenty percent margin. Your community's best bet is to have legal counsel review your current "55 and over" clause and see that it meets the needs of the community.

You are not correct about the census. Units which are rented are counted in the census. The federal regulations deal only with occupancy of the units, not ownership. Therefore, if a unit is owned by a person who is under age 55, but rented out to someone who is over 55, the unit should be counted in the census and would meet the requirement of the law.

QUESTION: I live in a homeowner's association. Our governing documents state that "the provisions of this declaration shall effect and run with the land and shall exist and be binding upon all parties claiming an interest in the development for twenty years, after which time they may be extended for additional ten year periods if approved by a majority of the members." Our documents are approaching twenty years. However, won't the Marketable Record Title Act extend them to thirty years? J.H. (via e-mail)

ANSWER: No. MRTA only serves to extinguish restrictions that are more than thirty years old and which have not been properly preserved. MRTA does not serve to extend restrictions which have terminated in their own right.

QUESTION: How often should the governing documents for a homeowner's association be updated? The developer turned over our community several years ago and they are full of obsolete and confusing references to the "declarant."

ANSWER: Many associations find it helpful, after transition of control (turnover), to "clean up" the governing documents by removing obsolete references to the developer. Many people find that this creates a "cleaner" and better reading set of documents.

In my experience, many developers do not devote adequate resources to generating a good set of documents for their customers to live with in the future. Many developer "boilerplate" documents are woefully inadequate in a number of areas.

I would recommend that the association's legal counsel review the documents and provide an opinion as to whether they would benefit from substantial updating, not just cleaning up the developer references. I also recommend that associations review their documents thoroughly, at least every ten years or so, as laws in this area seem to change rapidly, as does the "state of the art" with respect to issues typically covered in a well-written set of governing documents. ⚖

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Be Crystal Clear about Repair Rules

FORT MYERS THE NEWS-PRESS, APRIL 29, 2004

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Today's column is the third part of a series regarding amendment of governing documents for community associations.

Today's topic, allocating responsibility for maintenance, repair, and replacement of condominium property. Next week we will look at maintenance allocations in homeowners' associations.

Without a doubt, one of the most confusing areas in any set of condominium documents is the issue of who pays to fix what. With some exceptions, developer-generated documents are inadequate to address these questions, and even many amendments adopted after unit owner control of the Association leaves something to be desired.

In order to address maintenance issues (and generally, maintenance will also refer to repair and replacement), it is always necessary to first consider the demarcation of boundaries between the unit (sometimes called the "apartment") and the common elements. Basically, the unit is the space which is privately owned, and is defined in the original documents. Unit boundaries cannot be changed without unanimous approval of all unit owners and mortgage holders. Most documents define the unit as the "box of air" bordered by the floor slab, ceiling, and the interior of the boundary walls. However, this definition is not universal.

All portions of the condominium property located outside of the unit are known as "common elements." Common elements are divided into two sub-sets. "Limited common elements" are those portions of the common elements which are reserved for the particular use of one unit or group of units, to the exclusion of other units. Balconies and lanais are often defined as limited common elements, as well as a variety of other areas such as patios, courtyards, individual privacy fences, terraces, walkways, entry foyers, boat docks, assigned parking spaces, air conditioner compressors, and the like.

The allocation of maintenance responsibilities in the documents must be made within the parameters of the law. Common elements must be maintained by the association. Limited common elements can be maintained by the association as a common expense; by the association but only at the expense of the benefiting owner (sometimes called "limited common expense"); or by the individual unit owner. As to the unit, maintenance is to be performed by the owner unless the declaration delegates responsibility for maintenance of portions of the unit to the association (it should be noted that some debate whether Florida law permits a declaration to allocate responsibility for maintenance of the unit to the association).

Once the definitional scheme has been understood, it is my experience that the association is best served by specifically pinpointing which items are the responsibility of the association, and those which are the responsibility of the unit owner.

There are a number of items which often fall into gray areas, and are best handled through specific mention in the documents. Here's a sample of a few of the most common culprits:

Plumbing: It is helpful to try to specifically denominate where the line between unit owner and association responsibility exists for both inbound and outbound plumbing. Many pipes which serve only one unit are located in interior walls (and would thus normally be the responsibility of the unit owner), even though the association has always repaired such areas. Conversely, many elements may serve only one unit, but lie in a common element area, such as a shower pan which is channeled beneath the lower unit boundary (concrete floor slab).

Windows and Doors: Many condominium documents do not specifically address responsibility for replacement of the building's windows, which can be a significant expense when they reach the end of their useful life. That issue is further complicated by the fact that many windows that are now in need of replacement are no longer manufactured, or do not meet current codes. While most documents are clear to the effect that the owner is responsible for interior apartment doors, the unit's entry door, sliding glass doors, and exterior screen doors all present occasional controversy which can be avoided by clear drafting.

Lanais: A standard feature in many condominiums is an area enclosed by screening at the rear of the apartment which is often called a lanai, but referred to in some documents by many other names such as patio, balcony, or screen porch. In some cases, the lanai is designated as a limited common element, in other cases, it is defined as part of the unit. Areas of frequent debate for this space include maintenance responsibility for the screen frame assembly, screening, the slab itself, and improvements therein such as glass enclosures or tile floor covering.

Since every condominium is built a bit differently, and even different units in the same project will have varying lay-outs, this is one area where boilerplate documents "borrowed" from another association will not work. Usually, the board needs to set a policy on how it believes maintenance allocation should occur (which is often based on the "way it has always been done"), and an attorney experienced in document drafting can help bring you to the finish line. ⚖

Legislation Clearly Sets Out Condo Insurance Liability

Fort Myers The News-Press, April 29, 2004

QUESTION: I was told that the law in Florida is that each condominium unit owner is only responsible for insuring their individual unit. Is this correct and is there a web-site where I can find this information? M.M. (via e-mail)

ANSWER: You are probably referring to the amendments to Section 718.111(11), Florida Statutes, enacted during the 2003 Legislative Session. The scope of coverage was clarified to some degree, by this new legislation to reflect the current intent of the statute, that the association insure the structure of the building whether part of the unit or common elements) as originally constructed. For example, an item like a closet door is typically to be maintained by the unit owner, but is to be insured by the association. Exempted from the association's master policy items are unit owner upgrades and "excluded items" which are specifically listed in the statute. All floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries, are excluded from the association's master policy. All real or personal property located within the boundaries of the unit which is excluded from the coverage to be provided by the association shall be insured by the individual unit owner's policy (usually called an H06 policy). Section 718.111(11), Florida Statutes can be found at the State of Florida's Legislative web-site, www.leg.state.fl.us/.

QUESTION: I belong to a homeowner's association. The board has called for a special meeting to approve an assessment for golf course renovation. Our bylaws state that an assessment may be approved by a majority of the members voting at any meeting of the voting members (annual or special) at which a quorum is represented. The board of directors must give sixty days notice of any meeting at which an assessment will be considered, along with an explanation as to the need of such assessment. Notice of the meeting was sent out sixty days prior and contains the reason for the assessment, but not the amount of the assessment, the method of payment, nor a method of voting. The board feels that they may send out a ballot or proxy at a later time or announce the amount at the special meeting and let people attending the meeting vote. Is this proper? D.G. (via e-mail)

ANSWER: It appears that the board has complied with the requirements in your bylaws, as it sent out the notice sixty days prior to the meeting. Many times, the exact amount of the assessment is not known until the contract is signed and the work is

ready to be done. Homeowners' associations are governed by Chapter 720, Florida Statutes. Section 720.306(4), Florida Statutes, provides that unless law or the governing documents provide otherwise, the notice of a special meeting must include a description of the purpose or purposes for which the meeting is called. In your case, it appears that the purpose of the meeting was included in the notice. Therefore, unless the bylaws require the proposed assessment amount to be included in the sixty day notice, then there is nothing in the law requiring such.

QUESTION: If our condominium documents require carpets in the unit, can the board of directors make an exception if an owner claims that he is allergic to the carpeting and wants to install tile instead? S.O. (via e-mail)

ANSWER: Based on the Federal Fair Housing Act and the Administrative Rules promulgated by the Department of Housing and Urban Development ("HUD"), an association must allow a "handicapped" unit owner to make reasonable modifications to his or her unit. The association must also make reasonable accommodations to its rules, policies, or practices. The term "handicapped" is defined as a "physical or mental impairment which substantially limits one or more major life activities." The extent of the limitation caused by the impairment must be substantial. In a case decided by the State's condominium arbitration program, an arbitrator found that a unit owner who suffered serious allergies to mold and mildew was considered handicapped for purposes of the Fair Housing Act. The arbitrator did not require the owner to remove the tile, notwithstanding prohibitions against tile in the condominium documents. An association, however, can require a unit owner to present documentation of the handicap and how the modification will ameliorate the effects of the disability, such as letters from the owner's doctor. Legal counsel should be consulted in any situation involving an accommodation request from a disabled resident.

QUESTION: A number of years ago, my friend and I purchased two chaise lounge chairs for our own personal use, which we kept at the pool. The President at the time gave us permission to leave the lounge chairs at the pool with our name and unit number on them so that everyone would know that they were our personal chairs. The Board has now purchased additional chaise lounge chairs for use by all of the owners. The Board has asked us to remove the chairs from the pool area (in which case we would have to carry the chairs back and forth when we go to the pool) or donate them to the association so that everyone can use them. Do we have any rights in this regard? J.L. (via e-mail)

ANSWER: The Board cannot force you to "donate" the chairs, but can adopt a rule prohibiting personal items to be stored or kept on the common elements (assuming your governing documents give the Board the authority to adopt reasonable rules and regulations regarding the condominium property.) The fact that the President may have given you permission in the past to keep your personal lounge chairs at the pool does not, in my opinion, give you the right to keep them there if the Board adopts a rule prohibiting personal property on the common elements. ⚖

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Spell Out Allocations for Upkeep

FORT MYERS THE NEWS-PRESS, MAY 6, 2004

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Today's column involves the issues typically encountered by homeowners' associations in updating governing documents regarding maintenance, repair and replacement of the property in the community.

This is one area where condominium law and the parallel concepts in HOA's differ substantially. As discussed in last week's column, the allocation of maintenance in condominiums is set primarily by state law, with some room for deviation in the documents.

Conversely, the law applicable to homeowners' associations does not mention maintenance, repair, or replacement. Rather, the division of responsibility between the parcel owner and the association is entirely dependent on the governing documents, typically the deed restrictions (which is often called a declaration of covenants, declaration of covenants, conditions, and restrictions, deed of restrictions, or something similar).

In HOA's, the community's property is broken down into two segments, the common areas and the parcels. Typically, the common areas (unlike condominiums) are deeded to the association, and are also usually dedicated to the use of the parcel owners (or the association) on the plat map which creates the community. Nearly without exception, as to common areas available for use by all parcel owners, the governing documents require the association to maintain, repair, and replace the common area.

Allocation of maintenance responsibilities for the parcels is a bit trickier. The parcel is the individually-owned property in the community. The parcel may constitute anything from a deeded single family lot with a traditional home to a "zero lot line" townhouse community where the parcel owner only owns the building structure, and may also share ownership of a party wall with a neighboring unit.

Understanding the parcel's boundaries is the first step to creating a helpful set of documents. For example, some areas that service the parcel (such as a driveway or mailbox) may actually be located on common areas. This is a situation where the documents may need to delegate responsibility to the individual owner.

The next area that requires careful attention is grounds maintenance. There are many HOA's where the individual owns the lot, but the association mows the grass. Whether the association's responsibility would extend to keeping trees healthy (or replacing them if they die), trimming and fertilization of shrubs, pest control, and similar services will depend upon how the documents are worded. This is again an area where carefully worded documentation always trumps generic boilerplate clauses when a dispute arises.

Finally, the trickiest issue of all is how to allocate responsibility for the structure of the home itself. This is one area where there is no one size fits all form that will assist in nailing down who pays for what. In many traditional single family subdivisions, the property owner is responsible for maintenance of the home, in its entirety. Conversely, many zero-lot line townhouse communities are quasi-condominiums as far as maintenance allocations go. Most HOA's fall somewhere between these two extremes.

A well-written set of documents will also dove-tail the concept of aesthetic controls, insurance, and repairs after casualty when looking at maintenance allocations.

Although the cliché may be beaten to death, having clear governing documents on maintenance allocations is an area where an ounce of prevention is worth a pound of cure. ⚖

Condo Manager may be Overstepping his Authority

Fort Myers The News-Press, May 6, 2004

QUESTION: Our condominium association manager recently took time off to take a state test on condo laws to affirm his accreditation with the state association management board. Our condo board relies on the condo manager exclusively to advise them on legal or illegal condo actions and all procedures, such as ballot handling; and the association manager has also stated to me that it is his job to know the state condo association laws and explain them to the board. Our board rarely uses an attorney, and the last regular consultation was apparently in 1996 when the owners' manual was updated. Is a major part of the association manager's job to advise the condo board on state condo laws? J.W. (via e-mail)

ANSWER: A community association manager is not qualified to advise anyone on state condo laws, or any other laws. When they do so, they are committing a crime known as Unlicensed Practice of Law ("UPL"). UPL is punishable by up to a year in prison and a $1000 fine.

As to community association managers, the Florida Supreme Court has specifically held that the following, when conducted by a non-attorney to constitute the unauthorized practice of law:

1. Completing the Department of Business and Professional Regulation Frequently Asked Question and Answer Sheet;

2. Drafting Claim of Liens and Satisfaction of Claim of Liens.

3. Modifying Proxy and Meeting forms as well as preparing amendments to the documents;

5. Drafting Limited Proxy forms;

6. Drafting a Notice of Commencement form.

7. Drafting such documents as are required to exercise the community association's right of approval and/or right of first refusal.

8. Determining the timing, method and form of giving notice of meetings to unit owners and board members;

9. Determining the votes required to take certain actions;

10. Responding to an association's query concerning the application of law to a particular matter being considered and/or advising an association that a particular action or course of action may or may not be authorized by statute, administrative rule or the community association's governing documents.

When a community association manager performs the functions of an attorney, they are providing services that could seriously imperil your community's legal rights, not to mention their CAM licenses. Even licensed attorneys who do not regularly practice in the area of community association law find themselves confused by this field of law.

QUESTION: Please address the problem of barking dogs disturbing condominium residents. The problem has been reported to president and manager who have sent a letter but state that otherwise nothing has been done. Do residents who have paid hundreds of thousands of dollars have to let dogs, i.e., negligent residents, rule? Please give us some direction to solve this dilemma. Thank you. A.L. (via e-mail)

ANSWER: There appears to be fewer subjects more contentious than that of nuisance animals in a community. The association's governing documents most likely contain a "nuisance" provision. If so, the association has the power to file a petition for arbitration against the offending unit owner to seek an injunction preventing them from allowing this disturbance to continue. Additionally, your documents may specifically address the issue of nuisance animals, and may provide for removal procedures in the event that an animal becomes a nuisance.

If your board of directors does not wish to take action against the offending unit owner, you, as an individual, have the right to file an individual complaint against the offending owner in order to seek a similar injunction. You may need to proceed in court instead of arbitration. Additionally, most counties have an ordinance prohibiting animal-created nuisances, including excessive barking (for example, Lee County has such an ordinance). You may be able to solve your dilemma by contacting Animal Control in the appropriate jurisdiction.

QUESTION: I have read your articles on the Florida Clean Indoor Air Act and condo associations. I am in a condo with an upstairs tenant who smokes on her

lanai and the cigarette smoke travels into my condo below. Do I have any recourse with condo association or tenant? Do I need a lawyer to handle this situation? Thank you for your advice. J.S. (via e-mail)

ANSWER: The Florida Clean Indoor Air Act would not govern this specific situation, as it does not appear that the tobacco use is taking place in an enclosed indoor work place.

Your neighbor's conduct may constitute a "nuisance" to you. Your condominium association most likely has a "nuisance" clause in its governing documents, which could be invoked to restrain this behavior. If your board does not wish to get involved, you may have an individual cause of action against this neighbor for "nuisance." If it is important enough to you, competent legal representation would seem to be a wise investment.

QUESTION: Our neighbors removed some palm trees that were between our homes, which completely deprives us of the privacy we once had in our back yard. The board met in private session and voted in favor of removing the palms. We then sent a letter to the board appealing their decision, and they told us to work it out with our neighbors. What is your opinion of this? W.R. (via e-mail)

ANSWER: Generally speaking, you do not have a "right to a view" in Florida. Additionally, since plant growth is always in a state of flux, there is no clear right to have landscaping maintained at the same level as when you moved in. Nevertheless, it appears that your board may have violated the sunshine provisions of the Homeowners Association Act by meeting in private. That being said, "working it out with the neighbors" is often difficult, but is always the best solution. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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.

Adequate Insurance a Moving Target

FORT MYERS THE NEWS-PRESS, MAY 13, 2004

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Today's column continues a study of issues frequently encountered by associations when updating the community's governing documents. Today's subject, condominium insurance.

When discussing an association's insurance responsibility, it is important to understand the different types of insurance that a condominium association will usually need to consider.

Casualty Insurance: Often called "first-party coverage" in the industry, this is "no-fault" insurance that primarily covers casualties to structures, such as buildings. Covered losses typically include fire, storm damage, and bursting pipes. In today's market, windstorm or hurricane insurance (although a casualty policy) sometimes has to be purchased through a special pool set up by the State. Casualty insurance is intended to cover fortuitous events and will usually not cover maintenance-related problems. For example, damage caused by a pipe that suddenly bursts is normally covered by casualty insurance, while damage caused by seeping water due to a defect in the construction of the building may not be covered.

General Liability Insurance: This is the insurance primarily intended to provide protection to the association if a claim is made that the association has been negligent in doing its job. Liability insurance covers claims made against the association by third parties and is usually referred to in the industry as "third party coverage." A slip and fall claim, or a suit for an accident on common area roadways are the types of claims covered under thirty party coverage.

Flood Insurance: Although flood damage is a casualty, it is not covered under general casualty policies. Rather, flood insurance is available through a federally-sponsored program, and involves a separate insurance policy. It covers damage from rising water.

Fidelity Bonding: Sometimes called crime coverage or employee theft, the fidelity bond is an insurance policy that is intended to protect the association against the theft of its funds, typically theft by an employee or director.

Workers' Compensation: This insurance is mandated by state law for any person or corporation who employs four or more individuals. This policy provides an injured worker with a set schedule of benefits while they are off the job due to injury. In exchange for receiving the benefits, the worker loses the right to sue the employer for personal injury.

Directors & Officers Insurance: Often called D&O or E&O (errors and omissions), this policy provides protection to the association and its board members individually. Typical D&O claims usually allege that the board has acted wrongfully in some matter. For example, unit owner claims for breach of fiduciary duty are often covered under the D&O policy.

Umbrella Coverage: As the name implies, this is a policy that overlaps the association's other insurance policies, and is intended to provide additional protection in the event of under-insurance. The umbrella policy is primarily aimed at providing additional protection to the general liability policy, and is typically considered a third-party policy.
There are many nuances and details involved in purchasing a comprehensive insurance package for the association. There are endorsements, riders, and other add-ons to basic insurance that can help the association cover its assets.

The condominium law simply requires an association to obtain "adequate insurance," with no embellishment of that concept. Because association insurance laws have changed so many times, many older documents specify insurance coverage that either no longer complies with the law, or is simply not up to current industry standards.

For example, the law used to require an association to maintain a minimum of $50,000.00 in fidelity bonding. Today, the law requires than an association have theft coverage for up to the maximum amount of association funds that could be stolen. An association with an outdated set of bylaws requiring $50,000.00 in fidelity bonding may be in violation of current law if it has several hundred thousand dollars of reserves that are theoretically susceptible to theft.

Many older condominium documents require general liability insurance of $100,000.00 or $300,000.00. These are typically not considered acceptable liability limits in this day and age. Most association liability policies provide at least one million dollars in coverage, and many associations buy several million dollars worth of coverage, or even more (depending upon the size of the community and the nature of its operations).

In general, it is my view that it is helpful to draw insurance clauses broadly, and allow the board to operate within the parameters of sound business judgment. For example, I do not typically recommend mandating through the documents that the association have workers' compensation insurance, although many associations with fewer than four employees find such coverage to provide a valuable risk management tool. However, flexibility and giving the association the ability to change in a very dynamic insurance market will typically provide an adequate framework from which to operate. ⚖

Noninvestors can be Legally Excluded from Meetings

Fort Myers The News-Press, May 13, 2004

QUESTION: I live in an RV park. The residents own their lots and mobile homes. We pay a monthly maintenance fee to the owner. The previous owner retired and sold the common areas to a group of park residents. They formed a homeowners association. They hold meetings to set maintenance fees and other charges. They refuse to allow lot owners to attend the meetings. A resident wrote the DBPR and they found the park isn't operated as a condo or as a mobile home association but as a homeowners association. Do the lot owners that didn't buy shares in the park have a right to attend the meetings of the common area owners? - D.P. (via e-mail)

ANSWER: Since each community has unique covenants and restrictions, I can only respond in general terms. It used to be quite common for developers to construct a mobile home community, sell the individual lots to homeowners, but retain ownership of the common areas. The developer (or some other subsequent operating entity) provides basic maintenance services and use of the recreational facilities to the homeowners. In return, the homeowners pay a recreation and maintenance fee to the operating entity. The original operating entity has apparently sold the property and assigned the right to collect recreation and maintenance fees. The new operating entity is probably a corporation consisting of members who are homeowners within the community. However, it is likely that the new operating entity is not a "homeowners' association" as defined by Chapter 720, Florida Statutes ("the HOA Act."), because membership is not mandatory. Rather, the new operating entity is probably governed by Chapter 617, governing Not-For-Profit Corporations. This statue only gives rights to the actual members of the corporation. In this particular instance, this would be limited to the people who are members of the corporation. Therefore, you probably have no right to attend their meetings if you did not invest in the purchase of the common areas.

QUESTION: My condominium association had someone come in and work on my master bathroom shower to repair a leak. They had to cut a hole in the wall to repair the leak. Now they are refusing to pay for the repairs to the shower and they will not fix the hole in the wall. The association says

it is my responsibility. However, the condominium documents say that the vertical boundaries of my unit are the undecorated finished interior walls. The repair had to be made inside the walls. Furthermore, the condominium documents say that the association is responsible for "all conduits, ducts, plumbing, wiring and other facilities except heating and cooling units." Your advice would be much appreciated. - M.G. (via e-mail.)

ANSWER: This is a common source of contention in condominiums and can only be solved by an interpretation of your documents by the association's legal counsel. The boundary description concept you describe appears to be what is known as the "interior shell" concept. You own everything between the four outer walls, floor and ceiling of your unit and you are in all probability responsible for the maintenance, repair, and replacement of everything within those boundaries. Everything outside of that space is "common elements." However, ownership and maintenance responsibility are two entirely different things in the condominium context.

The Condominium Act states that the association is responsible for maintenance, repair and replacement of the common elements, which is all the condominium property not included within the units. However, the law also states that the condominium declaration can assign maintenance, repair and replacement responsibility for the "limited common elements" to the unit owners. A "limited common element" is a common element, the exclusive use of which is assigned to a particular unit owner or group of unit owners.

The plumbing to your shower may be outside of your unit and be a common element. However, this common element services your unit only. Accordingly, it may be classified as a limited common element (if your condominium documents make such a distinction) and the maintenance, repair, and replacement of the plumbing to your shower could be assigned to you and not the association.

QUESTION: How can I determine if a community has been registered as a "55 and Over Community" in the State of Florida? Is there any way to obtain the documentation submitted to register or renew the community's 55 and Over status? E.B. (via e-mail.)

ANSWER: The duties of the Florida Commission on Human Relations are set forth in Chapter 760, Florida Statutes. Generally speaking, the Commission's purpose is to prevent unlawful discrimination by ensuring people in Florida are treated fairly and are given access to opportunities in employment, housing, and certain public accommodations. Included within the Commission's oversight is enforcement of The Florida Fair Housing Act, which governs "55 and over" communities.

The Commission's website, located at http://fchr.state.fl.us, allows users to view a listing of registered 55 and over communities by county. It sets forth the date of the community's initial registration, as well as the deadline for renewal. (55 and over communities are required to renew their registration with the Commission every two years.) If you want a copy of the documentation submitted to register, or renew a community's 55 and over status, you may call the Commission at (850) 488-7082. Choose option 5 for the records department. The records department will then mail or fax you a document request form.

QUESTION: What options are available to file a complaint against a builder in Lee County? Specifically, a builder who has promised completed construction and final closing for over three months and has yet to deliver. I cannot find any county or state agency that deals with this. Is there a consumer advocate that would be able to assist? Can you help? A.J. (via e-mail.)

ANSWER: The first place to start might be the Better Business Bureau (BBB). The BBB works to facilitate communication between companies and consumers to help both sides come to a satisfactory resolution of a complaint. Its website, located at www.bbb.org, has lots of helpful information.

Another possibility, assuming your builder is a licensed contractor, is to file a complaint with the Florida Department of Business and Professional Regulation, Division of Professions, Construction Licensing Board. The Department's website is located at www.myflorida.com/dbpr and has helpful information on filing complaints.

QUESTION: My condominium association has failed to enforce its "no pet" restriction for a number of years. However, the Association has now

resolved to begin enforcement of the restriction. I have two cats. The previous president of the association advised me over a year ago that several condominium residents have cats and that I would be permitted to keep my cats as well. Is there any defense I have against the Association's belated enforcement of the restriction. R.B. (via e-mail.)

ANSWER: There are several potential defenses you may have to the Association's belated enforcement of its "no pet" restriction. Restrictive covenants are unenforceable after their "abandonment." This defense, which may terminate a restrictive covenant, depends upon conduct by the owners of the land showing an intent to abandon the general scheme and relinquish the benefit of the covenant. Another possibility is "waiver." The defense of waiver requires proof of an intentional relinquishment of a known right. By failing to enforce the restrictive covenants, an association leads others to believe that the covenants will not be enforced, and when an association fails to object to general and continuous violations of restrictions, the restrictive covenants will be waived. "Laches" may provide an equitable defense to enforcement of a restriction when the association delays enforcement for an excessive period of time, such that as a result of the delay, the owner suffers legal detriment. "Estoppel" may be invoked as a defense when the association has observed an owner's violation and approves or makes no objection, while the owner changes his position in reliance on the association's representation or silence. Lastly, "selective enforcement" is available when an association enforces a restriction against one or several owners, but not another owner. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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Review Your Amendment Procedures

FORT MYERS THE NEWS-PRESS, MAY 20, 2004

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Today's column continues our ongoing look at updating the community's governing documents. Today's issue, the amendment clause.

As explored in previous segments, the governing documents for a condominium or HOA typically consist of a declaration, articles of incorporation, bylaws, and rules and regulations. Each of the documents serves a specific function, although there is occasionally overlap. Typically, each of the documents will have a separate amendment clause.

When updating the documents, understanding the amendment clause is important for two reasons. First, the Association needs to know how many votes it has to get to pass the new documents. Secondly, an update of the governing documents is often a good time to also look at changing how amendments are handled.

This is one area where there is no consistency between one association and the next. Some associations require the same vote for all documents, some establish a hierarchy, and many documents conflict with each other on the exact point. It is important to recognize that there is a commonly accepted hierarchy of the documents, starting with the declaration, then articles, then the bylaws, then the rules and regulations.

In my experience, most associations grant the board rulemaking authority when updating the documents, and this is by far the most common modern practice, as opposed to requiring the owners to approve rules and regulations. However, be careful about nuances in the current documents, which I covered in a previous part of this series.

As for declaration amendments, most documents require some super-majority, either two-thirds, seventy-five percent, and I have seen some documents that even require ninety percent approval. In fact, some older documents still require one hundred percent approval for amendment. In my opinion, two-thirds or seventy-five percent is a reasonable standard to shoot for.

The more difficult question is whether voting should be based upon the entire membership of the Association, or only those who vote at a meeting where a quorum is established. In my opinion, the latter policy (basing amendments on those who vote) is the most democratic method of handling voting. After all, we do not elect the President of the United States based on the total number of registered voters, only those who go to the polls. When rewriting documents, I have found that most associations seek to implement this standard.

However, remember the "chicken and egg." If the current documents are based upon the entire membership, then that is the level of approval that you must obtain until you can get the clause changed.

Amending articles and bylaws is a matter of choice. Some associations seek a lower percentage vote than required for the declaration (for example, a majority standard if the declaration requires two-thirds vote to amend), and some prefer to keep all documents amendable by the same percentage vote, for simplicity sake. I have found that the latter approach usually works better.

The only constant in life is change. Make sure that your documents can change with the times.

Who Pays for Condo Repairs Depends on Documents

Fort Myers The News-Press, May 20, 2004

Question: My Condominium Association has asked that I replace the door frame around my front door on the basis that "doors and windows" are the unit owner's responsibility. Our condominium documents do state that the doors and windows are the unit owner's responsibility, but I do not think that the door frame is part of the door. I think it should be the Association's responsibility. Do you agree? C.T. (via e-mail)

Answer: It all depends on the exact wording of your condominium documents. Unfortunately, many condominium documents are poorly written and it can be difficult to determine whether something is a unit owner responsibility or an association responsibility. The first thing you should look at is the unit boundaries in the declaration of condominium. Typically, everything "outside" of the unit is a common element. The unit is the maintenance responsibility of the unit owner, except that sometimes the Declaration will require the Association to maintain certain parts of the unit. The common elements are the maintenance responsibility of the Association. However, if something is designated a limited common element, the unit owner may be required to maintain it if the Declaration so provides. You may be right that the door frame is part of the common elements, but without looking at the specific language in your Declaration, I could not say for sure. You might suggest that the Board ask for a legal opinion so that it can have a standard policy when this issue comes up again.

Question: Our homeowners' association documents contain a provision regarding easements. Basically, the Declaration creates a nonexclusive easement over, through, and across sidewalks, paths, walks and lanes, and paved areas, except that the easement does not give or create in any person the right to park upon any portions of the common areas except those areas specifically designated for such purpose. Does that mean that vehicles are permitted or not permitted to park on the streets? W.K. (via e-mail).

Answer: The language in the Declaration indicates that the purpose of the easement is for ingress and egress for pedestrian and vehicular traffic. By it's own terms, the easement does not grant to any person the right to park on the common areas. Therefore, the easement language does not confer any rights that would supercede another provision in the Declaration or the rules and regulations of the Association prohibiting parking on the streets.

Question: Our homeowners' association governing documents provide that the Board has the right to levy a Resale Capital Assessment upon the transferee of a conveyance of every Lot or Living Unit, provided that all Lots or Living Units similarly situated are assessed at a uniform rate. Our Board adopted a resolution whereby new owners (who are not current owners in the community) will be assessed a Resale Capital Assessment of $1800. However, if the person already owns a home in the community and is buying another home, the assessment will only be $1200. I do not believe this should be allowed because the owners are not being assessed a uniform rate. Do you agree? J.W. (via e-mail).

Answer: First, there is nothing in the Homeowners' Act (Chapter 720) which limits the ability of a homeowners association to charge such a fee. (In condominiums, however, the fee may not exceed $100). The question, therefore, is what does the language in your governing documents mean when it refers to Lots or Units that are "similarly situated" based upon what you have quoted. I would interpret that language to mean that the Board could impose one assessment amount for two-bedroom homes and a higher assessment amount for three-bedroom homes. Imposing an assessment amount depending on whether the purchaser is a new owner or a current owner does not seem to be related to the Lots or Living Units being similarly situated. Rather, the assessment is being based on the purchasers being "similarly situated." However, I would categorize this one as a close call.

Question: Are there any arbitrators that a condominium problem can be taken to rather than hiring a lawyer and going to court? M.G. (via e-mail).

