Earthquake Ruling has Impact Here

FORT MYERS THE NEWS-PRESS, JANUARY 6, 2005

By Joe Adams

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Over the next several months, millions of Americans will be busy adding up figures and digging up records in order to square up their 2004 taxes with Uncle Sam. Although most community associations are not-for-profit corporations, contrary to popular belief, associations are generally obligated to file tax returns, and in many cases pay taxes.

For community associations with a fiscal year ending December 31, federal tax returns must be filed by March 15 of each year, unless an extension has been granted. The association's tax rate will either be 15% or 30 % of certain types of net income, depending upon the association's tax filing situation.

Recently, the Internal Revenue Service issued a private Revenue Ruling involving whether insurance proceeds received by a condominium association, for earthquake damage, were taxable. This Ruling may be of interest to condominium associations in Florida which receive hurricane insurance settlements, as well as to unit owners who need to keep track of their "basis" in the unit, which will affect how much of a gain the owner realizes when the property is sold.

In the case which was subject to the Revenue Ruling, the association filed suit against the insurance company because they felt that not enough money had been offered to repair the damages to the common areas. An out-of-court settlement was reached two years after the earthquake

Several owners had made repairs in the interim, and the association intended to distribute portions of the settlement proceeds to reimburse such owners.

The IRS concluded that the funds received by the association, in its capacity as agent for the owners, were not taxable to the association.

The IRS also ruled that under the facts of that case, every unit owner would be required to reduce his or her basis in the unit by the proportional amount of recovery received by the association attributable to the common areas and the unit. The unit owners would likewise be entitled to increase their basis in the unit by their proportional share of the amounts used or retained by the association for the repair or restoration of common areas, plus the amounts expended by the owner to repair damages to the unit resulting from the earthquake.

While Revenue Rulings are not binding on parties other than the taxpayer involved, they are the best indication of the IRS' position on a point of tax law. Associations and individuals should consider the effect of settlements received from the 2004 hurricanes in both the association's tax picture, as well as the individual owners' taxable basis in the unit. See I.R.S. Revenue Ruling 2004-39017…Release Date 9/24/04

Law Firm Sponsors Legal Seminar, Including Hurricane Legal Issues

The Law Firm of Becker & Poliakoff, P.A. will be holding two seminars in Southwest Florida involving condominium, cooperative, and homeowners' association law. Topics include review of court cases and legislative changes during the past year, as well as disaster planning and recovery, and post-disaster legal issues.

The Fort Myers seminar will run from 8:30 a.m. - 12:00 p.m. at the Barbara B. Mann Performing Arts Center, on Saturday, January 8, 2005.

The Naples seminar will run the same hours and will be held at the Naples Bath & Tennis Club on January 22, 2005. Both seminars are free of charge, and open to the public.

For registration call (239) 433-7707 or e-mail cquinones@beckerlawyers.com. ⚖

Q&A

Question: Is it correct that the "official records" for a condominium association must be on paper or in a form which is easily transferred to paper? (A.B., via e-mail)

Answer: Yes. The list of "official records" is contained in section 718.111(12) of Florida's condo statute. Most of the records listed in the law refer to "a copy" or a "photocopy" of the record, such as the condominium documents, meeting minutes, a current roster of unit owners, current insurance policies, etc.

If the documents that are specifically listed as an official record are not contained on "paper," the association would still need to maintain those records in a form that could be inspected or copied by unit owners. Section 718.111(12)(a)15 of the law also states that "all other records" of the association which are not specifically mentioned in the statute, but which are related to the operation of the association, are an official record too.

Therefore, records related to the operation of the association, if kept in a manner other than on paper (such as electronically) would still need to be made available to the owners in a manner in which they can be inspected and copied.

Question: Our association is getting ready for our upcoming annual meeting. We are not sure how to determine the officers, once the directors are elected. Do the directors nominate among themselves who takes which office, or is another meeting of the homeowners held? (F.P., via e-mail)

Answer: The procedure for electing both directors and officers should be set forth in the association's by-laws.

In the vast majority of cases, the association members (if it is a condominium, they are called "unit owners;" if it is a homeowners association, they are "parcel owners") elect the board of directors at the annual meeting.

Typically, the by-laws require the board to then hold an organizational meeting within a set time of the annual meeting, usually ten days, for the purpose of electing officers. Many boards hold their organizational meeting immediately after the members' annual meeting, although that is not required by law.

At the organizational meeting, the directors elect their officers, typically a president, vice-president, secretary, treasurer, and perhaps assistant officers. The officers need not be directors, unless the by-laws require the officers to also be directors.

The board is entitled to vote for its officers by secret ballot. This is the only area where the law allows secret voting by board members, all other board votes must be recorded in the minutes by roll call.

Question: I live in a mobile home park, where the park is owned by a for-profit company to whom we pay rent. Are we subject to Chapter 720, the statute applicable to homeowners associations? (A.G., via e-mail)

Answer: No. Section 720.302(4) of the Florida Statutes expressly exempts mobile home park associations from the law. Your park is governed by Chapter 723 of the Florida Statutes.

Question: We live in a townhouse community, operated by an association. 26 of the units border one of the three ponds in our community. There are 100 units in total. It has been determined that all of the ponds need to be dredged. There is a question whether the units which border the pond should pay more (some argue that it increases their property value) or whether everyone should be equally assessed. (M.V., via e-mail)

Answer: A review of your governing documents would be necessary to give a definitive answer. I assume that the lakes are either the "common areas" (if the community is operated by a homeowners association) or "common elements," if the community is a condominium.

In almost every case, man-made lakes (ponds) within residential developments are part of the surface water drainage system, and are the responsibility of the association. Typically, all owners share equally in the

maintenance of common area surface water drainage installations, even if their individual property is not "on the water."

Therefore, although your governing documents may provide a different twist, typically all owners would be responsible to share the cost of maintaining the lakes, including dredging. The costs would likely be shared on a 1/100 basis, unless the documents provided for weighted assessments based on unit size, and then the weighted formula would control. ⚖

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Employees Deserve Protection

FORT MYERS THE NEWS-PRESS, JANUARY 13, 2005

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America's unique system of law and government involves principles which occasionally conflict with each other. A classic conflict for community associations is the inalienable right to use one's property freely, versus the extent to which that right can be controlled through a contract with your neighbors and your association.

Another point where values collide in associations involves expectations of privacy versus the right (or perceived right) to information.

One common question involves the extent to which a member of a community association (such as a condominium association or homeowner's association) can look at the employment records of an employee of the association. On the one hand, all association members help pay the employees' salaries, and have a legitimate interest in how they do their job. On the other hand, most of us feel that certain parts of our lives are entitled to some degree of privacy, including salary information, medical insurance records, and the like.

The Florida Legislature, in its recent amendments to the statute applicable to HOA's (Chapter 720), appears to have resolved this debate in favor of the employee. Specifically, the new law provides that "disciplinary, health, insurance, and personnel records" of HOA employees are exempt from member/parcel owner inspection.

Unfortunately, this is one area where the condo law is not as clear. The state agency with jurisdiction over condominiums has ruled that all payroll and personnel records of a condominium association are included as part of the "official records" of the association. Therefore, it is easy to see how an unhappy association member, perhaps without regard to legal consequences for the association, could misuse information that most of us would not want to have shared with others.

There are, however, some "privacy laws" which may provide a shield for condo associations. For example, employee drug testing information must be kept confidential by state law. Likewise, child support collection information involving employee deductions also enjoys a legal privilege.

Along the same lines, Florida law provides that a health care provider may not provide medical records to anyone other than its patient, and certain other authorized agents. Therefore, if a condominium association employee has not authorized the release of his or her medical records, I believe associations should shield these documents as well.

One issue that seems to get a fair amount of play in the press lately is one's privacy expectation in their social security number. Florida's courts have recognized that employees' social security numbers, as may be contained in personnel records, are highly confidential, and not subject to disclosure. Most of the case law involves Article I, Section 23 of the Florida Constitution, which primarily applies to privacy rights and governmental agencies.

Taking laws that apply to public entities and applying them to condominium associations is not necessarily the best way to protect the association from members with a curious mind.

I believe that with the exception of certain basic information (such as the annual salary or hourly wage of a particular class of employee), that expectations of privacy outweigh the "right to know" in associations. Of course, balancing competing interests always results in laws that will make someone unhappy, but I believe it is high time for the law for condominium associations to catch up with modern times. ⚖

Q&A

Question: Our condominium association has a sizeable population of non-U.S. citizen people. Some of these owners have expressed an interest in being on the board or holding an office. Is there any statute to prohibit this? E.S. (via e-mail)

Answer: There are no citizenship requirements in the Condominium Act for persons who wish to serve on the board. Any unit owner who is age eighteen or older is eligible to serve on the board. The only exception is if the person has been convicted of a felony by any court of record in the United States and has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence. In fact, amendment to your bylaws requiring board members to be U.S. citizens would be invalid.

Question: The Deed of Restrictions for our community expired in the early 90's due to MRTA (the Marketable Record Title Act). In my opinion, since the restrictions are expired, I am not an association member. Since I am not a member, I cannot vote on installing new restrictions. Do you agree? Also, not all of the homeowners in the area are being mailed information about the possible upcoming vote. Do we have to be notified by certified mail? If I am opposed to the new restrictions, do I have to vote, or will my lack of support constitute a negative vote? A.G. (via e-mail)

Answer: If the Deed of Restrictions are in fact expired (and you should have an attorney review your Deed of Restrictions to confirm that they are expired), the only way to "revive" them is through the new procedures set forth in Sections 720.403 – 720.407, Florida Statutes. You can find these provisions by going to the following website: www.flsenate.gov. This new law sets forth detailed procedures regarding the vote needed to revive expired covenants and restrictions. In short, it requires initiation of the process by an "organizing committee." The revived declaration cannot include amendments, except for certain designated amendments described in the statute. A majority of the affected parcel owners must agree in writing to the revived declaration or approve the revived declaration by a vote at a meeting. In addition, the revived declaration must be submitted to the Department of Community Affairs ("DCA") for review and approval. An association should not attempt to revive extinguished covenants without the assistance of an attorney.

As your lot was previously governed by the expired Restrictions, you (and the other parcel owners in your community) are the persons who will vote on the revived Deed of Restrictions. I do not agree that because the Restrictions are expired, you cannot vote. The statute requires that a copy of the complete text of the proposed declaration of covenants (or restrictions), the proposed articles of incorporation and bylaws of the homeowners' association, and a graphic depiction of the property to be governed by the revived declaration, shall be presented to the affected parcel owners by mail or hand delivery not less than 14 days prior to the meeting at which the consent of the affected parcel owners will be sought. The mailing does not have to be by certified mail. You are correct that the vote needed is a majority of the affected parcel owners. Therefore, if you do not vote, your vote would be considered a "no" vote.

Question: Our condominium association is considering changing its rental policy. I thought I read in one of your recent articles that existing owners would be grandfathered. Is that correct? C.L. (via e-mail)

Answer: Not exactly.

In what I believe was one of the most ill-conceived amendments to the condominium law that the Florida Legislature ever adopted, a new Section 718.110(13) was added to the law effective October 1, 2004. The new law reads 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.

Therefore, an amendment to a declaration of condominium "restricting" rentals (whatever that means) would apply to owners who vote for the amendment, but not those who do not. The change would only apply to the successors in title of those who do not approve the amendment.

Obviously, there is an extreme element of unfairness in "punishing" owners who support what may be a much-needed amendment to the declaration of condominium to stem rental problems. I think that many associations will attempt to address this problem by adopting amendments which contain their own "grandfathering" language, although that is not required by the law.

Hopefully, enough condominium associations and their boards will let the Legislature know how this new law hurts associations, and the law will be changed back to the way it was before.

Question: I live in what is called a "resident-owned" mobile home park. It was originally set up as a rental park. About five years ago, approximately one-half of the residents pooled their money and purchased the park. We now have two boards of directors, one for the renters and one for the shareholders who own the park. This has continually reinforced an "us versus them" attitude. I would like to see one board. What is your opinion? E.K (via e-mail)

Answer: Most "resident-owned" manufactured home communities are structured through a corporation which acquires the Park from the owner. Usually, these are set up as not-for-profit corporations (often cooperative associations). As such, the entity which now owns the Park must, by law, maintain a separate board. I would assume that only those who have contributed toward the purchase are considered members of that corporation.

For those who did not purchase in the Park's buy-out, they are still subject to Section 723 of the Florida Statutes, the Florida Mobile Home Act. In general, the non-shareholders/tenants still enjoy the rights from Chapter 723, including the right to set up their own "homeowner's association" to address issues involving the non-shareholder/tenants (who are still renters).

Therefore, it is likely that your Park will always have two "associations" unless either (a) everyone eventually buys a share and there is no further need for a tenants' association, or (b) the tenants decide that they no longer need to have their own association (although they will not become members of the governing association unless they buy a share). ⚖

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Time to let in a Little Sunshine

FORT MYERS THE NEWS-PRESS, JANUARY 20, 2005

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I have written this column for ten years and have practiced community association law in Florida for nearly twenty years. I have taught many educational classes to board members and unit owners during that time. Without a doubt, the single question I am asked most frequently involves the so-called "sunshine laws" for associations. Therefore, every year or two, for the benefit of people being elected to association boards, I present a primer, which I think I will dub Community Association Sunshine Law, Course 101.

Chapter 1: Definitions

First, almost all community associations fall into one of three categories, a condominium association (governed by Chapter 718 of the Florida Statutes); a cooperative association (governed by Chapter 719); or a homeowner's association (governed by Chapter 720). The law for condominiums and cooperatives is essentially identical, so when I mention the law for condos, it applies to co-ops as well. The law for HOAs is similar to the condominium counterpart, but slightly different in a few key respects, as we will see.

Like any beginners course, we must of course start with the definitions. All of the relevant laws define a "meeting" of the association's board as any "gathering" of a "quorum" of the board where association business is "conducted."

The first relevant point is that a quorum must be present. This is different than the sunshine laws for public officials, where two or more public officials cannot meet, even if they are less than a quorum. The association law is more liberal in this regard and two directors can discuss association business (except in the case of a three-member board)

One of the most frequently debated topics is what constitutes the "conduct" of business. I have seen many associations under the auspices of "executive sessions", "planning meetings", or "agenda development workshops", argue that a quorum of the board could gather out of the sunshine as long as no binding votes were being taken. In my opinion, this is not what the law says, and is certainly not what it means. Although I am not aware of any reported appellate court cases which have come out in the association context, there are a number of cases in the public arena which have held that any interaction contributing to the development of ideas constitutes a "meeting", without regard to whether or not a formal vote has been taken.
Otherwise, association boards could make all of the tough decisions in "executive session", with the "public meeting" being simply a rubber-stamp event. While many associations legitimately desire to avoid "airing dirty laundry" in open meetings, it is simply the price that is paid for the owners' right to know.

Let's now look at the definition of a "gathering" of a quorum of the board. If you have a five-member board, clearly three of them sitting in the same room constitutes a quorum. Those three are certainly free to get together for social purposes, or other non-association reasons, but once association business is discussed, a weekly golf game could easily turn into a meeting of the board.

Likewise, if a quorum of the members of the board are assembled by telephone, the law considers them to be meeting in person.

One frequent inquiry involves the electronic transmissions which most of us refer to as e-mail. This is definitely a gray area in the law, and one which I think the Legislature needs to take a look at.

In the days of old, if Director A wrote a letter to Directors B, C, D, and E, that letter was not a "meeting" because there was no "gathering" of the board. If Director B replied to Director A and copied Directors C, D, and

E, that letter was likewise not a "meeting", although the letters would probably be considered "official records" and would need to be retained in the association's file.

Now, correspondence which used to take a couple of days to be received is received in a couple of seconds. I know that many board members set up e-mail board groups, and items of association business can be debated by e-mail ab infinitum, to the point where not only does the development of ideas occur, decisions may actually be made.

To throw a bit more sauce into that mix, there are also situations where an agent or executive officer of the association (such as a board president or community association manager) may already have the authority to do something, but would like to "poll" the other board members for support. If the president already has the authority to take a specific action (let us say, for example, counseling an employee about perceived problems), does getting e-mail support for that action turn it into a vote?

These are all questions that will either need to be sorted out by the courts, the relevant enforcement agency, or preferably through further guidance in the governing statutes. In my view, until the law is written otherwise, e-mail interactions are not technically "meetings", although I am aware of at least one case where a condominium association received a stiff fine for conducting all of the association's business through e-mail, and never holding board meetings. Therefore, discretion is clearly the better part of valor (not to mention legal protection) when in doubt.

Next week, we will move on to Chapter 2, which I think I will call: ***The Do's and Noticing Meetings***. ⚖

Q&A

Question: Our condominium association's board always posts the agenda for upcoming meetings on the association bulletin board. After the regular meeting is adjourned and everyone leaves, the board holds "executive" meetings without the residents present. Is this legal? If not, what can be done to correct the situation? J.H. (via e-mail)

Answer: The Florida condominium law defines a "meeting" of the board as any gathering of a quorum of the board where association business is "conducted." In my opinion, discussing association business is a "meeting", whether or not votes are taken. There are numerous reported court decisions in the analogous area of public sunshine law to this effect.

The only exception to the rule is if the board is meeting with the association's legal counsel regarding matters of association business which are subject to an attorney-client privilege.

As to what you can or should do, this is a bit tricky. I would recommend that you privately approach the board president and tell him or her that you are concerned with an apparent violation of the law. You should ask that he or she either cease the practice, or provide a written legal opinion that the meetings are being properly conducted.

You have the right to file a complaint with the State's enforcement agency if your board is violating the law, although I never recommend that as a step of first resort, but rather one of last resort. Agency complaints are divisive in the community and rarely do anything to solve political problems, they usually become worse.

Accordingly, I would encourage you to try to address this matter within your association directly, but privately, so that all can do the right thing without public humiliation or loss of face.

Question: I am a handicapped person who must use a motorized chair to get around in a condo complex. I was informed by the board that condo complexes are considered to be like a single family residence, and are therefore exempt from the Americans with Disabilities Act. Is the board correct, or do they have to follow ADA regulations? J.D. (via e-mail)

Answer: An answer regarding the applicability of the Americans with Disabilities Act will depend substantially upon the nature of your condominium. The ADA mandates accommodations for disabled persons in places of public accommodation, and requires

retrofitting in many instances. If there is some type of facility at the condominium that is open to the general public, the area may fall under the ADA as a place of "public accommodation." If the facilities are restricted to residents and their guests only, then it is likely that the ADA would not apply.

However, there are other sections of law that also relate to disabled individuals. For example, the Fair Housing Amendments Act of 1988 protects handicapped individuals from discriminatory housing practices. Refusal to make reasonable accommodations, when such accommodations are necessary to afford each resident an equal opportunity to use and enjoy a dwelling, constitute unlawful discrimination under the FHAA. This includes the right to make reasonable modifications to the premises.

The main difference between the ADA and FHAA is that ADA requires retrofitting at association expense, whereas FHAA involves premises modification at the disabled individual's expense.

Question: My request for information concerns placing hurricane shutters on the outside of our lanai sliding glass doors. I, along with other unit owners, have made a request to have hurricane shutters installed, but the board expressed concern that the structure of the building may not have been built strong enough for the weight. They have heard that some condo lanais in Cape Coral have collapsed, and therefore they are being cautious. Do we need to contact an engineer for his opinion? C.M. (via e-mail)

Answer: The Florida Condominium Act states that every board must adopt hurricane shutter specifications for each building operated by the association. The association's specifications may address color, style, and other factors deemed relevant by the board, and must be consistent with the applicable building code. Additionally, the law states that notwithstanding any provision to the contrary in the condominium documents, if approval is required by the documents, a board shall not refuse to approve the installation or replacement of hurricane shutters conforming to the specifications adopted by the board.

If your board has structural concerns, it should consult with an engineer to help to develop the hurricane shutter specifications, and review their concerns regarding the soundness of your buildings. In the unlikely event that the engineer's professional opinion showed that no hurricane shutters could be installed because of structural problems with the building, that would create a unique problem. In such a case, it is likely that the association would need to address the structural deficiencies to make the building safely habitable, including being able to bear the weight of hurricane shutters. ⚖

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Shedding More Light on Laws of Sunshine

FORT MYERS THE NEWS-PRESS, JANUARY 27, 2005

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the second installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005).

Chapter 2: The Do's and Don'ts of Noticing Meetings

As with meetings of governmental bodies, the right to attend and speak at meetings is of little benefit to the governed if they do not know when or where the meetings are going to be held. While governmental entities normally advertise meetings through newspapers, association advertisement is generally handled through physical posting of the notice.

Section 718.112(2)(c) of the Florida condo statute provide that notice of all board meetings, which must incorporate an identification of agenda items, shall be posted conspicuously on the condominium property at least 48 continuous hours preceding the meeting, except in an emergency. Further, written notice of any board meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered must be mailed, delivered, or electronically transmitted to the unit owners, and posted conspicuously on the condominium property not less than 14 days prior to the meeting.

If there is no condominium property upon which notices can be posted, notices of all board meetings shall be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit. In lieu of or in addition to the physical posting of notice of any meeting of the board, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. Certain rules must be followed in both condos and HOA's when television notice is used in lieu of posted notice.

Section 720.303(2)(c) of the law applicable to HOAs likewise provide that notices of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. Unlike the law for condos, there is no requirement that an agenda be posted. As an alternative to posting, notice of board meetings can be mailed or delivered to each member at least 7 days before the meeting. For communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association.

An assessment may not be levied at a homeowner's association board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. Written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

In general, both laws require that notice of all board meetings be posted in the community at least 48 hours before the meeting. Both laws also require that if assessments are to be considered, or if rules regarding use of the units or parcels (as opposed to common element or common area rules) are to be considered, notice must actually be given to the owners by mail (or hand delivery with written receipt or electronic notice where the owner has so consented to receiving electronic notice) 14 days before the meeting. Notices in these cases must also be posted fourteen days in advance.

The location requirement for posted notices often causes some confusion and potential legal complications. The Florida condominium law requires the board to adopt a rule stating where official notice may be posted. The board may specify more than one official location, but there must at least be one location in a conspicuous place on the condominium property, where the notices must be posted. The notices can also be posted in other locations. If the association does not have a location where notices can be physically posted, notices must be mailed out fourteen days in advance, for all board meetings.

For homeowners' associations, the law simply states that the notices must be posted "in a conspicuous place" in the community. While there is no requirement that the HOA board adopt a posting location, it is a good idea to do so. Also, in lieu of posting notice of regular or special board meetings, the HOA can mail out the notices seven days in advance, which is slightly more liberal than the condominium notice requirement.

Next week's lesson will move on to Chapter 3, which will address the rights of owners to speak at, and participate in, meetings of the board. ⚖

Annual Association Trade Show

The Community Associations Institute will be holding its 11th. Annual Conference & Trade Expo 2005 at the Seven Lakes Association Auditorium on Thursday, February 3, 2005. The Expo is open to the public from 10AM through 3:30PM.

Over 40 exhibitors providing product and information to residents of community associations. At 7 AM CAI will provide a two hour forum for CAM licensed managers and community association board of directors on "Stress Management" given by CAI President Mr. Paul Grucza.

At 9 AM the State of Florida's Department of Business & Professional Regulation in conjunction with CAI will conduct a three hour seminar on "Condominium Operations". This seminar focuses on the core responsibilities of community associations.

At 10 AM a two hour CAM Manager continuing education seminar, "2005 Legal Update" with Joseph E. Adams, Esq. and Richard D. DeBoest II, Esq.

From 1PM a two hour "Attorney One-On-One Forum for condominium and homeowner association members.

At 2PM "A ROAD TO EFFECTIVE LEGISLATION Forum" will be conducted with CAI-FLA representatives, CAI's Andy Krakowski, Sr. Director of Government & Public Affaires, and state legislatures.

All events provided to condominium and homeowner association members free of charge.

Q&A

Question: Our condominium association is contemplating charging a one hundred dollar "processing fee" when an owner rents out his or her condominium unit. We are questioning whether there are any "hidden responsibilities" which might come into play. W.M. (via e-mail)

Answer: Great question. Section 718.112(2)(i) of the Florida condominium statute states that an association may not charge any fee in connection with the lease of a unit unless the association is granted the right to approve rentals, and the fee is authorized by the condominium documents. The maximum fee is one hundred dollars per applicant. No fee may exceed one hundred dollars per applicant, members of the same family are treated as one applicant, and no fees can be charged in connection with renewal of a lease. The only other fee an association can charge is a security deposit against damage to common elements, and again that fee must be authorized by the condominium documents and cannot exceed one month's rent.

Therefore, you must first check your condominium documents to see if they authorize the association to approve leases, and if so, whether they also authorize the transfer approval fee. If both of those conditions

are not met by the current documents, an amendment may be necessary. If an amendment is considered, you will also need to consider the grandfathering issue created by the 2004 amendments to the statute, which I have consistently criticized in this column as being antithetical to the proper operation of associations.

If the association is already entitled to approve leases and charge the fee, or achieves that right through amendment, then you will need to begin to process lease applications, which many associations do. This often includes getting basic information about the proposed tenant (for example to make sure that their vehicles or pets will not violate your condominium rules) and in many cases, conducting some level of a background investigation, such as a criminal record check.

Your inquiry raises the question of whether an association could be held liable if, for example, it failed to note that a rental applicant was a habitual sex offender, and some further similar crime occurred on association property. I am not aware of any court which has ever held an association to this standard, but the argument could certainly be made that to the extent the association takes on the duty to investigate proposed tenants, it needs to do so competently.

Question: Our association administers various types of units, including condominiums, duplexes, and some single family homes. We are told that our liability insurance would cover most accidents that occurred on the multi-family areas, but that the insurance does not cover the single family homes. Our question is whether we should require the single family homeowners to show the association that their contractors (such as the person who cleans their pool) has all of the appropriate insurance, and also have the association named as an additional insured under those policies. R.F. (via e-mail)

Answer: In theory, that sounds great. In reality, it is almost impossible to enforce or police.

First, to the extent your association has no responsibility over an individual's property, I do not know why the association would be liable for injuries on that property. Of course, in today's society, many lawsuits take the "shotgun" approach, which goes after the "deep pockets", often including the association. However, your association's liability insurance policy should include a duty to defend these claims, and if the association is for some reason liable, also pay any judgment or settlement.

I always recommend that anybody who hires a contractor in Florida require proof of licensure and insurance. However, particularly in a larger association where a single homeowner may do business with a dozen different contractors (pool company, lawn company, pest control company, security alarm monitoring company, etc.), it is difficult at best for an association to obtain this information and/or keep up with changes in individual owners' contracting arrangements.

Likewise, while being an "additional insured" under an insurance policy permits you to make a direct claim against the policy, it is not something many contractors would be willing to do, and would likewise be difficult to enforce.

Your association should encourage (and arguably legislate) that individual property owners use licensed and insured contractors, but I am not a personal proponent of monitoring compliance with such a requirement. I know of others who see it differently.

Question: Our condominium association is refurbishing our lanais for the third time. In each previous instance, all of the owners were assessed the same amount, even though the larger units have twice the square footage because they have two lanais, or their lanais are double-wide. Is this legal? It does not seem fair that the smaller units should be charged to improve the property this way. M.M. (via e-mail)

Answer: This is a common source of contention. The correct answer will depend upon a close reading of your condominium documents. The first thing that needs to be determined is whether the lanai area is part of the "common elements" and is therefore the responsibility of the association.

Although many condominium documents define the lanai as either part of the "unit" (privately owned by the individual) or perhaps "limited common elements" (for which only the affected unit owner pays), most "concrete restoration" involves the super-structure of the building, often the concrete slabs and the exterior elements.

In most cases I have seen, the slabs and other parts of the super-structure are "common elements" and are therefore maintained, repaired, and replaced as a common expense.

Florida law only permits common expenses to be shared on the basis set forth in the declaration of condominium, which must either be equal per unit, or weighted based upon the square footage size of the entire apartment (not just the lanai). Most local condominiums have equal assessments (I would say seventy-five percent or so) so it may well be that your board is acting properly, as unfair as it may seem.

If there is enough money involved, you may want to have your attorney look at the condominium documents and see how he or she interprets the allocation of responsibilities. ⚖

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Sunshine Laws Apply to Condo Boards

FORT MYERS THE NEWS-PRESS, FEBRUARY 3, 2005

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the third installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005 and Shedding more light on laws of sunshine, January 27, 2005).

Chapter 3: Owners' Rights at Board Meetings

One common thread in our discussion of community association sunshine laws is the fact that the law for condominium associations is very similar to the law for homeowners' associations, but with subtle and occasionally significant differences between the two.

First, let us look at the condo law. Section 718.112(2)(c) of the condominium statute provides that meetings of the board shall be open to all unit owners. The law states that the right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. A condominium association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

For HOAs, if 20 percent of the total voting interests petition the board to address an item of business, the board shall at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

Chapter 720 goes on to provide that members have the right to attend meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The HOA may also adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak.

The following are the highlights of members' (homeowners') rights for both types of associations:

- **Requiring The Board To Meet.** For condominium associations, unit owners do not have the right to demand that a board meeting be called. That prerogative is typically vested in either a majority of the board or the association's president, through the bylaws. Conversely, for HOAs, twenty percent of the members can petition the board to call a meeting to consider a particular item. There is no requirement in the law that the board of the homeowner's association act favorably on the requested item, only that it be appropriately considered.

- **Right To Speak At Board Meetings.** For HOAs, the statute does not confer a general right to speak at meetings of the board, although some governing documents for homeowners' associations do so. Members of homeowners' associations do have the right to speak at board meetings which have been called by petition of the association membership. Conversely, condominium unit owners have the right to speak at all meetings of the board of directors with respect to items which have been placed on the agenda for the meeting. This does not mean that every unit owner serves as a member of the board and is entitled to debate motions, but it does mean that they are entitled to be heard regarding matters the board intends to consider at the meeting. Therefore, I believe that unit owner statements should be taken either at the beginning of the meeting, or at a set time in connection with a specific agenda item. Allowing owners to speak after the board has voted does not, in my opinion, fulfil the requirement allowing participation by members.

• **The Board's Right To Establish Meeting Rules.** Both laws permit a board to establish reasonable regulations regarding the procedures for speaking at meetings of the board. For example, I think it is reasonable to require those who wish to speak to turn in a form at the beginning of the meeting, indicating which agenda item or items they would like to address. I also believe that an association may impose reasonable time limits. Three minutes per topic, per speaker, is typically considered a reasonable time limit.

Next week, we will move on to Chapter 4, entitled "Everything you wanted to know about minutes of meetings, but were afraid to ask."

Do Not Forget Trade Show Today

The South Gulfcoast Chapter of Community Associations Institute will be hosting its annual Trade Show today, at the Seven Lakes Condominium Complex (across from the Bell Tower Shops). The program starts at 10:00 a.m.

There are a variety of free educational opportunities available, as well as exhibitions from various vendors of goods and services to community associations.

Walk-in registration is permitted for the educational programs. ⚖

Q&A

Question: We read your recent column about the new laws for homeowners' associations. Our HOA is quite large, has annual income over four hundred thousand dollars, and will fall into the new requirement for an annual audit. We understand that the audit can be waived by a majority vote. Our fiscal year ended December 31, 2004. Since our bylaws do not require an audit, are we required to get an audit for 2004? Can we still take the waiver vote? L.F. (via e-mail)

Answer: Unfortunately, the new law, which became effective October 1, 2004, did not specify whether or not it was intended to reach retroactively into an association's fiscal year.

Recently, the Department of Business and Professional Regulation issued a letter enunciating the Department's position on this question. The Department stated that it did not feel that the law was intended to apply retroactively, and that an HOA whose fiscal year was January 1 – December 31, would not need to begin complying until the fiscal year starting January 1, 2005.

I agree with the Department's interpretation of the statute, since associations which may now be required to have audits would not have had the ability to make budget provision for an audit for a fiscal year ending December 31, 2004.

With respect to the waiver vote, the law does not say when it must be taken. The law for condominiums specifically requires the waiver vote to be taken before the end of the relevant fiscal year. Presumably, for HOAs, the vote could be taken at any time up until the audit's due date.

Question: I purchased a condo unit in December, 2002 with the intention to rent it out to cover the costs. In December of 2002 the association, with a two-thirds majority, voted to prohibit all rentals effective immediately. While I voted against the measure, I believe it obtained the required vote to pass. Does the recent change regarding rental amendments, which you have discussed in this column, provide me with relief? S. J. (via e-mail)

Answer: In my opinion, the recent change to the law would not apply to your situation.

The so-called "rental grandfathering amendment" to Chapter 718 was effective October 1, 2004. Laws cannot be retroactively applied, except in limited situations. Therefore, if the association properly amended the documents in 2002 regarding rentals, I believe the amendment would stand up.

Question: I attended a recent seminar involving condominium law. One of the topics was the condominium law's new requirement for a "Q&A Sheet." I did not understand what was involved. Could you explain? J.S. (via e-mail)

Answer: Back in 1992, the Florida Legislature implemented substantial 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 that was required to 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. ⚖

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Minutes Bring Order to Conduct of Board

FORT MYERS THE NEWS-PRESS, FEBRUARY 10, 2005

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the fourth installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005; Shedding more light on laws of sunshine, January 27, 2005; and Sunshine laws apply to condo boards, February 3, 2005).

Chapter 4: Keeping Minutes of Board Meetings

I have heard corporate minutes referred to as the line between organization and disaster. I have also seen "minutes" that are so lengthy, perhaps they should have been called "hours."

The purpose of minutes is to record what was done, not what was said. Where detailed findings of facts are appropriate for inclusion with minutes, they should be recited in a separate resolution of the board.

A typical set of board minutes should be one to three pages in length. The minutes should reflect:

- The date, time, and place at which the meeting was called to order.
- The presiding officer.
- The establishment of a quorum, with attendees listed by name.
- Proof of proper notice for the meeting.
- Disposal of unapproved minutes from previous board meetings.
- A summary of reports given to the board and a statement by whom the reports were given (a one or two sentence summary is typically sufficient).
- Unfinished business.
- New business.
- Adjournment.

Whenever an item of board business is put to a vote, the person making the motion for approval of the item should be identified in the minutes, as should the name of the person who seconds the motion. The exact wording of the motion should also be included in the minutes. The points raised in debate are typically not included in the minutes.

The condominium law requires the vote of every director to be recorded in the minutes. Accordingly, if five directors vote in favor of a motion and two are opposed, the minutes should reflect the names of the five who voted for the item, as well as the names of the two who voted against. There is a similar requirement in the statute for homeowners' associations.

Most boards operate under Robert's Rules of Order, either through mandate from the bylaws, or simply because most people are familiar with Robert's as a standard reference for parliamentary procedure.

Under Robert's Rules of Order, the chair of a meeting typically does not vote, except to break ties. This is not the case for associations. Typically, the chair of board meetings is the association's president, who is also a member of the board. As a member of the board, the president is entitled (and probably legally obligated) to vote on issues before the board.

One area where there is some significant difference between the condominium and homeowners' association law involves abstentions. Directors may desire to abstain from voting be-

cause they may not know enough about the topic (for example, if they just joined the board), or if they do not wish to take sides on a politically sensitive issue.

Directors are obliged by law and concepts of fiduciary duty to abstain from voting when the subject matter of the vote presents a conflict of interest. For example, if a board member owned two units and approval of a lease application for one of those units was on the agenda, that director should abstain from voting on that item due to a conflict of interest.

In condominiums, directors may only abstain from voting in the event of a conflict of interest. Otherwise, the director is deemed to have voted with the majority of the board. For HOAs, the law is a bit looser. The statute provides that a director's abstention must be noted in the minutes, but does not limit abstentions to conflict of interest situations. As in condos, unless there is a conflict, it is preferred practice for all HOA directors to vote on items that have been brought to a vote by motion.

Both the laws for condominiums and homeowners' associations require minutes of board meetings to be kept for seven years, as part of the official records of the association. In my opinion, minutes should be kept perpetually (from the beginning of the association) and are one of the few documents that an association should keep in its files for so long as the association is in existence.

Next week, we will address the frequently misunderstood topic of how the sunshine laws apply to association committees.

Q&A

Question: My condominium association has an annual budget of four hundred thousand dollars. Must we employ a community association manager to run our association? N.M. (via e-mail)

Answer: There is no requirement in the law that a condominium association employ a community association manager to manage the condominium. Some associations decide to self manage. However, if your condominium association decides to hire a community association manager, the manager must be licensed.

The state's condo agency has adopted a rule which provides that in furtherance of its fiduciary duty to the unit owners, a board of directors shall employ only a licensed community association manager where licensure is required by law.

The exception to the licensure law is if the association contains fifty units or less, or has an annual budget of one hundred thousand dollars or less. In that case, the association can hire a manager, and the manager does not have to be licensed (the manager cannot manage multiple associations which result in exceeding the legal limits).

Therefore, if your association has a budget of more than one hundred thousand dollars, then the association can either be self managed, or you can hire a community association manager. If you choose to hire a community association manager, the manager must be licensed.

Question: Can a homeowner's association levy and collect fines? By what means? Also, can the board of directors amend a rule without amending the deed of restrictions by a vote of the owners? R.F. (via e-mail)

Answer: The ability of a homeowner's association to levy and collect fines is addressed by Section 720.305(2) of the Florida Statutes. In order to have the right to fine, it must be allowed by your documents.

Prior to October 1, 2004, the law allowed a homeowner's association to file a lien against a parcel for non-payment of a fine and collect the fine through foreclosure, if that procedure was authorized by the governing documents. In the alternative, the association could file a lawsuit against the owner to recover the fine. However, the amendments to Chapter 720 during the 2004 Legislative Session included an amendment to prohibit homeowners' associations from filing a lien against a parcel for nonpayment of a fine.

In my opinion, there are serious constitutional issues with applying this change to existing covenants that allow an association to file a lien for the nonpayment of a fine. Nevertheless, if your association were to levy a fine, you could now only collect the fine by filing a personal action against the unit owner, unless your association wanted to be the test case over the constitutionality of the amendments to the law.

In a court action, the association (assuming it wins the case) would be able to collect the association's reasonable attorney's fees and costs from the non-prevailing party.

Regarding the rule changes, you would need to look at your deed of restrictions, articles of incorporation, and bylaws to determine whether the board of directors has the authority to amend rules and regulations without a vote of the owners. If the board has the authority to amend rules and regulations, the rules must be reasonable and may not contravene either the statute governing homeowners' associations or your governing documents (for example, the deed of restrictions).

In addition, the board must also now comply with Section 720.303(2), Florida Statutes, which was amended effective October 1, 2004. The statute now requires that written notice of any board meeting at which amendments to rules regarding parcel (lot) use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than fourteen days before the board meeting. Therefore, if the board of directors has the authority to adopt or amend rules and regulations (and you would need to refer to your governing documents to determine this), then the rules can be adopted by the board of directors at a board meeting at which fourteen days' notice is given as required by the statute, and such rules must be reasonable and consistent with the law and governing documents.

Question: I live in a condominium where we have two different groups running for the board, the incumbents and the new candidates. The current board has designated persons on their side to count the votes on election day. The new candidates suggested that they would like to designate other people to count the votes also. The current board claims that they already made the decision regarding who will be counting the votes, and this is their final answer. Is there anything that we can do before the elections? A.K (via e-mail)

Answer: Chapter 61B-23.0021 of the Florida Administrative Code discusses the handling and counting of ballots at a condominium association's annual meeting. That law states that all of the ballots shall be handled by an impartial committee appointed by the board. An impartial committee means a committee whose members do not include any of the following, or their spouses: current board members; officers; and candidates for the board. Therefore, the current board does have the authority to appoint the committee to handle all of the ballots, so long as the committee is made up of proper persons.

Additionally, part of the "handling" the ballots includes counting them. The law also says that the ballots are to be removed from their envelopes and counted in the presence of the unit owners. Therefore, although only the board has the authority to appoint the committee, the ballots are counted in front of the unit owners who can ensure the process is above board. ⚖

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Committees Sometimes in Sunshine

FORT MYERS THE NEWS-PRESS, FEBRUARY 10, 2005

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the fifth installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005; Shedding more light on laws of sunshine, January 27, 2005; Sunshine laws apply to condo boards, February 3, 2005, and Minutes bring order to conduct of board, February 10, 2005).

Chapter 5: Sunshine Laws for Committees

As we have learned by now, the sunshine laws for condominium associations and homeowners' associations contain many similarities, but also some important differences.

For both condos and HOAs, there are certain committees which must always operate in the sunshine, which means they must post notice of meetings, permit all association members to attend committee meetings, keep minutes, and permit the meetings to be videotaped or recorded with audio equipment. For condominiums, operating in the sunshine also means the committee must permit other unit owners to speak to designated agenda items.

The sunshine laws for homeowners' associations apply to committees which can make final decisions regarding the expenditure of association funds, or committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. I call these HOA Statutory Committees.

The sunshine laws for condos apply to committees which are empowered to take final action on behalf of the board, or committees which make recommendations to the board regarding the association budget. I call these Condo Statutory Committees.

Regardless of what the bylaws say, the sunshine requirements always apply to Condo Statutory Committees and HOA Statutory Committees. All other committees might be called "nonstatutory committees." Here, there is a big difference between the condo law and the law for HOAs.

For homeowners' associations, nonstatutory committees are not subject to sunshine requirements.

Conversely, the condominium statute provides that nonstatutory committees are subject to sunshine requirements unless the bylaws for the association specifically exempt those committees from the sunshine laws. In my experience, very few bylaws for condominium associations exempt nonstatutory committees, and in such cases the sunshine rules apply to all condominium association committees.

Confused yet? If so, you are not alone. There is no compelling reason why the law treats these two types of associations differently, but it does.

In short-hand, the architectural review board (sometimes called architectural control committee) for a homeowners' association, and any HOA committee which is authorized to spend money must operate in the sunshine. Other HOA committee need not do so.

For condos, the budget committee, and any committee empowered to take final action on behalf of the association, must always operate in the sunshine. All other committees are exempt from sunshine laws, but only if the bylaws contain a direct exemption, otherwise the sunshine laws apply to those committees as well.

Next week, we will wrap up with a discussion of exceptions to the sunshine rules. ⚖

Q&A

Question: Our association is comprised of fourteen separate buildings, each of which has its own condominium association. There is also a master association that administers the common areas for the entire community. Our master association has a "grievance committee." There is a debate within our community as whether members of the board may also sit on the grievance committee. What is your opinion? A.G. (via e-mail)

Answer: Based upon the information you have supplied, it appears that your "master association" is what is known as a "condominium master association." If that is the case, then the operation of the association is governed by Chapter 718 of the Florida Statutes, commonly called the Florida Condominium Act.

You do not say what your "grievance committee" does. If it is empanelled to deal with disputes between unit owners and the board, there is no problem with members of the board also sitting on the committee.

If, however, the "grievance committee" is also serving as the "fining committee", a different answer probably applies. Section 718.303(3) of the Act states that a condominium association may levy fines of up to $100.00 per violation, and up to $1,000.00 for "continuing" violations, provided that the authority for the fines is contained in the declaration of condominium or association bylaws.

However, before a fine can be levied, the association must afford the accused with the opportunity for a hearing. The hearing must be held "before a committee of other unit owners." If the committee does not agree with the fine, the fine may not be levied.

I have heard many arguments on the issue of what "other unit owners" means. Some argue that the reference to "other" means unit owners other than the accused. Some argue that "other" unit owners means "fellow" unit owners. My interpretation is that "other" means people other than members of the board.

The idea is due process. The board should not be the judge, jury, and executioner.

Back in the 1990's, the Division of Florida Land Sales, Condominiums, and Mobile Homes had a specific written rule which stated that the fining committee could not include board members. However, that rule, Rule 61B-23.005 of the Florida Administrative Code, was repealed on January 19, 1997, as part of an effort by the Division and all governmental agencies to streamline government regulation.

Notwithstanding, the Division has continued to express the position that the reference to "other" unit owners, means unit owners other than members of the board of directors. One arbitrator from the Division has specifically so ruled in a case called ORA at Melbourne Beach, Inc. v. Mashke, DBPR Case No. 98-2737.