Answer: The Condominium Act provides for mandatory non-binding arbitration for certain condo-

minium disputes. Whether you can go to arbitration if you have a dispute with your condominium association depends on the nature of your dispute. If your dispute has to do with the failure of the association to properly notice meetings, properly conduct elections, allow inspection of books and records, and properly conduct meetings, the dispute can be heard in the State's arbitration program. Also, if the dispute involves the authority of the Board to require you to take action or not take action involving your unit or the appurtenances thereto, or the authority of the Board to alter or add to a common area or element, the dispute can also be arbitrated. Unit owners may represent themselves in arbitration. There is a filing fee of $50 and certain notices that you must give to the other party before filing a petition for arbitration. For more information regarding the arbitration program, see Section 718.1255, Florida Statutes. The program is administered through the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes. You can also find out more information about the program on their website located at www.state.fl.us/dbpr.

Question: Is there a general rule to apply when determining whether something is a common element or part of the unit? Specifically, are balconies considered part of the unit or part of the common elements? Is the Association or the unit owners responsible for structural repairs (not improvements) to the balconies? H.S. (via e-mail)

Answer: It all depends on the exact wording of your condominium documents. The first thing you should look at is the unit boundaries in the declaration of condominium. Typically, everything "outside" of the unit is a common element. The unit is the maintenance responsibility of the unit owner, except that sometimes the Declaration will require the Association to maintain certain parts of the unit. The common elements are the maintenance responsibility of the Association. However, if something is designated a limited common element, the unit owner may be required to maintain it if the Declaration so provides. Typically, the balconies are considered part of the unit or a limited common element. However, it is also typical for the Association to be responsible for the balcony slab and those parts of the condominium unit that are structural. ⚖

Free Course on Florida Condominium Association Operations to be held in Fort Myers.

A free course on Florida condominium association operations will be held on Thursday, May 27, 2004 from 9:00 am to 12:00 noon 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.

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 manager CEUs for community association managers.

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. Course seating may be limited to one owner occupant per condominium unit based on space availability. To see a complete list of classes in your area, visit www.caionline.org/florida.

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Fines Touchy Area of Association Law

FORT MYERS THE NEWS-PRESS, MAY 27, 2004

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Today's column continues our series on issues debated by associations when considering updating the community's governing documents. Today's topic seems to get substantial play in the media, the levy of fines.

It is important to start the discussion of fining with the understanding that the levy of fines in associations is regulated by Florida's statutes. Although there are a few subtle differences, the law is generally similar for both condominium and homeowners' associations.

Both statutes require that the authority to levy fines be contained in the recorded governing documents, such as the declaration, the articles of incorporation, or bylaws. If the documents do not permit the levy of fines, then the association has no authority to do so.

Under both statutes, the maximum permissible fine is one hundred dollars per violation. The maximum fine for condominiums was fifty dollars in the 1980's (until the law was amended). Many older condominium documents still state that limit, which would likely apply until amended. The preferred modern practice in amending documents is to recognize that laws dealing with fixed dollars change as the times change, and to permit the association a discretionary range in the levy of fines, up to the maximum permissible by the law existing at the time.

Both laws also permit cumulative fines for ongoing violations, although the documents should be written to authorize cumulative fines. The statutory maximum cumulative fine for ongoing violations is one thousand dollars for condominiums. For HOAs, the maximum is the amount set forth in the governing documents, and if those documents are silent, the one thousand dollar maximum applies.

Since the association essentially serves as prosecutor, judge, jury, and executioner in the fining process, it is no surprise that both statutes require a certain amount of "due process" before a fine can be levied and collected. Both laws, for example, require the appointment of an independent committee which must review a proposed fine. If the committee does not agree with the proposed fine, it may not be imposed. Ideally, the fining committee is not a rubber-stamp for the board, or a kangaroo court, but rather a group of free-thinking individuals who will add impartiality to the process.

A fundamental difference between condos and HOAs is the ability to file a lien against the unit/parcel to collect an unpaid fine. The condominium law has always prohibited the use of liens to collect fines, with small claims court (or in some circumstances, arbitration) being the required venue for relief. Conversely, Florida law has recognized an HOA's right to place liens to secure collection of a fine, if authorized by the appropriate governing document. However, there is a Bill sitting on the Governor's desk at press-time (which most observers feel is unlikely to be vetoed, this column will cover new legislation when the Governor acts) which specifically states that liens cannot be used to collect fines in homeowners' associations. That law will present interesting constitutional questions in associations which currently recognize the right to use liens to collect HOA fines.

In my experience, fines are a useful tool in some circumstances, and are largely worthless in other

cases. For example, I have observed that the fining process is useful when there is a communication breakdown in the community. The formality and openness of the hearing, the presence of the independent committee, and every party being entitled to fully present their case often permits discussions to occur that resolve the problem before it heads to court. In fact, I have attended many fining hearings that were considered successful by the association where no fine was imposed at all, but instead an understanding reached on how the association and the residents could resolve the perceived problem.

Next week, we will continue this series by discussing proposed amendments regarding the election of the board of directors, board sizes, term limits, and similar concepts. ⚖

Granting Variances can be a Dangerous Business

Fort Myers The News-Press, May 27, 2004

Question: I am on the Board of my homeowners' association. In the past, the Board has granted variances such as allowing a bigger concrete driveway in front of a house or allowing a 3-car garage but double in depth so it would accommodate 6 cars. Our deed restrictions only allow garages for not less than two nor more than three motor vehicles. Is it legally possible for Boards to grant variances (exceptions to deed restrictions)? The Board now says that it cannot issue any more variances. Can you give me some information about this? J.K. (via e-mail).

Answer: I typically do not recommend that the Board grant variances or exceptions to deed restrictions, especially when the documents do not contain a specific variance procedure. Once an exception is granted for one person, other homeowners will also ask for an exception. If the Board grants one exception but denies another, the homeowner who was denied the exception will claim that the Board is selectively enforcing the deed restrictions. The board will likely claim a difference in the two cases. Litigation then ensues over "shades of gray."

If the Board feels that certain deed restrictions are out-dated or should not apply to the community, the appropriate solution would be to amend the deed restrictions. You should talk to your association attorney. The Board may also be able to "grandfather" those who were previously granted an exception and then provide notice to all of the owners that no future exceptions will be granted. In that case, the Board may be able to enforce the restriction prospectively.

Question: Does Chapter 720 (governing homeowners' associations) say anything about the vote required to amend our governing documents? Do we need the approval of two/thirds of the owners present in person or by proxy at a meeting or two-thirds of the total number of lot owners? J.K. (via e-mail)

Answer: Section 720.306(1)(b), Florida Statutes, states that unless otherwise provided in the governing documents or required by law, regular amendments to any governing document of an association requires the affirmative vote of two-thirds of the voting interests of the association. Therefore, if your governing documents provide for a different level of approval, your governing documents will control. Generally, if the amendment is to be approved by those present in person or by proxy at a meeting, the language in the documents will usually be clear on that point. If the amendment requires approval of a certain percentage of the lot owners, the documents will usually refer to a certain percentage of "all the owners" or "all voting interests" or something similar. Also, remember that each governing document may require a different level of approval for amendments. You need to look at the Declaration of Covenants, the Articles of Incorporation, and the Bylaws in order to determine what vote is necessary to amend each document.

Question: In your column of April 15, 2004, you answered a question about a "President's Council." You stated that the "sunshine" provisions in the Florida Condominium statute and the HOA statute did not apply to the President's Council. Does this mean that this President's Council can adopt rules and regulations and levy assessments without notice to the owners? P.Y. (via e-mail).

Answer: No. The President's Council was described as "self-created." Therefore, it would not have the authority to adopt rules and regulations or levy assessments. However, the sunshine provisions would apply if the President's Council was a Board of Direc-

tors for a "Master Association." If a Master Association meets the definition of an "association" in Chapter 718, it would have to comply with the sunshine laws in Chapter 718. An "association" means, in addition to a typical condominium association, any entity which operates or maintains other real property in which unit owners have use rights (such as a common area pool that is shared by all of the owners of the various condominiums), and where membership in the entity is composed exclusively of condominium unit owners or their representatives and is a required condition of unit ownership.

Question: I am about to close on the purchase of a condominium unit. One of the main reasons I chose to purchase a unit in this condominium is because it has no pet restrictions. However, in a recent conversation I had with the President of the association, he advised me that the board is discussing changes to the rules of the condominium, which would prohibit pets. If there are no pet restrictions at the time I purchase my unit, can the board retroactively enforce this proposed rule and require me to remove my pets? C.L. (via e-mail)

Answer: If the restriction imposed against pets is a board-made rule then the board may not retroactively enforce the rule and require you to remove your pet. The Condominium Act necessitates that board-made rules must be reasonable. It is not reasonable to requiring pet owners to remove their pets if the owners purchased units in the condominium because there were no pet restrictions. Therefore, such a rule would be unenforceable against unit owners that own pets at the time the rule was adopted, and you would be grandfathered. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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.

Let Bylaws Control Board Details

FORT MYERS THE NEWS-PRESS, JUNE 3, 2004

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For the past couple of months, this column has been exploring issues often tackled by associations when updating the community's governing documents. Today's topic, the board of directors.

In my opinion, it is best to leave the details of board issues to the bylaws, with only brief mention in the declaration of condominium (or for homeowners' associations, the declaration of covenants) and the articles of incorporation.

Most association bylaws have an entire section devoted to the details of seating the board. Among the issues typically addressed include the following:

Qualifications for Service: Contrary to popular belief, one does not need to own property in a community to serve on its board. Most associations do establish ownership as a criteria for board service through the bylaws. There may be some exceptions to be considered, such as permitting non-titled spouses to serve, since many families own property in the name of one spouse for estate or tax reasons. Most other qualifications on board service, such as residency requirements, are inconsistent with the statutes for condominiums and HOAs, and would likely be stricken if challenged. It appears that term limits are okay.

Size of Board: I typically recommend that the board be set at a fixed size in the bylaws. In fact, for condominiums, unless the bylaws set a fixed size for the board, the statute will impose a five member board. I have found that five or seven member boards are the most efficient. There are exceptions on both ends of the spectrum. Three member boards may be appropriate for smaller communities or those where there are historically insufficient candidates to fill a large member board. Likewise, while a board of more than seven is often unwieldy, larger boards may be desirable in large communities, in master associations, and in other cases.

Term of Service: Although there are some exceptions, most developer-drafted documents simply provide for one year terms. I have found that most associations like "staggered" terms, so that there is not turnover on the board every year. This seems to work best by establishing two year terms. For example, if there is a five member board, the bylaws could provide that two seats are up for election in even-numbered years and three seats in odd-numbered years.

Vacancies: Especially when the directors serve multi-year terms, the bylaws should be clear on how vacancies caused by resignation are filled. In most modern documents, the board of directors is given the authority to fill the vacancy for the unexpired term of the director leaving office.

Board Meetings: A well written set of bylaws will determine how meetings of the board are to be called, by whom, and how the agenda is established. For example, many bylaws provide that either the President or any two directors (perhaps more with a larger board) can call for a board meeting.

Notice: Notice for the benefit of the unit owners is set by state statute, and in most instances is posted notice forty-eight hours in advance of the meeting. The bylaws should also address how notice is given to each of the directors when a meeting is being called, such as whether telephone notice is sufficient. There should also be a provision ensuring that each member of the board receives reasonable notice before the board's meeting.

There are many other issues pertaining to details of the board's operation, such as the procedure for recall (removal) of directors. Some of these issues are mainly governed by state statute, and some can be "customized" to suit the community's particular needs. It is usually most cost effective to have a "wish list" ready for your association attorney, so he or she can help with the language drafting in an efficient manner. ⚖

Board Should be able to Limit Firearms at Meetings

Fort Myers The News-Press, June 3, 2004

QUESTION: What are the Florida Statutes regarding individuals carrying firearms to homeowners' association meetings? Our association would like to prohibit firearms at meetings. W.C. (via e-mail)

ANSWER: I always try to answer new and unique questions from column readers, and yours wins this week's prize in that category. Section 790.01, Florida Statutes, makes it illegal to carry a concealed firearm without a license to do so. (There are certain exclusions for law enforcement officers.) Any individual carrying a concealed firearm without a license to do so is guilty of a third degree felony.

Additionally, Section 790.053, Florida Statutes, makes it illegal (subject to certain exceptions, such as when you are hunting) to openly carry a firearm. Any individual openly carrying a firearm is guilty of a second degree misdemeanor.

Therefore, the carrying of a firearm in public is illegal unless the person holds an appropriate permit. I believe that the Board could reasonably adopt a rule prohibiting the carrying of any weapons at association meetings, whether licensed or not, perhaps finding an exception for certain law enforcement personnel to be in order.

QUESTION: I have invested in several high-rise condominium units at pre-construction prices with hopes of selling at higher prices upon completion. Some contracts are assignable, but others are not. Typically for those that are not assignable, I cannot advertise for sale or list with realtors until after closing. Do you have any tips for how to find buyers for these to (hopefully) do a double close? R.S. (via e-mail).

ANSWER: Unfortunately, you are stuck with word or mouth. No-listing / no-advertising provisions have become common in pre-construction real estate sale and purchase contracts.

The purpose of these provisions is so resales will not compete with the developer's sale of units. Developers do not want investors who purchase at pre-construction prices to undercut the appreciated sale prices of new units.

However, if the provisions in your contracts are simply no-listing provisions, you may be able to post your units on websites, bulletin boards, or in the classifieds section of the newspaper. However, if the provisions in your contracts are no-advertising provisions, even using these avenues could open you up to liability for breach of contract. It may be worth having your attorney take a look.

QUESTION: I live in a large community consisting of several smaller neighborhood subdivisions. Currently, some of the neighborhood subdivisions have gates at their entrances, which are operated and maintained by the neighborhood subdivision community associations. However, many residents within the larger community have suggested that gates be constructed at the various entrances to the overall community, so that each neighborhood subdivision can discontinue the operation and maintenance of the gates that currently exist at the neighborhood subdivision entrances. The new gates of course would be operated and maintained by the community master association. Therefore, all residents within the community could share the cost of operation and maintenance of the proposed "main gates." Does the master association have the authority to construct the proposed gates? R.S. (via e-mail.)

ANSWER: First, I would seriously doubt whether your Master Association could eliminate the Neighborhood Association gates, even if it has the authority to construct gates serving the entire development.

The answer to your question really depends on what the governing documents of your community provide. If the documents provide the Master Association with the specific authority to construct a gate at the community's main entrances, then it can likely move forward with the project. If the documents do not grant authority, some type of vote from the property owners is probably required. However, you would also need to look at whether easement rights are being impaired. Further, depending on what municipality is involved, permits for new gates are not always easy to come by.

QUESTION: Our homeowners association does not have a mandatory membership requirement nor do we have the ability to file a lien against members who do not pay dues or assessments. What steps can we take to bring the Association into conformance with Chapter 720 of the Florida statutes? N.L. (via e-mail)

ANSWER: In order to be considered a "homeowners' association" governed by Chapter 720, Florida statutes, an association must meet several criteria. First, it must be a Florida corporation. Second, it must be responsible for the operation of a community. Third, the voting membership must be made up of owners of property within that community (or their agents). Fourth, membership in the association must be a mandatory condition of property ownership within the community. Finally, the association must be authorized to impose assessments that may become a lien

on an owner's property if unpaid. If an association meets all of these criteria, it is a "homeowners' association" governed by Chapter 720, Florida Statutes and the rights and responsibilities set forth therein are bestowed upon the association and its members.

In order to make Association membership mandatory and to subject property owners (and future owners of the property) to assessments that may become a lien if unpaid, the property owners in your community must consent to such and record restrictive covenants, which subject their property to these requirements. These restrictive covenants are usually imposed by developers upon a large parcel of property, which is later developed and sold as individual homesites to consumers. The consumers are then subject to the restrictive covenants recorded by the developer. If you attempt to impose covenants and restrictions after the fact, you either need unanimous approval of the property owners (and possibly mortgage holders), or impose hodge-podge restrictions on those who consent.

QUESTION: Can an association director be denied access to the onsite office of our manager after normal business hours (nights and weekends)? A majority of the directors have voted not to allow any director to have this type of access at the request of the management company. Is there any statutory law or case law on this issue? There is nothing in the condominium declaration about this.

ANSWER: In my opinion, the directors of your association have the right to prohibit access to the onsite office after normal business hours. Section 718.112(3) of the Florida Condominium Act states that association bylaws may grant associations with the authority to promulgate and enforce reasonable rules and restrictions for the use of common elements. Provisions such as these are usually found in association bylaws and the authority to promulgate and enforce such rules is often entrusted to the Board of Directors to exercise at its discretion. The only limitation is that the rule be "reasonable."

The rule you describe seems reasonable enough. ⚖

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Alteration Rules Cause Controversy

FORT MYERS THE NEWS-PRESS, JUNE 10, 2004

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Today's column continues our review of issues tackled by condominium and homeowners' associations when updating the community's governing documents. Today's topic, one of the most controversial in association living, changes to the common property.

This is one area where the law applicable to condominiums and homeowners' associations is entirely different.

In most HOA's, the association holds title to common areas, such as roadways, lakes, clubhouses, tennis courts, swimming pools, and even golf courses. Although likely a topic for future legislative debate, the current law applicable to HOA's places no limit on a board's authority to improve or alter the common area. Rather, the sole source of authority granted to the board, and the limitations placed on that authority, are found in the governing documents, usually the declaration of covenants (sometimes called CC&R's, deed of restrictions, and the like).

Conversely, the authority of a condominium association to improve property is heavily regulated by state statute, specifically Section 718.113(2) of the Florida statute applicable to condominiums. That law says that there can be no material alteration of or substantial addition to common elements or association real property except as provided in the declaration of condominium. The law goes on to say that if the declaration of condominium is silent, seventy-five percent of the entire voting interests (there is usually one voting interest per unit) must approve the alteration or addition.

In my opinion, the declarations for both condominiums and HOA's should spell out a clear procedure for the alteration of or addition to common property. Since every community will have different relevant factors to consider (including the size of the community, the price point of the units, the nature and extent of common property, the age of the development, etc.), there is no one-size fits all clause that works in dealing with the issue of alterations and additions.

It is important to make sure that the board of directors is given the authority to maintain and repair the property, which is a different issue than the issue of alteration or additions, the latter concept being more geared toward improvements and "upgrades" of the property. A point of contention in alteration disputes often involves whether the board's action involves "maintenance," or is indeed an upgrade. This can become particularly controversial when an existing item (for example, window installations in a twenty year old high-rise building that are no longer available on the market) must be replaced.

I have found that most associations feel comfortable delegating a certain amount of leeway to the board for alterations and additions, but not a completely open checkbook. For example, a common clause found in many updated documents gives the board the authority to improve common property up to a specified dollar amount, or some percentage of the association's annual budget. For any planned project that would exceed that limit, a vote would have to be taken.

The law does not mandate what percentage vote is required for alterations or additions (except, as noted above, if condominium documents are silent a seventy-five percent threshold is implied by the law).

Most associations prefer a super-majority such as two-thirds or seventy-five percent. Some are comfortable with a majority.

Regardless of the voting threshold selected, I have found that most associations prefer to have voting based upon the number of owners who vote, rather than the entire membership. One of the most frustrating situations faced by many boards involves cases where the documents permit those who do not vote to essentially cast a negative vote.

There is a fine line between granting a board unfettered power (which can be abused) and requiring a popular vote for every issue that an association may face. The alteration issue is one of those issues where a balance can be struck by a clear set of governing documents. ⚖

Termination Clause Covers Redevelopment Projects

The News-Press June 10, 2004

QUESTION: Our condominium association may be offered a buy-out from a developer. I do not want to sell for any reason. Am I compelled to sell if the board or the majority agrees to sell at a set price? S.V. (via e-mail)

ANSWER: Your question addresses an issue that will be faced by Florida condo dwellers with increasing frequency. Many older condominium projects are built on highly desirable land (such as waterfront), which may no longer be the highest and best use of the property. When that fact is coupled with the cost needed to maintain an aging condominium structure, it is often a "win-win" situation for the property to be redeveloped.

However, in order to accomplish this objective, it is usually necessary to "terminate" the condominium, which means to end the condominium structure of ownership.

Termination is governed by the declaration of condominium, as originally recorded. For example, some declarations permit a condominium to be terminated by an eighty percent unit owner vote, plus the consent of certain lienholders, such as mortgagees. Other documents require unanimous approval of all unit owners. The termination clause of your condominium documents is what will answer the question.

Termination and redevelopment are becoming increasingly common on Florida's east coast, and the trend will no doubt find its way here as well. In most redevelopment cases I have heard of, the unit owners fetch a much better price for their unit than they could by simply selling it as an ongoing condo unit to a third party purchaser. Before you foreclose any of your options, you should certainly listen to the proposals and look at the dollars and cents.

QUESTION: I live in an older deed-restricted community. We have deed restrictions (covenants) which are recorded. There is an association which enforces the documents, but membership is voluntary. Are we subject to any "sunshine" laws? J.H. (via e-mail)

ANSWER: Probably not.

The only "sunshine" laws applicable to community associations are for condominiums (which you obviously are not involved with) and "homeowners' associations." Technically speaking, a "homeowner's association," in the legal sense, requires mandatory membership, which you have stated does not apply.

Therefore, the state's statutory "sunshine" provisions (requirements for posting notice of board meeting, member's right to attend, and the like) would not apply. However, many bylaws for non-mandatory associations also contain their own "sunshine" clauses, which may apply.

QUESTION: I would like to know if the board of our homeowner's association can conduct association business through e-mails. K.K. (via e-mail)

ANSWER: Your question addresses one of those issues where the law does not keep pace with technology. Obviously, electronic mail is an invaluable communication tool, and undoubtedly is here to stay.

I am aware of one condominium association which received a stiff fine from the Department of Business and Professional Regulation when the board regularly utilized e-mail polls as a substitute for open board meetings and the conduct of association business.

In the strictest legal sense, if Director A writes a letter to Directors B, C, D, and E, there is no requirement for "sunshine" in that communication (although the letter may be an "official record"), since no "meeting" occurs. If Director B then responds to Director A and also copies C, D, and E with the response, the same concept applies. Theoretically, e-mail is no different than letter-writing, but as a practical matter it can be nearly instantaneous.

While I do not discourage association boards from using e-mail as a method of keeping each other current, it certainly should not be used to avoid the conduct of business at open meetings, which is intended to permit homeowners to know what is going on and also have input on the issues facing the community.

Whether that fine line is crossed is probably a question of degree. This is a gray issue for the Florida legislature to tackle, and maybe that will happen some day.

QUESTION: There is a unit owner in our condominium who does not live in the unit. He allows his family members and guests to use the unit for vacation stays. Our documents clearly state that units cannot be leased for less than thirty days and that transient tenants are not permitted. There is a disagreement between our board and our property manager as to how the documents should be interpreted. Could you provide your opinion? R.K. (via e-mail)

ANSWER: Coming from a lawyer, I'm sure this sounds self-serving, but interpretation of legal documents is best left to lawyers, that is what they go to school for. Your property manager should not be interpreting documents, as that is the unauthorized practice of law, and violates Florida law.

Typically, permitting a guest to use one's home is not considered a "rental," transient or otherwise, unless something of value (like money) changes hands between the lessor (landlord) and lessee (tenant).

Some associations do address "guest usages," and this was in fact the featured topic in one of my recent column addressing possible document updates (see Guests Can Wear Out Welcome Fast, April 22, 2004, which is available on-line). Your board probably needs to look elsewhere than the rental restrictions, and consider whether regulation of guest usage is necessary. ⚖

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Remodeling Special Issue For Condos

FORT MYERS THE NEWS-PRESS, JUNE 17, 2004

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Today's column continues a review of common legal issues addressed by community associations when updating the governing documents. Last week, we took a look at alterations of common property by the association. Today, we'll explore the other side of that equation, alterations by individual property owners. On this topic, the issues applicable to condominiums and homeowners' associations are quite different. Today, we will tackle alterations to condominium units made by owners. Next week's column will address alterations by property owners in homeowners' associations and the general concepts of architectural control and review in HOAs.

There seem to be a few common hot buttons in condo living involving a unit owner's maintenance, repair, or improvement of their apartment:

Flooring Restrictions: In the 1970's and 80's, the typical boilerplate set of condominium documents written by a developer required wall-to-wall carpeting in all areas of apartments (at least those units above the first floor) typically with exceptions for kitchens, bathrooms, and similar areas. The obvious intention of a carpeting requirement is to minimize noise transmission to the lower-floor apartments. In the past two decades, various types of "hard flooring" have entered the scene. Ranging from traditional tile floor, to hardwood flooring, to marble, many people simply prefer hard flooring to carpeting. However, particularly when there is no sound-deadening underlayment installed beneath hard flooring (and even in some cases where there is), complaints from neighboring units abound, and frequently blossom into litigation. The "best rule" for any particular condominium depends on the collective desire of the owners. Whether the association wishes to retain a strict carpet-only rule, or permit hard flooring with a requirement for sound insulation, this is something that should specifically be addressed in a well-written and updated set of documents.

Hurricane Shutters: The Florida condominium law provides that a board of directors must adopt specifications for hurricane shutters, and cannot prohibit a unit owner from installing shutters in accordance with the board's specifications. Most associations strive toward a "standard" hurricane installation, usually focusing on the style of shutter, the location of its installation, and approved color. Associations are also well advised to have professional assistance from an engineer or other consultant to assist in developing technical specifications for shutter installations to make sure that there is no compromise of water drainage, that the fastening of the shutters to the building will not cause structural problems, and the like. Shutter specifications are typically addressed through a board-made rule. The declaration of condominium should also provide that any improvement to the condominium by a unit owner, including shutters, is the responsibility of the unit owner as far as maintenance, repair, replacement, as well as the expenses that may be incurred if the item has to be removed and re-installed in connection with maintenance of the building.

Structural Alterations of the Unit: Most associations do not desire to have a role in an owner replacing appliances, cabinetry, and other items originally installed when the building was built. The rub usually arises when someone wants to "remodel" their apartment, and that involves knocking down walls, relocating partitions, modifying common area electrical or air conditioning facilities, and similar items. Several different interests of the association are implicated here. One common controversy involves whether heavy remodeling work should be permitted during certain times of the year. For example, some condominiums will not permit jack-hammering and other noisy or messy work to be done during the typical "high season" months. Secondly, an association is well advised to have control over significant structural alterations, or the relocation of plumbing or electrical facilities. For example, moving a unit's bathroom over the bedroom of the downstairs neighbor is a likely source of future legal disputes. Additionally, many associations find it desirable to require the unit owner to submit detailed plans and specifications, and in some cases assurances to the association from an outside engineer, if significant work

involving the building's structural elements, electrical system, plumbing system, or air conditioning system are involved in the remodeling job.

Alterations Visible from the Exterior: One of the most pleasing aspects of condominium living to many people is the uniformity found in many developments. As mentioned in last week's article, alterations by the association can be a source of contention. Likewise, if a unit owner is going to do work which alters the exterior appearance of the property, the potential for problems escalates. In addition to a minimum requirement that any exterior alteration be approved by the board of directors, some associations even require a vote of some percentage of the other unit owners to approve a neighbor's exterior alterations to the "look" of the property.

As condominium buildings age, or as owners wish to keep their units updated in a market of escalating property values, a well-written set of documents will help draw the line between individual rights and protection of the collective good. ⚖

Termination Clause Covers Redevelopment Projects

Fort Myers The News-Press, June 10, 2004

Question: Our condominium association board appointed a five-member landscape committee. The landscape committee does not have the authority to make decisions, only recommendations to the board. Are the meetings of this committee subject to the sunshine rules? T.D. (via e-mail)

Answer: It depends. The committee you have described is what is commonly called a "non-statutory" committee, because it has not been granted the authority to take final action on behalf of the association or make recommendations to the board regarding the association budget. Committees which can take final action or make budget recommendations are often referred to as "statutory committees."

Statutory committees are always subject to the sunshine rules of the law, including the posting of meeting notices, unit owners' right to attend and speak, minute-keeping, and the like. Conversely, non-statutory committees are subject to the sunshine rules unless the bylaws exempt their operation from the sunshine requirements. Therefore, if your bylaws exempt the committee from the sunshine rules, they do not apply. If the bylaws do not address the subject, then the committee must follow the sunshine rules until the bylaws are amended.

Question: I live in a homeowner's association, which has various governing documents including bylaws. Our bylaws state that a quorum is a majority of our members, although I learned on the Internet that the Florida State statutes sets a thirty percent quorum for homeowners' associations. What percentage should we use? J.W. (via e-mail)

Answer: Your question is a common one, and has not been answered by the courts.

The Florida statute applicable to homeowners' associations was amended in the mid-1990's to state that a quorum for the conduct of HOA business is thirty percent of the parcel owners unless a lower number is stated in the documents, implying that thirty percent is the highest quorum permitted for homeowners' associations. However, many associations that existed prior to the change in the law specified a majority for a quorum, as is your case.

Most attorneys I have discussed the issue with feel that the change is "procedural," which means that it can be applied retroactively to existing associations. However, most also feel that if the HOA documents set a specific quorum requirement for a particular action (as many do for special assessments), then that quorum would need to be followed.

The best thing for your association to do is update the bylaws to conform to current state law, which would basically eliminate that question.

Question: I recently purchased a unit that is within a community with a mandatory homeowners association. The association's management company has asked that I provide it with a copy of my warranty deed and the settlement statement from my closing. They state that the reason they need this information is to assure correct billing of future assessments and for accounting purposes. The deed is available through the Lee County Property Appraiser's website. The settlement statement includes financial information relevant to the purchase of my home which I feel is an invasion of my personal privacy. Am I required to provide this information? D.B. (via e-mail)

Answer: There is nothing in Chapter 720, the law governing homeowners' associations, which would require you to provide this information. There may be something in the association's governing documents that would require this information to be provided after a parcel has been sold, but without reviewing the governing document, I could not say for sure. Even if not specifically required by the documents, you may have an obligation to assist the association in carrying out its duties. For instance, it is important that the association know who the record owners of the unit are for purposes of billing and collecting the assessments if they were to become delinquent and to determine who is eligible to vote for the unit. This information is best determined through the warranty deed and it is not unreasonable to ask that it be provided by the new owners. Regarding the settlement statement, it will usually show whether any outstanding assessments were collected at closing and also if any assessments were paid through a certain date. If the monthly or quarterly dues were collected at closing, the association will not want to bill you for those assessments. I would recommend that you talk to the management company to determine what information they are looking for on the settlement statement. If there is some personal information that you feel is not relevant, you could black out that information.

Question: My condominium association recently determined to replace the spiral staircases at the rear of each unit. However, the association has not decided whether to specially assess the members for the cost or fund the project with reserve funds. I am currently trying to sell my unit. If the association has not decided how to fund the project by the time I sell, or if I sell the unit before the special assessment is due, am I responsible for paying the assessment since the decision to pursue the project was made while I was an owner? Do I need to disclose this information to the buyer? L.S. (via e-mail).

Answer: In regard to your first question, you are not responsible for payment of any special assessment until the association actually levies the assessment. Just because the association decided to move forward with the project while you were an owner, does not obligate you to pay the assessment. If the assessment is levied after the sale of your unit is concluded, the new owner is responsible for payment.

As to whether you must advise prospective purchasers of the possibility of the assessment, I recommend that you disclose the information to save yourself from future aggravation. Particularly relevant to your inquiry is a 1985 Florida Supreme Court case called Johnson v. Davis. In its opinion, the Florida Supreme Court stated that "where a seller of a home knows of facts materially affecting the value of the property, which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." While the courts have not, to my knowledge, extended the concept of this duty to condo re-sale disclosures, I think the potential exposure to a seller warrants a conservative approach, which your buyer may well appreciate too. ⚖

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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.

Be Precise with Owner Restrictions

FORT MYERS THE NEWS-PRESS, JUNE 24, 2004

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Today's column concludes our eleven part series involving tips for condominium and homeowners' associations when updating the community's governing documents. Today, we will explore the fine line between individual property rights and an association's right to control the use of one's property.

Architectural review and control disputes spawn more litigation in the homeowners' context than any other aspect of HOA governance. At tension are two competing principles of law. The first is engrained in our national psych beginning in grammar school. We are taught that America is a country where we are free to do as we please, whether others like it or not, unless we are violating some law created by society.