Therefore, unless the law is interpreted differently by the courts, or amended by the Legislature to clarify its intent, I continue to espouse the position that board members can not serve on the fining committee.

Question: Our condominium association is in the process of refurbishing our condominium and the Board plans to change the color of our condominium from gray to beige. They also want to change our landscape. Does the board have the right to make those changes without a vote of the owners? I believe that our condominium documents say that the condominium must remain the same as originally built, including color and landscaping. However, I cannot find my condominium documents. R.W. (via e-mail)

Answer: Section 718.113(2)(a) of the Florida Condominium Act provides that there shall be no material alteration or substantial addition to the common elements except in the manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration, as originally recorded or as amended, does not specify the procedure for approval of material alterations or substantial additions, seventy-five percent of the total voting interest of the association must approve the alterations or additions. There is usually one voting interest assigned to each unit.

There has been appellate court case law in Florida holding that a change in the color scheme of a condominium is a material alteration of the common elements, requiring a vote of the owners. Likewise, there have been numerous condominium arbitration decisions decided by the State's arbitration program which have held that a color change is a material alteration to the common elements requiring a vote of the owners.

Therefore, it is important to look at your condominium documents to determine the procedure for approving material alterations and substantial additions. If you have lost your set of documents, the association is obligated by law to have extra sets available. They can charge you for copies. In many condominium documents, the board is authorized to make material alterations and substantial additions up to a certain dollar amount. If your condominium documents do not address this issue, then seventy-five percent of all owners would need to approve the color change.

Regarding landscaping changes, while the tendency of the arbitrators is to find many changes to condominium property to be "material alterations", the arbitrators have exhibited more latitude toward boards with respect to landscaping decisions. Obviously, landscape is always in a changing condition (it grows, it dies, etc.). Unless the board determines to radically remove or change the landscaping scheme of the common elements, most landscaping changes would not be considered a material alteration or substantial addition to the common elements requiring a vote of the owners.

Question: The board of directors of our condominium association is confused as to the permitted duration of contracts for services such as landscaping, elevator maintenance, etc. Is our board allowed to negotiate multi-year agreements? One unfortunate and related problem that we have is that we inherited several contracts from the developer in February 2004, such as our five year, non-bid elevator maintenance agreement, that has left us vulnerable to huge price increases. Do we have any options to get out of this agreement? We also have several contracts that have roll-over provisions that automatically renewed for an additional year because they were not canceled with 90 days of the contract expiration. We would really appreciate your response. C.B. (via e-mail)

Answer: Section 718.3026 of the Florida Condominium Act requires most contracts of the association to be in writing. This includes service contracts, contracts for the purchase or lease of materials or equipment, and any contract that is not to be performed within one year.

There is no maximum duration for association contracts specified by the law. I recommend that, where possible, the associations seek arrangements that are terminable upon reasonable notice, such as thirty days or sixty days, with or without cause. This is especially important for agreements with employees and management companies.

However, certain industries are typically unwilling to enter into contracts that are terminable at will. Examples include cable television agreements, elevator maintenance agreements, and sometimes landscaping contacts. Such contracts should be reviewed on a case-by-case basis.

Regarding the contract inherited from the developer, Section 718.3025 of the Florida Statutes permits associations, after transition of control from the developer (commonly called "turnover") to cancel certain types of agreements. A vote of seventy-five percent of the entire voting interests is usually required (there is typically one voting interest assigned to each unit). Some contracts must be cancelled within eighteen months of the turnover date, others can be cancelled after that time.

In terms of "automatic renewal" clauses, I am aware of no law which would make such contracts illegal or unenforceable. I am extremely hesitant to recommend automatically renewing contracts for condominium associations, especially when they have lengthy initial terms. Timely cancellation often "falls through the cracks" with boards.

The association's attorney should be able to assist in navigating through these issues. ⚖

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.

Sunshine Rules Also Have Some Exceptions

FORT MYERS THE NEWS-PRESS, FEBRUARY 24, 2005

By Joe Adams

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the sixth installment of a primer on sunshine laws which I have dubbed "Community Association Sunshine Law, Course 101" (See Time to let in a little sunshine, January 20, 2005; Shedding more light on laws of sunshine, January 27, 2005; Sunshine laws apply to condo boards, February 3, 2005; Minutes bring order to conduct of board, February 10, 2005); and Committees sometimes in sunshine (February 17, 2005).

Chapter 6: Exceptions to the Sunshine Law

Every rule has its exceptions. Today, we will look at the exceptions to the sunshine rules for condominium and homeowners' associations.

As noted previously, there are no exceptions to the sunshine rules for "executive sessions", "planning sessions", "fact finding missions", "personnel meetings", or for any other gathering of a quorum of the board (or, where applicable, committees) for the purpose of conducting association business. Remember, votes need not be taken for association business to be conducted.

As we have learned by now, there are subtle differences between the law for condominium associations and the requirements for a homeowners' association. Generally speaking, the HOA law tends to be a bit more liberal, and is indeed a bit more flexible (although only slightly so) regarding closed meetings.

First, let's take a look at the law for condominiums. Section 718.112(2)(c) of the Florida Condominium Act provides the requirement that board meetings and committee meetings be open to the unit owners is inapplicable to meetings between the board or a committee and the association's attorney, with respect to "proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice."

Therefore, condominium association boards (or committees) may hold closed meetings when they are meeting with legal counsel to discuss pending litigation. The rationale for the exemption is obvious. For example, if an association is involved in litigation with a member, it would be unfair to the association to permit the member to attend meetings with the association's attorney to discuss the strengths and weaknesses of the case, strategic issues, and the like.

The statute also permits closed meetings with legal counsel regarding "proposed" litigation. Here, the law is open to greater interpretation. Theoretically speaking, any legal matter in which an association is involved presents the specter of "potential" litigation, but by whom must it be "proposed"?

The law for HOAs contains a nearly identical exclusion for meetings with legal counsel regarding pending or "proposed" litigation. This exclusion is found in Section 720.303(2)(a) of the statute applicable to homeowners' associations. However, the HOA law also contains a second exemption, which is found at Section 720.303(2)(b) of the statute. This law provides that meetings between a quorum of the board (or a committee) and legal counsel may be closed when "personnel matters" are under discussion, there is no requirement that pending or proposed litigation be involved. There is no similar provision in the condominium law, although there probably should be, and many "personnel matters" also involve "proposed litigation."

A question often posed is whether notice of closed meetings needs to be posted in the community. Public governmental entities are also entitled to have closed meetings with attorneys, and they are obligated by law to post notices of those meetings. Neither the condominium law nor the law for homeowners' associations specifically address this

point, and I have heard both sides of the coin argued.As a practical matter, the purpose of posting notice is to let owners know that the board is meeting and to permit them to attend, observe, and address the topic when permitted by law. Posting notice for a closed meeting often throws fuel on a community's political fires, particularly when the litigation involves a high profile or contentious issue in the neighborhood.

Nonetheless, I am of the belief that associations are wise to post notice of these meetings, and quite likely legally obligated to do so, since the posting requirements in both statutes refer to "all" meetings, while the exemptions only specifically apply to unit owner or parcel owner attendance rights.

Boards should also keep minutes of attorney-client privileged meetings, particularly if a vote is taken at the meeting. The minutes should never reflect attorney-client privileged information, but only who attended the meeting and proper documentation of any vote which was taken.

This concludes Community Association Sunshine Law, Course 101. To make sure the students have been paying attention, next week's column will be the final exam. Study hard. ⚖

Q&A

Question: Our condominium has assigned parking spaces, which were granted by the original developer, and which are recited on our deeds. I chose my unit, in part, because the parking space is close to the apartment's front door. Because we have a number of elderly and disabled residents, the board has been discussing assigning handicapped parking spaces close to the building. Can they take away my parking space and make it a handicapped space? L. J. (via e-mail)

Answer: In my opinion, no.

Although the Fair Housing Amendments Act of 1988 and parallel state statutes require associations to make "reasonable accommodations" for disabled individuals, I do not think it is reasonable to take away another unit owners' property.

While making reasonable accommodations often involves parking issues, I am assuming that your parking spaces are what are called "limited common elements." This means that the exclusive right to use that parking space passes with the title to your unit, and cannot be separated from it.

Question: When a holiday bonus is given to an employee by an association, is it proper to give the bonus in the form of a check and deduct taxes? In the past, our association has given the manager cash bonuses, with no deductions. V. B. (via e-mail)

Answer: In my opinion, bonuses from the association should be paid by check, so there is a record of the amount of payment. All appropriate taxes and other withholdings should also be deducted from the bonus. The required deduction should, of course, be taken into account when the gross bonus amount is set.

If unit owners wish to give cash gifts to the manager, then the interests of the association are not implicated (unless the association has a policy against such gifts). The manager will need to check with his or her own tax advisor as to whether or not these gifts are considered taxable as tips or otherwise.

Question: Our condominium complex is about twenty years old. Our bylaws were written at that time. We need to change our laws on a few matters. We are told that it takes one hundred percent to change our documents, is this correct? J.T. (via e-mail)

Answer: The procedure for amending your condominium documents (declaration of condominium, articles of incorporation, and bylaws) will be contained in those documents themselves. The law provides that if the documents are silent on the required vote for amendment, it takes two-thirds of all voting interests for amendment. There is usually one voting interest per unit.

Most documents require some type of super-majority approval for amendment, usually two-thirds or seventy-five percent. Some are based upon the entire voting interests, some are based upon only those who actually vote.

With the exception of some very old condominium documents I have seen, very few documents require unanimous approval for amendment. There are, however, a few areas where Florida law requires unanimous approval for change. This includes changing the size of units, granting or taking away certain property rights, and amendments having to do with the allocation of costs and ownership.

Question: We have a 7 unit condo with ants. One owner refuses to let our pest control contractor in. Do we have a remedy? D.B. (via e-mail)

Answer: Section 718.111(5) of the Florida Condominium Act provides that 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.

In addition to this section of the Condominium Act, it is very common for a condominium association to have a provision contained within the condominium documents requiring unit owners to provide the association a key to their units so the association can properly exercise this right of access to units. You should review your condominium documents to see if owners are required to provide a key to their units.

With this background in mind, the arbitration case of *The Beaches of Longboat Key – South Owners Association, Inc. v. Goldreyer*, dealt with the issue of owners who denied the association access to their unit to provide pest control services. In that case, the arbitrator concluded that the provision of pest control services for the entire condominium was a necessary form of maintenance. Further, the arbitrator concluded that while the unit owners had the right to have as much peace in their unit as possible, when this right conflicts with the right of the association to access the unit during reasonable times when necessary to provide maintenance, the unit owner's right gives way to the association's irrevocable right to access units under the Condominium Act. The arbitrator ordered the owner to grant access to the association.

Therefore, an association generally has the right of entry to the units within the condominium to allow for pest control. Associations do have to be careful with pest control issues, however, including dealing with owners who have peculiar sensitivities, and reviewing the documents to determine whether certain types of pest control are a proper common expense.

In terms of a remedy, there is no quick and easy solution in the law. In all likelihood, you would need to file a petition for arbitration with the State of Florida, at which point the arbitrator would review the matter and order the unit owner to provide reasonable access, of course assuming that the arbitrator agreed with your case in the first instance. If the unit owner did not comply with the arbitrator's order, or if they wished to appeal, the matter would go to court. The winning side would be able to collect their attorney's fees from the losing side.

Some associations use "self help" (such as a locksmith) to gain entry to units. In general, I recommend against forced entry, with perhaps the limited exception of an extreme emergency situation, such as the recent hurricanes. ⚖

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Sunshine Laws Put to the Test

FORT MYERS THE NEWS-PRESS, MARCH 3, 2005

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Florida's courts have referred to community associations as "democratic subsocieties." At least in theory, American democracy requires the governmental decision-making process to be conducted in the open. Not surprisingly, Florida's "sunshine" laws have imposed open-government requirements on association boards.

Today's column is the seventh and final installment of a primer on sunshine laws which I have dubbed "*Community Association Sunshine Law, Course 101*" (See *Time to let in a little sunshine*, January 20, 2005; *Shedding more light on laws of sunshine*, January 27, 2005; *Sunshine laws apply to condo boards*, February 3, 2005; *Minutes bring order to conduct of board*, February 10, 2005); *Committees sometimes in sunshine* (February 17, 2005); and *Sunshine rules also have some exceptions* (February 24, 2005) Today, the final exam.

Question #1: Your association's board consists of five directors. Which of the following events constitutes a "meeting" of the board?

A. Three members of the board holding a planning session in order to set the agenda for the next board meeting.
B. Two members of the board meeting with an employee to discuss performance problems.
C. Four members of the board attending an educational seminar regarding association law.
D. All of the above.
E. None of the above.

Question #2: Notice of board meetings is to be posted in a conspicuous location:

A. 48 hours in advance of the meeting.
B. 14 days in advance of the meeting.
C. 72 hours in advance of the meeting.
D. Both A and B.
E. All of the above.

Question #3: A board meeting may be closed to unit or parcel owners when:

A. The board is going to be discussing controversial topics.
B. The board is going to discuss an opinion letter it received from the association's attorney.
C. The board is going to meet with legal counsel to discuss pending or proposed litigation.
D. In an emergency.
E. All of the above.

Question #4: Members of the association can audiotape (tape record) or videotape which of the following meetings:

A. Board meetings for homeowners' associations.
B. Board meetings for condominium associations.
C. Only meetings where the owner's direct interests are involved.
D. A and B.
E. None of the above.

Question #5: The sunshine laws for associations applies to which of the following committees:

A. Any committee of a homeowners' association that can approve architectural requests or authorize the expenditure of association funds.
B. A condominium association's budget committee and any committee of the condominium association that is empowered to take final action on behalf of the board.
C. Every committee of a condominium association unless the association has exempted "nonstatutory committees" from the sunshine requirements through its bylaws.
D. All of the above.
E. None of the above.

Question #6: Owners have the right to address the board in regard to any designated agenda item at which of the following meetings:

A. Any meeting of a condominium association board.
B. Any meeting of a homeowner's association board.
C. A meeting of a homeowner's association board called by petition of twenty percent of the voting interests.
D. A and C only.
E. All of the above.

Question #7: In addition to notice of the date, time, and place of the meeting, postings must also include an agenda for which of the following meetings:

A. Condominium association boards.
B. Homeowners' association boards.
C. The board members' weekly poker game.
D. All of the above.
E. None of the above.

To make sure all students pass the course, here are the answers:

Answer #1: The correct answer is A. The setting of the agenda for a future board meeting is "conducting" association business. Attendance by a quorum of the board at a seminar does not involve the conduct of business for the association. Although a meeting with an employee involves the conduct of association business, this is not a "meeting" in our example since a quorum of the board is not in attendance.

Answer #2: The correct answer is D, both A and B. Notice of all board meetings must be posted at least 48 hours in advance. For both condominium and homeowners' associations, notice of meetings where assessments will be considered, or notice of meetings where rules concerning the use of the units or parcels will be considered, must also be posted 14 days in advance, and also mailed or delivered to the owners 14 days in advance.

Answer #3: The correct answer is C, only meetings between the board and legal counsel are exempt from the sunshine requirements. The meeting must be for the purpose of discussing pending or proposed litigation, and for homeowners' associations, may also include discussion of personnel matters, but legal counsel must still be present. Although notice provisions can be suspended in the event of an emergency, this does not suspend unit owners' or parcel owners' right of attendance.

Answer #4: The correct answer is D, both A and B. Both the condominium and HOA laws permit unit owners or parcel owners to record meetings of the board. The board may adopt reasonable rules regarding how such recording is done, but may not otherwise limit that right, nor require demonstration of any particular reason why the owner wishes to record the meeting.

Answer #5: The correct answer is D, all of the above. Certain enumerated committees of both condominium and homeowners' associations are always open to owners. For condominiums, all committee meetings are likewise open to owner attendance unless the bylaws have exempted them.

Answer #6: The correct answer is D, both A and C. This is one area where the condominium law and the law for homeowners' associations differs substantially. Condominium unit owners have the right to address the board with respect to any designated agenda item. Conversely, there is no similar right in HOA's. HOA parcel owners are only granted the right to address the board if the board's meeting is called by petition of the members. The bylaws of a homeowners' association may also confer participation rights greater than the statute, and of course the board can (and should) permit input from owners in an appropriate fashion.

Answer #7: The correct answer is A. Only the condominium law requires the posting of an agenda with notice of a board meeting. However, for homeowners' associations, if an assessment is to be considered at the board meeting, notice that an assessment will be considered and the nature of the proposed assessment must also be included with the notice. ⚖

Q&A

Question: I live in a two-story condominium, with no elevator. My wife is having physical problems which make it difficult for her to go up and down the stairs. There has been some discussion about installing a lift. My question is who should have to pay for this? G.K. (via e-mail)

Answer: The Fair Housing Amendments Act of 1988 requires housing providers, including condominium associations, to make reasonable accommodations for the disabled.

One required accommodation is that the association must permit handicapped individuals, at the expense of the handicapped individual, to make reasonable modifications to the premises

so as to permit the disabled individual to enjoy the property as fully as a non-disabled person, to the extent practicable.

Assuming that your wife suffers from a handicap, which the law defines as a mental or physical condition which impairs a major life activity, you would be entitled to have the lift installed, at your expense. The association could establish reasonable conditions as to the type of installation, its maintenance, protection against liability issues, and the like.

Question: Our condominium association is also governed by what we call a "master association." It is combined with single family homes and condos. The master association wants to collect a processing fee for rentals. My question is whether they can do this, or if only condominium associations can collect. D.B. (via e-mail)

Answer: The Florida Condominium Act specifically permits the collection of processing fees if the association has the right to approve rentals, and the fee is specified in the documents. The fee for condominiums cannot exceed $100.00 per application.

The law for homeowners' associations is silent on the topic. In my opinion, if the governing documents (declaration of covenants or bylaws) as originally recorded, or as amended, authorize the fee, then it is valid.

Question: Is there any state law requiring a homeowners' association to have an annual audit? Our budget exceeds $100,000.00 annually. L.B. (via e-mail)

Answer: Florida's law was amended in 2004 to impose heightened financial reporting requirements on homeowners' associations. The law is now similar to the condominium law.

First, it is important to understand that the association's governing documents may impose more stringent requirements than that found in the law.

For HOAs with annual receipts over $400,000.00, a certified annual audit is required. If the receipts fall between $200,000.00 and $400,000.00, a review is required. A compilation is the required level of report for associations with receipts between $100,000.00 and $200,000.00.

Associations with annual receipts of $100,000.00 or less must provide an annual report of cash receipts and expenditures. HOAs operating less than 50 parcels, regardless of annual receipts, may also provide a year-end cash receipt and expenditure statement.

The law, as it does for condominiums, also permits waiver of these requirements by a majority vote.

Question: I am a real estate agent in Fort Myers. I have been told by lenders in deals I am working on that the condominium association or management company refuses to fill out the lender questionnaire. Would a seller or buyer have legal recourse against the association for refusing to provide the lender with this information? J.H. (via e-mail)

Answer: Under Florida law, the potential buyer has no legal relationship with the association and has no "standing" to pursue claims against the association.

A seller (a unit owner) does have standing to pursue legal claims against the association. However, Florida law is very clear on this topic. Specifically, the Florida Condominium Act provides that associations (and accordingly, their managers) are not obligated to respond to project information requests from lenders.

However, the law was amended in 2003, and again in 2004, to try to create greater incentives for associations to cooperate with respect to lender questionnaires. Specifically, the law now provides that an association may charge up to $150.00 for responding to these questionnaires (plus any attorney's fees the association incurs). The law also confers immunity on the association if it responds to these requests in good faith in using certain "magic words" in a response.

Accordingly, the impediments faced by many associations in responding to these requests in the past have been removed by the law. However, the association is still under no affirmative obligation to respond.

Question: When is the next educational program being held in the Fort Myers area. L. J. (via e-mail)

Answer: A free course on conflict resolution for Florida condominium and cooperative board members and unit owners will be held on Wednesday, March 23, 2005 from 9:00 am to 12:00 noon at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Fort Myers. The course will be presented by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes. I am the course instructor.

The course will explore the role of the board of directors in creating and enforcing rules as well as how those rules ultimately impact unit owners. It will also review basic principles of group interaction, conflict management and communications and describe constructive steps that unit owners can take to prevent conflict from escalating into costly and damaging disputes. Finally, participants will leave with a basic understanding of alternatives to litigation in resolving disputes. 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. ⚖

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Condo Ombudsman Outlines his Vision for Job

FORT MYERS THE NEWS-PRESS, MARCH 10, 2005

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In 2004, the Florida Legislature created the "Office of the Condominium Ombudsman" as a measure intended to avoid day-to-day frictions in condominium living becoming full-scale legal battles.

The Ombudsman is appointed by the Governor, and serves at the pleasure of the Governor. In October of 2004, Governor Jeb Bush appointed Virgil Rizzo as Florida's Condominium Ombudsman. Rizzo, a retired physician and attorney, has been on the job for about three months. I took the opportunity to interview Dr. Rizzo for this column to obtain his insight and his visions for the Ombudsman's post. Here are some of the highlights.

Adams: The 2004 Legislature created the Ombudsman's office, but did not provide any funding for the program. I believe the politicos call that an unfunded mandate. Has this been a problem for you?

Rizzo: Not really. I was not involved in the creation of the statute or the original budget process. Of course, my office will need adequate staff and funding to operate. I am working on a business and organizational plan which is going to be submitted to the House Appropriations Committee next week. It is currently a work in progress. Ideally, I would like to start with a staff of six, with three in Tallahassee, and three serving the Tri-County area (Dade, Broward, and Palm Beach counties), where most of the condominium problems occur.

Adams: That is a nice lead in to my next question. According to most observers, the vast majority of Florida's condominium disputes emanate from the so-called Gold Coast: Dade, Broward, and Palm Beach counties. Other regions of the State, such as Southwest Florida, the Panhandle, mid-Florida (Tampa and Orlando) and the Space Coast area (Jacksonville, Daytona, St. Augustine, etc.) complain that they are the step-children when it comes to making condominium policies. How does the Ombudsman plan to reach out to these regions?