On the other end of the spectrum, the modern practice of imposing and enforcing restrictive covenants through homeowners associations has resulted in a private form of government, where every member has theoretically given up some of his or her property rights for the purpose of promoting the collective health, safety, welfare, and preservation of property values for those in the community.

These lofty legal principles are often slugged out in relatively unglamorous settings, ranging from whether a fence can be kept in someone's back yard, to the color of one's house.

While well drafted governing documents will not eliminate human conflict, they will often provide certainty to the parties in the event of a legal dispute. The guiding principle is that if there is a doubt in the eyes of a court, the free use of property will always trump a restriction.

Therefore, the first order of business for a homeowner's association when looking at the governing documents is to make clear what is permitted, or perhaps more specifically, what is prohibited. While it is always necessary to leave some room for interpretation, a specific clause is always better than a general restriction. For example, if the association does not wish to permit free standing buildings (such as detached garages) in the community, or wishes to limit those buildings to a certain type (height, style, etc.), the association stands a much better chance of surviving a legal challenge if the restriction is clear, and in writing. While there are some reported court cases which have upheld general schemes of development, associations with loose restriction lose their cases as often as they win them.

Obviously, there is no one-size-fits-all set of restrictions. What may be acceptable in a single family subdivision containing 3,000 square foot homes may be entirely inappropriate in a townhouse community with party walls, where the association maintains the exterior of the buildings.

It is equally important that once restrictions are established, that there be a procedure for homeowners to make sure what they want to do will be acceptable. In my opinion, a well-drafted set of governing documents will have a clear application process, including what materials must be submitted, who has the right to review the submissions, deadlines for responses, and perhaps an appeal process.

Many homeowners' associations use a committee for reviewing exterior change requests, which is often known as an "ARB" (architectural review board), "ARC" (architectural review committee), or "ACC" (architectural control committee). Remember, the ARB is a "sunshine committee" under Florida law, meaning that the committee must operate by the same rules as the board of directors.

Ideally, the details of the architectural review and approval process will be contained in written guidelines promulgated by the ARB, and approved by the board. For example, if the community association has approval rights regarding landscaping, it is helpful to have a list of both recommended and prohibited plantings. This takes the guess-work out of things for the homeowner, and definitely cuts down on disputes between the homeowner and the ARB as to what "good" and "bad" plantings are.

When all is said and done, even a perfectly written set of documents (if there is such a thing) will not solve every controversy, that is the nature of human nature. However, a little forethought can certainly make life a bit easier for all concerned. ⚖

Absentee Board Members are Common in Florida

Fort Myers The News-Press, June 24, 2004

Question: Our condominium association board appointed a five-member landscape committee. The landscape committee does not have the authority to make decisions, only recommendations to the board. Are the meetings of this committee subject to the sunshine rules? T.D. (via e-mail)

Answer: It depends. The committee you have described is what is commonly called a "non-statutory" committee, because it has not been granted the authority to take final action on behalf of the association or make recommendations to the board regarding the association budget. Committees which can take final action or make budget recommendations are often referred to as "statutory committees."

Statutory committees are always subject to the sunshine rules of the law, including the posting of meeting notices, unit owners' right to attend and speak, minute-keeping, and the like. Conversely, non-statutory committees are subject to the sunshine rules unless the bylaws exempt their operation from the sunshine requirements. Therefore, if your bylaws exempt the committee from the sunshine rules, they do not apply. If the bylaws do not address the subject, then the committee must follow the sunshine rules until the bylaws are amended.

Question: I live in a homeowner's association, which has various governing documents including bylaws. Our bylaws state that a quorum is a majority of our members, although I learned on the Internet that the Florida State statutes sets a thirty percent quorum for homeowners' associations. What percentage should we use? J.W. (via e-mail)

Answer: Your question is a common one, and has not been answered by the courts.

The Florida statute applicable to homeowners' associations was amended in the mid-1990's to state that a quorum for the conduct of HOA business is thirty percent of the parcel owners unless a lower number is stated in the documents, implying that thirty percent is the highest quorum permitted for homeowners' associations. However, many associations that existed prior to the change in the law specified a majority for a quorum, as is your case.

Most attorneys I have discussed the issue with feel that the change is "procedural," which means that it can be applied retroactively to existing associations. However, most also feel that if the HOA documents set a specific quorum requirement for a particular action (as many do for special assessments), then that quorum would need to be followed.

The best thing for your association to do is update the bylaws to conform to current state law, which would basically eliminate that question.

Question: I recently purchased a unit that is within a community with a mandatory homeowners association. The association's management company has asked that I provide it with a copy of my warranty deed and the settlement statement from my closing. They state that the reason they need this information is to assure correct billing of future assessments and for accounting purposes. The deed is available through the Lee County Property Appraiser's website. The settlement statement includes financial information relevant to the purchase of my home

which I feel is an invasion of my personal privacy. Am I required to provide this information? D.B. (via e-mail)

Answer: There is nothing in Chapter 720, the law governing homeowners' associations, which would require you to provide this information. There may be something in the association's governing documents that would require this information to be provided after a parcel has been sold, but without reviewing the governing document, I could not say for sure. Even if not specifically required by the documents, you may have an obligation to assist the association in carrying out its duties. For instance, it is important that the association know who the record owners of the unit are for purposes of billing and collecting the assessments if they were to become delinquent and to determine who is eligible to vote for the unit. This information is best determined through the warranty deed and it is not unreasonable to ask that it be provided by the new owners. Regarding the settlement statement, it will usually show whether any outstanding assessments were collected at closing and also if any assessments were paid through a certain date. If the monthly or quarterly dues were collected at closing, the association will not want to bill you for those assessments. I would recommend that you talk to the management company to determine what information they are looking for on the settlement statement. If there is some personal information that you feel is not relevant, you could black out that information.

Question: My condominium association recently determined to replace the spiral staircases at the rear of each unit. However, the association has not decided whether to specially assess the members for the cost or fund the project with reserve funds. I am currently trying to sell my unit. If the association has not decided how to fund the project by the time I sell, or if I sell the unit before the special assessment is due, am I responsible for paying the assessment since the decision to pursue the project was made while I was an owner? Do I need to disclose this information to the buyer? L.S. (via e-mail).

Answer: In regard to your first question, you are not responsible for payment of any special assessment until the association actually levies the assessment. Just because the association decided to move forward with the project while you were an owner, does not obligate you to pay the assessment. If the assessment is levied after the sale of your unit is concluded, the new owner is responsible for payment.

As to whether you must advise prospective purchasers of the possibility of the assessment, I recommend that you disclose the information to save yourself from future aggravation. Particularly relevant to your inquiry is a 1985 Florida Supreme Court case called Johnson v. Davis. In its opinion, the Florida Supreme Court stated that "where a seller of a home knows of facts materially affecting the value of the property, which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." While the courts have not, to my knowledge, extended the concept of this duty to condo re-sale disclosures, I think the potential exposure to a seller warrants a conservative approach, which your buyer may well appreciate too. ⚖

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HOA Reform Proves to be a Tough Nut

FORT MYERS THE NEWS-PRESS, JULY 1, 2004

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In 2003, Governor Jeb Bush vetoed legislation (Senate Bill 1632) which would have permitted units of government, such as local benefit and taxing units, to enforce private deed restrictions. Apparently, a number of communities around Florida have recorded restrictive covenants, but have no mandatory association with authority or finances to enforce them. In his veto statement, the Governor said:

> *"I recognize that homeowners' associations in Florida are facing a variety of difficult issues; however, I believe it is inappropriate and fundamentally unfair to use the government's taxation power to compensate for shortcomings in private contractual arrangements to the benefit of one party and to the detriment of another. Instead, I have asked Secretary Carr of the Department of Business and Professional Regulation to form a task force to examine the challenges that associations face. It is my hope that practical solutions to these issues, like those in this bill, can be found."*

Further, Governor Bush reportedly took note of the desirability of addressing relationships in homeowners' associations based upon inquiries from citizens, as well as media reporting on high profile HOA disputes, such as the Jupiter, Florida case involving a battle between a property owner and his association over the right to fly the American flag.

As a consequence, Governor Bush asked the Department of Business and Professional Regulation Secretary, Dianne Carr, to appoint a task force with the following mission statement:

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.

Secretary Carr appointed a 15 member task force which held six meetings throughout the State of Florida in the latter part of 2003 through January of 2004.

The Task Force ultimately produced a 46-page Report, including proposed recommended legislation. The Report, including proposed legislation, can be viewed at www.myflorida.com/dbpr/os/hot_topics/hoa_taskforce.

Equally important to what the Task Force ultimately recommended, are items which the Task Force recommended against. The more significant decisions in that regard include the following:

- **Government Regulation:** The Task Force voted that although alternative dispute resolution needs to be encouraged in homeowners' associations, extensive government regulation of HOAs, similar to the condominium system, is not desirable.

- **Warranties for Home Purchasers:** By one vote, the Task Force defeated a motion that would have recommended statutory warranties for individual home purchasers in HOA communities.

- **Covenant Enforcement by Government:** Espousing a similar philosophy to the Governor's

veto of Senate Bill 1632 (2003), the Task Force concluded that enforcement of covenants and restrictions is a matter of private contract, and should not be placed in the hands of local taxing or benefit districts. The Task Force likewise concluded that membership in a non-mandatory association could not be made mandatory without the consent of all affected parties.

Also relevant to a full understanding of the Task Force's work is a review of proposed legislation recommended by the Task Force which was not approved by the Legislature.

• **Disclosure:** The Task Force's recommendations and proposed legislation contemplated detailed disclosure to prospective purchasers, including disclosure of pending litigation in the association, the superiority of association's lien rights over homestead protection, and other important items. The recommended changes to the law also included a three-day "cooling off" period, similar to that which exists in condominium re-sales, so that potential buyers could think about what they were getting into before signing a binding contract. Reportedly at the insistence of lobbyists for the Florida realtors, this part of the proposed legislation was killed.

• **Common Area Warranties:** The Task Force's recommendations would have required developers to grant statutory warranties of merchantability and fitness for the common areas servicing the Community. Although this proposal would have provided much needed relief to Florida's consumers, it was killed by Florida's powerful lobby of developers and home builders.

• **Right to Speak at Board Meetings:** The HOA Task Force recommended that members of homeowners' associations be granted the right to speak at all meetings of the HOA's board. Apparently out of fear of filibuster in large associations, this proposal was scrapped during the legislative committee process.

• **Kickbacks:** The Task Force's proposed changes to the law would have made accepting kickbacks a felony of the third degree, and also the basis for permanent disqualification from board service. For reasons unknown, the Legislature did not consider this to be a necessary change in the law.

Next week we will begin a look at those initiatives from the Task Force which were adopted by the Legislature, and which became law on June 23, 2004, as well as other new legislation affecting homeowners' associations. ⚖

Homeowner at Disadvantage in Dispute with Board

Fort Myers The News-Press, July 1, 2004

Question: About two years ago, I moved into a community that is operated by a homeowner's association. The documents state that the HOA is responsible for landscape maintenance, landscape replacement, and irrigation. Since I have lived here, the only thing the association has done is mow my lawn. I have had little or no irrigation. The association admits that the system is poor, but does not want to spend the money to fix it. I have been watering my lawn myself to try to save the plants that I put in at my own expense. One member of the board is watering his lawn by illegally turning on the system at the street. We have requested breakdowns of where the money is being spent per unit and have not received the information from the board or the management company. What can we do? Can those of us who have not been given value for our money get refunds? Quite a few of us are willing to put in new irrigation units and pay our own bills. Is there a way this can be done? V.A. (via e-mail)

Answer: Disputes involving the appropriate degree of maintenance in a community usually involve the classic "shades of gray." In general, the board is afforded a fairly wide degree of latitude. For example, if the association controlled the watering schedule and thinks two times per week is enough to water the lawns, while you think three times would be better, the association would win that argument.

However, there is a point where the line is crossed and the board's discretion is superceded by the documents. For example, if the documents require the association to provide irrigation to your home, I believe the association has an obligation to provide a reasonably functional irrigation system, whether they want to spend the money or not. Of course, this sometimes creates a "Catch-22," since some HOAs cannot levy special assessments for capital improvements without approval of the members (often two-thirds), and some people may not be willing to spend the money and therefore will not vote for the assessment. Of course, this is all driven by your community's particular documents.

It goes without saying that members of the board should not abuse their positions to receive greater benefits than anyone else. A board member has a fiduciary duty to the homeowners, which by law requires the fiduciary to put his or her personal interests beneath those of the association and its members. However, as a practical matter, the only remedy short of a lawsuit is to expose the abuse and seek removal of the director (although any director can be removed without cause), or finding someone else to do the job at the next election.

Your other possible remedies arise from a law signed by Governor Bush last week, which will be explored in my column over the next several weeks. The new law applicable to homeowners' associations gives you a couple of additional options that you would not have under present law.

First, you now have an expanded right to inspect official records of the association, including the records you inquired about. Under the old law, only a set number of documents constituted "official records" of the association.

Secondly, the new law gives you the opportunity to circulate a petition in the community. If twenty percent of the members of the association sign the petition, you can require the board to take up the irrigation issue at a special meeting of the board. Although the board would not be obligated to act in any particular manner, you could at least bring the matter to public debate through the petition process. Good luck.

Question: I purchased a townhouse in a four unit townhouse development in 2000. The association for the townhouses was created in 1980, but dissolved in 1983. I own one of the two interior units. The owners on both end townhouses have put up fences which run to the rear property line. This prevents me from getting to the rear of my home. Does this have to remain "common area" or can it be "annexed" by the end townhouses? A.B. (via e-mail)

Answer: Even though the association which is supposed to govern the community has apparently been dissolved for some twenty years, I would assume that there still are recorded restrictive covenants that run with the land. You should have gotten a set of these documents with your closing papers, or they should be recorded with your local recording office. These covenants should define what is "common area" and what is individually owned property.

In most situations, every owner is granted an easement for enjoyment of common areas and the end owners usurping that area may well impair the legal rights of the two interior owners.

However, there may be an appropriation in the governing documents for what your neighbors did. Further, depending upon the specific facts of the case, your neighbors may be able to claim adverse possession, sometimes known as "squatter's rights" which accrues in Florida after seven years. There are very specific things that must occur for one to acquire property interest by adverse possession. Your problem involves a number of complex legal issues. If you cannot work it out directly with the two end owners, you should consult a local real estate attorney to determine if the matter is worth your while to pursue legally.

Question: We purchased a single family home that is covered under a master association covenant. After closing, we received an invoice from the association for a resale working capital contribution. Our closing statement indicates that an estoppel letter was issued to the association. We purchased title insurance with the acquisition of our home. Who should pay? J.G. (via e-mail)

Answer: It depends. It sounds like someone made an error, and in situations like this, the party who made the error usually is the one who has to pay for it. I would check with your title company and if they wrote title insurance without waiting for a response to the estoppel letter, they may be on the hook. ⚖

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Law Gives Members More Voice

FORT MYERS THE NEWS-PRESS, JULY 8, 2004

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Last week, we looked at actions of the Governor's Task Force on Homeowners' Associations that were not passed into law. This week's column begins a review of legislation recommended by the Task Force which became law on June 23, 2004. Parts of the new legislation are effective immediately, while others are effective October 1, 2004. The following provisions all have an effective date of October 1, 2004.

Petition Rights, F.S. 720.303(2)(b), F.S. 720.303(d): This reform in the law is intended to provide members of homeowners' associations with the right to be heard on issues of concern. The law provides that if twenty percent of the total voting interests (there is usually one voting interest per lot or parcel) petition the board to address an item of business, the board must take the item up at a meeting of the board. The board is not obligated to act on the item, only consider it. For example, if twenty percent of the members want the board to consider hiring a management company, a decision typically within the prerogative of the board's discretion, the board would be obligated to call a meeting to at least debate the topic. The board is obligated to consider properly presented petitions either at its next regular board meeting, or at a special board meeting, but no later than sixty days after receipt of the petition. The law further requires the board to give all parcel owners notice of the meeting by mail or delivery, fourteen days in advance. The notice must also be posted in the manner prescribed by law. Each member of the association is granted the right to speak for at least three minutes on any matter placed on the agenda by this petition process. As noted above, the Task Force recommended that parcel owners be permitted to speak to any agenda item (whether placed on the agenda by petition or not), but the law as adopted limits a parcel owner's right to address the board to items brought to the board by the petition process. This is in contrast to the condominium law, where unit owners are entitled to speak at any board meeting with respect to any designated agenda item. The new HOA law also provides that the board may require those desiring to speak to sign a sign-up sheet prior to the meeting.

Notice of Board Intention to Adopt Special Assessments or Enact Rules Regarding Parcel Use, F.S. 720.303(2)(c)2: The new law requires fourteen days notice be given to all parcel owners before the board considers the adoption of a special assessment, or rules regarding parcel use (parcels are the individually-owned property, such as lots). Of course, the authority for the adoption of rules and assessments must be granted in the governing documents, and the new law is procedural in nature. This procedure does not apply to the adoption of rules regarding use of common areas. The notice which must be given to each parcel owner is a fourteen day mailed, delivered, or electronically transmitted notice to members, which must also be posted conspicuously on the property by posting or closed circuit cable television fourteen days in advance. The right to use electronic transmission of notice to members and closed-circuit cable television in connection with association notices is based upon 2003 amendments to the Florida laws, which should also be reviewed in connection with use of those procedures.

Official Records, F.S. 720.303(4) and (5): Under prior law, "official records" in homeowners' associations were limited to those records specifically mentioned in the statute. Similar to the condominium law, the HOA statute now states that all written records of the association not specifically exempted are part of the official records. Therefore, items such as correspondence from a parcel owner to the board, not considered an "official record" under prior law, would now be considered an official record. The law exempts certain potentially

sensitive documents from the definition of "official records," including: attorney-client and work-product privileged documents; information obtained by the association in connection with the approval of unit leases or transfers; disciplinary, health, insurance, and personnel records of association employees; and medical records of parcel owners or community residents. The law also requires that the association make photocopies for members who inspect the records if the association has a photocopy machine available, and if the member's request is less than twenty-five pages. The association may charge up to fifty cents per page. For more voluminous requests, the association is entitled to send the project out for copying, and the owner is required to reimburse actual copy costs. The law permits the board to adopt reasonable written rules governing records inspection, provided that an association cannot limit a parcel owner's rights to inspect records to less than one eight hour business day per month.

Year-End Financial Reporting Requirements, F.S. 720.303(7): The changes to the HOA law are very similar to the existing requirements for condominium associations. Homeowners associations will now be required to provide year-end financial reports in accordance with generally accepted accounting principles. The level of report is based upon the association's annual receipts. Associations with revenues of less than $100,000.00 may prepare a cash report of receipts and expenditures. Associations with annual revenues between $100,000.00 and $200,000.00 shall prepare compiled statements. Revenues between $200,000.00 and $400,000.00 require a review. Associations with annual revenues in excess of $400,000.00 must prepare an annual audit.

Associations of fewer than fifty parcels, regardless of the annual level of revenue, may prepare an annual report of cash receipts and expenditures in lieu of the more thorough financial statements, unless the governing documents provide otherwise.

As with condominiums, if approved by a majority of the voting interests present at a properly called meeting of the association, the association may waive the financial reporting requirements required by the law to any lower level of report, provided that a report of cash receipts and expenditures is required under any circumstances.

On the flip side, twenty percent of the parcel owners may petition the board to obtain a level of financial reporting higher than that required by the law. If the higher level report is approved by a majority of the total voting interests, the association has ninety days to prepare the expanded report. The board is also authorized to amend the budget or adopt a special assessment to pay for the costs affiliated with the more expansive financial report.

Next week, we will continue this review with a discussion on the new law's requirements regarding the recall (removal) of directors, fining, competitive bidding, and HOA membership meetings. ⚖

Homeowner at Disadvantage in Dispute with Board

Fort Myers The News-Press, July 1, 2004

Question: I live in a community governed by a homeowners' association. We recently voted to change our declaration of covenants. The result of the vote, including how each member voted, was distributed to the entire community. Does the board have the right to publish how each member voted? L.J. (via e-mail)

Answer: Votes involving amendments to the governing documents are considered part of the association's official records. While it is not customary for the association to publish voting results, there is nothing in the law which prevents the board from doing so.

Question: Could you explain what the difference between mediation and arbitration is for condominium problems. S.D. (via e-mail)

Answer: Most disputes involving issues between an association and one of its members must be heard in arbitration before it can be submitted to a court. Arbitration is managed by a state agency called the Department of Business and Professional Regulation, which employs a staff of attorney-arbitrators through its Division of Florida Land Sales, Condominiums and Mobile Homes.

Arbitration is similar to court proceedings. Evidence is submitted to the arbitrator, and one party is declared the winner. By law, any party wishing to be heard in court may appeal an arbitration decision, and is granted a new trial, called trial de novo. The losing party pays the winning party's costs and attorney's fees in arbitration and court proceedings.

Mediation, by contrast, does not result in one winner and one loser, but if successful, results in a settlement where each side gives something, and gets something in return. The mediator serves the role of a facilitator of the settlement. A good mediator will help each party to the dispute view their case more realistically than they otherwise might.

Mediation has become a preferred method of alternative dispute resolution in community association governance. In fact, the law now also mandates pre-suit mediation for homeowners' associations as well.

Question: I am trying to effect change within our community. One concern I have is that the board can make any decision it likes, which may or may not be what the homeowners want. I think this is unfair. S.G. (via e-mail)

Answer: Your HOA is a democratic sub-society, and is governed by principles of both corporate law and municipal law. In either a corporate or municipal setting, the elected governing board is entrusted with substantial power, and only answers to the shareholders or voters at election time.

Change is often resisted in any institution, including community associations. Often those seeking change are unfairly labeled as troublemakers. Sometimes, however, those seeking change are more interested in addressing some personal or political agenda.

I would recommend that you run for your association's board. I think you will come to find that while the board serves the people, it is rarely practical or desirable to take a popular vote on every issue that requires a decision. ⚖

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Law Denies Developer Fund Access

FORT MYERS THE NEWS-PRESS, JULY 15, 2004

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Today's column is the third part of a series reviewing Governor Bush's Task Force on Homeowners Associations and the 2004 amendments to Florida law that affect homeowners' associations (see HOA Reform Proves To Be A Tough Nut and Law Gives Members More Voice). These changes were signed by the Governor on June 23, 2004. Parts of the new legislation are effective immediately, while others are effective October 1.

Limitation on Expenditures During Developer Control, F.S. 720.303(8)(c): The law has been changed to state that association funds may not be used by a developer to defend legal proceedings filed against the developer, or directors appointed to the board by the developer, even when the subject of action or proceedings concerns the operation of a developer-controlled association. This provision is effective on October 1, 2004.

Recall, F.S. 720.303(10): The new regulations for recall (removal) of directors in homeowners' associations largely mirrors the provisions found in the Condominium Act. The law clarifies that HOA directors may be removed, with or without cause, by a majority of the entire voting interests. Unlike the condominium counterpart which provides equal deference to both procedures, the HOA law seems to favor recalls by written agreement over the petition/meeting process. However, the HOA law does permit the use of petition by ten percent of the members for the call of a recall meeting, however authority for this procedure must be contained in the governing documents. Recall by written agreement is permitted regardless of enabling authority in the governing documents. Like the condominium law, there is a requirement that when more than one director is being subject to recall, separate votes be taken for each. There is also a procedure for service of recall agreement on the board by certified mail or formal service of process. As in condominiums, the board has five full business days after receipt of recall papers to call a board meeting to certify or de-certify the recall. Recall contests are handled through arbitration proceedings. Unlike the condominium statute (although now subject of a proposed rule for condos), written recall agreements or ballots used in one recall effort may be reused in a second recall effort, if the first recall effort is stricken for any reason. However, in no event is a written agreement or ballot for recall valid for more than 120 days after it has been signed by the member. Consistent with condominium regulations, rescission or revocation of a written recall ballot or agreement must be in writing and must be delivered to the association before the association is served with recall papers. When more than a majority of the board is being subject to recall, the recall agreement or ballot must list at least as many possible replacement candidates as there are directors subject to recall. If less than a majority of the board is recalled, the remaining directors can fill vacancies created by the recall. This provision is effective October 1, 2004.

Flags, F.S. 720.304(2): The right to fly the American flag in HOA-operated communities has been expanded to mirror the condominium statute

which permits the flying of various armed service flags on certain enumerated holidays. The new HOA law also permits a homeowner to display one portable, removable official flag of the State of Florida, a right not conferred by the condominium law.

Securing HOA Fines by Liens, F.S. 720.305(2): The statute has been changed to specifically state that a fine may not become a lien against a parcel, which is the law for condominiums, but which has not been the law for HOAs (where appellate court cases have recognized the right to secure fines by liens if authorized by the governing documents). It is debatable whether the new statute can be retroactively applied to existing associations whose governing documents permit the securing of fines by liens, based upon constitutional considerations. The new law also provides that in any action to recover a fine, the prevailing party is entitled to collect its reasonable attorney's fees and costs from the non-prevailing party, as determined by the court.

Competitive Bidding, F.S. 720.3055: This change is also very similar to the law for condominiums. However, the threshold where competitive bidding is triggered is ten percent of the association's total annual budget (including reserves), as compared to the five percent threshold in condominiums. The bidding requirements apply to any contract that cannot be performed within one year for the purchase, lease, or renting of materials or equipment to be used by an association, and all contracts for services. These contracts must also be in writing. Like condominiums, the association is not required to accept the lowest bid. Further, contracts with employees of the association, attorneys, accountants, architects, community association managers, engineers, and landscape architects are not subject to competitive bidding. Certain existing contracts are also exempt from bidding, as are contracts procured on an emergency basis or from a sole supplier of the goods or services involved.

Notice of Membership Meetings, F.S. 720.306(5): The bylaws of the homeowners' association shall provide, and if they do not so provide, are deemed to provide certain requirements regarding notice of membership meetings. An association must give all parcel owners actual notice of all membership meetings, which shall be mailed, delivered, or electronically transmitted to members not less than fourteen days prior to the meeting. This notice must also be posted or broadcast on closed circuit cable television fourteen days in advance. When electronic transmission is used as an alternative for mail or delivery of notice, or where broadcast television is used an alternative for physical posting, the authority for these alternatives should be contained in the bylaws. The new law applies not only to annual meetings of the homeowner's association, but special meetings as well. Proof of compliance is required to be given through affidavit.

Right of Members to Speak at HOA Meetings, F.S. 720.306(6): As distinguished from meetings of the homeowner's association board, where the right to speak is limited to "petition" meetings, parcel owners are given an unfettered right to speak at all membership meetings with reference to all items "open for discussion or included on the agenda." The reference to items "open for discussion" appears to be a bit broad, and it is not clear whether a parcel owner has an individual right to "open an item for discussion." The board may adopt rules regulating member statements, provided that each parcel owner has the right to speak for at least three minutes "on any item." However, the member must submit a written request to speak prior to the meeting, and the association may adopt additional rules regulating owner statements at membership meetings.

Next week we will look at the new law's provisions regarding mediation of HOA disputes and a prohibition against "SLAPP" suits. ⚖

Withholding Assessment Payment Likely to Backfire

The News-Press July 15, 2004

Question: We purchased a condominium apartment in a building that contains five units. At the time we bought, the same person owned all five units. He said he was going to sell all of them, but only ended up selling two, so he owns three out of five units, therefore controlling a majority. This person still makes all decisions like he owns all of the units. We have been denied financial information. He will not set a meeting even though we have requested one. We have stopped paying assessments until we get some response. What can we do? S.B. (via e-mail)

Answer: First, you should not withhold paying your assessments. You expose your property to a lien and foreclosure, which is not protected by homestead laws. This strategy usually backfires.

Unless you were promised in writing that all of the units would be sold, or unless there was an intent to commit fraud, you are likely stuck with your minority ownership status. This is one of the few situations where I would recommend filing complaints with the State's condominium agency as a means of addressing your concerns. Normally, I consider administrative complaints to be a last resort. However, in your case, you will not be able to change things politically (through recall, or at the annual election), so help from the regulatory agency may be your only choice.

You can file a complaint with the Department of Business Regulation, through its Division of Florida Land Sales, Condominiums and Mobile Homes, by email. Go to www.state.fl.us/dbpr/ and follow the instructions on the website.

Question: We recently bought a condominium unit and found out that we are near a "rotten neighbor," who has caused many people to move. This person has a long documented history of alienating all of his neighbors, trouble with the association, intervention of the police, etc. Could this be considered an "undisclosed defect?" K.G. (via e-mail)

Answer: Interesting question. Undoubtedly, a nasty neighbor can make life miserable. I suppose in an extreme case, owning property close to certain personality types could have an effect on property values.

The law requires disclosure of conditions which will have a material affect on the value of property. So far, all of the reported case law has dealt with construction related problems.

However, I would not be shocked to find a court to extend Florida's disclosure laws to a bad apple neighbor.

Question: Our association recently voted to amend our condominium documents to outlaw certain breeds of "vicious" animals, including rotweillers and dobermans. Our board has now given "vicious" pet owners one month to get rid of their animals. How can the board do this? Don't they have to grandfather these pets? C.A. (via e-mail)

Answer: In my opinion, the board does not have the authority to implement the new rule unless existing pets are grandfathered.

I would reach a different conclusion if any particular animal ("vicious breed" or otherwise) has bitten anyone, or engaged in other behavior suggesting a threat to safety. In such cases, I believe that the board has the right, if not the duty, to see that the animal is removed from the community.

Question: When our cooperative association sends out the proposed annual budget to the shareholders, does it also have to send the reserve schedule? Is it up to the board or the shareholders how to fund the reserves? J.F. (via e-mail)

Answer: The proposed annual budget that is sent out to the shareholders (or, in the case of condominium associations, the unit own-

ers) must include a reserve schedule of "fully funded" reserves. The full funding formula must be presented using straight line depiction, unless the members have voted to switch over to "pooled" (or sometimes called "cash flow") funding of reserves.

The board may, but is not obligated to, permit the shareholders to vote on the reduction or waiver of fully funded reserves. If the board does not present a reserve funding choice with the annual statement, the shareholders are permitted to petition for a vote on the issue. ⚖

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Law Calls for Binding Arbitration

FORT MYERS THE NEWS-PRESS, JULY 22, 2004

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Introducing CALLBP.COM, the Community Association Legislative Lobby Website. CALL is the comprehensive source for legislative information that impacts HOAs, condominium owners, and other common ownership residents. Visit www.callbp.com today.

Today's column is the fourth part of a series reviewing Governor Bush's Task Force on Homeowners Associations and the 2004 amendments to Florida law that affect HOA's (see *HOA Reform Proves To Be A Tough Nut*, *Law Gives Members More Voice* and *Law Denies Developer Fund Access*).

Mandatory Binding Arbitration of Election Recall Disputes, F.S. 720.306(9): The Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") has been empowered to intervene in certain controversies within homeowners' associations, including election and recall disputes. The new law requires all disputes involving election challenges or recalls to be submitted to binding arbitration with the Division.

"SLAPP" Suits, F.S. 720.304(4): This change to the law, which is likely to have little effect on operation of homeowners' associations in the real-world, prohibits so-called "SLAPP" suits, which is an acronym for Strategic Loss Against Public Participation. The new law would prohibit a homeowner's association from suing a parcel owner solely because the parcel owner sought redress of his grievances before a governmental agency. The law provides various penalties, including triple damages.

Alternative Dispute Resolution, F.S. 720.311(1): Typical disputes between homeowners' associations and parcel owners must now be submitted to mediation prior to the dispute being filed in court. Included within the definition of controversies requiring pre-suit mediation are:

- Disputes between an association and a parcel owner regarding use or changes to the parcel or common areas;
- Disputes regarding amendments to association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings, not including election meetings; and
- Disputes regarding access to official records.