Rizzo: I am not sure yet. We are only into the third month of operation. Most of the publicity about my office has come from East Coast media. At least ninety percent of the inquiries the office has received to this point are from Dade, Broward, and Palm Beach counties.

Adams: How can unit owners or board members reach your office?

Rizzo: Our phone number in Tallahassee is 850-922-7671. I can be reached by e-mail at Virgil.Rizzo@dbpr.state.fl.us.

Adams: What percentage of your inquiries involve unit owners with complaints against their associations, and what percentage involve boards seeking your assistance?

Rizzo: I cannot say with precision at this point, I am working on those statistics right now. My best estimate is that approximately 60% of calls come from unit owners who have issues with their associations or boards. About thirty percent come from board members who are looking for help. The other ten percent involve miscellaneous inquiries, such as complaints against managers.

Adams: Could you break down, generally, the substance of the inquiries you receive?

Rizzo: Elections is a big one. The other general categories involve fiscal management/mismanagement, assessments (regular and special assessments), rule enforcement procedures, and material alterations of common property. Many of the contacts are informational, seeking information about how the laws or regulations apply to their particular situation.

Adams: One of the purposes of your office, as specified by the Legislature, is to provide unit owners and board members with the widest possible access to educational opportunities. What is your plan to get the job done on this front?

Rizzo: I am still working on it. The most ideal situation would be a website where people could plug in a key word and any possible issue they might have would be addressed, with information on how to proceed. Right now, I am using a staff of volunteers to assist. I have three volunteers, whom I have trained.

Adams: According to media reports, you come to your post with no prior experience in condominium law or operations, except a well publicized legal battle between you and the board of directors which operates the condominium where you reside. What has surprised you most about Florida's condominium living experience?

Rizzo: Every day is a surprise. What I find most daunting is the lack of consistency in the laws applicable to condominiums, Chapter 718. The administrative rules conflict with the statute, and the case decisions and arbitration decisions conflict with both the rules and the statutes.

Adams: A significant portion of the legislation involving your position, and also a topic of frequent discussion involves insuring fairness in condominium elections. Do you think the current election system is too complicated, and if so, how would you change it?

Rizzo: No, it is not too complicated, but it is incomplete. I have been to about eight contested condominium elections so far, where I have served as an election monitor. It seems that every manager, attorney, and law firm handles things a bit differently. For example, some disregard election ballots that are not placed in the inner envelope, while others count them. The biggest problem with elections is that the ballots are returned to the board. This provides opportunity for mischief when the person handling the ballots is also a candidate.

Next week, excerpts from the interview with the Ombudsman will continue.

Community Associations Day Set for March 30, 2005 in Tallahassee

Several groups interested in condominium association legislation have organized a "Community Associations Day" for March 30, 2005 in Tallahassee. The event is being coordinated through the Community Association Leadership Lobby (CALL) which is administered by the law firm of Becker & Poliakoffl, along with other participating groups including Community Associations Institute and the Space Coast Condominium Association. The purpose of Community Associations Day is to permit those directly affected by the laws, homeowners and board members, to meet their Legislator and personally participate in the shaping of policies involving the governance of community associations. All members of condominium associations and homeowners' associations, whether or not board members, are encouraged to participate. This year's hot topics in the Legislature are likely to include government regulation of homeowners' associations and mandatory training for condominium association board members. For more information, log into CALL's website at www.callbp.com or telephone Donna Berger, CALL Executive Director at 1-800-432-7712. ⚖

Q&A

Question: We live in a relatively new development, still being managed by the developer. The community includes a golf course. About two-thirds of the homeowners are golfing members of the Club, and the other third are called social members. There are different dues structures for the different types of members. Several golf members convinced the manager to allow them to put signs on two prime parking places, reserving the spaces for the men's and women's golf champion. This parking area is used for the pool and fitness centers, which is available to the social members as well. This would appear to infringe on the common area rights of the social members, and was done without the consent of the owners. What is your opinion? C.B. (via e-mail)

Answer: I believe that the management of a homeowner's association, under the circumstances you describe, would be given some degree of latitude in the assignment of parking, so long as the assignments are not permanent and do not purport to create property rights.

For example, I think it would be appropriate to set aside a reserved space for the Club's "employee of the month" and I likewise see no legal problem with recognizing others who have achieved accomplishments within the Community.

Question: Our homeowner's association recently attempted to hold an annual meeting. Because the required majority quorum

was not present, the meeting could not be held. Our bylaws state that an annual meeting must be held in January of each year. Our management company said it was not necessary to hold a meeting. What is your opinion? J.P. (via e-mail)

Answer: The law for homeowners' associations was amended several years ago to lower the quorum requirement so that the maximum quorum permissible in an HOA is thirty percent. Many older bylaws still contain the majority threshold, although I believe associations can reasonably rely on the new law when setting quorums. The courts, however, have not addressed retroactive application of the new statute.

I think it is important to have an annual meeting, especially for the purpose of electing members of the board. It is not uncommon for associations, particularly homeowners' associations, to have difficulty in getting a quorum for the annual meeting. That is why the Legislature lowered the required quorum threshold.

Under Robert's Rules of Order, if a quorum is not established, the members can vote to adjourn the meeting for the purpose of gathering more proxies and establishing a quorum. This is what I typically recommend. I also recommend that the association make at least two good faith efforts to hold the annual meeting. If, after that effort, a quorum still cannot be established, I do not think anyone can accuse the incumbent board of shirking its legal duty.

Question: cent series on the sunshine laws. I wanted to look at the actual law. Do you know where I could get a copy of the law, including the sunshine laws? B.M. (via e-mail)

Answer: The "sunshine" rules for condominium associations is found in Section 718.112(2)(c) of the Florida Statutes. For HOAs, look at Section 720.303(2)(c). There are a number of websites where you can easily find the Florida Statutes. I find www.leg.state.fl.us, the website of the Florida Legislature, to be one of the more user-friendly sites on the Internet.

Question: Is there any state law requiring a homeowner's association management company or board to be bonded against potential theft of association funds? L.B. (via e-mail)

Answer: No. The Florida law contains detailed requirements for "fidelity bonds", which is typically an insurance policy called "employee dishonesty", "crime coverage", and similar names, but there is no equivalent in the HOA statute.

Although the law for HOAs does not require bonding, in my opinion it is extremely important that members of the board, managers, and anyone with access to association funds be covered by a fidelity bond. In my view, the bond should cover all amounts that are potentially subject to theft. Also, be careful when relying on a management company's bond. It often will not provide coverage to the association.

Your board should sit down with your insurance agent and understand available coverage, and make the appropriate purchase of insurance.

Question: Our condominium was established in the late 1970's. There are a number of provisions which conflict with the current version of Chapter 718. Which controls? C.F. (via e-mail)

Answer: It depends. The courts have generally held that "substantive" provisions contained in a declaration of condominium are not changed by changes to the law. For example, the law was amended in 1992 to state that a condominium association could only assess for maintenance fees either equally, or based upon square footage. Many older condominiums contain different formulae for assessment, and those formulae remain legally valid.

On the other hand, "procedural" or "remedial" changes to the law are generally considered applicable to existing condominiums. For example, most of the "sunshine" requirements of the law, that pertain to board procedures, would be applicable to existing associations, even if the bylaws provided differently. ⚖

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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.

New Condo Office Stresses Education

FORT MYERS THE NEWS-PRESS, MARCH 17, 2005

By Joe Adams

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Today's column continues our interview with Virgil Rizzo, the newly appointed "Condominium Ombudsman" for the State of Florida. (See Condo Ombudsman outlines his vision for job, March 10, 2005.)

Adams: Have you seen any evidence of widespread election fraud or misdeeds in condominium elections?

Rizzo: Yes. I do not know how "widespread" it is, as I have only handled eight elections so far. I should say that there are many allegations of election fraud. I try to stay impartial.

Adams: The law which created your position states that you are supposed to act as a "neutral resource" in assisting both boards and unit owners in understanding their respective rights and responsibilities. Some critics charge that your office has so far demonstrated an anti-board bias, and comes in with "guns blazing" on the side of the unit owner who has made the complaint. What is your response?

Rizzo: I have not heard that. I really encourage boards to call me if they have a question about procedures. Many board members are lay people without experience in the corporate world. The primary way to improve the performance of associations is through education. This is not a battle between boards and unit owners, its about understanding rights and responsibilities.

Adams: Recently, a Bill was filed in the Legislature which would make education mandatory for all condominium association board members. Do you think this is a good idea?

Rizzo: I think board members should have some knowledge. As to whether training should be mandatory by law, that is hard to grasp for me. The most important thing is for boards to learn that they must make decisions as a group. An association is not one person, even if that person is the president.

Adams: Many of the State's condominiums, particularly here in Southwest Florida, contain less than 100 units. Many of those associations have a difficult time in finding volunteers to serve on their board. Do you think the laws should exempt smaller associations?

Rizzo: No. My experience with smaller communities is that they are more like families, but they should all be subject to the same laws. When everyone knows their neighbors, there is a greater tendency for people to go out of their way to avoid trouble with each other. In large communities, no one knows their neighbors, so disputes have less social consequence.

Adams: The Division of Florida Land Sales, Condominiums, and Mobile Homes estimates that there are more than two million condominium unit owners in the State of Florida. Last year, there were approximately 1,800 complaints filed by unit owners against their boards. About 50 people account for 800 of those complaints, so there were actually about 1,000 unit owners who filed complaints against their association. Some would say that the current system allows the tail to wag the dog. What do you say?

Rizzo: I would question the accuracy of those statistics. Keep in mind that many people have concerns, which you might call "gripes", that do not go to the point of filing a formal complaint with the State. We are trying to resolve those gripes.

Adams: Do you feel there is significant graft or corruption in the operation of Florida's condominium associations?

Rizzo: I have not seen it. There have been allegations made, but those are serious charges and require hard evidence. The condominium scheme definitely presents the opportunity for kickbacks, but I honestly cannot say whether or not that is going on. If so, it should be addressed by the criminal authorities.

Adams: Recognizing that you have only been on the job for a few months, what is the greatest accomplishment of the Office of the Ombudsman so far?

Rizzo: Offering a resource for people to find answers to their questions.

Adams: Is there anything you have done so far which you would do differently if you had to do it over again?

Rizzo: No.

Adams: Under the current system, if an association violates the law, the Division can levy a fine against the association. Do you think fines against associations are an effective way to administer the condominium laws?

Rizzo: No. People are reluctant to address concerns in their communities because when the fine is levied by the association, the person who complains ends up having to pay. That is like fining yourself.

Q&A

Question: What happens if only four people choose to run when there are five seats open for our condominium association board. Two of those four are current directors, who were originally appointed, not elected. The association is telling us that there will be no election. Is this the law? What happens to the fifth seat? What happens if the four members cannot agree on the fifth person? Can a person that has a condo as a second home be on the board? R.M. (via e-mail)

Answer: Any unit owner is entitled to stand for election to the board, provided that they pre-qualify for election. Typically, this requires that a unit owner file with the association at least 40 days before the annual meeting. It sounds like there were only four candidates who filed for five seats. Accordingly, your association's position is correct, no election is required. The four who put their names into nomination (whether incumbents on the board or not, whether sitting on the board due to election or appointment) will be automatically elected.

The remaining four directors will fill the fifth seat. If they are unable to do so, they will need to keep balloting until they break the deadlock.

Question: In our condominium, all owners contribute equally to association assessments. However, some owners who do not own carports are required to pay toward their upkeep. This does not seem fair. Should we have to pay? C.G. (via e-mail)

Answer: It is likely that your declaration of condominium describes the carports as "limited common elements."

Limited common elements are a sub-set of common elements, meaning that their exclusive use is reserved for a particular unit (or group of units) to the exclusion of other units.

Section 718.113(2)(a) of the Florida condo statute provides that the maintenance of limited common elements may be assigned to the association at the expense of all owners (as a "general common expense"), may be assigned to the association, but only at the expense of the benefiting owners (sometimes called a "limited common expense"), or may require the individual assignees to undertake the maintenance, at their individual expense.

If the declaration of condominium is silent, then the carports would be maintained as a general common expense, and that could only be changed through an amendment to the declaration of condominium. The owners who do not have carports may wish to review the procedure for petitioning for an amendment to the declaration.

Question: Our board recently decided to make a change to our rules and regulations. The first time the rule came up, one of the board members voted against it, because he did not like it. The board ruled that the change did not pass, because the board thought that it took unanimous approval of the board to change our rules. A second meeting was called, and the association stated that it had found out that the rules can be changed by a majority of the board. The board then changed the rule. Is this legal? L.T. (via e-mail)

Answer: In my opinion, assuming all notice procedures were followed, and that the board's current interpretation

of the bylaws is the correct one, it would seem that a valid rule was adopted.

Just because the association misunderstood the required vote to change a rule does not bind the association to the misunderstanding perpetually.

Question: Our condo was established in the mid-1980's. Ownership for two bedroom units is two shares and ownership for one bedroom units is one share. The maintenance fee is half for the one bedroom units over the two bedroom units (example, $180 for two bedroom units and $90 for one bedroom units). Since all of the units use the common elements equally, can the board change the maintenance fees so that everyone pays the same? If a vote of the unit owners is necessary, what would the required percentage vote be? C.T. (via e-mail)

Answer: The Florida Condominium Act provides that unless otherwise provided in the declaration of condominium, as originally recorded, an amendment cannot change the method by which common elements are owned or common expenses are shared, unless all unit owners and lien holders approve.

Question: I am an owner in a condominium association, but I use my unit as a rental. Our association has a restriction that says that owners can keep pets in their units, but tenants cannot. Is the association allowed to keep my tenants from having pets when other owners are allowed to have them? D.T. (via e-mail)

Answer: Many associations' governing documents provide for pet restrictions, and it is not uncommon to see a restriction where the owners are allowed to maintain and harbor pets in their units but tenants are not allowed to do so. The question is whether this disparate treatment between owners and renters is allowed. This has not been addressed by the courts.

However, there have been several cases from the State's arbitration program that have discussed this issue. Grove Isle Condominium Association, Inc. v. Levey, et al., was a case where the association had a pet restriction allowing owners to maintain pets so long as they were within specifically defined parameters, but renters were not allowed to have pets at all. The arbitrator ruled: "it does not appear that the rule against pet ownership by tenants is wholly arbitrary, violates public policy, or abrogates a fundamental constitutional right." As a result, the tenants in this case were required to remove their dog from the unit.

Additionally, in the arbitration case of Quatraine Condominium Two Association, Inc. v. Convisor and Sotolongo, the association's rules contained a similar ban on pets by tenants, but allowed owners to keep pets within the guidelines established by the rule. The arbitrator concluded that the rule precluding tenants from having pets was enforceable, and that the differential treatment between owners and tenants was valid. ⚖

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New Condo Watchdog Supports Term Limits

FORT MYERS THE NEWS-PRESS, MARCH 24, 2005

By Joe Adams

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Today's column concludes our interview with Virgil Rizzo, the newly appointed "Condominium Ombudsman" for the State of Florida. (See Condo ombudsman outlines his vision for job, March 10, 2005 and New condo office stresses education, March 17, 2005).

Adams: How do you feel about fines against volunteer board members who make errors or violate the laws?

Rizzo: I think that would be the more appropriate of enforcing the law. However, I would not support fining a board member who was not first given a warning about what they were doing wrong, and an opportunity to correct it.

Adams: For the past several years, there has been talk of changing the law to impose term limits on board members. Do you have an opinion on term limits?

Rizzo: I think there should be term limits. Certain people get elected and refuse to give up. I think it is as important, if not more important, for there to be limits on the terms of officers. Someone should not serve as an association's president for fifteen years.

Adams: The law permits associations, through their own bylaws to establish term limits. When someone is continuously elected, they are obviously supported by their neighbors for the post.

Rizzo: I understand. Many people who might want to run for the board choose not to do so as they do not wish to challenge the incumbents. I support term limits for both board members and officers, and think it should be contained in the statute. Documents are difficult to amend, and the statute should override association documents.

Adams: Since your position was created, how many calls and e-mails, on average, does the Ombudsman receive each week?

Rizzo: I am working on that report right now. We think it is running at somewhere around 300 inquiries per week, and growing.

Adams: There is a Bill pending that would regulate homeowners' associations, bringing them under the Division's jurisdiction for enforcement and fines, and which would give the Ombudsman jurisdiction over HOAs. Do you support that?

Rizzo: I have not really looked at that issue in detail. There are some major differences between the two statutes. Regulation of HOAs is a question for the Legislature. Right now, I am focusing on condominiums.

Legislature Looking at Association Assessment Collection

The regular session of the Florida Legislator convened on March 8, 2005. Already, a half-dozen Bills affecting condominium and homeowners' associations have been filed. Some of the proposed legislation would have a significant effect on the operation and management of community associations. The next several editions of this column will provide a heads-up on what's cooking in Tallahassee.

Today, Senate Bill 2632 is at center stage. S.B. 2632 can be viewed on the Internet at the website of the Florida Legislature at www.leg.state.fl.us, where links to both the House and Senate are available.

S.B. 2632 would accomplish the following:

- Condominium associations would not be entitled to recover any attorneys' fees incurred in connection with the collection with delinquent assessments.
- Condominium associations could not file liens for unpaid assessments until the amount of delinquency exceeded $2,500.00.
- A condominium association would need to wait 180

days (the current law is 30 days) before starting a foreclosure action in those cases where foreclosure would still be permitted.

A similar proposal was considered in 2004 by the California Legislature in reaction to a few widely-publicized stories involving reported abuses of the foreclosure remedy. In his veto message, Governor Arnold Schwarzenegger stated that this Bill could "unfairly result in increased assessment for other homeowners who pay their assessments in a timely manner", which seems to be the likely result if this Bill passes in Florida.

Whether you are for or against, your Legislator is interested in your opinions. You can contact members of the Southwest Florida delegation as set forth to the right:

- Sen. Mike Bennett, District 21; 823-5718; bennett.mike.web@flsenate.gov
- Sen. Burt Saunders, District 37; 338-2777 in Lee or 417-6220 in Collier; saunders.burt.web@flsenate.gov
- Rep. Michael Grant, House District 71; 941-764-1100; michael.grant@myfloridahouse.gov
- Rep. Paige Kreegel, House District 72, 941-575-5820; paige.kreegel@myfloridahouse.gov
- Rep. Bruce Kyle, District 73, 335-2411; kyle.bruce@myfloridahouse.gov
- Rep. Jeff Kottkamp, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov
- Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov ⚖⚖

Q&A

Question: Our condominium is located on Pine Island, and consists of thirty-two units, contained in two-story buildings. Our insurance costs continue to rise and we are looking for ways to save money. Do we have to carry flood insurance, which is over one-third of our insurance costs? All of the ground floor units (except one or two) carry flood insurance. Can the board make this decision or are we required to have a unit owner vote? R.S. (via e-mail)

Answer: For those of us who hunkered down as Hurricane Charley was about to hit, one of the greatest fears was a storm surge which was predicted to run higher than fifteen feet. Fortunately, due to Charley's fast-moving pace, the surge did not materialize, but it reminds us that it could happen. Indeed, Charley was initially anticipated to parallel a 1960 storm named Donna, which produced tremendous flood surges throughout the region.

The Florida Condominium Act requires an association to maintain "adequate" insurance. The law does not specifically mandate flood insurance, and in fact refers to flood coverage among insurance that an association "may" obtain. Accordingly, there is some debate as to whether flood insurance is or is not mandatory for Florida condominium associations.

In my opinion, every condominium association should have flood insurance. Further, I believe that if you are located in a flood hazard area (which I assume you are), the requirement for "adequate insurance" in the law, probably includes full flood insurance.

Your unit owners' individual flood insurance is usually similar to "renters' insurance", and primarily covers damage to contents. Further, second floor owners are exposed to flood claims, even if the water does not rise to their level. After a significant flood loss, there will be no power in the buildings, there will likely be substantial water intrusion, there will be mold problems and other structural problems. The "upstairs owners" will likely be equally assessed for all of the repair costs, which could be astronomical in the absence of insurance.

Personally, I would never serve on the board of directors of a condominium association located on a barrier island that did not carry full flood insurance.

Question: I am on the board of a condominium association. Our condominium documents state that "each independent purchaser is required to remit a non-refundable transfer fee of one hundred ($100.00) dollars with the application to purchase. The transfer fee is to defray any present or future cost of transferring unit responsibility from the present owner to the new owner. A board majority may waive the background investigation but it must be recorded in the minutes of a duly called directors meeting."

If a husband and wife purchase a unit, they are charged $100 for a background check. However, the background check is done on both the husband and wife.

If two women, two men, or a man and a woman, who are not married purchase a unit, they are each charged $100 for a background check. Some feel that it's discriminating to charge them each $100 when we only charge a husband and wife $100 combined for both.

I would appreciate your expertise on this subject. B.K (via e-mail)

Answer: Section 718.112(2)(i) of the Florida Condominium Act specifically authorizes an association to charge a fee in connection with the approval of the sale or lease of a unit. However, in order for the association to have the authority to charge the fee, the association must have the authority to approve the transfer (sale or lease) in the first instance, and the fee must be authorized by the documents.

The law goes on to say that any such fee may be preset "but in no event may such fee exceed $100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant."

Accordingly, since separate checks are done on each applicant, the law authorizes a separate fee for each applicant, so long as the documents do. However, spouses and parents and children are considered a single "applicant" for the purposes of the law.

Question: I read your recent columns regarding the requirement for the Q&A Sheet. Where can I get a copy?

Answer: The Q&A Sheet is a state-mandated form known as DBPR Form CO-6000-4. It can be found at the website of the DBPR. Go to http://myflorida.com/dbpr and navigate through Land Sales, Condominiums, and Mobile Homes, then condominiums, then miscellaneous forms.

Question: I read your recent series on the sunshine law for condominium and homeowners associations. You have not addressed how the sunshine law applies to developers who control the board. Does the same law apply? G.S. (via e-mail)

Answer: Yes.

The provisions in Chapters 718 and 720 regarding "sunshine" requirements for community association boards apply equally to developer-controlled associations and associations which are controlled by the unit owners or parcel owners. ⚖

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Bills Cover Wide Range of Issues

FORT MYERS THE NEWS-PRESS, MARCH 31, 2005

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of issues affecting associations are brought up for consideration each year.

Last week, we began a review of legislative proposals for 2005, with a look at a radical proposal that would limit an association's right to collect delinquent assessments through lien foreclosure proceedings. As of this time, Senate Bill 2632 does not have a counterpart in the House of Representatives, and has not been set for any Committee Hearings.

Today, we will shift attention to House Bill 1593 and Senate Bill 2062, which are identical proposals which have been filed in both legislative chambers.

H.B. 1593/S.B. 2062 is a Bill which addresses several unrelated community association issues:

• **Retrofitting Fire Sprinklers:** In 2000, Florida's building code was amended to require the retrofitting of fire sprinklers in most high-rise condominium buildings of more than seventy-five feet. The new law gave associations until the year 2014 to comply. The law was amended in 2003 to permit associations, by a two-thirds vote, to "opt out" of the retrofitting requirement, provided that various technical procedures are followed. H.B. 1593/S.B. 2062 would extend the retrofitting deadline for those who do not opt out until the year 2020.

• **Revival of Covenants Extinguished by MRTA:** As has been discussed in previous editions of this column, Florida's Marketable Record Title Act has unwittingly extinguished many covenants and restrictions applicable to homeowners' associations in Florida. In general, MRTA does not apply to the covenants of a condominium association. Covenants and restrictions are extinguished by MRTA, typically after thirty years, unless certain detailed procedures are taken to prevent extinguishment. For those communities who missed the boat, and have had their covenants extinguished, there is now a procedure for "revival" of those covenants. This procedure was created by a 2004 law, which requires a majority vote of the affected members for reinstatement, and requires the association to follow certain procedures and filing requirements with the State of Florida. However, the 2004 law appears to only apply to mandatory-membership homeowners' associations (since it is found in Chapter 720, the law that applies to homeowners' associations), and thus of no assistance to subdivisions where no mandatory exists. H.B. 1593/S.B. 2062 would also allow reinstatement in neighborhoods that have voluntary associations.

• **Emergency Board Powers After Hurricanes and Similar Casualties:** Although Hurricanes Andrew and Opal affected community associations to some degree, there is no precedence for the magnitude of the 2004 Hurricanes (Charley, Francis, Ivan, and Jean) and the particular effect those storms had on real estate governed by community associations. The "Big Four" from 2004 struck in the heart of areas heavily developed with condominiums, including Lee and Charlotte Counties, Palm Beach and Martin Counties, Central Florida, and the Panhandle.

One issue that was a frequent source of uncertainty after these storms was the scope of a board's authority to take extraordinary actions in the wake of a significant catastrophe. H.B. 1593/S.B. 2062 would address a board's rights after a catastrophic event, including treatment of the following issues:

- The right of an association to declare the condominium property unavailable for occupancy by unit owners, tenants, or guests.
- The right of an association to mitigate damage, including tearing out wet drywall and carpeting, and

the handling of damaged unit owner personal property, such as furniture.

- The ability of an association to suspend notice requirements and levy assessments, the use of reserve funds for non-scheduled purposes, and borrowing money in the wake of a disaster.
- The ability of an association to cancel or reschedule meetings.
- The scope of an association's authority to close down a building when a hurricane is threatened, such as shutting down elevators, shutting off electricity, and dealing with owners who refuse to leave.

Remember, proposed legislation can be viewed on the Internet at the website of the Florida Legislature, www.leg.state.fl.us, where links to both the House and Senate are available.

Whether you are for or against, your Legislator is interested in your opinions. You can contact members of the Southwest Florida delegation as set forth below.

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- **Sen. Burt Saunders**, District 37; 338-2777 in Lee or 417-6220 in Collier; saunders.burt.web@flsenate.gov
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- **Rep. Bruce Kyle**, District 73, 335-2411; kyle.bruce@myfloridahouse.gov
- **Rep. Jeff Kottkamp**, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov
- **Rep. Trudi Williams**, District 75, 433-6775;

Q&A

Question: I live in a senior condominium village in Lee County. I belong to the craft club there and we sewed a beautiful quilt. We did this with the intention to raffle it off for donations to go to our social club. The social club uses monies to purchase bocci balls, craft supplies, sewing machines and repairs, subsidize dances and various functions, etc. Our Board told us that it was illegal for us to have a raffle and refused to allow us to have it. Is it illegal to have such a raffle? L.F. (via e-mail)

Answer: Section 849.09, Florida Statutes, makes it unlawful for any person in the State of Florida to promote or conduct a lottery for money or anything of value. There are, however, some exceptions to the law, namely for certain penny-ante games, bingo, and drawings by chance. The law defines "drawing by chance" as an enterprise in which, from the entries submitted by the public to the "organization" conducting the drawing, one or more entries are selected by chance to win a prize.

I believe the raffle you have described falls under this statute, and would be exempt. However, the statute further defines "organization" as meaning an organization which is exempt from federal income taxation pursuant to federal tax laws, and which has a current determination letter from the Internal Revenue Service. Generally, such "organizations" include corporations operated exclusively for religious, charitable, or other specifically defined purposes, and would not include condominium associations or their committees.

Therefore, your board is technically correct and the drawing is unlawful. From the real world perspective, I would like to meet the state attorney who would be willing to prosecute a group of grandmothers for auctioning a quilt.

Question: Our condominium is located in a master planned community. Therefore, we are governed both by our "local" condominium association and the "master association", which also has jurisdiction for architectural control in all of the condos.

As I am sure you know, the Florida condominium statute states that each board "shall adopt hurricane shutter specifications." The law goes on to say that the board's specifications "shall include color, style, and other factors deemed relevant by the board." The law also requires the condo board's specifications to "comply with applicable building codes."

The Chairman of the Architectural Control Committee for the Master Association states that the Master Association's By-Laws gives them control over the appearance of individual condominium shutters. I claim that the Florida statutes have top priority. What is your opinion? P.O. (via e-mail)

Answer: Interesting question.

You correctly point out that the condominium law requires the board to adopt hurricane shutter specifications, and that

the condominium association board cannot refuse a unit owner's request to install shutters which comply with those standards.

Conversely, the HOA law is silent on hurricane shutter issues, and the covenants would control.

There are two theories. The first is one of "preemption", and under this theory, a court would conclude that the Legislature has given condominium associations exclusive jurisdiction over this issue. If that were the rule of law, your position would be correct.

The other argument is one of contract. The argument would go that since the HOA does not address hurricane shutters, the Master Association's Architectural Control Committee would have the authority to adopt supplemental specifications, which may be different than the condominium board's, since the Master Association is presumably entitled to adopt more restrictive provisions, and there is no law that would prohibit it as to the HOA.

This reminds me of one of those radio shows where "you be the judge." If I were the judge, I would come down on the side of the condominium unit owners' absolute right to install shutters. However, that may be tempered by the Master Association's ability to require some consistency within the overall community, such as a common shutter color.

Question: In order to serve on the association board, the bylaws state that I must be an owner. If I live in the unit, but am not on the county tax roll, can I serve on the board? J.C. (via e-mail)

Answer: Typically, the county's "tax rolls" are computerized records, and while handy references, are not one hundred percent accurate.

If the documents require someone to be a "unit owner" to serve on the board, their name must appear on the deed or conveyance. There may be exceptions in certain cases, such as trusts, where the law allows the grantor (maker) of the trust to serve on the board, as well as any beneficiary of the trust who actually resides in the unit.

Remember, the law does not require one to be a property owner to serve on the board, this restriction must be contained in the governing documents.

Question: Our new board is having weekly meetings called "work sessions." The members of the community are told that we cannot voice our opinion. All five board members are at these meetings. I think we have a problem with the new board. Any suggestions?

Answer: I would suggest that you ask your board to review the recent seven-part series on "sunshine laws" that ran in this column a couple of months ago. I am currently condensing that series into a pamphlet which will be available on the Internet.

If you live in a condominium, your board must allow owners to speak to agenda items. Conversely, in a homeowners' association, there is no right to speak, and your problem would be more "political" than "legal." I am assuming that the board is properly posting notice of these meetings, which would be required whether it is a condominium association or a homeowners' association. ⚖

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Controversial Legislation Pending

FORT MYERS THE NEWS-PRESS, APRIL 7, 2005

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of issues affecting associations are brought up for consideration each year.

Two weeks ago, we began a review of legislative proposals for 2005, with a look at S.B. 2632, a proposal that would limit an association's right to collect delinquent assessments through lien foreclosure proceedings. Last week we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. Today, we will shift attention to House Bill 1229, one of the more controversial pieces of pending legislation.

H.B. 1229 tackles some of the more contentious issues in condominium living, including the waiver of audits, reserves, and state enforcement against community associations. Because of the number of topics addressed in H.B. 1229, we will look at these proposals in two parts, today and next week. Here's some of the highlights of H.B. 1229:

• **Reserve Funding:** The proposed law would provide that "reserves shall maintain a minimum level of at least ten percent of the yearly operating budget." The apparent intent of this proposal would be to prohibit associations from waiving reserves altogether, which is permitted by current law. It is not clear how this proposal, if made into law, would apply to the currently required formula for funding reserves, and whether it would limit an association from spending existing reserve funds on an appropriate reserve expenditure. Clearly, the extent to which associations should be mandated by law to keep reserves, and the unit owners' right to self determination (through waiver votes) are public policy issues that have been and will continue to be debated in the Legislature.

• **Mandatory Education for Board Members:** One of the more controversial aspects of H.B. 1229 is a proposal that would mandate education for condominium association board members. This law would mandate "training" for "newly elected board members and members currently serving on a board who have not previously voluntarily attended training." While most who are involved in providing services to community associations preach training for both board members and unit owners, opponents of H.B. 1229 argue that mandatory education will chill volunteerism. Further, the Bill as currently written, does not indicate how much "training" is mandatory, what type of classes are required, nor how the mandate would be funded or enforced.

• **Waiver of Audit Requirements:** Currently, the condominium law requires associations with annual receipts in excess of four hundred thousand dollars to produce an annual audit. The law permits association members, by a majority vote, to waive the audit requirement and have prepared instead a review, a compilation, or a cash report of income and expenditures. The new proposed law would prohibit "an association or board [from] waiv[ing] its audit for more than two consecutive years." Current law does not permit boards to waive audit requirements anyway, so it is unclear why this part of the proposed Bill is necessary. Mandatory audits will presumably offer some increased disclosure to unit owners, but at what price? This proposal, like the reserve proposal, removes the association's self-determination rights, through majority vote, and places those decisions in the hands of government. Also, where financial abuses do exist, they are as often (or more often) found in smaller associations, which are not required to have audits anyway, and which would receive no protection from this Bill.

Next week, we will wrap up our review of H.B. 1229 by looking at proposals to create government enforcement agency for homeowners' associations, expand the role of the Condominium Ombudsman, and address the role of the Division of Florida Land Sales in dealing with complaints against condominium associations and their directors.

Remember, proposed legislation can be viewed on the Internet at the website of the Florida Legislature, www.leg.state.fl.us, where links to both the House and Senate are available.

Whether you are for or against, your Legislator is interested in your opinions. You can contact members of the Southwest Florida delegation as set forth below.

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• Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov

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Q&A

Question: I read your recent series regarding sunshine laws for associations. Here is my question, which involves our homeowner's association. We have five board members. Three board members (including two who were recently elected) recently met with the management company so that the manager could explain how our financial statements are prepared, and how the management company authorizes the payment of bills. Questions were asked by the board members present, and minutes were taken. The main issue of contention is whether this is was a "meeting of the board", for which notice had to be posted. Also, can the board have an "executive meeting" prior to the board meeting to review and understand the items on the agenda for the public meeting? There are no motions or voting at this time, only discussion. This was done at my association in New Jersey. T.C. (via e-mail)

Answer: Your second question is the easier one, the "executive meeting" described would clearly be a "meeting" of the board and subject to the "sunshine" requirements (posted notice, owner rights of attendance, etc.).

Your first inquiry, the "training session" with the management company, presents a closer call. For example, it is my opinion that if a quorum of your board attends a class or seminar about association law no "meeting" occurs, since no business is being conducted.

However, in your "training session", there is focus on your association's particular business, and participation by your board members in addressing governance policies. I would err on the side of caution on that one, and consider it a "meeting" for all appropriate government in the sunshine requirements.

Question: We would like to know if there is anything we can do about a unit owner in our condo complex who constantly violates our rental rules. He has rented out to four different groups so far this year, and has therefore violated our minimum rental term requirements. He also refuses to fill out any paperwork or pay our association's processing fee, claiming that these occupants are his "friends and relatives." However, I know better because one of these "friends" told me they had rented the condo from the Internet. Is there some way we can stop this? R.W. (via e-mail)

Answer: There are always a few in every society, including condominium associations, who believe that rules are meant to be broken, or maybe should be applied to everyone else.

Some associations have addressed similar situations by requiring non-paying guests to also be registered with the association. Others have amended their documents to treat guests the same as tenants, including minimum stay requirements, prior registration, and the like. Unfortunately, policies of this nature tend to limit the rights of those who do obey the rules, in order to stop the cheaters.

I would recommend that your board sit down with the association's legal counsel, discuss the potential range of

responses, and tailor a policy that will accommodate your goal with the minimum amount of regulation.

Question: Six of the units in our condominium were damaged by Hurricane Charley. Work is still ongoing in a couple of the units. Two of the units that were damaged belong to our Board's President and Vice-President. We are told that they did not like the work that was done and refused to pay the contractor the full amount. There are now liens on the condominium, and threats of more legal problems. Do they have this authority? Will this stop us from being able to sell our units? J.A. (via e-mail)

Answer: In general, significant decisions of this nature should be made by the Board as a whole, and not just its executive officers. This is especially true when those officers are personally affected by the decision. Even if their decisions were entirely appropriate, there is always the taint of conflict of interest when a director makes association decisions which affect their own financial interests.

Florida law imposes a "fiduciary" duty on board members, which means that decisions must be made without regard to personal interest. Florida's "business judgment rule" also provides protection to board members who make decisions in reliance on the advice of professionals whom they believe to be qualified about the particular issue in controversy.

For example, in your situation, if the board as a whole decided to withhold payment to the contractor after consultation with competent legal counsel, there would be no question that the association's action would be upheld.

If liens have been placed against the condominium, the board should also discuss this with legal counsel. There are ways to mitigate the affects of liens, including "bonding off" the lien, or filing a notice that the lien is being contested. Prior to resolution of the dispute, individual unit owners can still sell their units, although funds may need to be set aside from the closing proceeds (or paid by the association) to pay off a pro-rata share of the lien.

Question: I purchased my condominium unit in 1981. I was given a "document book" from the developer, called the "Offering Circular." One of the attachments in the book was an unrecorded document called the "Declaration of Condominium." I found out much later that before the developer actually recorded the Declaration of Condominium in the Lee County land records, he changed certain clauses, including the formula for sharing common expenses. Which version would control? Was the developer required to give notice of this change? J.M. (via e-mail)

Answer: The recorded Declaration of Condominium is the legal document which establishes the condominium, and in the event of a conflict with the Offering Circular, the recorded Declaration controls.

A developer is required to give every purchaser notice of "material" changes to the Offering Circular, and that certainly would have been a "material" change. Purchasers are then given a right of "rescission" (right to cancel a contract) after receipt of notice of a material change.

I would highly doubt that after twenty-five years, your development company is still in business, and even if it were, you would likely be barred from any relief due to the statute of limitations. ⚖

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.

Proposal Restructures State Agency

FORT MYERS THE NEWS-PRESS, APRIL 14, 2005

By Joe Adams

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of issues affecting associations are brought up for consideration each year.

Three weeks ago, we began a review of legislative proposals for 2005, with a look at S.B. 2632, a proposal that would limit an association's right to collect delinquent assessments through lien foreclosure proceedings. In the second installment we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. Last week, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation, focusing on reserve waivers, mandatory education for board members, and audit waivers.

Today we will look at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman:

- **Restructuring Regulatory Agency:** H.B. 1229 would change the name of the Division of Florida Land Sales, Condominiums, and Mobile Homes (the state agency currently charged with enforcement of condominium laws), to the "Division of Florida Land Sales, Condominiums, Homeowners' Associations, Community Association Management and Mobile Homes." The changes would bring HOAs and manager regulation under the auspices of the agency (more below).

- **Manager Regulation:** Currently, the regulation of community association managers is handled through the general jurisdiction of the Department of Business and Professional Regulation. H.B. 1229 would shift regulation to the Division of Florida Land Sales (with its new name) and would also require the licensure of management companies. Under current law, only individual managers (not management companies) have to be licensed.

- **Enforcement:** H.B. 1229 would provide that "any condominium owner" found to be in violation of the law is to be notified by the Division, by certified mail, and "will have 30 days in which to respond in writing." It is unclear what this change would do. Although the apparent intent is to apply to associations (and not unit owners), the use of the term "condominium owner" leaves plenty of room for interpretation.

- **Regulation of Homeowners' Associations:** Perhaps the most significant aspect of H.B. 1229 would be to provide for mandatory state regulation of homeowners' associations. The Division of Florida Land Sales would be empowered to investigate complaints made against HOAs made by their owners, and impose civil penalties, similar to the law that now exists for condominiums. In 2003 and 2004, Governor Jeb Bush's Task Force on Homeowners' Associations extensively debated regulation of HOAs, and concluded that mandatory government regulation was not in the best interest of homeowners' associations.

- **Role of Ombudsman:** H.B. 1229 would increase the role of the Condominium Ombudsman to include monitoring disputes involving condominium elections.

Remember, proposed legislation can be viewed on the Internet at the website of the Florida Legislature, www.leg.state.fl.us, where links to both the House and Senate are available.

Whether you are for or against, your Legislator is interested in your opinions. You can contact members of the Southwest Florida delegation as set forth below.

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Q&A

Question: Our current homeowners' association board of directors includes a husband and wife. The husband is the board president and the wife is a member of the board at-large. Are there any rules or laws that prohibit this? P.B. (via e-mail)

Answer: No. Chapter 720, the law applicable to homeowners' associations, does not limit the simultaneous service on the board by a husband and wife. Presumably, the homeowners who voted these two into office were aware of their marital status.

It is unclear under Florida law whether your bylaws could be amended to prohibit more than one co-owner representing the home on the board, although I personally believe that such a clause would be upheld.

Question: Our manufactured home park is a "55 and over" community. A question has come up about whether a person who is under age 55 is permitted to buy a lot in the Park. I was under the impression that you could buy a lot, just not reside there. What do you think? F.W. (via e-mail)

Answer: This issue is not addressed by the federal laws that permit so-called "housing for older persons." It depends on how the covenants which implement the "55 and over" clause are written.

The federal law, and most governing documents focus on occupancy, not ownership. For example, someone who is under age 55 might buy a lot in your Park, but intend that his or her elderly parents live there. This would not violate the "eighty percent rule" required for "55 and over" housing status.

Therefore, unless the covenants applicable to your Park specifically prohibit ownership by persons under age 55, it is likely permissible.

Question: I would like to install hurricane shutters at my condo unit. However, I would like to install "accordion" shutters as opposed to the "roll-down" type. Accordion shutters are less expensive and do not require support members, which would block my view. However, our board has adopted a rule that only permits roll-down shutters. Is this rule legal? A.B. (via e-mail)

Answer: Section 718.113(5) of the Florida Condominium Act states that association boards must adopt hurricane shutter specifications for each building within each condominium operated by the association, which shall include color, style, and "other factors deemed relevant by the board." All specifications adopted by the board shall comply with the applicable building code. In my opinion, if your board's specifications meet the applicable building code, the requirement for a unified type of shutter installation would be upheld.

Question: I live in a condominium community with various sections and a master association. Our master association has an annual meeting, where we are asked to vote on different items by proxy. The association opens the proxies prior to the meeting and advises the section presidents how the votes are going, so that the presidents can drum up more votes if needed. Is this legal? R.K. (via e-mail)

Answer: Yes. Unlike, ballots used in electing condominium association directors, proxies received by an association are not required to be kept sealed until the meeting, and in fact are routinely tallied in advance to make the meeting go more quickly. However, if the association chooses to open the proxies before the meeting, they become part of the "official records" of the association, and those who may be opposing the item up for vote are also allowed to inspect the proxies, see how the vote is going, and do their own "politicking."

Question: Our homeowner's association board recently elected five people. Only four of the successful candidates were present at the annual meeting. Right after the annual meeting, they elected the person who received the lowest number of votes as President. Is there a proper way to do this? E.A. (via e-mail)

Answer: In most associations, the members (parcel owners) elect the board, and the board elects its officers. Absent a provision to the contrary in the bylaws, which would indeed be unusual, there is no requirement that the president receive more votes than others who were elected to the board. ⚖

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H.B. 1229 Tackles New Reforms

Fort Myers The News-Press, April 21, 2005

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of issues affecting associations are brought up for consideration each year.

Four weeks ago, we began a review of pending legislation for 2005 with a look at S.B. 2632, a proposal that would severely limit an association's right to collect delinquent assessments through lien foreclosure proceedings. As of this date, that Bill seems to be going nowhere.

In the second installment we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. That one is still up in the air.

In the third week, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation, focusing on reserve waivers, mandatory education for board members, and audit waivers. Last week, we looked at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman.

Last week's column was supposed to wrap up our review of H.B. 1229. However, in a procedural move known as the "strike all amendment", H.B. 1229 has taken on a new face and tackles new "reforms" that have not previously been on the table.

For those keeping score, government regulation of homeowners' associations is no longer part of H.B. 1229, falling to legislative sticker shock when a $17 million dollar price tag was estimated. Mandatory education of board members has also been removed from the Bill.