The law also requires "other covenant enforcement disputes" to be submitted to pre-suit mediation, which would presumably address typical controversies in associations such as pets, vehicle parking, and similar matters. Some have speculated whether the reference to "covenant enforcement" is so broad so as to encompass assessment collection disputes, although this was not the focus of any Task Force debate, and presumably not the in-

tent of the Legislature. The cost of mediation is to be shared equally by the parties. Mediators may either be employed by the Division or be private mediators. Mediation conferences attended by a quorum of the board are not "meetings" of the board and are not subject to the "sunshine" requirements of the law. If mediation is not successful in resolving all disputes before the parties, the parties are free to file in a court of competent jurisdiction or avail themselves to either binding or non-binding arbitration with the Division. Unless the parties mutually agree to Division arbitration, unsuccessful mediations must be resolved in court. The Division is obligated to develop a certification and training program for private mediators and private arbitrators. The Division may only certify those mediators also certified by the Florida Supreme Court. Pre-suit mediation is also available for non-mandatory associations with the right to enforce restrictive covenants, although mediation for non-mandatory associations is optional.

Remedies for False and Misleading Information by a Developer, F.S. 720.602: The law now provides remedies to purchasers in HOA communities similar to those granted to condominium purchasers who are the victims of false or misleading statements or information published by, or under the authority of, a developer. If false or misleading information is published in promotional materials, including but not limited to contracts, governing documents, brochures or newspaper advertising, a purchaser may rescind his contract or collect damages prior to closing. After closing, the purchaser has the right to collect damages for a period of one year after the later of several triggering events, the most common of which will be the closing date. Like its condominium counterpart, this law entitles the prevailing party to recover his attorney's fees from the non-prevailing party.

Jurisdiction of County Courts, F.S. 34.01(1)(d): Although not an amendment to Chapter 720, this change addresses the jurisdiction of the county and circuit courts. The new law provides a county court with jurisdiction in homeowners' disputes, which is concurrent with jurisdiction of the circuit court. This would permit a plaintiff in the typical HOA dispute to choose county court as the desired forum for resolution, even where only injunctive relief is being sought.

Next week we will finish up this series with a look at other changes to homeowners' association laws, and then move on to new laws affecting condominiums including grandfathering of rental rights and the purchase of defibrillators. ⚖

Questions Arise Over Condo's "55 and Over" Rules

The News-Press July 22, 2004

Question: I have two questions about "55 and over" rules. We own a condo in an age restricted building. If we are away from our condo for a few months and we wanted to let our children (forty years old) stay there for a couple of weeks while we are gone, would this be allowed under the 55 and over rules? We consider ourselves to be the "permanent occupants," although we would not be there while our children are visiting. My next question has to do with the sale of the condo unit. Right now all of the units are occupied by at least one person age 55 or over. The use restriction in our condominium documents states that the board shall establish policies for the purpose of ensuring that the required percentages of occupancy by persons over age 55 is maintained at all times. My question is because we have one hundred percent occupancy of persons over age 55, can I sell my unit to someone who is under age 55, since a sale would not take the building below the eighty percent threshold required by law. W.T. (via e-mail)

Answer: The answer to your first question is, to my knowledge, an open issue in the law. Federal regulations regarding the required census for persons aged 55 and over deals with occupancy of the units. While I believe that an association can make the argument that a visiting child is a "guest," they

would clearly be "occupying" the unit in the absence of the age-qualified resident. I do not believe that any of the enforcement agencies with jurisdiction over "55 and over" housing have adopted a position on this issue. Of course, use of the unit by guests other than the unit owner may also be regulated by the condominium documents, irrespective of the age restriction issue.

Your second question involves an interpretation of your declaration of condominium. Most declarations of condominium that impose a "55 and over" restriction are written to strive toward one hundred percent occupancy of units including at least one person age 55 or over. The twenty percent is usually a "cushion" for hardship situations, including the death of an age-qualifying spouse, or an inheritance situation. If your declaration of condominium is written in this manner, the board could properly prevent the sale of the unit to a person under age 55 (unless the new owner intended to use the unit for occupancy by a person over age 55, such as a rental).

Question: Is it legal for the president of a condominium association board to spend association money to purchase gifts for individual board members without collective board approval? L.P. (via e-mail)

Answer: I do not believe, as a strict technical matter of law, that it is appropriate for an association to spend common expense monies for gifts.

Although I certainly feel that it is appropriate to give tokens of appreciation to directors in limited circumstances (such as a plague for a retiring member of the board), I recommend that the funds toward these acknowledgements be raised through voluntary contributions.

Question: Is it appropriate for a condominium association board to appoint one of its board members to serve on an association committee? L.P. (via e-mail)

Answer: There is no prohibition in the law against board members also serving on committees, and in fact that is quite common.

Question: Our ocean-front condominium rules state that all windows and doors must be kept closed. Is that legal? I am told that it is to preserve the air-conditioned common areas and prevent mildew. Can I be forced to use my air conditioning year-round? C.C. (via e-mail)

Answer: In order for an association's rule to be valid, it must be reasonable. Reasonableness is obviously in the eyes of the beholder, and is ultimately for an arbitrator, judge, or jury to decide.

I can think of several situations where a rule requiring apartment doors to be kept closed would seem reasonable. One involves buildings configured so that noise would travel easily between the homes. Another situation where the rule would be reasonable is the case where the fire suppression design of the building necessitates the doors being kept closed. Your board's rule is apparently based on prevention of mold and mildew, which has become a topic of frequent litigation as of late. If your board's rule is predicated on some reasonable level of evidence, I think the rule would be upheld. ⚖

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HOA Law Changes Not Perfect

FORT MYERS THE NEWS-PRESS, JULY 29, 2004

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Introducing CALLBP.COM, the Community Association Legislative Lobby Website. CALL is the comprehensive source for legislative information that impacts HOAs, condominium owners, and other common ownership residents. Visit www.callbp.com today.

Today's column concludes a five-part review of 2004 amendments to Florida's law governing homeowners' associations found in Senate Bill 2984 and Senate Bill 1184. In general, these laws became effective June 23. The new law includes several amendments to Chapter 720 which were the product of efforts of parties other than the Governor's Task Force on Homeowners Associations. These amendments include the following:

- **Definition of "member" in Homeowners' Associations, F.S. 720.301(10):** The new law adds any person or entity obligated to pay an assessment or amenity fee as a "member" of a homeowners' association. It is reported that the intention of the change is to confer membership status in homeowners' associations on people (or associations) who are obligated by covenant to pay a homeowners' association for services, but are not members of the association due to charter restrictions or the jurisdictional boundaries of the homeowner's association.

- **Limitations on Enforcement of Amendments to Governing Documents for Associations of Fifteen or Fewer Units, F.S. 720.103(1):** This clause provides that an association of 15 or fewer parcel owners may enforce only the requirements of the original "deed restrictions" established prior to the purchase of each parcel. The intent of the law appears to limit an HOA consisting of 15 or fewer parcels from enforcing amendments to a declaration of covenants as to those who purchased prior to the amendment. Setting aside the absence of demonstrable public policy for this change, the law also appears to suffer significant constitutional infirmities as both a retroactive impairment of contract (for associations whose governing documents permit enforcement of future amendments) as well as the creation of a legislative rule in contravention of the authority of the Florida Supreme Court.

- **Ramps for the Disabled, F.S. 720.304(5)(a):** The statute applicable to homeowners' associations now provides that any parcel owner may construct an "access ramp" if a resident or occupant of the parcel has a medical necessity or disability that requires a ramp for ingress and egress. The law does not state whether the right to construct the ramp is limited to the parcel, or extends to common areas, certainly a drafting flaw. The law requires that the ramp be as "unobtrusive as possible" and that it also "blend in aesthetically as practicable." It must also be "reasonably sized to fit the intended use." Although the law appears to confer an absolute right to build a ramp, there is a procedure requiring submission of plans to the association before construction. Although the association apparently cannot deny approval, it can make "reasonable requests to modify the design to

achieve architectural consistency with surrounding structures." It is unclear how this law will interplay with state and federal fair housing laws which generally permit reasonable modifications of premises for the benefit of disabled individuals. Prior to construction of a ramp, the owner must submit a physician's affidavit to support the need for such alteration.

- Security Signs, F.S. 720.304(6): Any parcel owner may now display a sign of "reasonable size" provided by a contractor for security services, within 10 feet of any entrance to the home.

- Pre-sale Disclosure, F.S. 720.601: This change in the law basically removes existing pre-sale disclosure law from Section 689.26 of the Florida statutes and places it in Chapter 720, implying that the disclosure law does not apply in non-mandatory association settings, even if deed restrictions apply. The remaining changes to current law are largely grammatical. There is a new provision which states that if the required disclosure summary is not provided to a prospective purchaser "before" the purchaser executes a contract, there is a right of rescission for up to three days after receiving the disclosure summary. As a practical matter, if the prospective purchaser signs the disclosure summary minutes or even seconds before signing the purchase contract, there will be no right of rescission.

- Marketable Record Title Act, Revival of Covenants, F.S. 720.401-405: This change deals with revival of restrictive covenants extinguished by the Marketable Records Title Act (MRTA), or which have expired according to their own terms due to the lack of a provision for automatic renewal.

Senate Bill 1184/2984 also amended various other laws affecting community associations, including the condominium statute, most significantly involving the grandfathering of rental rights. Next week we will begin a look at the additional changes to the law adopted by the 2004 Legislature. ⚖

Questions and Answers

Question: In your July 1 column, you stated that the right to speak at board meetings of homeowners' associations was "scrapped during the legislative committee process." Senate Bill 2984, which was approved by the Florida Legislature, gives HOA members the right to "attend all meetings and to speak at any meeting with reference to all items open for discussion or included on the agenda." I am confused. — J.M. (via e-mail)

Answer: The section you are quoting was added to Florida Statute 720.306(6). This part of the law deals with meetings of the membership of the association (parcel owners), not the board of directors. As you correctly note, parcel owners now have the right, by law, to attend all HOA membership meetings, and to speak at any meeting with reference to all items open for discussion or included on the agenda.

Question: Senate Bill 1184, which becomes effective on Oct. 1, 2004, states that any amendment to a declaration of condominium restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of the amendment. Does this ruling apply to homeowners' associations as well? — G.M. (via e-mail)

Answer: No. Having completed a five-part review of the new law applicable to HOAs in today's column, next week I will begin a review of the new condominium laws, including the rental law. The so-called "rental grandfathering amendment" does not apply to homeowners' associations, only condominiums.

Question: Does the provision regarding recall of directors and binding arbitration apply to the removal of a sitting board member that was discussed in your July 22 column apply to removal of a board member by the other members of the board. — P.A. (via e-mail)

Answer: The new law applies to homeowners' associations, not condominiums. In condominiums, the law has for many years required binding arbitration of recall disputes.

Members of a board of directors do not have the right to remove or recall a fellow board member. This is a right that, by law, is placed solely in the hands of the association membership.

Question: I have a question regarding satellite dishes. Am I correct that the 1996 Telecommunications Act prohibits any restriction against satellite dishes? — B.R. (via e-mail)

Answer: While the law does give condominium owners the right to install certain Over-The-Air Reception Devices (commonly called OTARD's), the right is not unqualified. For example, with satellite dishes, the dish must be of one meter (39 inches) or less in diameter.

Further, the new law only applies to areas over which the unit owner has exclusive control, such as a limited common element patio area. For example, the law would not give a unit owner the right to install a dish on the roof of a high-rise condo building, even if that was the only way the owner could get reception.

Question: We live in a gated community of single-family homes that has just been turned over from the developer to the homeowners. The current declaration of covenants, created by the developer, states that two-thirds of all membership interests (there is one membership interest per home) must approve changes to the covenants. We want to change that so any future changes require a majority vote. We were told that we must have two-thirds and not a majority, is this true? — P.Y. (via e-mail)

A I am aware of no law which would prohibit amending the amendment clause of your declaration to reduce the voting threshold to a majority. Of course, you would need the current requirement (two-thirds vote) to get there.

Question: Can an association borrow money from reserves to pay a front-loaded insurance policy premium? — J.W. (via e-mail)

Answer: It is not uncommon for association insurance policies to be payable on an annual basis, in advance. This often presents cash flow challenges to associations. For condominiums, the use of "reserves" is strictly regulated by state statute and administrative regulations. In general, an association's board may not use reserve funds for purposes other than that for which they have been set aside unless a vote of the owners has been taken, and a majority of the owners have given the board the permission to do so.

In homeowners' associations, the law is a bit looser. There is no legal restriction involving the use of reserves, although the governing documents and concepts of good accounting practices would come into play. ⚖

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Lender Surveys are Tricky

FORT MYERS THE NEWS-PRESS, AUGUST 5, 2004

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Today's column continues our look at laws affecting community associations adopted by the 2004 Florida Legislature. In the first five parts of the series, we looked at the new laws applicable to homeowners' associations. Today's topic, amendments to the condominium statute, involving the so-called "lender questionnaire."

As anyone familiar with condominium operations knows, associations frequently receive questionnaires that the association is asked to fill out with information about the condominium. The typical questionnaire will ask for insurance information, the pendency of litigation, information about reserves, the number of rental/investor-owned units, the status of completion of the condo, and a variety of other information. Sometimes, answering these questions involves legal interpretations (such as whether the project is a phase project). Often, the questionnaires also ask for information that the association simply has no way of knowing, such as how many units are used as second/vacation homes.

Typically, these questionnaires are required by underwriters who buy condo mortgages on what is known as the "secondary mortgage market," which includes a number of different companies and agencies that buy up mortgages from the banks and the other institutions that actually make the loans. These secondary mortgage market entities have various guidelines that enable them to gauge whether a particular project is a good risk or not, and this is why they ask for the questionnaires to be filled out.

Whether or not to respond to these requests for information (which are often received days or hours before closing, accompanied by pressure and even threats from an anxious real estate agent or title company) has always been a topic of debate. This column has addressed the issue twice (Certain Paperwork Should be Refused, March 4, 2001; Don't Fill Out Lender Questionnaire, June 3, 2003).

As mentioned in my latter column on the topic (past columns of this column are available on-line), the law was amended in 2003 to provide some answers to the problem. Specifically, as discussed in that column, the law was amended in 2003 to specifically state that an association is not obligated to fill out lender questionnaires, and when it chooses to do so, it may charge a fee (not to exceed $150.00 plus any attorneys' fees incurred). As also noted, the 2003 amendment to the law did not include a proposal which would have provided an association with immunity from liability if it chose to respond to lender questionnaires.

Fortunately, the new law (which becomes effective October 1, 2004) incorporates the immunity clause that was eschewed by the 2003 Legislature. Specifically, the law will provide as of October 1 that an

association and its authorized agent are not liable for providing information in response to lender questionnaires, provided that the response is made in good faith and pursuant to a written request. Further, the person providing the information must include a written statement in substantially the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

In my view, it remains a choice for an association as to whether lender questionnaires should be filled out. However, the new good faith exception to liability certainly eliminates many of the reasons for previously not addressing these requests, although the law still specifically states that an association is not required to respond to lender information requests.

It is my belief that every association should specifically adopt a written policy regarding response to lender questionnaires. For example, if an association is otherwise inclined to respond to a request, I believe it would be appropriate to require such questionnaires to be provided a reasonable time before closing (such as ten or fifteen days), and not several hours before. The association, if it is going to adopt a policy of responding to questionnaires, should also establish a fee schedule.

If a management company is involved, there should be a clear understanding between the association and the manager, in the management agreement, as to who is entitled to the fee. ⚖

Leniency Varies Regarding '55 and Over' Regulations

The News-Press August 5, 2004

Question: We live in an over-55 community and also own two apartments that we rent. On occasion, our children come to visit us and because we do not have space in our unit to accommodate them, we "rent" our vacant apartments to them as our guests. Do you see any problem with this procedure? Does someone have to stay in the apartment with them who is over-55 years of age? (M.W. via e-mail)

Answer: In order to qualify as a "55 and over" community, eighty percent of the units must be occupied by at least one person age 55 and older. The other twenty percent, and the persons who make up that twenty percent, is a subject of great confusion and debate. The rules issued by the Department of Housing and Urban Development (HUD) indicate that HUD does not care what an association does with the twenty percent, as that is a decision for the association. Therefore, you should review your association's governing documents to see how that twenty percent is addressed. Most documents would probably prohibit what you are doing. I do see some problems in allowing under-55 guests to reside in a unit that would otherwise be considered vacant. A vacant unit is not counted when determining whether a unit is occupied by at least one person 55 years of age or older. Therefore, if a unit is occupied by your guests, that unit could lose its vacant status and count against the Association's eighty percent threshold. Nevertheless, some communities are fairly lenient with the twenty percent cushion, while others are quite strict.

Question: Is there an office where I can send a complaint about my homeowners' association? Is there an organization or state agency that makes sure that homeowners' associations are complying with statutory provisions regarding homeowners' associations? (N.L. via e-mail).

Answer: No, there is no state agency or organization which regulates homeowners' associations. There were attempts during the 2004 legislative session to include homeowners' associations within the regulatory authority of the Department of Business and Professional Regulation ("Department"). However, those legislative initiatives failed. The

Legislature did adopt amendments to the homeowners' association statutes (Chapter 720, Florida Statutes) which will require certain disputes between a homeowners' association and its members to be mediated through a program administered by the Department.

Question: We recently purchased a villa (it is not yet completed) and were told that no changes would be made to increase the size of the lanai. We recently discovered that one of the models now has a screened, extended lanai that is twice the original size. We were told by the builder that this was a "perk" for one of its employees. We do not think this is fair because the "rules" should apply to everyone. Also, when you move into a new development, should you be paying the full amount of dues even before any of the amenities are completed? (B.S. via e-mail)

Answer: It is not unusual for a developer to include certain provisions in the governing documents that will allow it to be treated differently with respect to architectural changes and use restrictions. The purpose of these provisions is to allow the developer flexibility when selling units. The answer to your question may depend on what your governing documents say with respect to the developer's rights. Also, it is important to know whether the area behind your home is part of your lot or part of the common areas. If the lanai extension were to encroach on the common areas, it would likely be considered illegal, based on a number of different legal theories. If the lanai extension would not encroach on the common areas, you could seek permission to have the lanai extended yourself, after your unit is completed and you have moved into the unit. However, you would likely need permission from the Association. The Association may continue to deny the extension. It is possible that if many owners extend their lanais, it could have a detrimental effect on drainage and the surface water management system because of the increase in impervious surfaces. There may also be setback and other zoning laws involved.

Regarding the dues that you are paying, there is probably not much that you can do regarding the dues that are imposed prior to turnover. There is nothing in the law which requires a developer to reduce the assessments until such time that the amenities are completed. After turnover, the owner controlled board of directors will adopt the budget and the corresponding level of assessments.

Question: Our Association is considering amending our Declaration of Condominium to restrict rentals. How will the amendment to Section 718.110(13), Florida Statutes, affect this proposed amendment? (G.A. via e-mail)

Answer: Section 718.110(13), Florida Statutes, was created by SB 2984 and SB 1184, both of which were approved by the Governor and signed into law on June 23, 2004. Section 718.110(3) provides as follows: Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment." However, the effective date of Section 718.110(13) is October 1, 2004. Therefore, if the proposed amendment is adopted by the members and recorded in the public records before October 1, 2004, the amendment will apply to all owners regardless of whether they purchased their unit prior to the amendment. ⚖

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Liability Changes Offer More Coverage

FORT MYERS THE NEWS-PRESS, AUGUST 12, 2004

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Today's column continues our review of changes to laws affecting community associations enacted by the 2004 Session of the Florida Legislature. In the first five installments, we looked at significant changes affecting the laws for homeowners' associations. Last week's column reviewed changes to the condo law involving so-called lender questionnaires received by associations in connection with the financing or refinancing of condominium units. Today's topic is one that has been covered in past editions of this column, liability affiliated with the use of defibrillators in community associations. See Defibrillators Leave Door Open for Suits, May 19, 2002; Law Offers Liability Protection, February 12, 2004.

As noted in previous reviews of the issue, the owner of defibrillation equipment enjoys certain immunity under Florida law, although the immunity is not absolute. As also previously reported, many insurance companies have apparently been balking when asked if they would insure claims that might arise from the ownership of defibrillators and/or the application of defibrillation treatment to a heart attack victim.

Thanks to the efforts of Community Associations Institute, through its Florida Legislative Alliance, Florida's Cardiac Arrest Survival Act, which is found at Section 768.1325 of the Florida Statutes, has been further amended to provide better protection for community associations.

The new law, which takes effect October 1, 2004, provides that community associations (cooperative associations, condominium associations, homeowners' associations, and mobile home homeowners' associations) are immune from civil liability for any harm resulting from the use or attempted use of defibrillators. However, it should be noted that the immunity is not available unless the association has notified the local emergency medical services director of the most recent placement of the defibrillator within a reasonable period of time after it has been acquired; the association properly maintains and tests the device; and must provide appropriate training in the use of the device.

Of equal importance, the law also will provide that an insurer may not require an association which purchases a defibrillator to purchase medical malpractice liability coverage as a condition of issuing other coverage. Further, an insurer may not exclude damages resulting from the use of defibrillators under general liability policies issued to associations.

As reported in this column previously, more than 350,000 Americans die of cardiac arrest each year. According to the experts, every minute spent waiting for paramedics to arrive reduces the chance of survival by ten percent. While nothing in life is risk free, it certainly seems that this year's changes to this law will encourage more associations to review defibrillator acquisition, and hopefully save a few lives. ⚖

Q&A

Question: I serve on the board of my condominium association. I am currently out of the state of Florida and requested to be called to participate in a board meeting by conference call. The board said that I could not participate in the meeting by conference call unless I paid the phone charges. What do you think? V.W. (via e-mail)

Answer: I think you have a short sighted board. While I am aware of no legal authority by which you could require the association to permit you to participate by telephone (at association expense), it is highly unusual for an association to disenfranchise duly elected directors who happen to be out of the state. Frankly, many association boards are staffed largely or evenly completely by seasonal residents, and association business could not go on without the use of conference call meetings, as permitted by statute.

You could presumably initiate a petition to amend the bylaws to require that absentee directors be permitted to participate in association board meetings by telephone, at association expense. The procedure for getting a bylaw amendment on the ballot depends upon how your documents are written.

Some condominium association bylaws also provide that directors are entitled to reimbursement for expenses they reasonably incur serving on the board. In my opinion, long distance phone charges to participate telephonically in a board meeting would be an expense reasonably incurred. However, it is likely that the board would refuse to pay you, so this may not be of much help unless you wanted to submit a reimbursement request and take the association to small claims court.

Question: I am an officer in a homeowner's association consisting of 423 lots. We are trying to amend our covenants and restrictions. Our declaration states that the covenants, conditions and restrictions may be amended by "an instrument approved by not less than two-thirds of the unit owners. Any amendment must be properly recorded." We have been advised that we must obtain signatures of seventy-five percent of the lot owners, and that such signatures must be witnessed and notarized. We feel that this is going to be a very long and onerous task, if not impossible. Does this seem reasonable or overkill? J.T. (via e-mail)

Answer: Whether written instruments approving an amendment must be witnessed and/or notarized depends on the actual language in your declaration. The portion of the declaration that you quoted does not appear to require the signatures on the written instruments to be signed with all the formalities of a deed, or acknowledged, or even recorded. However, many declarations are ambiguous on this issue and therefore, the most conservative position in such cases is that the written instrument should be witnessed and notarized.

The amendment itself must be recorded, and when the amendment is recorded, a certificate is usually prepared that is signed and executed by the president of the association attesting that the amendment received the requisite approval of the unit owners. The certificate of amendment should be witnessed and notarized and recorded.

If you are amending the documents, this is a good time to clean up that issue and remove any ambiguities.

Question: How much authority does the president of a condominium association have to decide an association's meeting agenda ? If another director wants something on the agenda, can the president remove it arbitrarily? What is the remedy if the president refuses to put an item on the agenda? D.M. (via e-mail)

Answer: Unfortunately, this is an area that is not well addressed by Florida's condominium laws. Sometimes, the bylaws of the association may lend guidance. For example, in bylaws which I write for condominium associations, there is a clause which vests the authority to set the agenda with the board president, but requires an item to be added to the agenda if requested in writing by at least two members of the board.

Most association boards operate under Robert's Rules of Order, which generally permit the majority of the body (here the board) to set or alter the day's agenda. Unfortunately, that is not feasible in condominium associations, because the law requires that the agenda be posted at least 48 hours in advance of the meeting, and items not on the agenda cannot be considered by the board, except in limited emergency circumstances.

In the absence of guidance from the bylaws, your board may wish to set a policy on establishment of agenda items. For example, you could require that agenda requests be submitted in writing, at least a certain number of days before the board's meeting, and depending upon the size of your board, you could establish whether the addition of an agenda item requires the concurrence of more than one board member.

Question: In the past, our condominium association has had a number of incidents where board members' cars have been vandalized after involvement in some controversial association issue. For example, many board members have had their cars "keyed" (scratched with keys). We want to establish a policy that will reimburse a board member for repair costs when their car is vandalized on condominium property. We feel that if the perpetrators know that everyone has to pay, and that the expense is not coming out of the board member's own pocket, they may be less likely to destroy everyone else's property, since they will have to share in the cost of fixing it. Would this policy be legal under Florida law? D.M. (via e-mail)

Answer: It is indeed unfortunate that your community is populated by one or more cowards who express their disagreement through anonymous criminal activity. Frankly, I question whether your proposed reimbursement policy will have much impact on anti-social personality types.

In order for condominium associations to expend common funds, the use of the money must be for a "common expense," which generally means the operation and maintenance of the commonly-owned property. Certain expenses which might seem normal in the course of operating most organizations (such as flowers to commemorate the death of an organization member) have been held not to be proper common expenses for condominium associations.

Your inquiry presents a close call. If there is a clear nexus between board service and being the target of the vandalism, you could probably justify use of association funds to support the plan. Many bylaws entitle directors to reimbursement for expenses they incur while serving on the board, although such clauses are typically geared toward long-distance telephone bills, necessary travel on behalf of the association, and the like.

I would recommend that you look into installing security cameras to catch the culprits. I am sure that assistance will be provided by your local law enforcement officials and prosecutors if evidence of the perpetrator's identity can be obtained.

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Association Can Help After Storm

FORT MYERS THE NEWS-PRESS, AUGUST 19, 2004

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Last Friday, Friday the 13th, started as a day like many I had experienced as a twenty-year resident of Southwest Florida. As a precaution, our business was closed, as it has been on many occasions when storm warnings are issued. I checked to make sure that my family had the rudimentary storm staples, some extra water, batteries, and the usual list. Just another ho-hum temporary inconvenience that would quickly pass.

Like several hundred other people, my Friday the 13th ended much differently than it started. Nature had unleashed its fury.

But for the eye of the storm deciding to take a last minute bounce off of the coast before making landfall, it is likely that I would have been among the thousands of homeless whose life has been reduced to a pile of rubble. My brief sense of gratitude that Mother Nature's whim had dealt me only moderate property damage was quickly outweighed by guilt and sadness, knowing that the turns of fate which spare one devastate another.

Since this column is dedicated to issues involving condominiums, homeowners associations, and mobile home parks, I will suspend the past two months' review of new association legislation (which somehow seems rather trivial at the moment), and focus on what associations can do to help put life back together.

Fortunately, lessons learned from past major hurricanes such as Andrew and Opal have taught us some valuable lessons:

Arrange for immediate mitigation of further damage: This includes securing the community from acts of vandalism or looting, clearing construction debris, and making the buildings as watertight as possible through the use of temporary covers, plywood, and the like.

Beware of scam artists: Thousands of people have come to the aid of Southwest Floridians. The vast majority are legitimate, and are here to help. Unfortunately, disasters also attract crooks. Stories after Andrew include "official" looking teams showing up at a disaster site, with slick brochures, matching uniforms, and an overall "professional" look. A representative of the association is asked to "just sign here," so that cleanup can begin. The association later learns that it has assigned all of its insurance proceeds to a company that is not qualified to do what needs to be done.

Contact your insurance agent: According to John Pollock, President of local insurance agency Oswald, Trippe and Company, there is no "central number" that can be called to report your community's loss to your insurance carrier. Every carrier has set up hotlines to assist in dispatching adjusters. Your insurance agent should be able to get you your association's policy number and the phone number to call to begin the adjustment process.

Document existing conditions: Although the association's insurance adjusters will attempt to document the site, a picture paints a thousand words. With today's digital technology, photographic and video records can be conveniently and safely stored

off premises and easily retrieved, if needed. Obviously, no one should go to a disaster site unless it has been cleared for entry by emergency management officials.

Check contractor licenses: As most of us who live in this area know, it is not easy to find people to do repair work when there is such a booming new construction industry. Obviously, the magnitude of this storm will tax local contractors even more. Out-of-town entities will hopefully be available to fill the void. Obviously, it is important to make sure that any contractor selected is appropriately licensed in Florida for the type of work they will be doing, carries adequate insurance, and the like. Again, although time is of the essence in moving forward with these projects, millions of dollars are involved, and the board best protects itself by ensuring appropriate legal review of the relationships it intends to commence.

Have the Condominium Documents immediately reviewed: After Hurricane Andrew, some associations were shocked to learn of a provision in the declaration of condominium which provided for automatic termination when damage exceeded fifty percent or more of the units, unless the owners voted to rebuild. Since the owners had scattered all across the country, at least one association had to seek court relief to prevent the activation of the provision. There will be other clauses in your documents which have importance in addressing post-disaster activity of the association.

I have personally had the opportunity to tour regions of Charlotte County with heavy condo and mobile home development and was literally nauseated at the scope of the hardship that this storm has brought to our region. Frankly, if there is anything good to be said about a calamity like this, we may take some solace in the fact that hurricanes hit during the time of year when many of our densely populated condo communities and mobile home parks are at their lowest occupancy point in the year. Otherwise, there is little doubt in my mind that the death toll would have been significantly higher.

The Question & Answer section of this column will not run today, but will resume next week with an emphasis on Charley-related questions. Inquiries can be sent to jadams@beckerpoliakof.com. ⚖

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Association Should Act Deliberately

FORT MYERS THE NEWS-PRESS, AUGUST 13, 2004

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The sense of urgency that follows a calamity like Hurricane Charley is basic human instinct. Buried deep in our primeval subconscious, the innate tendency to protect our physical well being, our families, and our possessions are strong influences indeed.

Unfortunately, these instincts occasionally cause us to make hasty decisions, and we all know the old cliché that haste makes waste. Although we all suffer for our own mistakes, mistakes made by community associations affect others as well.

Panic about the potential shortage of building materials and contractors has caused some associations, while still reeling from Charley's knock-out punch, to make decisions that they may come to regret.

Clearly, associations suffering damage from Charley need to engage in appropriate relationships to ensure that the buildings are shored, protected from looting, and that further damage (such as water intrusion) is mitigated. Unfortunately, some associations have signed "simple contracts", which, when read carefully, authorize the contractor to do all of the reconstruction work.

Authorizing total reconstruction of substantially damaged buildings at this point is definitely putting the cart before the horse. The Association needs to do several things before that happens:

Have legal counsel review the Condominium Documents. Many documents require insurance proceeds to be paid to an insurance trustee, such as a bank. Further, many documents require a vote of the owners to be taken within a certain time-frame after a significant casualty to avoid "termination" of the condominium.

Understand what insurance coverage exists. Condominium insurance is complicated, and interpreted differently by different people. Theoretically, the Association's master policy should be insuring the basic building structure. The individual unit owners' "HO-6" policy should insure things like carpeting and cabinetry. Both policies (the Association's master policy and the individual owners' HO-6 policy) have to be considered to understand what level of insurance proceeds will be available. Further, it is likely that there will be shortfalls in every case of major damage to due to deductibles. The association needs to understand whether these costs will be expected to be met from assessments against all owners, or borne only the affected unit owners. The individual homeowners may also have "loss assessment coverage" under their HO-6 policy which may pay some level of special assessments made by the association for shortfalls.

Specifications need to be developed. It is risky at best to authorize a contractor to "fix a building" without having detailed construction specifications, preferably prepared by an independent architect or engineer. Again, review of the Condominium Documents is necessary since many will require review by an architect after substantial casualty damage.

Proper contracts need to be in place. Hurricane Charley, as devastating as it was, does not suspend the laws of Florida. In my view, it is more important than ever to make sure that any contract entered into contains adequate legal protection for the association, that the association is protected against liens on the property, that payment and performance bonding be considered, that licensure and references of contractors be checked, and that other "due diligence" affiliated with construction contracts be followed.

Florida Chief Financial Officer Issues Emergency Order Regarding Public Adjusters.

On August 17, 2004, the Florida Division of Financial Services enacted an "Emergency Rule" as relates to Public Adjusters involved in insurance claims. The rule is in effect for ninety days, but is limited solely to losses resulting from Hurricane Charley and Tropical Storm Bonnie. The rule limits public adjuster commissions to ten percent of any insurance settlement or proceeds, prohibits adjusters from accepting any compensation prior to the settlement of a claim, and also allows an insured to cancel any public adjuster contract within fourteen business days after the contract is entered into, with no penalty or obligation.

While public adjusters will certainly play a role in the post-Charley landscape, I believe some associations have moved too quickly in hiring public adjusters, without even knowing what their insurance company intends to offer in settlement.

Q&A

Question: During hurricane Charley, one of the windows in my unit broke and as a result, my unit was extensively damaged. Will the Association's insurance company pay for the damage to my unit, or will my insurance cover it? J.A. (via e-mail)

Answer: In general, the Association's casualty insurance policy will cover damage to certain parts of your unit damaged as a result of the Hurricane. The Association's insurance policy will cover the condominium property located inside the units as originally installed by the developer. That includes things like the drywall, doors, and windows. However, the Association's policy will possibly not cover floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, built-in cabinets or countertops, windows treatments, and the like. You should notify the Association of any damage to your unit and also make a claim to your own insurance company for those items not covered by the Association's policy.

Question: I am a board member of a condominium on Ft. Myers Beach. Because of Hurricane Charley, we had a number of windows broken and some roof damage. Are we required to obtain competitive bids? Also, can the Board hold an emergency meeting and adopt a special assessment to pay for the costs of the repairs? H.B. (via e-mail)

Answer: The Condominium Act requires competitive bids for contracts for the purchase of materials or equipment or for the provision of services that exceed 5 percent of the total annual budget, including reserves. In addition, the Condominium Act normally requires 48 hours notice for all board meetings and fourteen (14) days notice to the owners by mail for a board meeting at which special assessments will be adopted.

However, the Condominium Act provides exceptions in the case of an emergency. The term "emergency" is not defined by the Condominium Act. The Florida Corporations Not-For-Profit Act considers an emergency to exist when a quorum of the board of directors cannot be readily assembled because of some catastrophic event. In addition, I believe that an emergency exists

when an unanticipated set of circumstances exist which, if not acted upon with immediacy, are likely to cause imminent and significant financial harm to the Association, the unit owners, or the Condominium Property.

For example, I believe that if an association needed to levy an emergency assessment in the critical days following Charley shore up the property and prevent further water intrusion, that would be entirely appropriate. Conversely, if an association is looking at an assessment for the repair of Charley-related damage that may not be repaired for a matter of several months, then it would be much more difficult to argue "emergency" circumstances even though the event giving rise to the need for repair was certainly an emergency in and of itself.

Question: My condominium association has multiple condominium buildings. There has been significant damage to some of the buildings but not all of them, and no damage to mine. If there is a special assessment to pay for damage to the other condominium buildings, will I be required to pay for the special assessment? J.M (via e-mail)

Answer: That depends. If all of the units are within the same condominium, you will likely be required to pay for any special assessment levied which is for the purpose of repairing the common elements of damaged condominium buildings even though your unit or building did not sustain damage. If, however, not all of the condominium units are part of a single condominium, you may or may not be required to pay for a special assessment depending upon whether the buildings to be repaired are part of your particular condominium.

Question: Our condominium buildings have been devastated. Most of our unit owners are seasonal residents and none of the members of the board were here during the hurricane. We have been unable to get in touch with any members of the board since the hurricane, how are we to conduct the necessary business of the association? S.K. (via e-mail)

Answer: Pursuant to Section 718.117, Florida Statutes, if after a natural disaster, the whereabouts of the members of the board cannot be ascertained or if they are unable to act, of if they fail or refuse to act, any interested person may petition the circuit court to determine the identity of the board of directors, or if determined to be in the best interest of the unit owners, appoint a receiver to wind up the affairs of the association after hearing upon such notice to such persons as the court may direct. The receiver shall be given the powers of the as given by the board of directors pursuant to the declaration and the bylaws.

As a practical matter, it is unlikely that the radical step of appointing a receiver should be necessary. Although the days following Charley were certainly chaotic in terms of communications, the various providers of utilities and communications have done a remarkable job of normalizing things. Power has been restored in all but the hardest-hit areas, and it seems that internet and telephone service has been restored in most areas as well.

I would recommend calling the Board members and asking them to convene an emergency special meeting of the Board to discuss their plans for addressing any issues arising out of Charley. ⚖

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Be Aware of Charley Deadlines

FORT MYERS THE NEWS-PRESS, SEPTEMBER 9, 2004

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Today is Day 20 on the post-Charley calendar. Life has gotten back to normal for most, but remains like a bad dream for many.

Power and communications have been restored to most areas. Barrier island residents have now had two weeks to assess and address their property, albeit under very difficult conditions through most of that time, including no electricity.

With perhaps exception for the most devastated communities, every condominium association should by now have accomplished the following:

Dry-In: The buildings should now be secured from further water intrusion. In many cases, this has been accomplished through temporary roofs and boarded windows and sliding glass doors, which will now need to be replaced.

Dry-Out: Every unit should have been inspected by the Association (preferably on several occasions) to insure that there is no moisture in the interior of the units. Moisture that has been detected, whether wet carpets or soggy drywall, should by now have been removed. Drying is typically accomplished through interior climate manipulation, including dehumidification, heating and/or air conditioning. An outside , neutral party should be involved in evaluating the more complex dry-out cases, and the association's insurance adjuster should be involved in all cases.

Proper Claim Reporting: Every association and every unit owner should by now have filed their insurance claims through their insurance agent. Be careful to make sure that every carrier with potential responsibility has been put on notice.

Review by Adjusters: At Day 20, if the adjuster for the association's master insurance policy has not yet visited the premises, there is a problem which should be discussed immediately with your insurance agent. Hopefully, the vast majority of individual unit owners' insurance adjusters will have inspected and documented conditions of the premises.

Legal Reviews of the Condominium Documents: This storm has rendered substantial numbers of units in many complexes uninhabitable, at least for the time being. Many condominium documents trigger automatic "termination" of the condominium if a vote is not taken within a set number of days to preserve the condominium form of ownership. This is an extremely important and consequential legal issue and should be reviewed immediately. There are also other issues you will need to have reviewed, including whether insurance proceeds must be paid to an Insurance Trustee (such as a bank) and how shortfalls in reconstruction costs (such as those due to deductibles) are to be allocated between the association and the unit owner.

Retention of an Engineer or Architect: For any association whose buildings have suffered moderate to significant damage, the board is well advised to retain a consultant who is beholden only to the

board, and who has no financial stake in the development of repair specifications. This will typically be an architect or structural engineer, and perhaps some other type of qualified consultant for particular items. In fact, many association governing documents require a reconstruction plan to be prepared by an engineer or architect.

According to recent information released by the insurance industry, Hurricane Charley is expected to be the fourth largest financial disaster in history, following only September 11, Hurricane Andrew, and the San Francisco area earthquakes. Due to the sheer magnitude of the catastrophe, there will certainly be many bumps in the road to reconstruction. While boards cannot afford to let grass grow under their feet, lessons from past catastrophes have taught us that hasty or ill-advised decisions in the chaotic post-hurricane environment often result in a disaster of greater magnitude than the storm itself. ⚖

Q&A

Question: I have enjoyed your column for many years but never though I would write in for a problem of my own. The condominium, for which I serve as association treasurer, suffered a great deal of damage as a result of Hurricane Charley. I believe we need to make an insurance claim. Given the damage to the building where the association's records were kept, we have not looked at our policies. However, I remember something about providing notice to the insurance company for any loss. When do I need to provide notice: B.H. (via e-mail)

A: Most insurance contractor provide a laundry list of things that an insured must do so as to make a claim, among these is notice to the insurer. The language for notice ranges from policy to policy, but typically provides for "prompt notice," "timely notice," "reasonable notice," "immediate notice" or things along these lines; although sometimes a specific number of days is set out. Given the situation you are in, the best thing to do is contact your insurance agent and notify them of the potential claim. Also ask your agent for where the notice of claim should be sent, whether to the agent or directly to the insurer. Make sure that you send the notice in writing, and as quickly as possible.

Question: I am an insurance adjuster and found your previous article called "Insurance Changes are Some Help" on the Internet. Now that Hurricane Charley has hit, I need to find a copy of the new statute involving condominium insurance. Can you point me in the right direction? P.C. (via e-mail)

A: The statute you are referring to is Florida Statute Section 718.111(11). The new law applies to all master condominium insurance policies issued on or after January 1, 2004. If a policy predates January 1, 2004, you may need to look at the old version of the law.

Since I have received numerous requests for the statute, I have reproduced it, in its full text below:

INSURANCE.--In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this section. Therefore, the Legislature requires a report to be

prepared by the Office of Insurance Regulation of the Department of Financial Services for publication 18 months from the effective date of this act, evaluating premium increases or decreases for associations, unit owner premium increases or decreases, recommended changes to better define common areas, or any other information the Office of Insurance Regulation deems appropriate.

(a) A unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). If the association is developer controlled, the association shall exercise due diligence to obtain and maintain such insurance. Failure to obtain and maintain adequate insurance during any period of developer control shall constitute a breach of fiduciary responsibility by the developer-appointed members of the board of directors of the association, unless said members can show that despite such failure, they have exercised due diligence. The declaration of condominium as originally recorded, or amended pursuant to procedures provided therein, may require that condominium property consisting of freestanding buildings where there is no more than one building in or on such unit need not be insured by the association if the declaration requires the unit owner to obtain adequate insurance for the condominium property. An association may also obtain and maintain liability insurance for directors and officers, insurance for the benefit of association employees, and flood insurance for common elements, association property, and units. Adequate insurance, regardless of any requirement in the declaration of condominium for coverage by the association for "full insurable value," "replacement cost," or the like, may include reasonable deductibles as determined by the board. An association or group of associations may self-insure against claims against the association, the association property, and the condominium property required to be insured by an association, upon compliance with ss. 624.460-624.488. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

(b) Every hazard insurance policy issued or renewed on or after January 1, 2004, to protect the condominium shall provide primary coverage for:
1. All portions of the condominium property located outside the units;
2. The condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed; and
3. All portions of the condominium property for which the declaration of condominium requires coverage by the association.

Anything to the contrary notwithstanding, the terms "condominium property," "building," "improvements," "insurable improvements," "common elements," "association property," or any other term found in the declaration of condominium which defines the scope of property or casualty insurance that a condominium association must obtain shall exclude all floor, wall, and ceiling coverings, electrical fixtures, appliances,

air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries. The foregoing is intended to establish the property or casualty insuring responsibilities of the association and those of the individual unit owner and do not serve to broaden or extend the perils of coverage afforded by any insurance contract provided to the individual unit owner. Beginning January 1, 2004, the association shall have the authority to amend the declaration of condominium, without regard to any requirement for mortgagee approval of amendments affecting insurance requirements, to conform the declaration of condominium to the coverage requirements of this section.

(c) Every hazard insurance policy issued or renewed on or after January 1, 2004, to an individual unit owner shall provide that the coverage afforded by such policy is excess over the amount recoverable under any other policy covering the same property. Each insurance policy issued to an individual unit owner providing such coverage shall be without rights of subrogation against the condominium association that operates the condominium in which such unit owner's unit is located. All real or personal property located within the boundaries of the unit owner's unit which is excluded from the coverage to be provided by the association as set forth in paragraph (b) shall be insured by the individual unit owner.

(d) The association shall obtain and maintain adequate insurance or fidelity bonding of all persons who control or disburse funds of the association. The insurance policy or fidelity bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time. As used in this paragraph, the term "persons who control or disburse funds of the association" includes, but is not limited to, those individuals authorized to sign checks and the president, secretary, and treasurer of the association. The association shall bear the cost of bonding. ⚖

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Flood Insurance Sound Idea

FORT MYERS THE NEWS-PRESS, SEPTEMBER 9, 2004

By Joe Adams

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Hurricane Charley was compared to a 44 year old storm named Donna. Frances' initial path and strength drew comparisons from an unnamed 1928 blow that killed 1,600 people.

In the span of 3 weeks, Floridians were reminded that history does repeat itself. Will it be another 44 years before another Charley? Another 74 years for a Frances? Maybe it will be next year, maybe next week. Lightning can strike twice in the same place.

There are many lessons that have been learned from these experiences, and many that were driven home by what could have happened had the fickle forces of nature bounced a bit differently. Without minimizing the sheer devastation of life and property caused by Charley, it could have been, and nearly was much, much worse.

Of greatest relief is the fact that because Charley was such a fast moving storm, the predicted "storm surge" of up to 15 feet did not materialize. This is one case where we were all glad that the weatherman (or weatherwoman) was wrong. What would have happened with a 15-foot storm surge? Tens of thousands of people would have their homes submerged, particularly those with older structures located on the barrier islands, the Caloosahatchee River area (Iona-McGregor, Cape Coral, North Fort Myers, etc.), Estero, Bonita, etc. In other words, just about everywhere.

Over the years, many condominium associations have asked me about flood insurance. Many feel it is a "waste of money" and say, "what are the chances?" I'm no odds-maker, but I will say that if your association is uninsured or underinsured for flood coverage, you have dodged two bullets in a short time and it is time to reevaluate your thinking. Although the Florida condominium statute does not specifically mandate flood insurance, it does require "adequate" insurance. In my opinion, any community located in a designated flood hazard area is violating the requirement for adequate insurance if it does not carry flood coverage. Indeed, Charley's predicted storm surge would have likely affected many in what are considered the lower risk zones.

People in high-rise condo buildings argue: "I'm on the 5th floor, a flood can't hit me". Remember, you also own a share of the lower floors, and all of the items that could be wiped out by a flood. In addition to the structure, think about the building's electrical system, plumbing, and other utilities that might have to be replaced in their entirety. Also remember that your windstorm insurance does not cover flood damage and vice-versa. Had Charley landed a one-two punch of both wind and flood, any association underinsured on either front could be in for a miserable time.

While most boards do their best to keep assessments down, this is one place where it is simply not worth skimping. The stakes are too high, and the decision affects others. Board members are not paid, and

the risk does not justify the reward. Also, keep in mind that many officers and directors' liability insurance policies will not cover claims made against the board for not procuring adequate insurance.

I am not an alarmist by nature, and believe strongly in the concept of giving association boards wide latitude in exercising reasonable business judgment in conducting the day-to-day affairs of the association. However, although I have always felt fairly strongly about the issue of flood insurance anyway, Charley's visit has converted me from a mere believer to a fanatic. So don't be surprised if you see me at the local airport, dressed in a robe, carrying a sign saying: "**BUY FLOOD INSURANCE.**" ⚖

Q&A

Question: The board of our condominium association said that it will be adopting an assessment against all of our members to pay for the costs of removing landscape debris caused by Hurricane Charley, and also replacing the landscaping that was destroyed. Shouldn't the board have had insurance for this? B.H. (via e-mail)

Answer: The Florida statute requires your board to obtain "adequate" insurance. The law does not define what is adequate, although the statute does specifically say that any insurance policy purchased by the association may contain a reasonable deductible, as determined by the board.

Based on my experiences from Hurricane Charley, it appears that the vast majority of associations do not have insurance for landscaping, although there are a few exceptions. In my opinion, the self insurance of landscape losses, given the apparent market conditions, is an appropriate decision for your board.

As to landscape debris removal, most of the adjusters I have been dealing with take the position that debris removal is also not covered by most insurance policies, except items like the removal of a tree that may have landed on your building's roof. Of course, every insurance policy is a bit different. Your association's insurance policy is an official record of the association and you are entitled by law to review it and get a copy of it, as long as you request it in advance, in writing.

I have found that most condo associations with Hurricane Charley damage have hurricane deductibles of 2% or 3% of the insured value of each building. Frankly, if your community's loss is below the deductible of the master policy, you should count yourself extremely fortunate.

Finally, assuming that you have insurance for your individual condo (and you certainly should), you may wish to discuss with your agent if you have "loss assessment coverage", which might reimburse you for the association's special assessment.

Question: Although our condominium documents require that every owner give the association a key to their apartment, we found that we did not have keys to several of the units when the manager tried to inspect all of the interior areas after Hurricane Charley. We made the decision to hire a locksmith and had new keys made. Can we charge this expense back to the owner? E.A. (via e-mail)

Answer: This catastrophe shows exactly why it is important for the association to have the ability to immediately obtain access to all units in the condominium. The Florida condominium statute, at Section 718.111(5) gives the association an irrevocable right of access to protect and maintain the common elements and those portions of the unit to be main-

tained by the association. The law does not specifically give the association a right to a key, but the state bureau which regulates condos has consistently ruled that the association may require the posting of a key, if so provided in the recorded condominium documents, or a properly enacted rule of the board. These holdings have also imposed an obligation on the association to take reasonable steps to preserve the security of the keys it keeps.

I think your board can seek recovery of the locksmith charges, although there may be some cost-benefit review of legal action. Hopefully, your board will take this as a wake up call to enforce the key requirement in the future.

Question: Whose insurance company is supposed to pay the costs of the dehumidifiers and fans that were brought in to dry out our apartments after Hurricane Charley. Who pays the deductible? S.C. (via e-mail)

Answer: That question has no easy answer and is certain to be slugged out in the next several months. The association insures the dry-wall, and to the extent it was being dried, it should be covered under the association's policy. However, the carpet is owned and insured by the unit owner, and therefore drying the carpet out would be the owner's responsibility. So, who should pay when both the dry-wall and carpets are being dried by the same machine? Hopefully, adjusters for associations and individual owners will work these matters out with some sensitivity for the unique issues presented by a calamity of this magnitude.

As to the deductible, your declaration of condominium will typically provide guidance on who pays for what when insurance proceeds are insufficient to cover the costs of casualty repair. ⚖

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Easy to Stumble into Second Disaster

FORT MYERS THE NEWS-PRESS, SEPTEMBER 16, 2004

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Although this column runs every Thursday, I have agreed with the News-Press editors to have it submitted for layout by Monday of each week, three days before it is published. In the world of community association law and operations, there is little in the way of late-breaking news that changes in a span of three days. However, I have learned that hurricane news can change drastically in the span of three hours, not to mention three days.

The last several issues of this column have focused on challenges and issues faced by associations arising from catastrophic events such as Hurricane Charley and Hurricane Frances. As I pen this week's piece, we will apparently need to add Ivan to that list, although hopefully not for the primary benefit of Southwest Florida readers.

Today is Day 34 for Charley's victims. Although most associations have made good progress in making temporary repairs to damaged communities, I have yet to see one association with significant damage that has received an offer from their insurance company to adjust the loss.

That is not to say that insurance companies and adjusters are dragging their feet. The magnitude of many of these claims, combined with the tax on resources attributable to Frances and Ivan, have made this a slow-going process.

Nerves are beginning to fray as residents in damaged communities wonder how long they will be displaced from their homes. Owners of investor and rental units are getting nervous about whether they will able to make mortgage payments if the units cannot be made ready for tenant occupancy during the upcoming tourist season.

Hopefully, notwithstanding the additional strains on the system from Frances and Ivan, heavily damaged communities will soon reach the phase where rebuilding may begin. Part of the rebuilding process includes selecting the contractor to do the work, and making sure that the association's interests are protected.

The following are a few tips for associations in moving forward in this process:

Thoroughly Review Proposed Contracts: Asking your lawyer to take a look at a contract after you have signed it is usually of limited or no value. Many contractors entice associations with "simple" forms, often one or two pages in length. You can bet that these were prepared by the contractor's lawyer, and will offer little in the way of protection to the association. Be wary of forms generated by trade industry groups, such as engineers and architects. These forms tend to protect the design professional, the contractor, and the owner (association), in that order.

Be Prepared For Disputes: Disputes, particularly in large construction projects, are not uncommon. There should be procedure for informal resolution of discrepancies in the field, and also a procedure

for formal dispute resolution. The party who prevails in the dispute should be entitled to be made whole, including any attorney's fees they might incur in resolving the dispute.

Contact Your Insurer: Many policies require that a representative of the insurance company make inspections before the work begins. Further, don't sign a contract and expect the insurance company to pay for the work if they have not been involved in that process as part of adjusting the claim.

Select Only Licensed and Qualified Contractors: General contractors and many specialty contractors must be registered with the state. Licensure and complaints against licenses can be checked on-line. Many cities and counties also require specific licensure and registration. Check references. Discuss bonding with your design professional and counsel. A bondable contractor is usually preferable to a non-bondable contractor.

Verify Contractor's Insurance: Insurance coverage may differ widely for items such as premises liability and the liability for the acts of employees. An association would typically want to be an "additional insured" under the policy. Both your insurance agent and legal counsel should assist in making sure that adequate insurance protections exist.

Use a Design Professional: Accepting the contractor's specifications at face value is probably the largest source of construction contract disputes, and a fertile source for both disappointment and legal entanglement. Every significant construction contract should include specifications that are either prepared or approved by an independent qualified party, who is beholden only to the association. This is especially important when new work must be tied in with pre-existing building components, or when new codes must be adhered to.

Review Warranties: Many manufacturer's warranties are nearly worthless. For example, a warranty that is only good as long as the contractor/applicator is in business may be of no value if your contractor goes out of business.

Have Your Attorney Participate in the Contract Process: There are many issues commonly found in construction contracts that will not be addressed in the "simple form" your contractor provides. You will want to look at areas such as indemnification (hold harmless), time of completion and liquidated damages, bonding, compliance with lien laws, and other important items.

Unfortunately, experiences from past hurricanes such as Andrew and Opal have shown us that entering into an ill-advised construction contract, which may involve millions of dollars, can be a bigger disaster than the storm itself. ⚖

Q&A

Question: Hurricane Charley caused roof damage to my home. The roofer who came to my house after the hurricane to give me an estimate told me that the roof company that installed a new roof two years ago put on the new roof over several layers of rotten wood. Is there any legal action I can take against the roof company? L.F. (via e-mail)

Answer: It depends on the scope of your re-roofing contract from two years ago. You should have an independent roofing consultant (there are several in this area) review the findings of your new contractor. If the previous re-roofing job violated industry standards of good workmanship, you may have a claim against the roofer, for damages you suffered but would not have suffered if the roof was installed correctly.

The statute of limitations for most claims of this nature is four years from when the work was completed. There may also be exceptions for

"latent defects," where the limitations period is typically four years from the date you discovered or should have discovered the defect.

If you are going to pursue a claim, you should also engage an attorney. Florida recently enacted a fairly complicated pre-suit statute involving construction deficiencies, which is found at Chapter 558 of Florida's laws.

Finally, your insurance company should immediately be brought into the picture. If they pay for the damage caused by the originally-shoddy construction, assuming that such occurred, they may have legal rights called "subrogation," where they could also seek recovery against the original roofer.

Question: I own a condominium that was recently damaged by Hurricane Charley. The condo association has sent me a letter indicating that a vote will be taken to either rebuild the units and to approve a special assessment or to terminate the condominium. I think the option to rebuild and assess is pretty straight forward but I do not understand the reason termination is being considered and what effect it will have on my property. R.K. (via e-mail)

Answer: Your condominium documents probably contain a clause similar to that found in the documents for the majority of local condominiums. These clauses, often called "Repair After Casualty," provide that if a certain number of the units are rendered "uninhabitable," or "untenantable," the condominium will not be rebuilt, and the condominium will be "terminated", unless the owners vote to rebuild. Termination means that the property will either be sold off, or divided for use among the unit owners as "tenants in common" (with no association, no agreement for operating common property, and the like).

In my view, there are few situations where damage from Hurricane Charley will be substantial enough to make termination of the condominium a sensible potential option. It is very important to understand that under most insurance policies, the settlement the association will receive may be much different in a termination scenario (where you do not rebuild) than in a rebuilding scenario. Most insurance policies will provide replacement cost value if you rebuild. Conversely, if the structures are not to be rebuilt, many policies provide for "actual cash value," which is known in the insurance industry as ACV. ACV is usually a much lower number than replacement cost, since ACV factors depreciation in reaching the settlement amount.

Unfortunately, the law does not define "habitability" or "tenantability," and I have yet to see a set of condominium documents that does so either. Apparently, your board feels that the damage is significant enough to invoke the issue and trigger the provisions for a unit owner vote.

Question: Our condominium community sustained fairly significant damage as a result of Hurricane Charley. Although there is much work to be done, our board feels that things can be put back together in the next couple of months. At a recent board meeting I attended, there was mention of the need for a possible special assessment due to our deductible and co-insurance penalty. I understand what the deductible is, but do not understand what a "co-insurance penalty" is. Could you elaborate? J.B. (via e-mail)

Answer: As explained to me by my acquaintances in the insurance industry, co-insurance is a formula that is applied when a property owner elects to procure less than full insurance. Let's say that a condominium building has a one million dollar replacement cost value. The association decides to only insure the building for eight hundred thousand dollars, or eighty percent of its insurable value. Let's further assume that a one hundred thousand dollar casualty loss occurs, for example from a hurricane.

The association would only receive eighty thousand dollars for the one hundred thousand dollar loss, because the "co-insurance clause" provides that every loss will be factored by the percentage of insured amount to insurable value (in our example, eighty percent). Then, the deductible would be subtracted as well. In most named-hurricane policies I have seen arising from Charley, that is three percent. You would therefore deduct three percent of the building's eight hundred thousand dollar insured value, for another deduction of twenty-four thousand dollars.

When subtracted from the eighty thousand dollar amount because of co-insurance, the total pay-out on the one hundred thousand dollar loss would be fifty-six thousand dollars, or slightly more than half of the actual cost to fix the problem. ⚖

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Have Plan Before, After Disaster Hits

FORT MYERS THE NEWS-PRESS, SEPTEMBER 23, 2004

By Joe Adams

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The last five editions of this column, as well as my weekly Q & A segment, have been devoted exclusively to legal issues related to Hurricane Charley.

Hurricanes Frances and Ivan have shown that the historical passing of many years between major storm events offers no guarantee or predictability as to when calamity may strike. Hopefully, Jeanne and Karl will fizzle out and/or avoid landfall, as predicted.

Even without hurricanes, the fickle forces of Mother Nature and the imperfection of human beings remind us that we cannot control the future. Last Sunday's local tornadoes emphasize that point. In the past several weeks, I have also been involved with condominium association clients who have experienced casualties unrelated to the forces of nature. One involved a fire that reportedly resulted in smoke damage to several units. Another case involved a sudden and substantial leak in the building's plumbing system, which dumped thousands of gallons of water through a whole "stack" of units in a high-rise building.

Hurricanes, tornadoes, fires, and bursting pipes are simply part of life. We cannot predict them, and we cannot stop them.

We can learn from our experiences and from the experiences of others. I suspect that many community associations will be focusing on their disaster preparedness plans during the upcoming months that we often refer to as "the season". They well should. In general, there are two phases to the plan, the pre-disaster phase and the post-disaster phase. The pre-disaster segment of the Association's plan should include (among other things) securing of insurance policies in a safe place, designation of an out-of-state contact person, and documentation of the pre-casualty condition of the premises.

The post-disaster phase of a plan includes having pre-established relationship with contractors who can show up and promptly do emergency work, assemblage of a post-disaster team (board members, manager, attorney, engineers, insurance agent and adjusters, etc.) and a process for keeping unit owners informed about what is going on (web-sites, newsletters, e-mail blasts, etc.).

Obviously, this is a thumbnail sketch and just a sampling of the many items to be considered, which will need to be tailored to the physical and occupancy characteristics of a particular community.

While it will be months before the end is in sight for some associations, it is time for the rest of the community to try to get back to business as normal. In the category "back to business as normal", these are my concluding comments about the unwelcomed visitor named Charley. Next week, we will resume a review of changes adopted by the Florida Legislature in 2004, most of which will become effective on October 1, 2004. ⚖

Q&A

Question: Our corporation's bylaws require a six-month residency as an eligibility requirement to run for the Board of Directors. Membership in the corporation is tied to lot ownership. Elsewhere in the bylaws, it is indicated that full membership rights include the right to run for office. I question the legality of this clause. What do you think?

Answer: I assume that your community is a homeowners association, governed by Chapter 720 of Florida's statutes. If your community is a condominium association, then it is clear that a residency requirement is invalid.

In HOA's, the law is not quite as clear. However, because the statute does provide that any parcel owner may nominate himself for election to the Board (from the floor at the annual meeting), I question the validity of the clause (at least as to floor nominations). This is an issue which the Florida Legislature would do well to clarify.

Regardless of the legalities, I do not believe that residency requirements are wise. In fact, many Southwest Florida communities are populated by seasonal residents who spend less than six months here, who may well be the only people interested in serving on the Board, or who may be the best qualified.

Question: Can you please provide me with the correct web-site that I can access to look at the Florida Statutes? B.A. (via e-mail)

Answer: There are many web-sites where you can get access to Florida's laws. The one I use is http://www.flsenate.gov/Statutes/.

Question: My condominium unit is located on the fourteenth floor of our building. Our building's electricity was shut off during one of the recent storms. When power was turned back on, my hot water heater burst and damaged the unit below. My downstairs neighbor has asked for my insurance information. There is damage to the ceiling in her hallway and the carpeting. When I bought my unit, the bank which financed my mortgage told me I did not need insurance, that I was covered by the condominium's master policy. I do not know where I stand, can you give me an idea? J.P. (via e-mail)

Answer: There are two types of insurance that generally come in to play in a situation like this. One is called the "casualty" insurance, which is a "no fault" policy. The association's casualty policy will cover damage to the building's structure, including the drywall in the downstairs ceiling. However, it is likely that the claim will be below the association's deductible, so there may be no insurance. Damage to the downstairs carpeting should be covered by the downstairs owner's casualty policy.

Liability insurance is different, it is based upon fault, such as negligence. The association's liability policy will likely not provide you with coverage for claims made against you. You would need your own insurance for this.

Therefore, if it can be established that you were at fault, you would be liable to the downstairs unit owner (or her insurance company) for the carpet damage and would be liable to the party responsible for fixing the downstairs ceiling (which will either be the association or the downstairs owner, depending on how the documents are written) and only your own insurance could provide coverage to defend or pay claims of that nature.

I believe that every unit owner should have basic condominium insurance which would include liability for situations such as yours, and casualty (no fault) insurance for those items in the building that are not insured under the association's mas-

ter policy (such as floor coverings, wall coverings, ceiling coverings, fixtures, appliances, hot water heaters, etc.). It is also a good idea to include "loss assessment coverage" as part of that policy.

Question: It is my understanding that either a federal law or a Florida statute says that an association cannot deny approval or prohibit the installation of hurricane protection devices. I understand that this applies both to condominiums and homeowners associations. Can you verify this for me and identify the statute? C.C. (via e-mail)

Answer: You are correct as to condominiums. Section 718.113(5) of the Florida Statutes provides that an association may not prohibit a unit owner from installing hurricane shutters. The association can adopt uniform specifications for shutter installation, including both functional and aesthetic items. The condominium board can require that hurricane shutters be installed in accordance with its specifications. There is no parallel law for homeowners associations. Rather, the issue is guided largely by the governing documents, such as a declaration of covenants or deed restrictions. Theoretically, a restrictive covenant could prohibit the installation of hurricane shutters. I would consider such a restriction to be unwise at best, perhaps reckless (arguably contrary to public policy).

It is a proven fact that hurricane shutters save lives and lessen property damage. I would never encourage an association to add a shutter prohibition to their covenants (and would strongly discourage it). In fact, if there were a restriction in a current covenant that prohibited shutters, I would strongly recommend deleting it by amendment. This may be another area where the Florida Legislature needs to look to the history of condominium law development for guidance on a very important topic. ⚖

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Q&A Sheet Again a Key Document

FORT MYERS THE NEWS-PRESS, SEPTEMBER 30, 2004

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Today's column continues the review of changes enacted during the 2004 session of the Florida Legislature, most of which become effective October 1, 2004.