What has now been added to H.B. 1229 will also significantly affect condo associations. Here's some more sauce for the mix:

- **Unlimited Unit Owner Complaints:** The law was amended in the early 1990's to require associations to provide "substantive responses" to "complaints" from unit owners, which were served on the association by certified mail. The term "complaint" was later changed to "inquiry" in the law. The so-called "certified inquiry rule" became a favored weapon in the arsenal of the Condo Commando, with some associations receiving certified letters from the same unit owner nearly every day. In order to strike a balance between a unit owner's right to a response to his or her legitimate inquiries, and preventing associations from harassment, the Legislature amended the Condominium Act to permit associations to limit "inquiries" to one per month. H.B. 1229 would remove the board's right to establish reasonable rules limiting "inquiries", and revert to the days when unlimited "inquiries" could be used for the

sole purpose of harassing the association, which is why the law was changed in the first place.

• **Board Terms:** H.B. 1229 would provide that the term for all board members "shall expire at the annual meeting", although directors could stand for re-election. This means that those associations whose bylaws provide two or three-year terms, or staggered board terms, would have their bylaws superceded by state law, everyone would need to stand for election each year. More importantly, the proposal eliminates language currently found in the corporate statutes which states that a director serves until their successor is duly elected. For example, if an association has a five-member board and no unit owner chooses to put their name into nomination forty days before the annual meeting, the sitting directors are automatically seated for another term, although they are of course free to resign their posts. H.B. 1229, if passed, would leave associations in such cases with no lawful directors. Under these circumstances, the only available alternative for the legal composition of a board would be to go through an expensive circuit court procedure to have a receiver appointed.

• **Prohibiting Husbands and Wives from Simultaneous Board Service:** The law would prohibit "co-owners" from the same unit from simultaneously serving on the board. Although perhaps a reasonable public policy, the proposed language in the Bill is flawed. As it is written currently, if a husband and wife own five units jointly, they still could not simultaneously serve on the board. I think the intended point is to avoid one unit having more power on the board than it has at membership meetings, certainly a complaint I hear frequently when co-owners (usually husband and wife) serve on the board.

• **No More Waiver of Reserves:** The most significant proposal in H.B. 1229 would be to change the law, which has existed for some forty years, which allows the unit owners in a condominium to vote to reduce or waive the funding of "statutory reserves." H.B. 1229 would require reserves to be "fully funded", and provides a five year phase-in. In my experience, most of the high-priced condominiums maintain full reserves anyway. This amendment would have the most direct impact on middle and lower-cost housing, which tends to be highly populated by senior citizens on fixed incomes. While "full reserve funding" sounds good in theory, this proposal would double assessments for some associations, and will likely drive people with limited economic means out of their homes.

H.B. 1229 has a few more worms in the can which we will open up next week. Remember, whether you are for or against, your Legislator wants to hear from you. Members of the Southwest Florida delegation can be contacted as follows:

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Q&A: Owner can Petition for Receiver Appointment

Question: I live in a ten-unit condo. Over the past several years, the mix of unit owners has changed from mostly owner-occupants to absentee landlords. There are now only two residents and eight investor-owners who rent their units out. Nobody will serve on the board, there are no financial statements available, no meetings are held, etc. Individual unit owners repair the common elements when someone thinks something needs to be fixed. Things are getting worse by the day. Is it realistic for one or both of the remaining owner-occupants to petition for the appointment of a receiver? B.G. (via e-mail)

Answer: The Florida condominium law permits any unit owner to petition the circuit court for the appointment of a receiver when there are not enough persons willing to serve on the board so as to constitute a quorum.

Receivers are professional conservators, most often accountants. They run your association for an hourly fee, under the supervision of a court. Receiverships are expensive, and are intended for only the most distressed situations.

I would image that, if faced with the prospect of receivership, the investor-owners would find it in their interest to find enough volunteers to serve on the board. In my experience, that is unlikely to resolve your personal situation. Although investor-owners are not evil people by nature, they have an entirely different set of objectives than condominium owner-residents. To them, the unit is an investment. To you, it is your home.

Only you can decide when enough is enough. You might want to think about looking for a more residentially-oriented community, or choosing a non-association setting. Good luck.

Question: During Hurricane Charley, many unit owners in our condominium experienced water intrusion. The board has advised us that the windows are the individual unit owner's responsibility. Is that true? They are mentioned as a unit owner responsibility in our condominium documents. R.R. (via e-mail

Answer: The general responsibility for maintenance of a condominium buildings' windows will depend upon how the declaration of condominium is written, particularly how the unit boundaries are described. If the windows are part of the "common elements", then they are the maintenance responsibility of the association, unless they have been described as "limited common elements", and the declaration specifically requires the owners to maintain them. Conversely, if the windows are described as part of the "unit", they would typically be the unit owners' private responsibility. Documents are written both ways, and there is no "standard" answer.

You should, however, be aware that even though the documents may make you responsible for maintenance of the windows, they are the insurance responsibility of the association, regardless of how the documents are written. You may wish to investigate whether your hurricane losses are covered under the association's master insurance policy.

Question: Our unit is on the top floor of the condo building we live in. The roof recently started leaking. We called the association's president, and wrote letters to him, but nothing has been done. Can we call a roofer to fix the problem and send the bill to the association? This has been a hopeless situation for us. J.P. (via e-mail

Answer: That is a tough call. On the one hand, the law favors parties "mitigating damages", which means taking steps to stop an ongoing loss. On the other hand, the roof is presumably part of the "common elements" of your condominium, and the board of directors is vested with the exclusive authority for the maintenance and management of common property.

I have seen a few sets of condominium documents which permit owners to engage in "self-help", when the association fails to take prompt action, although such pro-

visions are rare. On balance, I think you are better off insisting that the association fix the problem. Like in all legal matters, good documentation is the key.

First, you should call the association's president (or management company) and voice your concerns. You should follow up your conversation (or unsuccessful attempt at a conversation) with a certified letter. Your certified letter should specifically ask that the matter be promptly investigated and repaired. You should also take reasonable steps to preserve your personal property against damage (either removing it from the apartment, covering it with plastic, etc.). You should take photographs and keep detailed records of all your actions. You should also immediately contact your insurance agent and insist that the association do likewise.

Question: I live in a condominium which is part of a larger development which is governed by a master association. The master association owns the common areas and facilities in the development. The development is composed of several independent condominium associations. The board of the master association is composed of the presidents of each condominium association. An at-large member of the master board is elected by the members of the master association who becomes the president of the master association. The bylaws of the master association state that in absence of the condominium president, the duly elected vice president may assume the president's position on the master association's board. The current president of the master association has determined that the vice president cannot serve on the board in absence of the president. If the vice president cannot serve, our condominium association will be without representation on the board for a portion of the year since our president spends the summer up north. Do you agree that the vice president cannot serve? G.M. (via e-mail)

Answer: In general, if a master association is composed of only condominium unit owners, then it will be considered a condominium association which must comply with Chapter 718, Florida Statutes. If however, the master association includes non-condominium unit owners, the association would likely be a "homeowner's association" governed by the provisions of Chapter 720, Florida Statutes. This distinction is important. If the association is a condominium association (and it sounds like your master association is a condominium association), Chapter 718 would require an election to select the board of directors. There has been a recent Declaratory Statement issued by the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division"), which regulates condominium associations, which held that a master association composed of condominium unit owners was required to elect the board of directors. The Division further held that a system whereby certain officers of the condominium associations were automatically appointed to the master association board conflicted with Chapter 718. Therefore, not only can the vice president not serve in the absence of the president, but the master association should be electing all board members, not just the president of the master association. The election would have to be held just like a condominium association election (with the two-notice system, the secret ballots, the two-envelope system, etc.). The Declaratory Statement, In Re: Heron Master Association, Inc., (2003092101), can be accessed at www.myflorida.com/dbpr/lsc and by following the link to "Declaratory Statement Index." ■

Bill Covers Parking Provisions for Disabled

Fort Myers The News-Press, April 28, 2005

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

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In the second installment we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. This one is still hanging on.

In the third, fourth and fifth week, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation. The first installment focused on reserve waivers, mandatory education for board members, and audit waivers. Next, we looked at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman. Last week's column touched on unit owner complaints, reserves, board terms, and husbands and wives simultaneously serving on a board.

Today, the rest of H.B. 1229:

- **Handicapped Parking:** H.B. 1229 would require associations to make "reasonable provisions" for persons with "severe mobility disabilities" to obtain parking spaces that would allow the use of a vehicle lift or ramp. The Bill goes on to say that the association must permit a disabled person to "transfer the use rights to a limited common element parking space that does not accommodate their vehicle for common area parking space that will." The law seems to be saying that if the association is going to assign a handicapped person a "better" parking space to use for their vehicle lift, then the person needs to give up their limited common element space, if they have one. If that is the case, then that is what it should say. The proposal goes on to provide that if a parking space must be altered to bring it in compliance with Section 553.5041 of the Florida Statutes (which regulates handicapped parking), the modification would be at the expense of the person making the modification. That part seems reasonable.

- **Elimination of "Opt Out" Rights:** The Florida Condominium Act was amended in 1992 to implement a system for electing directors requiring the use of secret balloting. In general, the 1992 law was a substantial improvement over the old law, which permitted the use of proxies in electing directors, which were occasionally subject to abuse by boards seeking self-perpetuation. However, the new condominium election laws are very technical,

and somewhat complicated. For example, the state has promulgated a very lengthy rule about how envelopes are to be filled out and processed. Strict adherence to the rules often results in many ballots being thrown out. Several years ago, the law was amended to permit owners to vote to "opt out" of the detailed election system, in lieu of something that works for the particular condominium. Most associations that I have worked with still prefer the secret ballot system, but elect to "opt out" of all the technicalities to avoid ballots being disqualified. H.B. 1229 would eliminate an association's ability to "opt out" of the complicated election procedures, and in my opinion is a large step backwards for condominium associations.

- **Developer Waiver of Reserves:** The current Florida Condominium Act permits the developer during the first two fiscal years to vote to waive reserves. This change would prohibit developers from waiving reserves. Good if you are a condominium purchaser, bad if you are a developer.

- **Catastrophic Reserves:** H.B. 1229 would permit an association to use reserve funds for non-scheduled purposes after a catastrophic event, such as a hurricane. This seems reasonable.

- **Hurricane Shutters:** H.B. 1229 would amend Section 718.113(5) of the Florida Condominium Act to permit a board, with approval of a majority of the voting interests, to install "hurricane protection." The current law only mentions "hurricane shutters." Presumably, the new law would apply to items like hurricane glass.

- **Grandfathered Rentals for Cooperatives:** In 2004, in a legislative case study in how the tail can wag the dog, the Florida Condominium Act was amended to severely limit condominium associations in amending condominium documents regarding rental rights. H.B. 1229 would impose the same burden on cooperative associations.

Remember, whether you are for or against, your Legislator wants to hear from you. Members of the Southwest Florida delegation can be contacted as follows:

Sen. Mike Bennett, District 21; 823-5718; bennett.mike.web@flsenate.gov
Sen. Burt Saunders, District 37; 338-2777 in Lee or 417-6220 in Collier; saunders.burt.web@flsenate.gov
Rep. Michael Grant, House District 71; 941-764-1100; michael.grant@myfloridahouse.gov
Rep. Paige Kreegel, House District 72, 941-575-5820; paige.kreegel@myfloridahouse.gov
Rep. Bruce Kyle, District 73, 335-2411; kyle.bruce@myfloridahouse.gov
Rep. Jeff Kottkamp, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov
Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov ■

Q&A: Attorney-Client Privilege Rests with Control Group

Question: Does the board of directors of a homeowner's association have the right to refuse to disclose communications between the board and the association's attorney? As a homeowner, I believe I am "the client", as well as the board of directors, and should be able to view legal communications. I understand that there may be some exceptions to this, such as pending litigation. B.T. (via e-mail)

Answer: When an attorney represents a homeowner's association, the "client" is the organization, not the board, and not the individual homeowners. It is similar to an attorney representing a publicly-traded corporation. The attorney does not represent everyone who owns a share of stock.

The law is well settled that a corporation's attorney-client privilege generally rests with the "control group" of the corporation. That typically includes the board of directors, executive employees (such as managers in some instances), and officers.

Florida's statutes applicable to homeowners' associations, Chapter 720, also states that any record protected by the lawyer-privilege is exempt from the "official records." There is no requirement that the privileged document be related to litigation.

Your point of view is not uncommon (after all, the homeowners do pay the attorney's bill), but the law is clear on the subject.

Question: We read your recent article about voting on "material alterations" of common property, and the requirement for a seventy-five percent vote. Our question is whether this vote requires a "secret ballot." R.V. (via e-mail)

Answer: In general, the only vote of a condominium association which must be conducted by secret ballot involves the election of directors.

In fact, when voting on items like "material alterations", the only way that absentee owners can vote is through use of a "limited proxy", which must be signed. I also recommend the use of signed ballots for those who vote in person. Since those who vote by mail cannot vote secretly, there is too much potential for confusion (and duplicate voting) by allowing those who vote at the meeting to vote secretly. Further, the use of signed ballots enable a "recount" if there is a dispute as to whether the measure passed or failed.

Question: We have several townhouses in our condominium complex that have brown wooden fences around a courtyard in front of each townhouse. The fences are described as "limited common elements", and are maintained by the association. A homeowner has requested permission from the board of directors to change the color of his fence from brown, to a beige color, which would match the exterior paint on his unit. Does the board have the authorization to allow this change, or is a vote of the members required? D.R. (via e-mail)

Answer: It depends.
Even though the fence is a "limited" common element, it is still part of the common elements. Section 718.113(2) of the Florida law applicable to condos states that there shall be no material alteration of the common elements except as authorized by the declaration of condominium. If the declaration of condominium is silent, then seventy-five percent of all unit owners must approve.

Changing the exterior color scheme of a condominium is a "material alteration." Therefore, the declaration of condominium must be examined. If it gives the board of directors the authority to approve the change, then the board has the authority. The declaration may specify some type of vote required, and if it does not, seventy-five percent of all unit owners must approve the change.

Question: Is an association wasting money to hire an engineer to do a study on the remaining life of our roofs, painting, asphalt, etc.? This information seems to be common sense. N.L. (via e-mail)

Answer: The Florida Condominium Act requires condominium associations to set aside reserves for building repainting, pavement resurfacing, roof replacement, and any other item of capital expense or deferred maintenance exceeding $10,000.00. This "catch-all" category can include many significant items, including windows, plumbing, and recreational amenities.

The board of directors has a fiduciary responsibility to make reasonable efforts to prepare an accurate reserve schedule, which must include the estimated remaining useful life and replacement cost of the reserve components. Further, under Florida's "Business Judgment Rule", board members are exonerated from personal liability if they rely on professionals in taking actions on behalf of the association.

Therefore, I do not think that hiring an engineer to perform a reserve study is a "waste of money" in any sense, and indeed is money well spent. There are several companies that specialize in reserve studies, and your association should shop around for the best price and service.

Question: Are telephone calls between board members to discuss pending matters covered by the "sunshine law"? R. B. (via e-mail)

Answer: It depends. If a quorum of the board is on the telephone at the same time, then a "meeting" is taking place. If less then a quorum is involved, the HOA sunshine laws do not apply.

Question: Our association recently had its annual meeting. One item on the agenda was a vote to change the pet rules. It was very controversial, and created some hard feelings. Because of all the controversy, the members voted not to announce the result of the vote at the meeting. My contention is that the vote should have been announced. What do you think? S.S. (via e-mail) ■

Bill Could Ease Condo Redeveloping

Fort Myers The News-Press, May 5, 2005

By Joe Adams
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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process. The regular session of the Legislature ends tomorrow. In the next 48 hours, more action will likely take place with respect to Bills affecting association than has happened in the past 58 days combined.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of controversial issues affecting associations are brought up for consideration each year.

Six weeks ago, we began a review of pending legislation for 2005 with a look at S.B. 2632, a proposal that would severely limit an association's right to collect delinquent assessments through lien foreclosure proceedings. Absent a last minute miracle, that Bill is dead.

In the second installment we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. This one is still hanging on, although the House and Senate versions are in quite different forms.

In the third, fourth, fifth and sixth weeks, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation. The first installment focused on reserve waivers, mandatory education for board members, and audit waivers. Next, we looked at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman. The following week's column touched on unit owner complaints, reserves, board terms, and husbands and wives simultaneously serving on a board. In the final installment on H.B. 1229, we looked at handicapped parking, "opt out" rights, reserve waivers, and hurricane shutters. At press-time, H.B. 1229 appears to be hung up in committees, and with no Senate counterpart, looks likely to die.

Today, we end our review of proposed legislation for 2005 with a look at S.B. 2360, a proposal that may well be passed out of this year's session. S.B. 2360 addresses "termination" of condominiums, an issue that has been getting a lot of attention after the 2004 hurricanes. However, termination had already become an increasingly problematic issue, as many condominium buildings reach the end of their useful life, and talk of redevelopment occurs. Under many condominium documents, one person can "hold out" until the bitter end, making redevelopment impossible.

S.B. 2360, primarily being pushed by real estate lawyers in Florida, would accomplish the following:

- **Termination Due To Economic Waste Or Impossibility:** The law would permit a majority vote to terminate a condominium where repair costs exceed the combined fair market value of all units in the condominium.

- **Optional Termination:** As opposed to the one hundred percent "default" threshold currently found in the law, the new law would permit optional termination by a vote of eighty percent of the voting interests.

- **Mortgagee Approval:** The new law would provide that mortgage holders are not eligible to vote on a plan of termination unless it would result in them being paid less than the full satisfaction amount for their outstanding mortgage.

- **Powers Of Association In Connection With Termination:** The new law would permit the association to act essentially as a trustee in liquidating the property, including its sale at public or private auction.

The proposed new law is definitely an improvement over the current situation. However, because many documents were written to require one hundred percent approval for termination, and some even provide that the termination clause cannot be amended without unanimous approval, there are some constitutional questions as to whether this law can be retroactively applied, which is where it is needed most.

Remember, whether you are for or against, your Legislator wants to hear from you. Members of the Southwest Florida delegation can be contacted as follows:

Sen. Mike Bennett, District 21; 823-5718; bennett.mike.web@flsenate.gov
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Rep. Jeff Kottkamp, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov
Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov ■

Q&A: Fire Marshal has Right to Require Alarm Upgrades

Question: The local Fire Marshall appears to be singling our condominium complex out for "code improvements" that will require a substantial assessment. Our condominium was built in the mid-1970's, and has had to upgrade common area emergency lighting (which, by the way, nobody had complained about). The question is whether the Fire Marshall can require changes to an individual condominium unit. The current issue involves installation of a smoke detector/fire alarm horn that would tie into the building's alarm system. I strongly object to the idea of being awakened by a loud fire horn in my unit triggered by someone's burned toast. Where can we draw the line, isn't there a "grandfather clause" that comes into play? N.K. (via e-mail)

Answer: Section 1-5 of the Florida Fire Prevention Code, which is applicable to structures within the State of Florida, makes the Code applicable to both new and existing structures. Conditions in existing buildings, however, which do not meet the requirements of the Code, may continue to exist unless the agency having authority to enforce compliance determines, in its discretion, that the lack of conformity presents an imminent danger.

In other words, although your condominium was constructed thirty years ago, it is not "grandfathered", if the fire official determines that a life safety threat exists.

In most local jurisdictions, there is a procedure for appealing a fire official's determination regarding upgrade requirements.

Question: I live in a condominium association. Some owners seem to think that amendments to our condominium documents can be drafted by the owners or the board, and they only need to be notarized and filed at the courthouse. Is this true? J.T. (via e-mail)

Answer: The Florida condominium statute, Chapter 718, provides the method by which condominium documents must be amended. This typically involves striking through those things you are removing and underlining those things you are adding.

The documents will also state how amendments are to be adopted, particularly what percentage vote is required. There is also a state-mandated proxy form that must be used for amendment votes.

The Condominium Act further requires that once an amendment has been approved, it must be recorded in the public records of the county where the condominium is located, along with a certificate that must be executed with the formalities of a deed. Amendments to the articles of incorporation must also be filed with the Secretary of State in Tallahassee.

The wording of amendments to documents is very important, legal cases are won and lost over it all of the time. That is why the preparation of amendments by community association managers is considered "unlicensed practice of law", and associations should not attempt to "do it yourself" with document amendments, the stakes are too high.

An attorney who routinely handles document amendments should be able to address your amendments for a reasonable fee, with some ability to predict the estimated fees in advance. This is one area where an ounce of prevention is definitely worth a pound of cure.

Question: In my two-story condominium building, the water heater in an upstairs unit burst, causing extensive structural damage to the unit below. Portions of the ceiling and walls in the lower unit need to be replaced. The condominium association and its insurance agent have declined to repair this structural damage. The lower unit owners' insurance company has failed to respond. We were informed that the Associations' insurance would not help us because the deductible is $5,000.00. Also, we were told that the insurance company or the association would pursue the upstairs unit owner for repayment (subrogation) if it were forced to pay for these repairs. I

have two questions. First, who is responsible for the repair of the structural components (i.e. wallboard, sheet rock and ceiling material). Secondly, can the association or its insurance company recover any repair costs it incurs from the upstairs unit owner? R.B. (via e-mail)

Answer: Analyzing these issues can be confusing because there is a distinction between the obligation to insure the condominium property and the obligation to repair damage to the property. The association's obligation to insure is found in the Florida Condominium Act. That law requires that every hazard insurance policy issued or renewed on or after January 1, 2004, shall provide primary coverage for all portions of the condominium property located outside the unit; the condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality; and all portions of the condominium property for which the declaration of condominium requires coverage by the association.

The law goes on to specifically exclude floor, wall and ceiling coverings, and a host of other items from the association's insurance responsibility. The law also specifically allows the association to carry a reasonable deductible.

The obligation to insure certain property does not necessarily mean that the association is responsible for repairing that same property. The obligation to repair damage is determined by the definition of the "unit" and "common elements", and how the documents allocate repair responsibility.

Assuming this water heater damage resulted from an insurable event (which a burst water heater most likely is) then the insurance company must pay. But if the cost of repair does not exceed the deductible, the short fall and the responsibility to repair remains with the responsible party as defined in the Declaration. A unit owner can protect against this by purchasing her own insurance (usually called an "HO-6 Policy" which has lower deductibles available and is specifically written to cover losses in excess of the association's insurance coverage. In your case, your best recourse is to demand that the lower unit's insurer meets its obligations. Be sure to read the policy closely and comply with all claim notice requirements.