In the first four installments of this series (*Law Gives Members More Voice*, July 8, 2004; *Law Denies Developer Fund Access*, July 15, 2004; *Law Calls for Binding Arbitration*, July 22, 2004; HOA Law Changes Not Perfect, July 29, 2004), we looked at changes primarily affecting homeowners associations. Subsequent installments have looked at changes to the law involving lender questionnaires (*Lender Surveys are Tricky*, August 5, 2004) and defibrillators (*Liability Changes offer More Coverage*, August 12, 2004). The series was interrupted by Hurricane Charley and several columns devoted to post-disaster legal issues (A*ssociation Can Help After Storm*, August 19, 2004; *Association Should Act Deliberately*, August 26, 2004; *Flood Insurance Sound Idea*, September 9, 2004; *Easy to Stumble into Second Disaster*, September 16, 2004; and *Have Plan Before, After Disaster Hits*, September 23, 2004).

Remember, past editions of this column, going back four years, can be retrieved on the internet at http://www.beckerlawyers.com/. Click on "ATTORNEYS", click on "A", then click on "Joseph E. Adams" and scroll down the page where past edi-tions are sorted by date.

Today's column involves the so-called Q&A Sheet. The Q&A Sheet is a document which a condominium association must by law keep among its official records. It is helpful to understand the purpose of the Q&A Sheet, the history of the law pertaining to the document, and the new law.

Back in 1992, the Florida Legislature implemented radical changes to the Florida condominium laws. Much of the focus of the new law was to provide more "disclosure" and "consumer protection". The 1992 amendments required both developer-controlled associations and unit-owner controlled associations to prepare (and annually update) the Q&A Sheet on one "sheet" of paper (there was some debate whether two sides of the same sheet could be used.).

The list of items to be disclosed in the Q&A Sheet is found in Section 718.504 of the Florida Condominium Act which provides:

> [E]ach buyer shall be furnished a separate page entitled "Frequently Asked Questions and Answers," which must be in accordance with a format approved by the division. This page must, in readable language: inform prospective purchasers regarding their voting rights and unit use restrictions, including restrictions on the leasing of a unit; indicate whether and in what amount the unit owners or the association is obligated to pay rent or land use fees for recreational or other commonly used facilities; contain a statement identifying that amount of assessment which, pursuant to the budget, would

be levied upon each unit type, exclusive of any special assessments, and which identifies the basis upon which assessments are levied, whether monthly, quarterly, or otherwise; state and identify any court cases in which the association is currently a party of record in which the association may face liability in excess of $100,000; and state whether membership in a recreational facilities association is mandatory and, if so, identify the fees currently charged per unit type....

Florida law permits a right of rescission (right to back out of a contract) in condominium unit sales. There is a 15 day right of rescission in developer sales and a 3 day right of rescission in resales. The right of rescission is triggered by the buyer's receipt of a number of disclosure documents, including the Q&A Sheet.

Apparently, what began to happen was that condominium buyers looking for "loopholes" to get out of contracts would find that the Association had not updated its Q&A Sheet within the previous year, as required by law, and then void the contract. The annual update of the Q&A Sheet is something that "falls through the cracks" with many associations. In 2001, one legislator (who is also a real estate attorney) successfully led an effort to eliminate the Q&A Sheet from the rescission-triggering documents required to be provided by a unit owner controlled association. Stated otherwise, the change in the law several years ago did not eliminate the requirement that an association keep a Q&A (nor the requirement that it be updated annually) but did remove it as a required disclosure document tied to the right of rescission in resales.

The 2004 Legislature again changed the law. The new change to the statute re-institutes the Q&A Sheet as a document keyed to the right of rescission. Therefore, it is especially important for associations to keep a Q&A Sheet on hand, and update it at least annually. Otherwise, a buyer could theoretically seek to get out of a contract, citing the lack of a Q&A Sheet, and the seller (unit owner) might seek relief from the association.

As the old saw goes, history has a way of repeating itself. Whoever coined that phrase must have been a student of Florida's condominium laws.

Q&A

Question: The bylaws for our homeowners association provide that a change in annual dues, or a special assessment, can only be approved "by a 2/3 majority vote of the members of the association." Does this mean two-thirds of all of the members, or only two-thirds of those who vote? J.W. (via e-mail)

Answer: Without reviewing the documents as a whole, it is impossible to give an accurate answer. The language you quote suggests that the voting should be based upon two-thirds of all members, not just those who vote.

This is one area where associations are particularly benefited by having clear and concise documents, which often requires amendment. For example, voting should be based on "voting interests", not "members". If a husband and wife both own a parcel, they may both be "members" but there is typically only one vote signed to the parcel, and that is why the term "voting interest" is more precise.

When distinguishing between votes which require some percent of the entire voting interests and those which require a percentage of only those who vote, clear language can easily be added to eliminate confusion. For example, if the intention is two-thirds of everyone, the document should read "two-thirds of the entire voting interests". Conversely, if the intention is only for those who

vote, the clause should read "two-thirds of the voting interests present, in person or by proxy, and voting at a duly noticed meeting of the association at which a quorum has been established."

Question: Our condominium association is having difficulty with home owners following our rental regulations. We are in the process of implementing fines. I have three questions. First, is there a maximum find we can charge? Secondly, if the owner does not pay a fine, can we file a lien against their property or attach it to their quarterly maintenance fee? Finally, if we can prove that it is the real estate agent (not the unit owner) who is violating the documents, what is our recourse? G.M. (via e-mail)

Answer: In order for a condominium association to levy fines, the condominium documents must specifically grant that right. The ability to levy fines is also controlled by the Florida condominium statute, specifically section 718.303.

Under the law, the maximum fine that can be levied is one hundred dollars per violation and up to one thousand dollars for a continuing violation.

A fine cannot be attached to the unit's title like maintenance fees, and your association cannot file a lien for unpaid fines. This is also specifically spelled out in the statute.

The association has no legal relationship with a unit owner's real estate agent. Accordingly, the association has no standing fine them. However, if owners are fined for the conduct of their agents, they will hopefully find a new agent, or at least prevail upon their existing agent to comply with the association's regulations.

Question: What is the status of the new change to the law regarding condominium rentals? K.G. (via e-mail)

Answer: Stay tuned. The Florida Legislature enacted a significant change regarding amendments to condominium documents concerning rentals. The new law will become effective October 1, 2004. I will be reporting on this change, in depth, within the next couple of weeks.

Question: I have a question regarding the new law for homeowners associations which becomes effective October 1, 2004. Can anyone put something on the agenda for a board meeting.
R.H. (via e-mail)

Answer: No. The new law does not change how the directors create the agenda for their meetings. That is typically covered by the association's bylaws.

Under the new law, HOA members can petition the board to take up an item of business by a petition signed by twenty percent of the voting interests. The board must consider the item at a regular board meeting or special board meeting called within sixty days from receipt of the petition. There is no requirement that the board take any specific action regarding the item, only that the board take it up as an item of business.Section 718.113(5) of the Florida Statutes provides that an association may not prohibit a unit owner from installing hurricane shutters. The association can adopt uniform specifications for shutter installation, including both functional and aesthetic items. The condominium board can require that hurricane shutters be installed in accordance with its specifications.

There is no parallel law for homeowners associations. Rather, the issue is guided largely by the governing documents, such as a declaration of covenants or deed restrictions. Theoretically, a restrictive covenant could prohibit the installation of hurricane shutters. I would consider such a restriction to be unwise at best, perhaps reckless (arguably contrary to public policy).

It is a proven fact that hurricane shutters save lives and lessen property damage. I would

never encourage an association to add a shutter prohibition to their covenants (and would strongly discourage it). In fact, if there were a restriction in a current covenant that prohibited shutters, I would strongly recommend deleting it by amendment. This may be another area where the Florida Legislature needs to look to the history of condominium law development for guidance on a very important topic.

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Two New Entities Involved in Issues

FORT MYERS THE NEWS-PRESS, OCTOBER 7, 2004

By Joe Adams

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Today's column continues a review of changes enacted during the 2004 session of the Florida Legislature, most of which became effective October 1, 2004.

In the first four installments of this series (*Law Gives Members More Voice*, July 8, 2004; *Law Denies Developer Fund Access*, July 15, 2004; *Law Calls for Binding Arbitration*, July 22, 2004; *HOA Law Changes Not Perfect*, July 29, 2004), we looked at changes primarily affecting homeowners associations. Subsequent installments have looked at changes to the law involving lender questionnaires (*Lender Surveys are Tricky*, August 5, 2004) and defibrillators (*Liability Changes offer More Coverage*, August 12, 2004). The series was interrupted by Hurricane Charley and several columns devoted to post-disaster legal issues (*Association Can Help After Storm*, August 19, 2004; *Association Should Act Deliberately*, August 26, 2004; *Be Aware of Charley deadlines*, September 2, 2004; *Flood Insurance Sound Idea*, September 9, 2004; *Easy to Stumble into Second Disaster*, September 16, 2004; and *Have Plan Before, After Disaster Hits*, September 23, 2004). The series about the new laws was revised last week with a look at the new requirement for the for the "Q&A Sheet" (*Q&A Sheet again a key document*, September 30, 2004).

Remember, past editions of this column, going back four years, can be retrieved on the internet at http://www.beckerlawyers.com/attorneys/bios/adams_j.html

Today's column involves two new governmental entities with jurisdiction over condominium issues.

The Advisory Council on Condominiums was initially instituted as a result of the significant changes to Chapter 718 which became effective in 1992. Several years ago, the Council was eliminated by the Legislature, but has now been resurrected as of October 1, 2004. The new Council consists of seven members: two appointed by the President of the Senate; two appointed by the Speaker of the House; and three appointed by the Governor (one of the Governor's appointees must represent timeshare condominiums).

The functions of the Advisory Council include receiving public input regarding issues of concern to condominiums and recommending changes in the condominium law. The statute directs the Council to consider, among other issues, rights and responsibilities of unit owners in relation to the rights and responsibilities of associations. The Council is also empowered to advise the Division of Florida Land Sales, Condominiums and Mobile Homes regarding administrative regulations and to recommend improvements, if needed, in educational programs offered by the Division.

One of the more controversial aspects of the 2004 legislation which was passed included the creation of an "Office of the Condominium Ombudsman." The Ombudsman is to be employed by the Division of Florida Land Sales, Condominiums, and Mobile Homes, and is considered a Bureau Chief. The Om-

budsman is to be appointed by the Governor and must be an attorney admitted to practice before the Florida Supreme Court.

The Ombudsman's functions include preparation of reports and recommendations to the Governor, the Department of Business and Professional Regulations, the Division of Florida Land Sales, Condominiums, and Mobile Homes, the Advisory Council on Condominiums, the President of the Senate, and the Speaker of the House of Representatives on matters within the jurisdiction of the Division. The Ombudsman is also charged with acting as a liaison between the Division, unit owners, boards, managers, and other affected parties to assist in understanding their respective rights and responsibilities established by law and the condominium documents.

The Ombudsman is empowered to monitor and review election disputes, and may recommend enforcement action by the Division. The Ombudsman is also charged with providing resources to assist Board members and officers of the Association in carrying out their powers and duties.

The Ombudsman, whose office is located in Leon County (Tallahassee), is also empowered to encourage and facilitate voluntary meetings with and between unit owners, boards of directors, board members, community association managers, and other affected parties when the meetings may assist in resolving a dispute within a community. The expressed legislative intent is that the Ombudsman act as a neutral resource, with due regard for the rights and responsibilities of all parties involved.

In theory, both the Advisory Council and the Ombudsman will provide a neutral and balanced perspective in addressing the sometimes competing interests in condominium law and regulation. Of course, the proof will be in the pudding.

Q&A

Question: I own a condominium unit and have a live-in companion. Can my "significant other" be appointed to association committees, even though he is not listed on the title? S.R. (via e-mail)

Answer: There is no requirement in Florida's law that persons appointed to a corporation's committees (including committees of a condominium association) be members of that corporation. Therefore, unless your bylaws limit committee membership to unit owners (which would be rather unusual), the board is free to appoint your companion as a committee member.

Question: If one of our board members hires an unlicensed and uninsured person to work on the common property owned by our homeowners' association, is he or she personally liable for any fines levied against the association by the code enforcement board, or the contractor's charges? B.H. (via e-mail)

Answer: It depends. In general, directors of community associations are not personally liable for acts or omissions affiliated with the association, as long as they are acting in good faith and provided there is no self-dealing or conflict of interest involved.

Certain members of the board have what is called "apparent authority" to contractually bind the association. For example, the president of an association would have apparent authority to enter into a contract for work on common areas. Of course, if the board feels that the president is overstepping his or her authority, any officer can be removed by the remaining board members (as an officer, not as a director), with or without cause, by a majority vote of the board.

Conversely, if the contract was authorized by a board member who did not have apparent or actual authority, they may well be called upon by the board to answer for any financial consequences to the association. This will depend upon the exact circumstances of your case.

I would also note that if the person doing the work was not properly licensed, most contracts with unlicensed persons, for work requiring licensure, are unenforceable.

Question: I have read your recent article requiring that associations now keep a Q&A Sheet. Is there an exemption for condominiums of less than twenty units. K.D. (via e-mail)

Answer: There is no exemption in the law based upon the number of units in the condominium. As of October 1, 2004, every association should have a Q&A Sheet available for prospective purchasers (and as part of the official records) and should update it annually.

Question: My wife and I live in a deed-restricted community operated by a homeowner's association. We go "up north" for most of the summer, and would like to leave our hurricane shutters down while we are away. The governing documents for our association state that shutters can be put up a few days before a hurricane, and must be taken down after the hurricane threat has passed. We would like to know if there is any Florida law which states that we can keep our shutters down while we are away. J.L. (via e-mail)

Answer: The Florida statute applicable to homeowners' associations does not address hurricane shutters at all. Therefore, I believe that the governing documents would be deemed controlling.

There are obviously two sides to this debate. The devastation wreaked by Florida's four hurricanes in 2004 leaves little doubt that shutters are to be encouraged. On the other hand, I have heard people who reside year-round in deed-restricted communities say that they do not like the "boarded up" look of a neighborhood when all of the shutters are left in a closed position for extended periods of time.

I guess the debate comes down to aesthetics versus safety, and what is reasonable in a particular community's situation. For example, if all of the homes are equipped with modern rolling-type shutters, different considerations might apply than circumstances where everyone uses the old-fashioned removable metal panels.

Under the new HOA law, twenty percent of the members can petition the board to consider an item of business relevant to the community. I would recommend that you circulate a petition in your community and ask the board to take up the question of whether the governing documents should be amended to liberalize the current shutter rules. Your governing documents may also permit you to initiate an amendment through direct petition, without need for bringing the matter before the board. However, if you approach the situation in a non-confrontational manner (i.e. by involving the board), you may have better luck from a political perspective in reaching your goal.

Question: I am an insurance agent in Fort Myers and wanted to do some marketing to homeowners' associations. Do you know where I can find a listing of homeowners' associations in Lee, Collier, and Charlotte counties? V.P. (via e-mail)

Answer: Because HOA's are not regulated by the state, there is no governmental agency which keeps track of them. Therefore, there is no master list of homeowners' associations in the state, sorted by county or otherwise.

You may wish to consider joining the local chapter of Community Associations Institute (CAI). Many vendors of goods and services market to CAI members, which include associations, board members, and many local management companies. You can obtain membership information from the Chapter's local Executive Director, Bob Podvin, at 239-466-5757. ⚖

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Law Change May Create Confusion

FORT MYERS THE NEWS-PRESS, OCTOBER 14, 2004

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Today's column concludes a review of 2004 legislation affecting community associations, most of which became effective October 1, 2004. The first half of the series dealt with changes affecting homeowners' associations, with the remaining columns largely devoted to condominium issues. These reviews, as well as past editions of the column, are available on the Internet, free of charge.

One of the most controversial issues in condominium living has always been rentals. While I am aware of no research or studies showing that renters are inherently bad people, disputes between associations and tenants are a constant source of tension.

Perhaps human nature plays a role. If you rent a brand new car for a few days, would you really take care of it as well as a car you just bought and will spend the next five years paying off?

From the association's perspective, there are several ways renters can grate the collective nerves of the community. Moving trucks can damage the property, as can the constant hauling of furniture in and out the doors, up the elevators, etc. Condominium residents where short-term rentals occur often complain of a "hotel-like" atmosphere.

As a matter of economics, condominium developers rarely include significant rental restrictions in their original documents. After all, they want to attract as broad a buyer-base as possible, and that is certainly understandable. Most developers feel that the owners can impose their own rental regulations, through the democratic process of amending the condominium documents, after the developer has sold out.

The 2004 legislation puts a serious crimp in how associations have historically addressed the ubiquitous "rental issue."

Effective October 1, 2004, a new provision has been added to the Florida Condominium Act. Specifically, a new Section 718.110(13) of the law (which deals with amendments to declarations of condominium) provides:

> Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

There may be no single sentence found in the condominium statute that packs a more serious punch. The change in the law confers "grandfathered" status on anyone who purchases a condominium unit as to "rights relating to the rental of units", whatever that means. To the extent that the law is intended to bring consistency and predictability to association operations, this change will likely spawn great confusion and litigation.

First of all, there is a serious question as to whether the law can be constitutionally applied to any condominium in existence when the law was enacted.

After all, owners bought into the condominium with the understanding that by some type of vote, they could change things they do not like. That is a contract right, and the Florida Constitution prohibits the Legislature from retroactively impairing vested contract rights.

The rental amendment was not part of any originally-filed legislation, and as far as I know, was never even discussed in any committee of either the House or Senate. Rather, as unfortunately happens far too often with community association legislation (and probably all legislation), this amendment was tacked on at the "eleventh hour."

For better or worse, constitutional or unconstitutional, the "grandfathering law" is now the law of the land.

Curiously, all of the news media involving the passage of the new law discusses abuses by boards of directors in "taking away rental rights." Ironically, the new law does not apply to whatever rights a board may have, only amendments to a declaration of condominium. A declaration is supposed to be like a constitution, it addresses important rights and responsibilities, but can change with the times, through super-majority vote.

Sometimes I guess the tail wags the dog. ⚖

Q&A

Question: Your recent article regarding lender's questionnaires (Lender surveys are tricky, August 5, 2004) hit home with me. Unfortunately, I am on the other side of the issue. The management company for the association has refused to state how many units are primary residences, second homes, or investment units. They have completed the rest of the questionnaire. Our mortgage is through a major lending institution, and we have been told that we cannot close without this information, since the bank will not be able to sell the mortgage on the secondary market. I think that associations which refuse to provide this information are doing a disservice to all of their owners, since the availability of financing will have a direct impact on the value of property in the condominium. M.L. (via e-mail)

Answer: There are certainly two sides to every story, and you certainly make a valid point.

In the situation you have described, it does seem that the association has made an effort to supply the information within its possession. Otherwise, why would the association bother to answer some, but not all of the questions?

Although your case may prove to be the exception to the rule, I have been told by many community association management firms that these deals find a way to close, even when the association is unable to supply answers to all of the inquiries contained in the lender's questionnaire.

For better or worse, the law now clearly states that condominium associations are under no obligation to respond to inquiries of this nature, although the recent change to the law granting immunity for good faith responses will presumably entice more associations to do so.

Question: I own a unit in a condo complex that is starting to show its age. The association will soon need to replace all of the roofs on the condominium buildings. The original construction of the roofs is concrete tile. Some members have stated that the board should replace the tiles with asphalt shingle, because it will be cheaper. I feel that we should replace the old tile roofs with new tile roofs. Does the law require the association to maintain the property at the same standard to which it was built? W.G. (via e-mail)

Answer: Florida law, specifically Chapter 718.113(2) of the Florida Statutes, provides that there shall be no "material alteration" of the common elements of a condominium except as authorized by the declaration of condominium.

In my opinion, replacing tile roofs with asphalt shingles would be a "material alteration." Therefore, it is necessary to look to the declaration of condominium. Most declarations require some type of super-majority vote of the members (often two-thirds or seventy-five percent) for material alterations of common elements. Some documents delegate this decision to the board. If the declaration is silent on the topic, then seventy-five percent of the entire voting interests (there is typically one voting interest per unit) must approve the change.

Florida has also developed an exception to the material alteration rule, which is sometimes called the "necessary maintenance doctrine." For example, if the building's siding was made of a product that has been recalled because it does not hold up to water, it would be ludicrous to replace it with the same thing. This is the type of situation where the necessary maintenance doctrine comes into play.

Absent some unusual factor in your case, it is likely that a change from tile to shingles would require a unit owner vote.

Question: My condominium is going to levy a special assessment for uninsured damages to one of the buildings that was caused by Hurricane Charley. I do not live in that building and am wondering why I have to pay. I believe you wrote in a previous column that only those owners in the affected building would have to pay. Is that correct? C.F. (via e-mail)

Answer: In most cases, assuming the damage was to the common elements, all owners in the condominium will have to contribute for the repair costs not covered by insurance. The exceptions mentioned in my previous column involve a multi-condominium association, where a single entity (association) operates more than one condominium. This is the exception, and not the rule.

If uninsured damage involves the units (as opposed to common elements), then the declaration of condominium will determine who pays for the uninsured loss. In most cases, this is the responsibility of the affected unit owner (and not the other unit owners).

Question: We live in a subdivision on Pine Island. We have a voluntary homeowner's association. Although the original developer recorded deed restrictions, he did not mention our association in the restrictions, or make membership mandatory. Is there any way we can make our association mandatory? R.N. (via e-mail)

Answer: A similar issue was addressed in a reported appeals court case from Florida called Holiday Pines Property Owners Association, Inc. v. Wetherington, 596 So. 2d 84 (Fla. 4th DCA 1992).

The court held that creating a mandatory membership association required unanimous consent of all lot owners. This opinion from the court is consistent with the view most attorneys have about the subject.

Therefore, unless there is something unusual about your case, the only way you could make membership in your association mandatory would be through unanimous consent of all existing property owners. You may need their mortgage holder's consent as well. ⚖

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Board 'Working Sessions' Must be Held in the Open

FORT MYERS THE NEWS-PRESS, OCTOBER 21, 2004

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In less than two weeks, people across Southwest Florida will be heading to the polls to vote for everything from who runs the local hospital, to who runs the country. In selecting our nation's leader, we can form our opinions and make our choice based on televised debates, daily newspaper reporting, and unending discussion in every local beauty parlor or coffee shop about who is best for the job.

Choosing the best candidate for lower profile races is often based on less identifiable factors. After all, how many voters really know anything about the candidates who are running for judge, property appraiser, or a local fire district board?

Apparently, many suitors for those offices feel that the more signs they have adorning local streets and yards, the better their chance for the grail of office. Political yard signs are as much a staple of local elections as straw hats and funny-looking buttons at the conventions for the national seats.

There is no inalienable right that is more ingrained in our national psyche than the importance of free elections, and every person's right to support the candidate of their choice. Many have died, and die as we speak, to preserve this freedom. The First Amendment to our Constitution also guarantees us freedom of political speech.

So what happens when the Constitution clashes with the rules of a condominium or homeowners' association? If a live in a high rise condo building, should I be able to drape a "John Doe For Mosquito Control Board" banner over the railing? If I live in a single family neighborhood whose deed restrictions prohibit signs in the yards, can they really make me take my "Sally Jones for School District" sign down?

When you move into an association-regulated neighborhood, are you checking your constitutional rights at the gate?

When it comes to political signs, most consider the landmark case to be *City of Ladue (Missouri) vs. Gillelo*. A 24 by 36 inch sign which read: "**Say No to War in the Persian Gulf, Call Congress Now**" was at issue (this involved the first Gulf War). The City advised the homeowner that the sign violated the city's ordinances, which it justified by signs' potential to obstruct views, distract motorists, and create an eyesore. The U.S. Supreme Court ruled that the homeowners' constitutional speech rights trumped the city's regulatory interest.

While a governmental entity clearly cannot regulate political speech to the degree of banning it, do the same rules apply to a community association? That remains a question that is widely debated, but as of this point in time, not definitely resolved by the courts. Most legal experts agree that the legal principles that apply to governmental regulation are less likely to be imposed by the courts in the association context. The main reason is that violation of constitutional rights requires "state action", which means involvement by an actor of the government. The United States Supreme Court has ruled that enforcing racially restrictive private covenants in a court constitutes state action. However, the enforcement of sign restrictions has apparently not presented equally weighty constitutional principles.

In a Florida decision that arose from a Naples neighborhood, a homeowners' association sued an owner who refused to remove a "For Sale" sign, which violated the restrictive covenants, from their front yard. The judge ruled in favor of the homeowner, finding the association's rule to be an abridgment of free speech. Up on appeal, the appeals court sided

with the association, finding that the association was not an arm of government, that there was therefore no "state action, and enforcement of the no-sign-in-the-yard rule did not violate free speech rights. *Quail Creek Homeowners' Association vs. Hunter.*

Since the *Quail Creek* case involved what is called " commercial speech", which is afforded less protection than pure "political speech", it is perhaps debatable whether the same result would have happened if the test case was a political yard sign.

In my opinion, condominiums have a legitimate interest in severely limiting (or prohibiting) political signs, since the only outdoors property is owned by all of the owners as tenants in common. A candidate acceptable to one may be abhorrent to another.

In subdivisions and other types of single family developments, I believe political signs should be permitted by the covenants, subject to reasonable controls on how long before the election they can be put up (and how long after they have to be taken down), and perhaps restrictions on size, numbers and the like.

Q&A

Question: I am a director from a mobile home cooperative association in North Fort Myers. My question is whether we can have working sessions of the board, such start preparing next year's budget, without posting notice of the meeting? I know that no votes could be taken. **J.U. (via e-mail)**

Answer: Yours is probably the most frequently asked question from readers of this column.

The law is basically the same for condominium associations, cooperative associations, and homeowners associations. All of the relevant statutes say that a "meeting" of the board of the association occurs whenever a quorum of the board is together and they "conduct" association business. Although what is "conducting business" is subject to debate, it is clear that votes need not be taken in order for business to be conducted.

Otherwise, the board could make all of the tough decisions out of the "sunshine" and the public board meetings would be nothing but a "rubber stamp" event.

Therefore, while there is no problem with having workshop meetings, the board is required to post notice of the meeting (along with an agenda) at least 48 hours in advance. Unit owners from the co-op are permitted to attend and, subject to reasonable rules the board may impose, speak.

Question: We just took over the management of our homeowners' association from our developer and our new board has several questions. First, our board does not want to give our homeowners a list of the association members, citing privacy. Second, our board has not produced minutes from its previous meeting, which was four months ago. Are there any guidelines on this? Finally, if a member of our association requests records by email, is that considered an official written request to inspect records? **K.W. (via e-mail)**

Answer: The membership list is part of the official records of the association and must be made available to any member who requests it. While the boards' desire to protect owners' privacy is laudable, the information can be obtained in most counties by reviewing the local property records on the internet.

There is no requirement in the law as to how long the board has to reduce minutes of past meetings to writing. Obviously, the memory of the person preparing the minutes is freshest right after the meeting. There used to be a rule in the condominium laws that the board had 30 days to put the minutes in writing, although that rule was repealed. I would say that 30 days is a reasonable target to shoot for.

The courts have not addressed whether an email request is a proper written request to inspect official records, so as to invoke the penalties in the law for noncompliance. In my opinion, it is not sufficient.

Question: I was recently elected to the board of our homeowners' association. From what I can gather, the association used to be very active, but has been in a slump for the past few years, although it was never disbanded. There is a dispute as to whether our board

can raise the homeowners' fees and what the current version of our bylaws is. We could not find them at the courthouse and the Division of Corporations in Tallahassee didn't have them either. Do you have any suggestions?

Answer: Prior to 1995, Florida law did not require that HOA bylaws be recorded at the local courthouse, and your dilemma is not all that unusual. That is one of the reasons the law was changed.

I would start by having an attorney hire a title company to do a title search. While you did not find the bylaws in your personal trip to the courthouse, title companies search public records every day. The cost is usually less than a hundred dollars.

If that fails, I would look at all the minutes of past meetings of the board and membership (assuming you can find the minute book). Look to see if the association had a past relationship with a local law firm or management company. They may still have a file that they would make available for review.

If that fails, you can contact the Division of Corporations and obtain the yearly corporate reports filed since the association was started. You can look at who the registered agents have been for clues on past attorneys, or see if someone who still lives in the neighborhood was on the board during its active phase. They may have some personal records that could lead to the information you are seeking. Good luck.

Question: I was told they changed the condo law so owners can rent out their units no matter what the rules say. What is the status of that? **K.G. (via email)**

Answer: As mentioned in last weeks column, the new law took affect October 1. It only applies to amendments to a declaration of condominium enacted after that date.

Any rental rule in place prior to October 1, assuming it was validly enacted in the first place, still has to be followed. ⚖

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Association Budget Time Approaching

FORT MYERS THE NEWS-PRESS, OCTOBER 28, 2004

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November is budget time for community associations. Over the next thirty days, thousands of associations throughout Florida will be planning on how to spend billions of dollars on goods and services in 2005.

Although the shoe has not yet dropped, most associations can likely plan for substantial hikes in insurance premiums. Additionally, many communities will be seeking to replenish depleted reserve and contingency funds spent in the wake of the historic 2004 hurricane season.

As in most matters, the law for condominium associations is more specific in its requirements, and more complicated than the homeowners' association counterpart.

For condos, the proposed budget must be mailed (or hand-delivered) to each unit owner at least fourteen days in advance of the meeting where the budget will be considered (some older bylaws require lengthier notice, such as thirty days, and that should be followed). In most cases, the board of directors adopts the budget (no membership vote is required), although the bylaws may require unit owner approval.

The association's proposed budget package must contain the proposed operating budget. The operating budget must list anticipated operating expenses for the association, and must set forth a laundry list of items mentioned in the condominium statute.

The second part of the proposed budget is the reserve budget. Every condominium association must present the unit owners with a schedule of "fully funded" reserves for roof replacement, building repainting, pavement resurfacing, and any other component of the condominium property with a replacement cost in excess of $10,000.00 (typical examples would include swimming pools, tennis courts, fencing, common area decorations, and elevators).

Unless the members have voted to reduce or waive the funding of reserves, the Board has no discretion and must include fully funded reserves in the adopted annual budget. If reserves are to be waived, a vote of the unit owners must be taken, with majority approval required. The notice for the members' meeting must include a fully funded reserve schedule, and if a waiver or reduction vote is contemplated, should also include the Board's recommendation as to what the owners are voting on in terms of reduced reserves.

Under a recent change to the law, reserve funds may be presented either on a "straight line" or "cash flow" method of funding reserves, although a unit owner vote is required to convert existing reserve funds from "straight line" to "cash flow."

For HOAs, the law is simpler. First, reserve funds are not required to be set up unless required by the governing documents for the HOA. Nonetheless, it is certainly a good idea to include reserves within those areas for which the Association has financial exposure, and nothing in the law prohibits including reserves in the proposed budget for the HOA.

Likewise, the proposed operating budget need not follow any specific statutory formula, but should include the anticipated expenses for the year. Unlike the condominium law, Chapter 720 of the Florida Statutes (the law regulating homeowners' associations) does not require a copy of the proposed budget to be mailed to the owners, although the association must notify owners, in writing, that a copy of the budget is available from the association free of charge. Again, the bylaws may impose

additional procedures which the association must follow as part of its budget adoption process.