Where the association's insurance proceeds are not sufficient to cover the total cost of repairs, many declarations of condominium give the association the right to assess the extra cost to the unit owners of the damaged units. Again, this is where the unit owner's separate insurance policy is important. Also, even if insurance proceeds are sufficient, these policies almost always give the insurer the right to seek reimbursement from a person who is at fault for causing the damage. These are called subrogation rights.

Also, remember that as a unit owner, you have the right to inspect and copy the association's insurance policy. This may help to confirm what you have been told about the provisions of that policy.

Question: Our board conducts much of its business through e-mail. Is this permitted under the "sunshine law" for homeowners' associations? T.M. (via e-mail

Answer: Board members can communicate with each other by electronic mail (commonly known as "e-mail". However, if these e-mails concern association business, they are part of the "official records" of the association unless they are protected by law. Protected documents typically involve attorney-client documents, medical records, transfer approval documents, and certain personnel records and information.

Conducting board business via e-mail in lieu of a meeting is impermissible. Action of the board must be taken at a meeting, which is properly noticed and open to the members. Further, minutes of the meeting must be taken.■

Legislature Lets Most Association Bills Die

Fort Myers The News-Press, May 12, 2005

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Each year Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process.

Because Florida has one of the highest per capita populations of people living in community association settings, it is not surprising that a variety of controversial issues affecting associations are brought up for consideration each year.

Over the past seven weeks, we have reviewed proposed legislation which was filed and debated during this year's legislative session.

The 2005 session ended last Friday. For association legislation, it ended with a thud. Most measures affecting associations, even those which were not considered controversial, got bogged down in Tallahassee's gridlock, in what many describe as one of the most acrimonious sessions of the Florida Legislature in recent history.

HB 1593/SB 2062 died "in messages", meaning that it did not pass. That Bill addressed emergency powers of association boards after catastrophic events such as hurricanes. HB 1593/SB 2062 would have also tried to address problems in homeowners' association mediation, reinstatement of covenants in voluntary associations, and the extension of the current deadline for retrofitting fire sprinklers in high-rise condominium buildings. An amendment to that Bill introduced midway through the session, which would have allowed homeowners' associations to place liens for unpaid fines, became very controversial and may have had some role in the Bill's demise.

HB 1229 also was a focus of much attention during the Session. That Bill, at various stages of its life, would have required mandatory education for condo board members, would have prohibited the waiver of reserves, and would have required mandatory audits for many condominium associations at least every two years. This Bill did not survive the committee process.

SB 2362, which would have severely limited association collection rights never got a committee hearing, and died.

SB 2360, the proposal that would have liberalized the "termination" procedures for condominiums after a calamity also met its demise at the last minute.

The one piece of legislation which did survive the fracas, and which is now on its way to the Governor, is HB 291. HB 291 primarily deals with developer control of condominium associations and procedures required for litigation after transition of control (commonly called "turnover") has occurred.

Among the highlights of HB 291 are the following:

- **Developer Responsible For Its Board Members:** If signed by the Governor, a new section will be added to the condominium statute, Chapter 718. A new section 718.301(6) will be added which provides that

actions taken by members of the board who are designated by the developer are considered actions of the developer. The developer will be responsible to the association and its members for all such actions.

- **Construction Defect Claims:** A new section 718.301(7) will be added to the law (again, assuming approval by the Governor). The new law will require that in any construction defect claim by an association against a developer, an appropriately licensed Florida engineer, design professional, contractor, or "otherwise licensed Florida individual or entity" will be required to be involved. This would not appear to be a major detriment to associations, since the vast majority of claims against developers are supported by professional input anyway.

So once again, the most important news from the 2005 session is not what happened, but what did not happen. ■

Q&A: Rental Provision Changed while Unit under Contract

Question: My husband I recently purchased a condo unit. Between the date of our contract and the date of closing, the association owners met to change the condominium documents, requiring all units to be "owner occupied", meaning that rentals are no longer permitted. Does Florida law allow an association to change a use of a unit while it is under contract? The "old" owners are allowed to continue renting. L.V. (via e-mail)

Answer: This is one of the many flaws in the so-called "grandfathering law" passed by the Florida Legislature in 2004.

When an association amends rental provisions, it only applies to those owners who consent to the amendment, or their successors in title. The amendment is effective when it is recorded in the public records where the condominium is located.

Since this amendment was recorded four days prior to your closing, you were not an "owner" on the "grandfathering date." Therefore, I think the amendment can be applied to you.

You may wish to speak to your legal counsel as to whether the seller had notice of the pendency of the proposed amendment, and whether there may have been a duty to disclose the proposed action to you during the sale process.

Question: Our condominium association board has five directors. There is a split on the board. Three of the members are constantly having meetings without inviting the other two. Those three members also approve "newsletters" that are sent out, and send them out only to selective people who are "in their camp." Is this legal? W.T. (via e-mail)

Answer: The day-to-day affairs of a condominium association are run by a board, which makes its decisions by majority vote. Therefore, "majority rules" in most cases. However, the law is also designed to allow participation by those who may have a minority point of view, including your two directors who are apparently "on the outs" with the majority.

Most association bylaws require that, in addition to 48-hour posted notice for board meetings, that each director is entitled to personal notice of board meetings. Personal notice can usually be given directly by telephone. If your board has not been giving all of the directors proper personal notice of its meetings, the actions taken at those meetings may be set aside as unlawful unless ratified at a properly noticed meeting.

With respect to selective dissemination of association "newsletters", the law does not address this topic. Certainly, anything which comes as an official publication of the board should be made available to all owners, not just a select few.

Question: My understanding is that the Florida Government In The Sunshine Law applies only to state agencies and public collegial bodies. You have stated in your articles that it also applies to homeowners' associations. I would appreciate your comments. B.T. (via e-mail)

Answer: Technically, you are entirely correct. The Government In The Sunshine Law, Chapter 286 of the Florida Statutes, only applies to public bodies.

However, the laws for condominium associations, cooperative associations, and homeowners' associations have many "sunshine" procedures, and that is the term that is colloquially used for member rights in community associations as well.

One big difference between the "official" Government In The Sunshine Law and the "sunshine" laws for associations is that the government version applies to any meeting between two government officials, while the association version only applies to quorums of the board.

Question: In one of your recent columns, you state that if a quorum of the board is on the telephone at the same time, and association business is discussed, a "meeting" of the board occurs and that it is subject to the sunshine laws. What do we do in our case, where we have a three-member board? D.G. (via e-mail)

Answer: Technically, any gathering of a quorum of the board (including telephone conversations) where association business is conducted constitutes a "meeting."

Accordingly, if you have a three-member board, telephone calls between two members are subject to the sunshine laws, including prior posting and the opportunity for homeowners to observe the discussion. That is one of the major problems with three-member boards, and why I typically recommend boards of five members or more.

Question: Our condominium association has a long-standing practice of weekly "pool-side meetings", where a quorum of the board listens to owners' concerns. Anybody can attend and speak, no business is voted on. Is this legal? M.G. (via e-mail)

Answer: In my opinion, such meetings are entirely appropriate if the notice is properly posted. Votes cannot be taken on items not placed on the agenda, so no votes should occur at these meetings. The posted notice, where it designates an agenda, could say something like "town hall meeting to discuss unit owners' concerns." ■

Coping with Sex Offender in Your Area

Fort Myers The News-Press, May 19, 2005

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It sometimes seems that bad things happen in waves. Perhaps, the same things are happening all of the time, but the media decides it is time to focus on the issue.

The recent rash of child abductions, most with a sex-crime component, is a case in point. Do these despicable events trigger each other, or is it just the way that history happens?

The recent news coverage of these heinous crimes has once again caused community associations to focus on what they can do, what they should do, or even what they must do if a sex offender is living in their community.

Some will say that once a person has served their time, they have paid their debt to society, and deserve the right to live in freedom like the rest of us. Others will tell you that pedophilia is virtually incurable, and that it is not a matter of if, but when the offender will strike again.

The Florida Department of Law Enforcement maintains a web-site that keeps track of registered sex offenders, including their place of residence. The address for the site is www.fdle.state.fl.us

Florida categorizes registered sex offenders in one of two ways. Those with a history of more serious or recent crimes are known as "sexual predators", while those who have been convicted of less serious sex crimes , or were convicted longer ago, are known as "sexual offenders". The various types of offenses that qualify a person for the more serious or less serious categorization are found in Section 775.21 of the Florida Statutes, known as "The Florida Sexual Predators Act."

Similar laws exist throughout the country, and are often referred to as a version of "Megan's Law", which was enacted after the brutal death of 7 year old Megan Kanka in New Jersey. In Florida alone, well over thirty thousand predators and offenders are registered with FDLE.

A question faced by many associations is what, if anything, the association can or should do if it becomes aware that a registered sexual offender is residing in their community. There are certainly no easy answers, and no unanimity of opinion among community association attorneys.

According to a recent article published by Alexandria, Virginia based Community Associations Institute, CAI recommends a 4 prong approach when an association learns of the presence of a sexual predator residing within the community operated by the association:

1. Verify the Accuracy of the Report: Obviously, accusing a person of being a sex offender could create tremendous liability for defamation if the information is untrue. Do not rely on hearsay reports from community residents. The association can easily verify reported information through the FDLE's website. In cases I have handled, I have found that the offender's parole or probation officer is often willing to share information about the nature and history of the offense that might not be ascertainable from the website. For example, in a recent

case reviewed in my office, we learned that an offender had been ordered to stay at least one thousand yards from any child, unless supervised.

2. Consult With Association Legal Counsel: According to CAI's expert, every state has slightly different versions of Megan's Law, including immunities involving disclosure. Further, some state laws specifically prohibit the harassment of registered sex offenders. The Florida Sexual Predator's Act confers immunity on public officials, but not on private citizens in general. The Act does, however, offer immunity for any "individual acting at the request of or on the direction of any law enforcement agency."

3. Measure the Level of Potential Threat: As noted earlier, there are degrees of offense, which are sometimes measured by the severity of the conduct, and sometimes measured by how long ago the conduct occurred. I have seen cases where the registered offender may have been involved in a consensual relationship with a person who had not reached the age of consent, but was still fairly close in age to the perpetrator . Obviously there is some room for judgment between a situation like that and a repeat offender who preys on young children.

4. Send a General Notice Letter to Owners in the Community: This is where things get tricky. CAI recommends that if the threat level is sufficient, and notice is not prohibited by state law (which in Florida, it is not), a "general informational letter" should go out. The letter would basically say (in more formal language) : "We have learned there is a sexual predator in our community. We are not going to tell you his name. You can look it up on the FDLE website. You can call the FDLE or sheriff's office for further information. The association has no authority to evict this person, and is not in the business of protecting residents, so you need to take steps to keep you or your children safe."

I think that is prudent advice in many cases, but there are certainly dangers. For example, should an association make a subjective judgment of whether someone's previous sex crime was "not so bad" or too long ago to present a threat? Further, since many associations purport to "screen" potential renters or buyers, what type of liability exposures exists if a predator slips through the cracks in the background investigation? Or what if the governing documents require screening and the association simply pockets the application fee and does not go to the effort of a background check?

Unfortunately, this is an area where the stakes can be tremendous, perhaps incalculable, and where you can be darned if you do, or darned if you don't. ■

Q&A: Condo Declarations Will Determine Who Foots Bill

Question: My condominium unit was damaged after Hurricane Charley from roof leaks caused by the hurricane. The association's management company ordered a restoration company to tear out most of the ceilings, walls, and kitchen cabinets. Now the association is saying that we and our insurance company are responsible for the tear down and the rebuilding of the ceilings and walls. Our insurance adjuster is saying that because of the new law, the association is responsible for all repairs. What is the new law and what is the association responsible for? D.G. (via e-mail)

Answer: The "new law" that your adjuster is probably referring to is amendments to the Condominium Act which became effective on January 1, 2004. These amendments changed Section 718.111(11), Florida Statutes, to specify the portions of the condominium property that the association is responsible for insuring, and also describing the portions of the condominium property that the unit owners are responsible for insuring. The amendment applied to all association policies issued or renewed on or after January 1, 2004.

The main difference in the old and new law is that the new law applies to all condominiums, regardless of when the declaration of condominium was recorded. The prior versions of the law contained certain exceptions for condominiums created prior to 1986 and 1992. The old law and the new law did not change the insurance responsibility for ceilings and walls. The association has always been responsible for insuring that portion of the condominium property.

The confusion over the new law appears to arise primarily with regard to who repairs and who pays for the cost of the repairs. The new law controls who insures the various portions of the condominium property. The new law does not address who is responsible for making repairs to items damaged by a casualty. Just because an association insures an item (such as interior drywall) does not necessarily mean that it is responsible for making repairs or paying for the cost of the repairs if there is a shortfall in the insurance proceeds.

Those issues will be governed by the wording of your particular declaration of condominium and will likely be controlled by those portions of your declaration dealing with repair after casualty. It is not uncommon for declarations to say that if a damaged item is part of the unit, that the unit owners are responsible for making the repairs and for the cost of any shortfalls, notwithstanding the fact that the Association may insure that item. Other declarations may say the opposite.

Question: Is an association board member required to be physically present at a board meeting in order to be counted for purposes of having a quorum, or can the board member be present by telephone, email, or other electronic device? D.D. (via e-mail

Answer: A condominium or homeowners association in Florida must be a Florida corporation, unless it is a condominium association that was formed prior to 1977. The Florida Not For Profit Corporations Act allows directors to participate in meetings by using any means of communication that allows all participating directors to simultaneously hear each other during the meeting, as long as the articles or bylaws do not prohibit this. The Florida Condominium Act addresses the issue of telephone conference calls specifically, and adds the requirement that any unit owners in attendance must also be able to hear all directors. Therefore, conference calling or video conferencing is allowed, but email would not meet these requirements.

Question: Prior to the turnover of our homeowner's association, the Developer signed a contract giving himself control of maintenance of the common areas. The contract is for one year. The developer has performed these functions to date, and has been paid on a month to month basis. It seems to me that it would be illegal for the developer to initiate a long term contract by himself, binding the future Board. G.O. (via email

Answer: In a homeowners association setting, the relevant statute found at Section 720.309, Florida Statutes, indicates that any contract with a term that is longer than

ten years, and which is made by an association before control of the Association is turned over to the members (other than the developer), which provides for the operation, maintenance, or management of the association or common areas must be "fair and reasonable." In your case, the contract is only for one year, thus this statute does not come into effect.

As you can see, this statute does not afford the association much protection. In contrast, the condominium law provides that any contract made by an association prior to the unit owners (other than the developer) assuming control of the association that provides for the operation, maintenance, or management of the condominium association or the property serving the unit owners is to be "fair and reasonable." As you can see, there is no requirement in the condominium setting that such contracts exceed ten years before the "fair and reasonable" requirement comes into play. Additionally, the Condominium Act details multiple scenarios whereby the owners can vote to cancel such contracts. A similar right does not exist for homeowners associations.

Another potential issue is whether this contract was subject to the competitive bidding process. Section 720.305(5), Florida Statutes, indicates that if a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services requires payment by the association that exceeds 10% of the total annual budget of the association, including reserves, the association must obtain competitive bids for the materials, equipment, or services.

Finally, if the contract amounts to self dealing to the detriment of the association (for example if the conflict of interest was not disclosed, if the price is exorbitant, or if the party is not qualified to do the work), a claim for a common law breach of fiduciary duty may exist. ■

Report Says State Condo Laws Work

Fort Myers The News-Press, May 26, 2005

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As has been explored at length in previous editions of this column, the last several Sessions of the Florida Legislature have seen pitched battles regarding community association laws. Although the specific proposals for change have varied widely, the basic theme has been the same, the role which government should play in controlling affairs within a neighborhood.

One of the most significant differences between condominium associations and homeowners associations in Florida is government regulation. Condominiums have been heavily regulated by the State for some forty years. Conversely, there is no state agency which regulates HOAs, except for administration of a pre-suit mediation program.

In 2004, Governor Jeb Bush appointed a Task Force on Homeowners' Associations, which specifically considered whether homeowners' associations should be subject to government regulation. The Task Force overwhelmingly voted against regulation.

During the same time-frame, the effectiveness of existing condominium regulation was also debated. Some unit owners who were apparently having problems with their association, prevailed upon the Legislature to commission its Office of Program Policy Analysis & Government Accountability (OPPAGA) to review the effectiveness of the Division of Florida Land Sales, Condominiums, and Mobile Homes.

OPPAGA issued its report a year later, releasing it in early May of 2005. OPPAGA Report No. 05-24 can be viewed on the Internet at www.oppaga.state.fl.us/.

Unfortunately for those who cry that the sky is falling on condominiums, there is no smoking gun to be found anywhere in the eleven page Report. In fact, the Report reveals some noteworthy information about the "condominium crisis" in Florida. Among the items I found most interesting were the following:

- **Volume of Problems:** Although some claim that every association is "one board away from dictatorship", the statistics show a surprisingly low level of unit owner complaints against associations. During the fiscal year 2003-2004 (the time frame subject to the study), 1,822 unit owner complaints were filed against associations. According to Division statistics, there is a population of "repeat complainants", comprising of 54 people who have filed 833 cases against their association. Therefore, discounting the "frequent fliers", something in the neighborhood of 1,500 unit owner complaints are filed against associations each year. According to the most recent Division statistics, there are 1.2 million condominium units in this State. Therefore, conservatively, there are at least 1.5 million

unit owners in the State of Florida. Stated otherwise, only .001 percent of owners have been unhappy enough with the governance of their condominium to file formal complaints against their board.

- Public Interest: Although various "reform" groups loudly and persistently solicited people to make complaints to OPPAGA about the Division's effectiveness, only 90 comments were received by OPPAGA, including many from so-called "stakeholder" groups.

- Effectiveness of Arbitration: In 1992, the Legislature found that condominium disputes were clogging the courts, and required most document violation cases to be referred to mandatory, non-binding arbitration, before the case could head to court. According to the OPPAGA Report, 610 arbitration disputes were processed by the Division in the 2003-2004 fiscal year. Since 137 of those cases were attorney fee disputes arising from prior cases, the actual number of disputes subject to arbitration is about 500 per year. In a state of some seventeen million people, with well over a million condominium owners, one has to question frequent suggestions of rampant litigation in condominium associations. Remarkably, some two-thirds of filed arbitration cases were closed within a four-month period, demonstrating that the program does provide a more speedy (and presumably cost-effective) alternative to circuit court litigation, which can often drag on for years.

- Do Punishments Fit the Crimes?: According to OPPAGA, only five percent of complaints filed against associations resulted in formal enforcement action, which resulted in 46 separate cases involving the levy of fines totaling $230,176.00. As part of the fining guidelines adopted by the Division in 1998, fines are to be levied against unit owner-controlled associations only as a last resort. According to the Division's response to the OPPAGA Report, the Division issued 727 warning letters during the two-year period preceding the Report, with only 23 associations having been cited for repeat violations. Proponents of the status quo can certainly argue that a recidivism rate of .03 percent shows that the current system works.

Every condominium unit owner pays a four dollar yearly fee for the services provided by the Division. This includes a 49 member Bureau of Compliance, including 28 staff investigators. Clearly, no state in the nation places such resources at the disposal of an individual who has a beef with their association, and all for four bucks.

Perhaps the looming threat of fines keeps rogue boards in check.

Perhaps the tail has been allowed to wag the dog.

Check out the OPPAGA Report for yourself and reach your own conclusions. ■

Q&A: Condo Documents Filed with State, County Offices

Question: I have been recently elected as my homeowner's association's secretary. Who should I contact to confirm whether the articles of incorporation or the bylaws are recorded and where I can get a copy of the recorded documents? Also, is there some order of precedence with regard to the statutes and our governing documents? L.Y. (via e-mail)

Answer: The Articles of Incorporation, and any amendments thereto, must be filed with the Florida Department of State, Division of Corporations. A copy of the articles of incorporation, and amendments, can be obtained by writing to the Department of State, Certification Department, P.O. Box 6327, Tallahassee, FL 32314. The cost is $10.00. The bylaws do not have to be filed with the Secretary of State.

Most homeowners' associations also record the articles of incorporation and bylaws, and any amendments to each, in the public records of the county in which the subdivision is located. However, I have seen some older associations whose articles of incorporation and bylaws are not recorded. In my opinion, the articles of incorporation and bylaws and any properly adopted amendments to those documents should be recorded in the public records if they have not been.

Regarding the order of precedence for the governing documents, the hierarchy is: the declaration of covenants and restrictions: the articles of incorporation; the bylaws; and the rules and regulations. Regarding whether the statute (the Homeowners' Association Act found at Chapter 720, Florida Statutes), will control over any inconsistent provision in the governing documents, the answer may depend on when the declaration of covenants was recorded. The Homeowners' Act was initially adopted by the Florida Legislature in 1992 and has been subsequently amended throughout the years. In general, the Homeowners' Act will apply unless the law substantially changes pre-existing rights contained in the declaration of covenants. Most of the provisions in the Homeowners' Act are considered to be procedural and therefore will apply to governing documents existing prior to the enactment of the Homeowners' Act. There are some provisions in Chapter 720 that may be considered "substantive" which some homeowners' associations may seek to avoid.

Question: Three members of my condominium association purchased umbrellas and lounge chairs, which they have placed on our common areas along the beach. Are they permitted to do this? S.L. (via e-mail.)

Answer: Had these lounge chairs and umbrellas been purchased by your association for use by all the members, they could likely remain on the common areas without member approval. Since the use of this particular portion of the common area is presumably for lounging, sun-bathing, etc., the purchase and placement of personal property by the association to facilitate that purpose would be permissible without approval from the members.

The fact that these umbrellas and lounge chairs were purchased by individual members creates different issues. The members cannot monopolize a portion of the common areas for their own use. Furthermore, there may be rules in your condominium documents prohibiting members from storing items of personal property upon the common areas.

If these members wish to keep their umbrellas and lounge chairs upon the common areas, they should seek the Board's permission.