Association assessments, like taxes, are never popular. However, when you consider what you get for your monthly dues (in condominiums, items like building insurance, water and sewer, and even cable television are often included), and compare it to the costs of single family home ownership, it is still one of the best deals around. ⚖

Q&A

Question: I have read with interest your previous columns concerning "working sessions" of an Association's board of directors. Our Country Club's Board of Directors holds "Special Sessions" to conduct business and neither publishes the agenda in advance nor publishes the minutes of these meeting. They have used these meetings to enact major changes to our dues and fees structures. Likewise, they recently amended our Bylaws without a vote of the membership. Do the regulations covering Homeowners Associations apply to Country Club boards? **W.G. (via e-mail)**

Answer: The Homeowners Association Act, found in Chapter 720 of the Florida Statutes, applies to associations responsible for the operation of a "community" in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership. Further, the association must be authorized to impose assessments that, if unpaid, may become a lien on the parcel.

Therefore, if all of the owners in your community are required to become members of the country club, and if the country club is authorized to impose assessments that, if unpaid, become a lien on their homes, then it would be required to comply with the provisions in Chapter 720 of the Florida Statutes. Otherwise, the country club is governed by its articles of incorporation and bylaws and probably Chapter 617 of the Florida Statutes, the Corporations Not For Profit Act, which contains no "Sunshine" requirements.

Regarding the amendment to the bylaws, if the bylaws allow the provisions to be amended by a vote of the directors, then no membership vote is required. The required notices of the board meetings and participation by the members, would also be controlled by the articles and bylaws.

Question: Our condominium documents, in the "boundaries" and "maintenance" sections, describe comprehensively unit owner and Association responsibilities for maintenance and repair. We are told by our insurance adjuster, however, that the law makes the Association responsible for all wallboard. I believe this is in contradiction of our condominium documents. Can you verify for us that such regulations exist? If so, where can they be found in Florida law? Do they supercede our condominium documents?

Answer: The provision that your insurance adjuster is referring to is Section 718.111(11), Florida Statutes. This provision was amended in 2003 and is effective for all policies issued or renewed after January 1, 2004. Therefore, it is first important to know whether your policy was renewed after January 1 and before August 12, 2004 (assuming that we are writing about Hurricane Charley damages), although I believe drywall would be treated the same under both versions of the Statute. The purpose of the statute is to clarify the insurance responsibilities between an Association and the unit owners. Therefore, even though something may be the "maintenance" responsibility of the unit owners, it may be an "insurance" responsibility of the Association.

The law requires the Association to insure, among other things, the condominium property located inside the units as such property was initially installed or replacements thereof of like kind and quality and in accordance with the original plans and specification, or if the original plans and specifications are not available, as they existed at the time that the unit was initially conveyed.

The statute then goes on to a list of "excluded" items including all floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or

heating equipment, water heaters, built-in cabinets and countertops, etc. Therefore, an interior partition wall that would typically be the unit owners' maintenance responsibility is the Association's insurance responsibility under the statute.

However, in my opinion, the insurance requirements do not change the parties' responsibilities for repair after a casualty. You will need to refer to what is typically referred to in the Declaration as "Repair after Casualty" section. Even though the Association may insure something, the unit owners may still be responsible for repairing those items after a casualty (for example an interior wall.) In that case, the Association would be responsible for obtaining insurance proceeds, and disbursing them in accordance with the Declaration.

Question: I know that Chapter 720, Florida Statutes, permits me to display a "portable" United States flag, regardless of what my community restrictions or rules may provide. Must the flagpole also be "portable" or can it be affixed to my home or permanently installed in my yard?" **M.C. (via e-mail)**

Answer: Section 720.304(2), Florida Statutes, which is applicable to homeowners' associations, and Section 718.113(4), Florida Statutes, applicable to condominiums provide that owners may display "one portable, removable" United States flag in a respectful manner. The statutes however, do not make any reference to flagpoles nor discuss whether an association may promulgate any limitations on flagpoles.

Whether an association can defend a provision prohibiting the attachment of flagpoles to buildings or yards is an open question, that will need to be addressed by the courts, or preferably, an amendment to the statute.

Question: My community is governed by a homeowners' association. Is the Board permitted to meet in a resident' s home or must meetings of the Board be conducted in a neutral location? **M.M. (via e-mail)**

Answer: Section 720.303(2), applicable to homeowners' associations only, states that "all meetings of the board must be open to all members [of the Association]." It further provides that members have the right to attend all meetings of the board." However, the statute does not require that board meetings be held at a neutral location. Therefore, board meetings may be conducted in a resident' s home but must be open to all members regardless of where the meeting is conducted. ⚖

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Free Speech Rights Cast Aside

FORT MYERS THE NEWS-PRESS, NOVEMBER 4, 2004

By Joe Adams

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My recent column regarding political yard signs (Associations may limit yard signs, October 21, 2004) generated a number of e-mails about free speech rights in association living and whether you check your constitutional rights at the gate when buying into a community regulated by an HOA.

Recently, a Florida appeals court addressed similar issues in a published opinion which started with the following sentence: "The rigors of living in compliance with the rules and regulation of a homeowners' association set the stage for this appeal."

Charlotte Shields purchased a home in the Andros Isle Subdivision in Palm Beach County. Dissatisfied with the builder, she displayed a sign in her front yard advertising the sale of her house and criticizing the builder. She placed other signs complaining about her home and its builder in the windows of her automobile.

The Association sent Ms. Shields a letter concerning the "for sale" sign, and the property manager also paid her a visit. The manager told Ms. Shields to reduce the size of her "for sale" sign to not greater than two square feet, which was the size permitted by the deed restrictions. Ms. Shields reduced the size of her sign as instructed, but apparently did not change the wording.

About a year later, notices were again sent to the owner, claiming that all of the signs violated the restrictions, and had to go. Ms. Shields did not comply. Litigation followed.

The trial judge ruled in favor of the association on all counts, finding that the yard sign violated the restrictions, as did the signs posted in the car windows.

On appeal, a three judge panel was called upon to review the trial court's ruling.

The appeals court began its discussion of the dispute by noting two conflicting policies found in the law applicable to judicial enforcement of restrictive covenants. First, the court noted that restrictions found in a declaration of covenants "are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties." On the other hand, the court also noted that restrictive covenants "are not favored [in the law] and are to be strictly construed in favor of the free and unrestricted use of real property." Stated otherwise, when in doubt, the association loses.

The court then looked at the restrictions for the Andros Isle community under a judicial microscope. The first relevant clause stated that no sign could be displayed "to public view on any lot," except one "for sale" or "for rent" sign, of not more than two square feet. The court found that the reference to the "lot" was limited to the real property (the land and the home) and accordingly did not prohibit the signs in the car windows.

The second documentary clause in question stated that: "[n]o vehicles, except four-wheeled passenger automobiles... with no lettering or signage thereon, shall be placed, parked or stored upon any lot." Ms. Shields argued that the restriction against signs "thereon" automobiles did not prohibit signs "therein."

After quoting the dictionary, and considering the rules of grammar involving the use of prepositions, the appeals court sided with

the homeowner on the car signs. The court concluded that the language in the restriction was meant to curb the parking of commercial vehicles, not criticism against the builder.

The court did agree with the association that the yard sign violated the regulation. However, the court sent that issue back for trial, since Ms. Shields had argued "selective enforcement" by the association, citing 124 additional sign violations which the association had supposedly done nothing about.

Although "free speech" rights were not the center of the legal points in this case, the decision does show that courts will uphold an association's ability to restrict what might otherwise be considered constitutionally protected communications. The case also points out that unless the association has dotted the i's and crossed the t's, it may well find itself on the losing side of an effort to enforce its rules and regulations.

See *Shields v. Andros Isle Property Owners Association, Inc.*, 872 So. 2d 1003 (Fla. 4th DCA 2004).

Q&A

Question: Our bylaws state that a board member can serve on the board for two consecutive two year terms, but then cannot run for the board again until a two year lapse has occurred. We are a small association with 32 homeowners. Of the 32, approximately 24 are seasonal residents. Question: Without changing the bylaws, since this is expensive, how can the board get around this since some of the board members were asked to continue past the four year limit by many of the homeowners? Would a vote at the annual meeting be acceptable? **P.A. (via e-mail)**

Answer: The association's governing documents are required by law to set forth the criteria and guidelines for serving on the board of directors. It is not common to see language that limits a board member's service to a specific number of terms, or to require an outgoing board member to wait a set period of time before he or she is eligible to serve on the board again. However, such a clause is not unlawful, and must be followed. You cannot "get around" the current language of the governing documents by some other means, you will need to properly amend the bylaws. The process is not particularly complicated or expensive.

Question: I live in a condominium which suffered hurricane damage to all of the roofs in our complex, along with soffit, screen, solar panel damage, several trees and damage to a carport. Is our association required (and in accordance with most associations insurance policies) to have a licensed contractor repair all of these damages or can our maintenance people repair all of this damage although none of them have contractors/roofing licenses? **L.L. (via e-mail)**

Answer: In your description of the damage, you have listed items ranging from minor in nature up to what appears to be extensive roof damage. Certainly a good portion of the damages that you have listed would be beyond the scope of the normal maintenance duties or skill level of on-site maintenance personnel. Furthermore, to properly avoid issues of liability, it would behoove the association to have damages repaired by a licensed contractor. As you have pointed out, it is also possible that your association's insurance policy will require the use of a licensed contractor.

An additional benefit of hiring a licensed contractor is that in the process of obtaining quotes from several contractors, you will benefit from their professional experience when they come to assess the damage at your condominium. In other words, they have the experience to properly evaluate the total damage, and may discover additional needed repairs that your maintenance crew would not discover. Finally, a licensed contractor will have the knowledge and experience to obtain all proper permits and inspections for the repair process.

Question: My homeowners association has only had one audit since the beginning of the development, which was around 1984. The members of the Association would feel much more secure if an audit was done on a regular basis. How should this be handled? Do the

owners pay for an audit? Does the audit requirement have to be included in the bylaws? **B.M. (via e-mail)**

Answer: Significant amendments to Chapter 720, the statute governing homeowners' associations, were adopted during the 2004 legislative session. The amendments to Section 720.303(7), Florida Statutes, effective October 1, 2004, require certain financial reporting by a homeowners' association depending on the total annual revenues of the association. An association with total annual revenues of $100,000.00 or more, but less than $200,000.00, must prepare "compiled" financial statements. An association with total annual revenues of at least $200,000.00, but less than $400,000.00, shall prepare "reviewed" financial statements. Finally, an association with total annual revenues of $400,000.00 or more must prepare audited financial statements.

An association with total annual revenues of less than $100,000.00 is only required to prepare a report of cash receipts and expenditures. An association in a community of fewer than 50 parcels, regardless of the annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by the Statute, unless the governing documents provide otherwise.

Therefore, the first step in determining what type of financial reporting is required is to determine the association's annual revenues. If your association has total annual revenues of less than $400,000.00 or consists of fewer than 50 parcels, an audit would not be required.

However, the new law also permits 20% of the parcel owners to petition the Board for a level of financial reporting higher than that required by the Statute (for example, an audit). If a petition is presented, the association must hold a meeting of the members within thirty (30) days of receipt of the petition for purposes of voting on raising the level of reporting for that fiscal year. If approved by a majority of the total voting interests, the financial report approved by the members would be paid for using association funds.

The statute also allows the owners to waive the preparation of compiled, reviewed, or audited financial statements if approved by a majority of the voting interests present at a properly called meeting of the Association. If the required financial reporting is not waived, the Association must comply with the financial reporting requirements in the statute based on the total annual revenues.

It is not necessary to amend the bylaws to require an audit if your annual revenues exceed $400,000.00, as an audit will be required pursuant to the statute, unless waived. ⚖

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Mediation Favored Over Litigation

FORT MYERS THE NEWS-PRESS, NOVEMBER 11, 2004

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Notwithstanding constant attempts by a few to paint a contrary picture, few lawyers who handle community association matters are eager to take neighborhood disputes into court. While it is true that court cases generate legal fees, most community association attorneys I know look at litigation as a last resort in resolving disputes. Setting aside ethical and altruistic reasons why association lawyers try to avoid litigation, there are also some practical reasons to do so:

- Lawyers, by their nature, are competitive and do not like to lose cases. Unless an association case is a "slam dunk" (and few which reach the trial stage are), some judges feel that association disputes are petty, not worthy of valuable judicial resources, and may look for a way to rule for the owner. Although this attitude is indeed a minority, every association lawyer can name a judge or two who "hates association cases."

- Many cases, particularly those involving tenants, become "moot" during the pendency of the case. Although there is a provision in the law to get back attorney's fees if the association's lawsuit causes compliance, some cases simply "solve themselves," without the ability for the association to get back its lawyer's fees.

- Very few association cases go to trial, and most are settled in mediation. Even when the association is in the right, it will typically have to "give something" to settle in mediation, which often involves giving up some or all of the attorney's fees it could have recovered against the violator.

- Litigation takes time. Some cases outlast two or three boards, which often have very differing views about rule enforcement and lawsuits.

- Most attorneys who represent community associations for a living rely on ongoing relationships with the association. Assisting clients in resolving cases as quickly and inexpensively as possible usually leads to more work in the long run than leading a client through a case that never seems to end.

For these reasons, and because it is the right thing to do, Florida association lawyers have been leaders in implementing alternative dispute resolution, commonly called "ADR" to address some of the battles that erupt when human beings decide to live together under a man-made set of rules.

ADR was implemented for condominiums over a decade ago. Run of the mill disputes involving pets, parking, document amendments, elections and a variety of other issues are now handled through a state-sponsored arbitration program. As compared to a court case which often takes two years or more to resolve, many arbitration matters are settled in six months or less.

For homeowners' associations, efforts at ADR have taken longer to bring about.

Nonetheless, the new laws effective October 1, 2004, offer great promise for repeating the condominium success story for HOAs. Under the new law, prior to any HOA dispute heading to court, the parties must first submit to mediation, through a trained mediator. Although a slightly

different approach than the arbitration procedure for condominiums, both programs are intended to bring the parties face-to-face more quickly, in the hopes of exploring whether disputes can be settled before the alleged violation is no longer the centerpiece of the case, but rather the parties' egos, or the attorney's fees incurred.

Of course, as a nation of laws which values the separation of powers between branches of government, there will always be need for an independent judiciary, and for some cases to be resolved by a judge or jury. The ADR procedures for both condos and HOAs recognize our constitutional right of access to the courts, but try to cut down on the courts' case-load by providing an alternative forum for the problem to be solved. I recently had the opportunity to participate in a national panel involving the role of government in resolving association disputes. I had the opportunity to learn how these challenges are addressed in places like Nevada, Hawaii, California, Canada, England, and Australia. In my opinion, Florida has, by far, the most advanced ADR requirements in seeking to resolve community association disputes.

As they say, the proof is in the pudding.

So far, the condominium ADR program is perceived as doing its job. The HOA mediation program is too new to be battle tested, but will hopefully serve the same role as the condo program. According to Susan Wilkinson, the Chief Attorney for HOA Mediation and Arbitration, more than thirty-five petitions for mediation have already been filed, even though the law is barely a month old. Wilkinson also reports that the State has certified more than forty mediators, and stands ready to serve its constituents.

For those interested in following the development of the new HOA mediation program, check out the website of the Division of Florida Land Sales, Condominiums, and Mobile Homes at www.state.fl.us/dbpr. Click on the tab called "Homeowners Associations" and stay in the know. ⚖

Q&A

Question: Our condominium association had major damage from Hurricane Charley. We filed a claim with FEMA and a loan application with SBA. We are not sure what percentage of the unit owners we need to approve the loan. We plan to use the common property for collateral. In addition, we found out that one of the buildings was not built properly (the roof was not strapped down at all). Do we have any recourse with the developer, general contractor, or subcontractors? **S.S. (via e-mail)**

Answer: Regarding whether a vote of the owners needs to be taken to approve the loan, you need to review the condominium documents (declaration of condominium, articles of incorporation, bylaws, and amendments thereto). Some documents do require a unit owner vote. Some condominium documents are silent with respect to the association's authority to borrow money. Some specifically give this authority to the board of directors. If the documents do not specifically require a vote of the owners, it is my opinion that the association would have the authority to borrow money, by a resolution of its board of directors, pursuant to Florida's corporation statutes, which state that a corporation has the authority to borrow money.

It is unclear what you mean by "common property" for collateral. In my opinion, an association may pledge certain assessment rights as security for the loan. However, in my opinion, the association may not pledge "statutory reserves" as security for a loan, without prior approval of a majority of the voting interests of the association. Further, the association does not have the authority to mortgage real property as security for a loan, as the association owns no real property (all common elements of the condominium are owned by the unit owners in undivided shares, operated and administrated by the association).

Regarding the building defects, you should discuss with an attorney what recourses you have against

the developers and contractors. In general, the Condominium Act provides that the developer of a condominium shall be deemed to have granted certain warranties. Likewise, the contractor, and all subcontractors and suppliers, are deemed to grant to the developer and to the purchaser of each unit certain warranties. The warranty periods vary in the statute but in general run three years from the completion of the building. The statute of limitations for pursuing warranty claims is typically considered four years from the date of transition of control of the association (commonly called "turnover"). However, this statute can be extended in the case of certain "latent" defects, which are defects not readily observable in the exercise of due diligence. In no case may one party take action against another party for a building that has been certified for occupancy more than fifteen years ago.

If there are latent defects which have been discovered, your best bet is to consult with an attorney who is familiar with construction law. The attorney will typically recommend that you have an engineer review the situation to determine if codes have been violated or if there is a deviation from industry standards of good design or workmanship. The attorney will also assist in review of potential statutes of limitations issues, and also search to determine whether potentially responsible parties are still in business.

Question: Our condominium documents specifically state that the unit owners are responsible for the maintenance, repair and replacement of all exterior doors, including garage doors and gates leading to their specific unit. Our insurance company has advised that the association must insure these items, which we understand. Is it legal for the association to require the owner to maintain, repair or place these doors as stated in our condominium documents? **M.L. (via e-mail)**

Answer: It sounds like the doors and gates you have described are limited common elements. This means that they are part of the common elements, but the maintenance responsibility of the unit owners. Although the condominium documents may require the unit owners to maintain these items, your condominium documents may have different requirements if those items are damaged as a result of a casualty. It is important to look at the provisions in your condominium documents that are generally referred to as "repair after casualty." If there is any inconsistency between these provisions and the general maintenance provisions in the condominium documents, it is my opinion that the repair after casualty provisions would control over the general maintenance requirements. To answer your question specifically, it is legal for the association to require the owners to maintain, repair, or replace the doors, and repair those items after a casualty, if so provided in your condominium documents.

Question: You recently ran an article involving the "Q&A sheet" that a condominium must keep by law. We are told that this sheet must be prepared by an attorney. I can find no such requirement in the Florida Condominium Act. Is what we have heard true?

Answer: Yes. In response to a petition filed by a Sarasota community association manager, Florida's Supreme Court issued a landmark ruling on whether the preparation of certain documents by community association managers (commonly called CAMs) constituted the unlicensed practice of law (commonly referred to as UPL).

The high court ruled that preparation of documents such as claims of lien, notices of commencement, and limited proxy forms constituted UPL. The court specifically found that preparing a Q&A sheet, which is a disclosure-oriented legal document, constituted the practice of law. The court did note that CAMs could update Q&A sheets with administrative information, such as when the assessment amount changes.

UPL is now a felony in Florida. The law is intended to protect consumers against harm arising from the preparation of documents with legal consequences by persons who are not trained nor licensed in the practice of law. ⚖

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Association Financial Reports Due Out Soon

FORT MYERS THE NEWS-PRESS, NOVEMBER 18, 2004

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In approximately six weeks, community associations will be closing the books on another year. Although some associations operate on a customized fiscal year, most associations start their fiscal year on January 1, and end it on December 31.

The law for both condominium and homeowners associations imposes certain obligations on the association to let the members know how the association performed financially during the previous year.

The requirements for condominium associations are found at Section 718.111(13) of the Florida Statutes which provides that within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner.

The type of financial statement required is based upon the association's total annual revenues. An association with total annual revenues of $100,000 or more, but less than $200,000, must prepare compiled financial statements. An association with total annual revenues of at least $200,000, but less than $400,000, must prepare reviewed financial statements. An association with total annual revenues of $400,000 or more must prepare audited financial statements.

Associations with total annual revenues of less than $100,000 are required to prepare a report of cash receipts and expenditures. An association which operates less than 50 units, regardless of the association's annual revenues, likewise may prepare a report of cash receipts and expenditures.

If approved by a majority of the voting interests present at a properly called meeting of the association, an association may waive the reporting requirements. Further, the Board is entitled to prepare statements more thorough than the minimum required by the law.

The law for homeowners associations was amended effective October 1 to impose similar requirements on HOAs. Section 720.303(7) of the Florida Statutes now provides that a homeowners association shall prepare an annual financial report within 60 days after the close of the fiscal year. The dollar thresholds and type of report required is the exact same as the condo law.

If 20 percent of the parcel owners in the HOA petition the board for a level of financial reporting higher than that required by the law, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association must prepare the upgraded report. The condo law does not give this right to unit owners.

Both laws involve similar themes, and contain similar requirements (there are some minor differences). The highlights of both laws include the following:

- **Waiver of the reporting requirements:** Both statutes allow the members of the association to take a vote to waive the reporting requirements, although both condominium associations and HOAs must always produce,

at a minimum, a cash statement of revenues and expenditures. The waiver vote in condos must be taken before the end of the fiscal year. There is no similar requirement in the HOA counterpart.

- **Delivery of the report:** Both statutes provide that the association is not obligated to mail out the report, but only notify owners that it is available free of charge. There are certain procedures in each of the statutes, which are slightly different, that must be followed.
- **Stricter requirements in the documents:** In both condominium and homeowners' associations, the governing documents for the association may impose more stringent requirements than what is required by law. For example, if an association's bylaws require an annual audit, the association must obtain the audit and could only avoid the obligation to do so by amending the bylaws.

For those who are curious about where those monthly or quarterly fees go, you will soon get your chance to find out. ⚖

Q&A

Question: I have recently decided to provide hurricane protection for an inaccessible master bedroom window. My research indicates that the only satisfactory protection for this area is a roll down impact resistant hurricane shutter.

In approaching the Board of Directors, they have indicated that they don't like them and believe they will detract from the aesthetics of the building. Our units face the Gulf of Mexico on the beach. It is my contention that the association cannot deny me these type shutters, but can tell me the color, etc.

The association tells me that a suitable alternative may be to mount the shutters inside of the window. I do not feel that this is in compliance with the Florida Statutes. What is your opinion? L.H. (via e-mail)

Answer: Section 718.113(5) of the Florida Condominium Act provides that each board of administration must adopt hurricane shutter specifications for each building. The board's specifications shall include color, style, and "other factors deemed relevant by the board." All specifications adopted by the board are required to comply with the applicable building code. A board cannot refuse to approve the installation or replacement of hurricane shutters conforming to the specifications adopted by the board.

Therefore, if your board has adopted shutter specifications that meet the applicable building code, it has the authority to regulate the type and manner of installation.

I am not in a position to comment whether one type of shutter style works better than another, or which location is best, that question is more appropriately posed to an engineer.

I would suggest that you ask your association for its shutter specifications and try to work with the board toward a mutually agreeable solution.

Hurricane shutters do mitigate property damage. Conversely, the association has a legitimate interest in preserving the aesthetic ambiance of the property.

Question: Can you explain the procedure for election of board members to master associations (communities with multiple resident associations)? B.S. (via e-mail)

Answer: The procedure depends on whether the master association is composed of all condominium unit owners, or whether the master association includes both condominium unit owners and non-condominium owners such as members of homeowners' associations. The Division of Florida Land Sales, Condominiums, and Mobile Homes recently issued a declaratory statement which held that a master association in which all members are condominium unit owners is a "condominium association" under Chapter 718, Florida Statutes, and must comply with the Condominium Act.

The Division held that a master association that appointed its board members from among the officers of the subassociations (which in this case were all condominiums), violated Chapter 718, Florida Statutes, which requires an election of directors. Unfortunately, the declaratory statement did not specify the procedure for electing master board members.

In my opinion, if your bylaws provide for an appointment system, they could be amended to have the directors elected at large, or elected from the various associations, such that each association would have a representative on the master board, or another method whereby the larger associations would have a higher number of seats on the master board. These amendments should be prepared by an attorney, who can advise as to whether your association is a "condominium association" which must elect its members to the master board.

If your association is not a "condominium association", then the method of electing board members to the master board would be set forth in the bylaws and articles of incorporation of the master association. There is no specific provision in Chapter 720, governing homeowners' associations, that deals with elections of directors. Therefore, your governing documents will control in that case.

Question: Our community consists of multiple condominium associations and a master association that controls the recreational areas, the roads, the clubhouse, and community common areas. The recent storms have presented the need to replace carports. Two condominium associations replaced their carports without consulting each other or informing the overall community association board. The problem is that each association selected a different design. We would like to avoid numerous carport designs. Does the master association have any control over carport designs and/or other alterations to the common elements of the individual condominiums? F.S (via e-mail)

Answer: In some instances, the governing documents for the master association contain approval rights for alterations to the common elements of the subassociations. I have found that in most older communities, developers did not delegate architectural approval rights to "master associations", leaving them primarily responsible for the administration of commonly used facilities (roadways, recreational amenities, and the like).

Conversely, in recent development practice, developers almost always confer approval rights on "master associations", involving the entire community. The modern development theory is that the overall "look" of a master planned community plays an important role in preserving architectural compatibility throughout the development. nswer for your particular community will lie in review of the master association's governing documents and particularly a determination whether the master association is granted architectural approval authority. ⚖

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There are Reasons to be Thankful this Holiday

FORT MYERS THE NEWS-PRESS, NOVEMBER 25, 2004

By Joe Adams

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Thanksgiving Day includes many traditions: stuffing ourselves with turkey, enjoying the company of family, and watching football. Of course, the holiday's roots reportedly go back to our pilgrim ancestors and their ideas about celebrating good fortune and sharing with neighbors.

2004 was not a year of good fortune for Southwest Florida, including its condominium and homeowners' associations. Many of our communities' residents will face a Thanksgiving with no home in which they can entertain family, gorge on turkey, or watch football. In fact, insurance money for alternative housing arrangements is beginning to run out for many who were dispossessed by the hurricanes.

Investors in resort condominiums in areas like Sanibel and Captiva face a Thanksgiving holiday with no guests renting their units to help pay mortgages, taxes, and association assessments. In fact, many can also look forward to empty rooms for the Christmas holidays and the "high season" months thereafter following, while the rebuilding goes on.

Given the historic nature of this year's hurricane devastation, it would be easy to put on a grumpy face and say that there is not much to be thankful for. However, the truth of the matter is that adversity brings out the best in good people, and our area is blessed with many good people. Here's just a few who deserve our thanks:

- **Association Boards:** Service on an association board can be a thankless task in normal times. Making major decisions about how to put the pieces back together after a calamity of this magnitude can be daunting. As the old saying goes, you cannot please all of the people all of the time. Just try to please everyone when you are dealing with their most significant financial investment. Over the past several months, I have had the privilege of working with many association volunteers who have proven themselves more than capable for the challenge. I can name many people who, without an expectation of compensation or congratulations, spend most of their waking hours with association disaster recovery. We should all be thankful for them.

- **Homeowners:** In almost every hurricane-ravaged community I have worked with, boards have noted tremendous patience, support, and appreciation from the community's home owners. While there are always a few "me first" people in any setting, most have shown great support for their boards, in items ranging from rebuilding votes to the prompt payment of necessary assessments for damage repair. We should all be thankful for them.

- **Community Association Managers:** Whether employed as an on-site manager, or assigned to an account through a property management company, association management is a tough job in normal times. In many cases where there is high absentee ownership or seasonal occupancy, the manager is the "eyes and ears" for all of the owners. Of course, most of the property owners were in an understandable state of panic after the hurricane hit, and have looked to the managers for information and assistance. Often for no additional compensation, so many managers have stepped up in a time of need. We should all be thankful for them.

- **Mother Nature:** As strange as it may sound, I think it can be said that our area was lucky that we only suffered the damage we did. First, Florida's three major hurricanes which followed

Charley all had a bead on Southwest Florida at some time or other. Thankfully, they all chose to go somewhere else. As to Charley itself, we can be thankful that the storm's fast-moving nature prevented the significant flood surge predicted by many scientists. Although the damage received was certainly bad enough, a ten or fifteen foot storm surge through populated areas of Southwest Florida would have increased property damage, and perhaps loss of life, several-fold.

While Charley's scars will be seen for some time to come, we will ultimately build back better than we were before. We can all be thankful for that. ⚖

Q&A

Question: We have a large condominium association. Our annual meeting takes a very long time because of the length of time it takes to open the election envelopes and verify the information on them. Is there anything we can do to speed up the process? L.U. (via e-mail)

Answer: The Division of Florida Land Sales, Condominiums, and Mobile Homes, has adopted a rule allowing an association to verify outer envelope information in advance of the meeting. The rule allows the board of directors to appoint an "impartial committee." The appointment of the impartial committee should be at a properly noticed meeting of the board. The impartial committee can meet prior to the annual meeting, but on the same date as the annual meeting. The meeting of the impartial committee to verify outer envelope information must be noticed 48 hours in advance and must be open to all unit owners. The term "impartial" shall mean a committee whose members do not include any of the following or their spouses:

1. Current board members;
2. Officers;
3. Candidates for the board.

At the committee meeting, the signature and unit identification on the outer envelope must be checked against the list of qualified voters. The voters must be checked off on the list as having voted. The ballots, however, cannot be opened and counted until the annual meeting.

Question: Our condominium association's recorded documents are silent with regard to whether owners or tenants may have pets. The board has adopted a rule stating that tenants may not have pets. Is this valid? T.G. (via e-mail)

Answer: First, you must look at your condominium documents to determine whether the board of directors is authorized to adopt rules and regulations involving use of the units (apartments). Some condominium documents allow the board of directors to make and amend rules and regulations. Others require rules and regulations to be approved by the owners.

If the board has the authority to adopt rules and regulations regarding unit use, a board-enacted rule will be considered valid if it does not conflict with either an express provision of the declaration or a right "reasonably inferable" therefrom.

Also, the rule must be reasonable. If the recorded condominium documents are silent with regard to pets, then a rule allowing owners to have pets, but not tenants is valid probably if the Board has a reason to support the rule. The issue has not been addressed by the courts, but similar rules have been upheld in the state's condominium arbitration program.

The condominium statute also requires written notice of any board meeting at which amendments to rules and regulations regarding unit use will be considered to be mailed or delivered to the unit owners and posted conspicuously on the condominium property not less than fourteen (14) days prior to the board meeting.

Question: My condominium association says that I have to give them a key to my unit in case they need to go into my unit while I am not there. The condominium documents also say that I am supposed to give a key to the association, but I am not sure if they have the right to require a key or go inside of my unit without my permission, or while I am not there. E. O. (via e-mail)

Answer: The provision in your condominium association's documents that requires you to provide a key, as well as the Association's request that you provide the key, are both valid. Section 718.111(5) of the Condominium Act states: "the association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units."

As you can see, the Condominium Act specifically gives the association the irrevocable right to access your unit for the purposes described in the referenced section. The association's requirements that you provide a key are valid, and the statute does not require that you be present, or give permission, for the association to enter your unit for the purposes stated in the statute. Of course, the association must exercise its right of entry in a responsible manner and take steps to ensure that the key you have given is protected from unauthorized use. ⚖

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State Needs to Address Mold Issue

FORT MYERS THE NEWS-PRESS, DECEMBER 2, 2004

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A natural occurrence since the dawn of time, it is known by many names. Once considered best attacked with a bottle of bleach, its mere mention strikes fear in the heart.

Mold.

According to the Center for Disease Control, there are more than one thousand types of mold which have been found in homes in the United States. Mold is said to thrive in warm, damp, and humid conditions, making Florida one of the most obvious states for mold issues.

After a Texas jury awarded $32 million dollars to a homeowner who had developed illnesses allegedly caused by household mold, a cottage industry was born. From lawyers who advertise for plaintiffs to mold detectives wearing suits that look more appropriate for a mission to the moon, mold has become a multi-billion dollar business.

Of course, insurance companies do not need to get hit on the head too many times with the same stick before they catch on. For the past several years, many insurance companies have been drastically limiting coverage for mold claims in insurance policies, including commercial policies that are written to protect condominium associations which insure most structural aspects of condominium buildings.

At this point in time, it remains to be seen how the insurance industry will treat claims with a mold component when the claims arise from the 2004 hurricanes. In areas like Sanibel Island, for example, roof damage permitted water intrusion. The island was quarantined for a week and most parts were without power for two weeks or more. It rained almost every day after Hurricane Charley. The end result was that virtually every building which sustained damage had some element of mold damage.

Since few (if any) condominium associations have settled their post-Charley insurance claims, the jury is still out on how benevolent or draconian the State's insurers will be when addressing mold issues in post-hurricane reconstruction.

In many cases I have seen, associations tore out wet wallboard in the aftermath of the storm to prevent the spread of mold. In most cases, the insurance companies seem willing to provide coverage. Many insurers seem to agree that a piece of damaged drywall that also happens to have some mold on it, is still damaged, and is therefore covered by insurance.

However, I have also seen a few adjusters who seem poised to wield the "mold exclusion" as a sword, which could have a significant impact on rebuilding costs in some associations.

As was recently reported in the media, Governor Jeb Bush has empanelled a blue ribbon task force to examine the challenges facing Floridians after the 2004 hurricanes. A special session of the Legislature is also a frequent topic of discussion. Undoubtedly, the 2005 Regular Session of the Legislature will be dominated by disaster recovery issues.

In my view, one of the most critical needs for legislative assistance is to provide relief from the mold epidemic. Condominium associations are particularly vulnerable to claims, as they are often seen as well-insured deep pockets. A good place to start would be to make sure that associations can readily and affordably purchase insurance coverage to manage liability exposure. ⚖

Q&A

Question: Our homeowners' association recently held a board meeting to appoint our nominating committee. Unfortunately, the meeting was held during the day when many of our members work. We feel that the board hand-picked the nominating committee, and had the decision made in advance. There are current board members on the committee. We do not feel that our community is being represented. Do we have any recourse in changing the committee? **J.W. (via e-mail)**

Answer: There is nothing in the law about when board meetings need to be held. The board should try to accommodate as many members as it can. There may be some who would not like to go to evening meetings. Ask your board if it can hold at least a certain percentage of its meetings during non-work hours.

If your HOA's bylaws permit the board to appoint a nominating committee, there is probably nothing you can do to change its composition. Remember, any HOA member may nominate himself for election from the floor at the annual meeting. Although more difficult in many cases, floor nominees can solicit proxies and get elected.

I think that nominating committees are susceptible to abuse by a board that wishes to perpetuate its power, and prevent those they see as "trouble makers" from getting elected to the board.

For that reason, when I served on the Governor's HOA Task Force in 2004, I recommended that HOA elections be similar to condominiums, where everyone wishing to run for the board would automatically be entitled to have their name placed on the ballot. To my surprise, that reform to the law was not supported by a majority of the Task Force, including the self-described "consumer advocates."

Question: I am a community association manager. What is your opinion on posting minutes of association board meetings on the community's bulletin board. **T.R. (via e-mail)**

Answer: Although it is not uncommon, I think it is better to make minutes available either by request, or mailed to all owners, or in a secure setting such as a community website.

Although most association minutes are innocuous, there are occasions where there may be "dirty laundry" aired at a board meeting, or where statements are made that someone claims are defamatory.

Minutes posted for outsiders (guests, vendors, etc.) to see would probably enjoy less organizational privilege than those published only to members.

Question: Hurricane Frances caused enormous damage to many of the units our condominium. We have now discovered that Florida law changed regarding insurance coverage and that the association no longer insures many of the items that our documents say the association is supposed to insure. Is the association responsible to inform owners of the changes in our insurance policy? Many owners have no coverage, or in our case, what was originally sufficient no longer is. Did the State of Florida intend to punish condo owners like this? Our board cannot or will not answer our questions. **S.K. (via e-mail)**

Answer: In my opinion, the association is under no affirmative obligation to inform owners of changes in the law, or the association's contracts, including insurance. If you carry personal insurance coverage, your policy is probably called an "HO-6" policy, and is supposed to pick up all damage not covered by the association's policy. If anyone has an affirmative duty to make sure your insurance is up to date, it is most likely you, as the owner of the unit.

I do not think that the changes to Florida's insurance laws for condominiums, which became effective January 1, 2004, were intended to "punish" anyone. The changes were intended to bring consistency in adjusting claims between different condominiums, regardless of the wording in their documents (or interpretations thereof), when the documents were written, and the like. I do think there are some glitches in the recent changes, which will probably be accentuated after adjusting this year's hurricane losses.

You state that many of your owners are uninsured. In my view, that is a huge mistake, and also a disservice to the entire community. While some can afford to "self-insure", many cannot. What then happens is that after a majority calamity, many cannot afford to rebuild the uninsured segments of the property or pay association assessments for rebuilding common property. ⚖

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Association Honors are Handed Out

FORT MYERS THE NEWS-PRESS, DECEMBER 9, 2004

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There are approximately two million condominium residents in the State of Florida. Since homeowners' association populations are not tracked by the government, there is no reliable count on the number of HOA residents in Florida. Most experts place the HOA resident population at several million. Many estimate that at least forty percent of residents of single family dwellings in Florida belong to some type of mandatory membership community association.

Community association management and operations in Florida is a multi-billion dollar industry. Those who provide goods and services to associations include accountants, attorneys, insurance agents, property managers, telecommunication providers, landscaping contractors, engineers, surveyors, computer software vendors, banks, and virtually every type of construction contractor, including general contractors, roofers, painters, restoration companies, disaster response companies, and many more.

The development of community association laws and practices involves balancing the competing interests of many parties. Balance must be struck between consumer rights and a developer's ability to engage in lawful development and sales activity. Balance must be achieved in disclosure laws and the rights and obligations of real estate agents. There remains an ongoing debate about the relationship between community associations and local governmental entities, where association services overlap governmental services, thus resulting in potential double taxation of community association residents.

Of course, there is no greater focal point on interest-balancing than in the area of homeowner rights and responsibilities versus the powers and duties of members of their boards of directors.

All of the professions and trades which supply goods and services to community associations have their own trade groups to address matters peculiar to their industry. Insurance agents have their associations, attorneys have their Bar committees, contractors have industry trade groups, and so it goes for all who do business within the world of community associations.

Unlike providers of goods and services who have a profit motive, associations themselves typically do not have the financial or logistical resources to speak as a single voice.

Recognizing the need for such an entity, the Community Associations Institute was formed in Alexandria, Virginia some thirty years ago. CAI has 55 chapters in the United States, with 7 chapters in Florida alone.

Because of our heavy condominium and HOA development, the local chapter of CAI has been one of the country's most stable and well-performing chapters. The local chapter, known as the South Gulfcoast Chapter, boasts some 385 members, including 180 associations and 175 managers.

The Chapter's general focus is on education of community association members, both owners and board members, as well as manager education. The Chapter hosts numerous educational seminars throughout the year, and is the contract provider with Florida's Department of Business and Professional Regulation for condominium education.

Each year, the South Gulfcoast Chapter of CAI honors those who have stood out in the local community association scene. On December 4, 2004, the Chapter hosted its Annual Awards Dinner, and recognized the following people for their contributions:

- **Volunteer of the Year:** The members of the Chapter's Governmental Affairs Committee were feted for devoting countless hours to efforts involving condominium and HOA legislation. Included on the committee are local attorney Richard D. DeBoest II and Community Association Manager Bill White.

- **Manager of the Year:** This year's award was given to Kyle Kinney of the Pelican Bay Foundation in Naples. Kinney was recognized for displaying a consistently high level of professionalism, diplomacy, and work ethic in representing the interests of some 14,000 families in the Pelican Bay Development.

- **Board Member of the Year:** Pelican Bay was well represented in 2004. Honors for board member of the year went to Pelican Bay Foundation President, Gerhard Seblantigg, in recognition of outstanding service to his Community.

- **Vendor of the Year:** Co-awards were given to Robert L. James on behalf of R.L. James, Inc. and Chrisann O. Folk on behalf of Time-Warner Cable.

- **Legislator of the Year:** Last but not least, a member of our local legislative delegation received CAI's statewide award for "Legislator of the Year." This year's award went to J. Dudley Goodlette (R-Naples), for his tremendous efforts during the 2004 Legislative Session. Among Representative Goodlette's many efforts on behalf of community associations in 2004 was key assistance in the passage of a bill which made it easier for community associations to purchase automatic external defibrillators, by providing greater legal immunity for associations. Representative Goodlette's efforts will likely have a direct hand in saving someone's life some day.

Associations, managers, board members, homeowners and vendors interested in CAI membership should contact the Chapter's Executive Director, Bob Podvin, at 239-466-5757. ⚖

Q&A

Question: Our condominium association bylaws say that we can have between three and nine board members. Is it true that the Florida Statutes says that if a specific number of board members is not spelled out, the number of board members must be five? J.S. (via e-mail)

Answer: Chapter 718 provides that the bylaws are required to describe the form of administration of the association, including the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any of the officers and boards. The statute goes on to state that in the absence of such a provision, the board of administration shall be composed of five members, except in the case of a condominium which has five or fewer units. An arbitration decision decided by the State's Division of Florida Land Sales, Condominiums, and Mobile Homes, held that if the bylaws only provide a range of numbers, then the number of board of directors must be set at five. However, the arbitrator indicated that the bylaws could be amended to provide for a specific number other than five or a procedure for setting the number of board members. For instance, some bylaws state that the board of directors will be composed of a number within a certain range, but the number would be determined either by the board of directors or by the owners. In that case, whatever number is set by the board or the owners would control.

Question: In a recent article, you stated that with respect to financial reporting requirements, the governing documents for the association may impose more stringent requirements than what is required by law. Our bylaws state that "in accordance with Section 718.111(13) of the Condominium Act, not later than sixty (60) days after the close of each fiscal year, the board as per the Florida Statutes shall distribute or otherwise make available to the owners of each unit a report showing in reasonable detail the financial condition of the association." Am I correct in concluding from your article that the sixty days in our bylaws prevails as a requirement for the statement to be available? B.M. (via e-mail)

Answer: The language in your bylaws refers to the requirement in the statute prior to it being amended a few years ago, that required the financial report or financial statement to be provided to the owners

within sixty days following the end of the fiscal year or calendar year or annually on such date as otherwise provided in the bylaws of the association. It is unclear from the wording of your bylaws whether it was the intent to make the deadline consistent with the statute as amended. You should also look at the amendment section of your bylaws to see if it incorporates changes to the statute. If so, the new (more liberal) deadlines in the statute probably apply. If not, you are likely stuck with the 60 day deadline.

Question: I am having a difficult time with my homeowner's association as each and every "discussion" has taken place via e-mail. In fact, the board has not once voted on any issue or had any discussion on issues. Our meetings are mainly proclamations of decisions already made by the board. I am assuming that the board is discussing items without a quorum (one board member talks to another, and then to the other, etc.). I have scoured the Florida law and assume it has not caught up with the technology, but I may be wrong. I would appreciate any help you could give me. K.L. (via e-mail)

Answer: Although board members can certainly communicate with each other via e-mail (as well as in person or over the phone), the problem arises when e-mail is used to conduct board business instead of holding a properly noticed board meeting, or to decide the issues in private prior to an official board meeting. Board meetings must still be noticed, must be open to the owners, and minutes must be taken (and retained as official records of the association).

The allure of using e-mail as a means of communication and decision making between board members is evident. E-mails are quick, easy, and convenient.

E-mail cannot be used as a means to circumvent the requirements in the statute to make decisions required to be made by the board at properly noticed board meetings. However, there are also cases where a decision requires executive action (through the president or manager) and not formal action of the board. In such cases, I think it is acceptable for the president or manager to keep the rest of the board informed by e-mail, and to solicit their opinions in the same manner. Obviously, there is a fine line and a potential for abuse. This is one area where the law needs to catch up with technology.

Question: I live in a private golf and country club that is operated by a master homeowners association. Can the board refuse to reveal the salary of the employees of the club, including the Club Manager and Grounds Superintendent? M.M. (via e-mail)

Answer: The law was changed for HOAs governed by Chapter 720 effective October 1, 2004.

Prior to October 1, only those items specifically mentioned in the statute were considered "official records" of the association. Accounting records were amongst the "official records" defined in the old law, with some debate as to whether payroll records would be included.

The change to the law substantially broadened the concept of "official records" in HOAs, and basically included all records of the HOA as "official records", unless subject to one of the enumerated exceptions in the law.

One of the enumerated exceptions is employee records and personnel records, which are not available for inspection. I happen to have been the draftsman of this proposal on behalf of the HOA Task Force, and can tell you that it was intended to protect employee privacy rights. In my opinion, the exclusion applies to salary records, and they therefore are not available to inspection by Club members, assuming you are in an HOA governed by Chapter 720.

Conversely, if your association is a "master condominium association" governed by Chapter 718, there is no similar exemption in the law and payroll records would be available for inspection. ⚖

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Association Survey May Open Eyes

FORT MYERS THE NEWS-PRESS, DECEMBER 16, 2004

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Each year, Florida's 160 Legislators (120 Representatives, 40 Senators) are bombarded with requests to support or oppose a broad-ranging spectrum of legislative proposals.

Within that mix there are perennial efforts to change the Florida laws affecting community associations: condominiums, homeowners' associations, cooperatives, and resident-owned mobile home parks.

Although most legislators do rely on paid lobbyists to help winnow the ideas, there is no doubt that the majority of legislators most value the grass roots opinions of their constituents, and the organizations which the constituents form to help convey their message.

Since many of the arguments made about issues facing community associations and influencing its legislation are anecdotal (such as what community association residents "want", what they "like", what they "support", etc.), it is easy for someone with a legislative agenda to claim they "speak for" someone else, although that "someone else" might be surprised to learn that news.

Recently, the Law Firm of Becker & Poliakoff, P.A. (which is the firm where I have been employed for nearly eighteen years) conducted a survey of "association issues." The survey was conducted under the auspices of the firm's Community Association Leadership Lobby ("CALL").

CALL's website and internet updates are available to the Firm's 4,000 community association clients. Approximately 2,000 distinct e-mail users have participated in CALL since its inception about a year ago, mostly constituting board members, non-board member homeowners, and community association managers involved with these communities.

Contrary to the drum-beat of some pundits, including various web-based association anarchists, the survey's 751 respondents (only half of whom are current association board members) imparted some interesting information and opinions:

- **Occupancy Trends:** Year-round residency is reported by most owners (65.8%) surveyed, with the remaining one-third constituting traditional "snow birds" and investor owners who rent out their property. Surprisingly, 91% of the respondents do not make their property available as a rental during the year. Two-thirds of the survey's respondents were in the 50-64 age range, and approximately half of them were work at least part-time, even if "semi-retired." A full one-third of respondents engage in work-related activities from an office in the home.

- **Reasons for Purchasing in a Mandated Association:** Ease of maintenance and physical amenities top the list. Two-thirds of the respondents also cited personal and physical security as a factor in their purchase decision.

- **Unit Owners' Concerns:** The appearance of the neighborhood and the manner in which the Association maintains common property are the most important concerns to community residents. Following in a close second is Board member integrity, with some emphasis on the perception that certain Board members place their own well-being above the interests of other residents.

- **Enforcing Rules and Regulations:** 99% of the respondents believe that associations should strictly enforce community rules. There is some divergence over whether the board should be able to grant exceptions, with one-third feeling that no exceptions should be granted under any circumstances, and two-thirds feeling that a board should be given discretion to bend the rules in the case of a hardship. 86% of the respondents supported fines as a means of enforcing community rules, and three-fourths of the respondents supported an association's right to foreclose a lien for non-payment of assessments.

- **Financial Concerns:** Affordable insurance is the number one financial worry of community associations and their residents. Many respondents also mention the need for more clarification between condominium associations' master insurance obligations and where the insurance coverage for the individual unit owner kicks in. 8 out of 10 respondents expressed concern about the need for adequate reserve funding, and related problems that occur when special assessments are used in lieu of reserves, particularly in communities where some owners may not have the financial strength to pay large assessments on short notice.

- **Demographics:** Predictably, the survey shows the largest group of participating associations in the Dade-Broward-West Palm Beach area, with Southwest Florida (Lee, Collier, Charlotte, Sarasota and Manatee Counties) and Central West Florida (Clearwater/St. Petersburg/Tampa) accounting for most of the remaining respondents.

Surprisingly (at least to me), only slightly more than one-half (56.4%) of the respondents reported having an on-site manager or management company, with the remainder of the associations being primarily self-managed by the Board of Directors.

For those interested in the nitty-gritty, the entire survey is available on-line at http://www.callbp.com.

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Q&A

Question: Is it legal to borrow funds from a reserve fund for one condominium, to pay for capital replacements in a common area which several condominiums use? The association plans to repay the reserve fund over a twelve month period. R.K. (via e-mail)

Answer: It depends. The Florida condominium law requires reserve funds to be set aside for roof replacement, building repainting, pavement resurfacing, and any other item of deferred maintenance or capital expenditure exceeding $10,000.00. The association must set up "straight line" accounts for each required reserve item, where the amounts to be reserved each year are computed by a formula which takes into account the remaining useful life of the asset, its replacement cost, and the money currently on hand for the item.

The unit owners may vote to waive or reduce the required funding of reserves in any given year, by a majority vote.

Reserves, once set aside in the above-described manner, cannot be used for unscheduled purposes. There are two exceptions to this rule.

First, by majority vote, the association can vote to permit the use of reserves for purposes other than that for which they were set aside. If such a vote was taken, unless the owner's vote required the reserves to be repaid, there is no requirement to do so.

The other exception to the rule involves associations who use the so-called "pooling" or "cash flow" method of reserves. In those situations, all items within the "pool" are proper for capital expenditures from the reserve fund. However, it is unlikely that common areas serving several condominium associations are within the pooled reserve, if your association has in fact set up cash flow reserves.

Therefore, the short answer is that unless your owners have voted to permit the board to use reserves for a purpose other than that for which they were set aside, the board should not do so.

Question: Did the 2004 Florida Legislature pass any legislation dealing with the effects of the Marketable Record Title Act ("MRTA") on covenants and restrictions of a homeowner's association? I live in a community which has deed restrictions dated January 17, 1974. The homeowners' association is voluntary. If the restrictions have expired because of MRTA, is there anything that we can do? D.H (via e-mail)

Answer: The Marketable Record Title Act ("MRTA") found at Chapter 712 of the Florida Statutes, is primarily intended to facilitate real estate transactions, by eliminating stale claims against real property titles. The general yardstick for MRTA extinguishment is thirty years from the "root of title." Florida courts have held that covenants and restrictions are subject to MRTA extinguishment. Therefore, if your covenants and restrictions are more than thirty years old, you may have a MRTA problem. You should discuss with counsel whether the restrictions in your community are in fact extinguished by MRTA.

Prior to the 2004 Legislative Session, if a community's covenants and restrictions were extinguished by MRTA, there was nothing that could be done to "revive" them. During the 2004 Legislative Session, the Legislature adopted amendments to Chapter 720, Florida Statutes, the Homeowner's Association Act. You can find this legislation at Section 720.403 through 720.407, Florida Statutes. This new legislation provides a procedure for "reviving" extinguished covenants. Communities should not attempt to "revive" their covenants and restrictions without the assistance of a qualified attorney.

Voluntary homeowner's associations are not governed by Chapter 720. Therefore, there is some question as to whether a voluntary homeowner's association can use the provisions of the new law to revive covenants and restrictions extinguished by MRTA. You should discuss this issue with counsel as well.

If your covenants have not yet been extinguished by MRTA, as long as your association has the power to enforce restrictive covenants, the board of directors may vote to preserve the covenants against MRTA extinguishment. "Preservation" is a different issue than "revival."

It is my understanding that there may be an effort to amend Chapter 712 to also permit voluntary associations, which have been assigned or otherwise have enforcement rights, to also take advantage of the 2004 amendments to the law.

Question: I reside in a condominium consisting of 21 units. All of the units have been sold. I was told that our association would be able to elect a board of directors to run our own affairs. Recently, we were told that the developer and his lawyer are "working it out." Shouldn't we have formed an association by now? What are our options? H.H. (via e-mail)

Answer: The Florida condominium statute provides that unit owners other than the developer are entitled to elect a majority of the board of directors after varying "triggering events" occur. One "triggering event" is three months after the sale of ninety percent of the units that will ultimately be operated by the association. The developer has 75 days from the "triggering event" to call the meeting.

If the developer fails to properly notice the meeting for transition of control (often called "turnover"), any unit owner is entitled to call the turnover meeting. I would recommend that you organize your owners and have an attorney review the matter. If all of the units have been sold, you are entitled to elect the board, or soon will have the right to do so. If your developer does not call the meeting in a timely fashion, you have the right to do so.

Question: I am a board member of our homeowner's association. The board is considering amending our governing documents (declaration of restrictions, articles of incorporation, and bylaws) to make them easier to amend. All the documents currently require a two-thirds votes. Is this legal? A.G. (via e-mail)

Answer: In my opinion, there is nothing in the law that would prohibit such an amendment.

In fact, many associations seek to make their documents easier to amend. Many HOAs, in particular, have tremendous voter apathy problems. I typically recommend that governing documents require a super-majority vote amendment (two-thirds or seventy-five percent), but that the voting be based

on those who actually vote (in person or by proxy) at a properly noticed meeting of the association, and not the entire population. That way, people who choose not to vote are not effectively voting "no" on measures the participating owners may wish to see passed. ⚖

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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.

Holiday Bonuses Raise Issues for Some

FORT MYERS THE NEWS-PRESS, DECEMBER 23, 2004

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The holidays and year's end involve many customs in business and society. One such custom is the so-called "Christmas Bonus."

Unlike most businesses, community associations confront unique issues when addressing the issue of bonuses, which occasionally create a stir within the community, and unfortunately, sometimes create bad feelings with employees when handled improperly.

The most straightforward, but occasionally controversial aspect of bonus administration is between the board of directors and the association's employees. In such situations, it is like any other employer-employee relationship. The employer (association), through its board, determines if a bonus program is an appropriate management tool. In cases where a bonus program exists, bonuses are given to employees both in recognition of past contributions, and as an incentive to do a good job in the future.

One challenge that is somewhat unique to associations involves the fact that an association must budget for its planned expenditures. When a management level employee is involved in developing the budget, which is often the case, this results in the potential recipient of a bonus having a hand in determining how much should be set aside. This problem is usually addressed by the manager limiting his or her input into bonus budgeting for other staff members, with the board determining whether allowance needs to be made in the budget for the executive manager's bonus.

Another challenge involves the fact that because the budget is usually developed a year in advance of the possible bonus, there is no way to determine how the board in office at bonus-time will feel about the employees' performance, and whether (or in what amount) bonuses will be paid. This can create management issues because when a set amount has been budgeted for a bonus, human nature is that the employee comes to count on it in making their personal financial plans.

Another difficult issue which often arises in the association context involves cases where owners within the community also wish to personally acknowledge the efforts of association employees. On-site managers, custodial employees, maintenance personnel, and association office staff are the typical types of employees who receive private gifts from the members.

When individual home owners bestow such gifts directly upon those association employees they feel deserving, problems can arise for the association. This is especially true when in situations where those giving the gifts are rewarding personal services the employee has done for the individual, rather than their good work for the association, where associations permit employees to do "off-duty" work for individual owners. Management problems can arise in these circumstances when concerns exist over whether the employee is performing personal owner services on company time.

In my experience, most associations do not have a policy regarding individual owner gifts to employees. However, some associations have established guidelines limiting, prohibiting, or somehow controlling gifts from owners to managers and employees.

Although an association probably cannot legally prohibit an association member from giving a gift to whom they please, the association could, through ap-

propriate personnel means (written agreement, employee manual, etc.), prohibit employees from accepting gifts from individual owners. Unfortunately, this policy creates problems of its own, making the board seem draconian, or like Scrooge.

Some associations try to strike a balance by permitting home owners to contribute to a voluntary fund (which is additional to any bonus program the association may or may not have) and then having the anonymous contributions remitted to the employee through the association, or where more than one employee is involved, permitting the board to split up the pot.

Between the financial woes brought by the 2004 hurricanes and tourist industry worries, many local employers have made drastic cut-backs. Many workers who service community associations are worried. For those who can afford to do so, sharing a bit of your good fortune with those who help make your life easier is a nice thing to do, provided that you do it within your community's guidelines. ⚖

Q&A

Question: Our condominium has a unit that is owned by five families. None of them reside in the unit, but they all live in the vicinity. What can the association do to protect abuse of parking spaces and the use of common areas by a large number of people. Is there anything the association can do to prevent this type of occurrence or ownership in the future? S.W. (via e-mail)

Answer: Whether your association can address current problems will depend on the language found in your declaration of condominium and rules and regulations.

Most "boilerplate" condominium documents contain vague references to "single family" use requirements for condominium units. In the absence of a well-drafted definition, just about any use that is not commercial will pass the "single family" test.

If your board is given the authority to adopt rules and regulations, then the board could look at rules, which it would need to apply to all owners, restricting the number of parking spaces a single unit could use, the maximum number of people from one unit who could use a common area facility at the same time, and the like.

The situation you have described is known as "fractional ownership", and is becoming an increasingly popular means of property ownerships in desirable resort locations, such as ski areas, or here in Southwest Florida.

In my opinion, the association could amend the declaration of condominium to prohibit future fractional ownership. For example, a common clause would require that units be owned by a single individual or married couple. Since most associations wish to permit flexibility for estate and tax planning, artificial entity ownership is usually also permitted in those clauses, including trusts, corporations, family partnerships, and the like. In cases where ownership of the unit is through an artificial entity, the owners are required to designate a "primary occupant" who must be a natural person.

If your association adopts such an amendment to the declaration of condominium, which your attorney should be able to assist with, you will be able to avoid a repeat or escalation of the concerns often affiliated with fractional ownership.

Question: In one of your recent columns, you stated your opinion that associations should not make their meeting minutes available to the general public. You stated that you felt it would be appropriate to post minutes in "a secure setting, such as a community website."

Our community has a website that requires a user name and password to get past the home page. The user name and the password is the same for everyone in the community, and has been published in our newsletter. Would you consider that a "secure community website?" R.H. (via e-mail)

Answer: Yes.

Although the site is certainly not "secure" in the eyes of a computer hacker, the association has made reasonable efforts to ensure that the general public

cannot access the content, which I believe would be sufficient to retain any organizational privilege claim that may otherwise exist.

Question: The board of directors for our condominium association devotes countless hours to helping protect our investment. Most residents feel that our board does a marvelous job. We are discussing whether to reduce or waive the monthly condo maintenance fees for those who serve on our board. Is this legal? J.T. (via e-mail)

Answer: It is legal, although not something I would do lightly.

First, the association needs to review its bylaws. The Florida condominium statute states that directors serve without compensation unless otherwise provided in the bylaws. Most bylaws provide that directors serve without pay, but are entitled to reimbursement for out-of-pocket expenses (for example, if a director has to make a long-distance telephone call involving association business). Most attorneys write bylaws this way so that if the directors are going to be paid, it takes a conscious decision by the unit owners to authorize pay, that is through the bylaw amendment procedure.

Although I am not aware of any court cases directly on point, I also think that once directors start getting paid, they may be held to a higher standard of care, and possibly take on more liability than is the case with volunteer board service.

Finally, if the functions performed by the board for compensation also constitute acts which involve "community association management", there is also a question whether the directors would need to become licensed as managers under Chapter 468 of the Florida Statutes. ⚖

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Resolutions Can Assist Associations

FORT MYERS THE NEWS-PRESS, DECEMBER 30, 2004

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This column was written and first published in 2003, and received more comments than any other column I have written in ten years.

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.

- 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. ⚖

Q&A

Question: I live in a condo located in the Florida Panhandle. Our area was hit very hard by Hurricane Ivan. My personal condominium unit (which is on the building's third floor) sustained little damage. However, the top floor and the ground floor of the building were extensively damaged. Just as I was getting ready to move back in, the association turned off the power to the building and also turned off the water. Apparently, the contractor who is performing the repair work has threatened to walk off the job if any residents move back into the building. We are told that the work may take up to six months. I am at a loss as to what to do. In am told that I cannot get alternative living insurance and do not qualify for aid. What is your opinion? N.S. (via e-mail)

Answer: Your story is, unfortunately, not uncommon.

The Florida condominium law does not contain much in the way of guidance as to the scope of a board's authority when dealing with a calamity of this magnitude.

In my opinion, if adequate facts exist to justify the association's decisions, a court would be likely to uphold the board's ban on occupancy of the building. Although your particular apartment may be habitable standing alone, you must go to and from the apartment, which can present dangers with heavy construction going on.

I would recommend that you ask the board to formally declare the units uninhabitable and unsafe for occupancy. Your insurance company may then take a more favorable view of that situation, and you should also reinvestigate whether federal assistance may be available.

Question: I live in a subdivision with about sixty homes. We have a voluntary association which administers one common area, a boat basin. Our deed restrictions were recorded in 1967 and our association has been inactive for a number of years. What would be involved in making our association active? B.J. (via e-mail)

Answer: The first thing you should do is to check to see if your association is still an actively registered corporation with the Division of Corporations. You can check by going to the web at www.sunbiz.org.

If the association is not active, it can be reinstated by paying past years' filing fees and probably an administrative penalty of a couple hundred dollars.

You should also look at whether your deed restrictions have been extinguished by Florida's Marketable Record Title Act. Restrictions recorded in 1967, unless properly preserved or recited in individual transactions, may well be extinguished by MRTA.

If your association is voluntary, you cannot make it mandatory without unanimous approval of all members.

Some associations in your situation look at creating special taxing districts to assist in maintaining commonly utilized facilities, such as your boat basin. This may also be a viable option for you. Good luck.

Question: Could you please explain to me the rationale for the recent change to the Florida Statutes, Chapter 720, regarding employee records. The new law states that association members do not have access to an employee's employment and personnel records. Isn't the association the employer? T.W. (via e-mail)

Answer: Prior to the new law taking effect (which was October 1, 2004), HOA members were severely limited by the law in terms of what records they had the right to inspect. The intention of the change in the law was to provide home owners with much broader inspection rights, similar to what exists for condominiums.

However, it was felt that certain types of records are normally considered to enjoy some element of privacy, such as an employee's personnel records, or

using another example, health insurance claims the employee may have filed. For this reason, employee records were not made available to inspection by members.

The association members are not the employer, the association is the employer. The executive officers of the association would, for proper purposes, have access to these records.

Question: I recently became a part-time resident in Florida, and love it. I am thinking about running for my condominium association's board. However, one board member advised me that they have a policy which states that an owner who wishes to run for the board must agree to stay in residence year-round. This does not seem right to me. What is your opinion? D.B. (via e-mail)

Answer: In my opinion, the board's policy is invalid and unenforceable.

The Florida Condominium Act states that "any unit owner" is eligible to run for the board. There are only two recognized limitations on one's ability to run for a condominium association board. The first involves convicted felons who have not had their civil rights restored. The second exception involves associations where term limits are imposed by the bylaws. Florida's agency which governs condominiums has upheld term limits. Other restrictions (including residency requirements, requirements that unit owners be current in assessments, etc.) are invalid.

Question: I am a board member in our condominium. Recently, the board adopted a budget which was $20,000.00 lower than what we actually spent last year. I objected, since this was not a balanced budget. Are we required to adopt a balanced budget or can we engage in deficit spending? A.Y. (via e-mail)

Answer: If the association's board reasonably believes that it can operate on less money than was spent last year, then it would be entirely appropriate to adopt a budget for a lower amount. In fact, many associations will adopt budgets for 2005 involving less money than was spent in 2004, because of unexpected hurricane expenditures in 2004.

However, the board is not exercising its fiduciary duty if it is "low-balling" the budget, simply to make assessments seem lower than what they really need to be. The Florida Condominium Act specifically requires the association to assess not less frequently than quarterly, in an amount which is not less than that required to provide funds in advance for payment of all of the anticipated current operating expenses of the association, as well as the unpaid operating expenses previously incurred. ⚖

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