Question: My husband and I purchased a condominium unit near our home for our children and grandchildren to use when they come to visit us. Our Board recently adopted rules limiting guest usage for relatives to 30 days per year. The new rule requires 10 days notice to the Board. Can the Board do this? G.S. (via e-mail)

Answer: The Board can adopt reasonable rules regulating the use of units if your condominium documents

grant them this authority. However, 14 days written notice of any Board meeting at which such a rule would be considered must be given to the unit owners.

If the Board has authority to adopt rules governing the use of units, and the notice requirements were met, then the rules will be deemed valid if they are "reasonable" and not contrary to law or the your Condominium Declaration.

Many condominiums have similar restrictions to prevent transient occupancy. However, if your Condominium Declaration permits guest occupancy for time periods greater than what the new Board rule permits, you may have a valid objection.

Question: I have been recently elected as my homeowner's association's secretary. As the incoming secretary, what records should be turned over to me from the previous secretary? L.F. (via e-mail)

Answer: Your association's bylaws should describe the duties of the secretary. Typically, the secretary will keep the minutes of all meetings, send notices to the members and directors, and maintain the records of the association. The Homeowners' Act, in Section 720.303(4), identifies the records that the association must maintain as the official records of the association. These records include a copy of the governing documents and the rules and regulations of the association; the minutes of all meetings of the board of directors and of the members, which minutes must be retained for at least seven years; a current roster of all members and their mailing addresses and parcel identifications; the association's insurance policies or a copy thereof, which policies must be retained for at least seven years; a current copy of all contracts to which the association is a party; bids received by the association for work to be performed which must be kept for a period of one year; and a copy of the disclosure summary required by the Homeowners' Act for prospective purchasers. The financial records needed on a day to day basis are typically maintained by the treasurer, although other financial records can be kept by the secretary. The Homeowners' Act requires all financial and accounting records to be maintained for a period of at least seven years.

Question: What do you see as the pros and cons to a professional management company? We have a relatively small gated community (about 100 homes) with limited amenities, and a modest assessment ($300 per year) L.Y. (via e-mail)

Answer: Many officers of a community association do not want to be responsible for the day-to-day running of the association. Some of these day to day duties include collecting assessments, entering into contracts, maintaining the common areas, supervising maintenance workers, sending out notices of meetings, and enforcing the governing documents. Therefore, many associations hire a professional management company to take care of these day-to-day issues, although there are a number of associations which manage themselves.

The primary "con", of course, is cost. If your association is considering hiring a management company, you should interview a few different managers to determine what they do and whether it would be beneficial for the association to have professional management. If you do hire a manager, he or she should be licensed as a community association manager through the Department of Business and Professional Regulation. Also make sure the contract has a liberal termination provision. I recommend either party having the right to cancel, with or without cause, on thirty days' notice.

Advisory Council Finds its Footing

Fort Myers The News-Press, June 2, 2005

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As part of the changes to the condominium laws which took effect October 1, 2004, the Florida Advisory Council on Condominiums was created.

The Council consists of seven members, three appointed by the Governor, two appointed by the President of Florida Senate, and two appointed by the Speaker of the Florida House.

Appointments were finalized at the end of 2004, and the organizational meeting of the Council was held in Tallahassee in January of 2005.

The purposes of the Council are set forth in the legislation that created it, Section 718.50151 of the Florida Statutes. The Council is to receive public input regarding issues of concern with respect to condominiums, and make recommendations for changes in the condominium law. The issues that the Council shall consider include, but are not limited to, the rights and responsibilities of unit owners in relation to the rights and responsibilities of associations. The Council is also supposed to review, evaluate, and advise the Division of Florida Land Sales, Condominiums and Mobile Homes concerning rules affecting condominiums and recommend improvements, if needed, in the education programs.

Three meetings of the Council have been held since its organizational meeting. The first two meetings were held in Tallahassee, and focused upon structural issues intended to provide a basis for the Council's ongoing operation.

The first "public input" meeting was held in Panama City Beach on May 14, 2005. There was an excellent turnout from members of the public, and a wide range of opinions and recommendations expressed to the Council.

The next meeting planned for public input will be held in Miami, and is scheduled for June 25, 2005. Undoubtedly, the Council will continue to "ride the circuit" around the State, and will presumably make a visit to Southwest Florida in the foreseeable future.

Among the main issues the Council has tackled so far are the following:

- **Education of Board Members:** Although the Council does not appear to support mandatory requirements for board member education, there seems to be unanimous consensus that delivery of education and training to association board members and unit owners will go a long way in reducing problems in association life. The Council is examining the current program offered through Community Associations Institute, and is also exploring other ways to improve the availability of educational opportunities.

- **Role of the Ombudsman:** The same law which created the Council created the Florida Condominium Ombudsman. The Ombudsman is intended to serve as a neutral resource in disputes between unit owners and their boards, and nip problems in the bud before they turn into lawsuits or agency enforcement actions. The Council obtained some basic information from the Ombudsman's Office at the Panama City Beach meeting, and has requested further information from the Ombudsman in order to evaluate the program.

- **Role of the Division of Florida Land Sales, Condominiums, and Mobile Homes:** One of the key issues is whether a state agency with police power is the proper vehicle for resolving problems in associations. Unlike most other regulated industries where fines can be meted out, association operations are largely conducted by unpaid volunteers. If the Division is to retain an enforcement role, the Council is tasked with suggesting how the agency can better do its job.

In the interest of full disclosure, I am a member of the Council, and was privileged to be elected as its current Chair. The other members of the Council include: Community Association Managers Mark Benson (Fort Myers) and Tom Sparks (Panama City Beach); Attorneys Peter Dunbar (Tallahassee) and Michael Andrew (Orlando); Board Member George Geisler (Islamorada); and Consumer Advocate Karen Gottlieb (Dania Beach). The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, Michael Cochran, also serves as an "ex officio" (non-voting) Council Member.

At its last meeting, the Council voted to issue a Report to the Legislature at the end of 2005, for consideration during the 2006 Legislative Session.

Those interested in the workings of the Council can check out its website: www.state.fl.us/dbpr/lsc/condominiums/advisory_council. Those wishing to communicate with the Council can do so by e-mail at Condominium.advisorycouncil@dbpr.state.fl.us. ■

Q&A: Employees Work for Association, not Homeowners

Question: I live in a "55 and over" mobile home park. We own our lots and an association comprised of all lot owners owns the Park. We elect a board, and the board oversees our employees. For the last four years, our board has given the employees raises and bonuses. The problem is that I have no idea what I am paying my employees. Can you advise people like me about my rights to this information in the State of Florida? D.H. (via e-mail)

Answer: First, I would not characterize the association's employees as "your employees." Although you are a member of the association, and have a legitimate interest in employee performance, the Park's employees do not work for you. They work for the association. It is no different than owning stock in a publicly traded company, the employees answer to their managers and the board, not the shareholders.

Based on the information you have supplied, I am assuming that your Park is operated as a "homeowner's association" under Chapter 720 of the Florida Statutes. If that is the case, a homeowner's association must maintain accurate, itemized and detailed financial records of all expenditures and retain those records for seven years. Members of the association may review these financial records after giving ten working days' written notice to the association. The inspection may take place at reasonable times and subject to reasonable written rules adopted by the association.

Association employee personnel records are not open for inspection by members, but you should be able to get the answer to your question from the financial records.

Question: Our association is getting ready to review our documents to determine if any changes are needed. You were a guest speaker at a seminar I attended in which you briefly mentioned whether documents should have what you called "Kaufman language." I believe it meant that as the statutes change, so do the documents. I have been unable to find any details on that subject. Can you provide me with some direction. C.M. (via e-mail)

Answer: Generally, the Florida courts have held that the "substantive" law that exists when a declaration of condominium is created is "as though engrafted onto the condominium documents." Conversely, "procedural" and "remedial" changes in the law can be applied to pre-existing associations. There are exceptions to both rules, however.

There is also a parallel concept, involving provisions of the Florida Constitution, which prohibits the Legislature from enacting legislation which impairs vested contract rights. The courts have held that a declaration of condominium constitutes a contract, and thus may create contract rights.

The phrase "Kaufman language" comes from the 1977 court case called Kaufman v. Schere. In the 1970's, consumer price index escalators in recreation leases were outlawed by the Legislature. For the reasons listed above, the courts continued to apply such escalators to condominiums that pre-dated the new legislation. In the Kaufman case, the association's declaration of condominium specifically incorporated future amendments to the Condominium Act, and therefore the court struck down a recreation lease escalator in that case, even though it was entered into prior to the change in the law. Such "amended from time to time" language has come to be known as "Kaufman language."

While there are instances where an association might wish to preserve the right to claim exemption from changes in the Florida statutes, in my experience

many associations place as one of their highest priorities the certainty of their operations by not having to debate "which law applies."

Ultimately, it is a business decision for an association's board of directors in determining whether or not to include "Kaufman language" in the proposed new condominium documents. Some of the changes considered during the past couple of legislative sessions have caused me to rethink my position on the issue. Further, certain clauses in documents cannot be changed without unanimous approval of owners, regardless of the existence or incorporation of "Kaufman language."

Prior to making such a decision, the association should consult with its attorney to carefully weigh the pros and cons of adding such language, so an informed decision can be made.

Question: I am the secretary in my homeowner's association. Our governing documents state that when a lot is sold, the new owners have one year to complete plans for the new home, including having the plans approved by the association's design and review committee. One year after the purchase date, construction is supposed to start and be completed one year from then or on a reasonably agreed upon time (the association and the lot owner making that decision). Can we fine the lot owner if they do not follow the governing documents? M.T. (via e-mail)

Answer: The homeowner's statute (Chapter 720) allows a homeowner's association to levy a fine if the governing documents so provide. You should review the covenants, the articles of incorporation, and the bylaws, to determine whether any of those documents permit the association or the board of directors to levy a fine for violation of the governing documents. If so, a fine, not to exceed $100 per violation may be levied. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for a hearing, except that no such fine shall exceed $1,000.00 in the aggregate unless a higher or lower limit is specified in the governing documents.

Question: My wife and I live in a small condo complex. We have a by-law that states that no animals are allowed. Last summer, a couple moved in with a dog. They knew before they moved in about the rule. A few of us went to the board members and told them we did not want the dog and that it was against our by-laws. We told the board members time after time about this and nothing was done. Then, the board members and the dog owner had a meeting with no one else being notified. They passed a rule that would allow this dog until it passed away, but no other pets for anyone else. We told them they violated the Florida Sunshine Law and they were also discriminating against the rest of us. They rescinded their new rule but nothing has been done about the dog. What are our rights? P.O. (via e-mail)

Answer: Based upon the information you have provided, the meeting between the board members and the dog owner probably violated Florida's open meeting laws for condominiums. Section 718.112(2)(c) of the Florida Condominium Act indicates that board meetings at which a quorum of the members is present shall be open to all unit owners. This requirement is inapplicable only to meetings between the board and the association's attorney, with respect to proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice.

If your condominium documents prevent pets, the association has standing to file legal action against the pet owner. Other unit owners may also have the right to file legal action against the pet owner. Section 718.303(1) of the Condominium Act states that actions for damages or for injunctive relief, or both,

for failure to comply with the Condominium Act, the declaration, the documents creating the association, and the association bylaws may be brought by the association or by the unit owners against a unit owner.

If the current board does not enforce your condominium documents, you, and other owners, might consider a recall of that board and elect a board that will enforce your documents. ■

Smoking Becoming Hot-Button Conflict

Fort Myers The News-Press, June 9, 2005

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There's no doubt about it, condominium living presents unique challenges. In America, we are taught from grade school on that our home is our castle, and that America is the land of the free.

We are also taught that there are limits to freedom. The cliché example often used at law schools is that while you have the right of free speech, you do not have the right to run into a crowded movie theatre and yell "Fire."

In association living there are daily conflicts between individual freedom and the interests of the collective group. Otherwise lawful conduct, such as owning a pet, is routinely regulated. A Florida court probably best summed it up over thirty years ago, where a jurist observed:

> Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. 4th DCA 1971)

An association issue which has been getting a great deal of attention lately involves an association's ability to regulate smoking. While viewed by most as a disagreeable habit, smoking is legal. However, according to many experts (with whom juries in large class action suits seem to have agreed), second-hand smoke can pose a health risk. Setting aside health issues, many find the affects of others' smoke to be unpleasant at best, perhaps a nuisance in the legal sense of that term.

Florida law generally defines a nuisance as a condition which annoys or disturbs another in the free use, possession or enjoyment of their property or which renders the property's ordinary use or occupation physically uncomfortable. Generally, there must be a substantial and continuous or recurrent harm in order for a nuisance to be proved. A mere annoyance is not sufficient.

The test to be applied in determining whether a particular inconvenience is sufficient to constitute a nuisance is the effect of the condition upon any ordinary reasonable person with a reasonable disposition, in ordinary health, and possessing the average and normal sensibilities. In general, the courts will not afford protection to the hypersensitive.

According to a posting I recently received from one of the attorney e-mail groups I subscribe to, the appellate courts around the country have apparently not yet tackled this problem, but the tide may be rolling in. According to one article, the Boston Housing Court ruled last week that a landlord could evict his tenant from a condominium unit,

even though smoking was permitted in the building, and the landlord knew that the tenant smoked before the lease was entered into. Apparently, the tenant's neighbors complained about the constant pollution of their living space, and the jury found the situation bad enough to declare a nuisance.

The State of Utah recently amended its condominium statute to provide that restrictions regarding the use of units "may include other prohibits on, or allowance of, smoking tobacco products." The Utah Legislature has further specifically defined Utah's nuisance laws to include "tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit."

While smoking is generally legal in Florida, it is now forbidden in restaurants and many public places. If the Florida Legislature can ban a lawful activity, can a condominium association do so as well? Does it make a difference when you cross the threshold into the sanctity of your own home, your castle?

Most attorneys that I have chatted with about the issue feel that an amendment to a declaration of condominium regulating smoking inside a home would be likely upheld. I have heard the opposing point convincingly argued as well. Of course, policing such a rule is a different matter altogether. The effectiveness of a board-made rule on this matter is perhaps subject to greater debate.

Like many things in the law, until addressed by the courts or the Florida Legislature, there are two sides to the story, and both can claim to be right. ■

Q&A: Homeowners' Association Act Governs Most

Question: Our homeowners association was created in the 1970's. The articles of incorporation provide that the corporation shall have all of the common law and statutory powers granted to corporations not-for-profit. We know that the Florida Not For Profit Corporation Act, Chapter 617, applies to us. Does our association have only the powers provided for in the Florida Not For Profit Corporation Act, or, as a homeowners' association, are we also governed by the Homeowners' Associations Act, Chapter 720? J.G. (via e-mail)

Answer: In order for your association to qualify as a "homeowner's association" under Chapter 720 (commonly referred to as the Florida Homeowners' Association Act), membership in the association must be mandatory as a condition of property ownership, and the association must have the right to file a lien for unpaid assessments.

A homeowners' association under Chapter 720 of the Florida Statutes, must be either a for profit or not for profit corporation. Almost all homeowners' associations are organized as not for profit corporations. Chapter 720.302 (5) of the statute provides that, "Unless expressly stated to the contrary, corporations not for profit that operate residential homeowners' associations in this state shall be governed by and subject to chapters 617 and this chapter." Therefore, both Chapter 617 and Chapter 720 apply to your association. Chapter 617 provides the general framework for the formation and operation of the association, and Chapter 720 adds additional requirements designed to meet the special needs of homeowners' associations.

For example, the Not For Profit Corporation Act allows regular board meetings to take place without notice, unless the articles or bylaws specifically require notice. The Homeowners' Associations Act requires that all board meetings be preceded by notice. In the event of a conflict between these two statutes, the Homeowners' Associations Act controls, otherwise the specific provisions of that act would be rendered meaningless.

You should also be aware that the initial version of the Homeowners' Association Act was created in 1992, and therefore your association well pre-dates the law. There are some questions as to the extent of retroactive application. When the law was created, the Legislature's stated intent was to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions. The Legislature also recognized that certain contract rights were created prior to the new law, and that the Homeowners' Association Act could not be applied to impair vested contract rights.

Question: Our condominium was built over twenty years ago. The condominium includes a fishing pier and a set number of boat slips, which have been assigned to unit owners on a waiting list approach. However, the boat slips are not addressed in the declaration of condominium or in the bylaws. They are referred to in the rules and regulations, and there are very specific rules regarding the waiting list and slip usage. The recent hurricanes significantly damaged the slips. Now, the replacement of the boat dock and slips has become a major issue. Though never defined, the dock and slips have been treated as common elements and no fees have ever been collected from slip users. Due to the number of units, not everyone can have a boat slip. A question has arisen as to whether the association must rebuild the dock and slips, and if so, who must pay for it. In addition, does the association have to replace the seawall, or can we patch it/repair? J.R. (via e-mail)

Answer: Even though not specifically referenced in the declaration of condominium, the slips may be shown on the survey or drawings that are attached

to the declaration. You should check to see if those drawings show the slips as common elements. Even if not specifically shown on the drawings or survey, if originally built by the developer, they would likely be considered part of the common elements. In such a case, the association would likely have to pay to make the repairs.

If the slips are not mentioned at all in the documents, and were not built by the developer, the association should have its legal counsel review whether they were properly added to the common elements in the first instance. If the slips were illegally constructed, there may be no duty (or even authority) to replace them, especially with funds of all unit owners.

If the association wanted to make those owners who use the slips responsible for the maintenance, repair, and replacement, then the association would probably need to amend the declaration of condominium and enter into lease agreements with those owners who are assigned a slip.

As to whether the association must repair or replace the seawall, this is a business judgment decision for the board. The board can rely on experts regarding whether the seawall can be effectively repaired or whether replacement would be the more prudent option.

Question: Our board took over from the developer in March. The developer continued as the property management firm until late May when they informed us that they would discontinue services July 1. Is there any requirement for the association to have a licensed property management company or an individual licensed manager. B.C. (via e-mail)

Answer: Absent a requirement in your governing documents (which would be rather unusual), there is no requirement that either a condominium association or a homeowner's association hire a paid manager, whether management company or individual manager.

The hiring of a manager is typically a decision granted to the board of directors, in the exercise of its business judgment, through the governing documents for the association. Although I am not aware of any statistics on the issue, I would say that the majority of associations do have a paid management arrangement, although I am familiar with a substantial number of successfully self-managed associations.

If your association does hire a manager or management company, the community association manager assigned to your association must have a state-certified management license (there are some limited exceptions to the law).

You can check on a manager's licensure statute, and whether complaints have been filed against the license, by going to the web page of Florida's Department of Business and Professional Regulation, www.state.fl.us/dbpr.

Records Access Set by Statute

Fort Myers The News-Press, June 16, 2005

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During the past two decades, community associations have proliferated in Florida. In addition to the condo boom, virtually every new housing development includes mandatory membership in a homeowners' association.

There are many reasons for the phenomenon. Local governments greatly benefit from the existence of associations. While the tax base is increased by the creation of more homes, counties and municipalities are typically called upon to provide less services because maintenance costs for streets, street lighting, surface water management, and other functions traditionally performed by government are passed on to the association.

Further, Florida's housing market attracts large number of retirees, seasonal residents, and absentee investor-owners who benefit from centralized amenities and having maintenance functions performed by an association.

As with any form of government, the balance of powers, rights, and responsibilities is a subject of constant debate. Numerous advisory groups and task forces have been empanelled to study the laws and make recommendations for improvement.

Undoubtedly, one of the most frequently debated issues, and one of the greatest sources of contention in associations, involves access to the books and records of a community association. In most corporate settings, a shareholder's rights are rather limited regarding records inspection, and a proper purpose must be shown when shareholders desire to inspect many of the corporate records.

The model for community associations is more akin to government bodies, where the right of inspection is nearly absolute, and no proper purpose needs to be shown when requesting to inspect records. In fact, the association member does not even need to tell the association why they wish to inspect the records, simply that they wish to do so.

During the next several installments of this column, we will be looking at the details of records access. As always, we need to start with the governing law and definitions.

For condominiums, records access is governed by Section 718.111(12) of Florida's statutes. For homeowners' associations, Section 720.303(4) and (5) applies. Both statutes contain a laundry list of association "official records" including the association governing documents, minutes, and financial records.

For many years, Florida's condominium law has contained a "catch-all" provision stating that "all other records of the association" are also "official records." The law for homeowners' associations was amended in 2004 to similarly broaden that law. The HOA law now also states that official records include "all other written records of the association" that are not included in those specifically listed in the statute.

The catch-all phrase in the condo law refers to all "records", while the HOA law refers to "written records." Is that a distinction with a difference? When we explore inspection of tape recordings, computer records, and other non-written records, this may become a key point. For today's segment, it is enough to know that all records of both types of associations are considered "official records."

As will also be explored in more detail in future segments, official records must be made available for inspection and copying. As with most things in the law, there are exceptions to the rules.

For condominiums, attorney-client privileged documents are not accessible to unit owners. In addition to attorney-client privileged documents, there are documents protected by the "work-product" privilege, which might encompass items such as an engineering report prepared in connection with a warranty claim.

Further exempted from the definition of condo "official records" is information obtained by an association in connection with the approval of a lease, sale, or other transfer of a unit. For example, many associations ask for sensitive information in connection with reviewing a lease or transfer application, and the law has come down on the side of privacy.

Finally, medical records of condominium unit owners are not accessible to unit owners. For example, an association may have granted a handicapped owner with some type of accommodation, and may have had to obtain medical diagnosis information in order to determine whether the unit owner was indeed handicapped. For obvious privacy reasons, such records are not part of the "open book" of association official records.

For homeowners' associations, the same four exceptions (attorney-client privileged documents, work-product privileged documents, sales and rental records, and medical information) apply. Further, there is a fifth exemption not found in the condo law, that being "disciplinary, health, insurance, and personnel records of the association's employees." This was an added area of privacy included by the 2004 amendments to the homeowner's association law, which in my opinion would be wise to incorporate into the condominium laws as well.

Next week, we will take a look at the owners' inspection rights, copying of association records, and a board's ability to place reasonable limits on the exercise of inspection rights. ■

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Q&A: Statutes Conflict on Material Alterations Boards

Question: Our condominium association has set a precedent on how hurricane shutters are installed at our condominium. Can that precedent be changed by the board because one owner doesn't like the looks of the shutters? C.S. (via e-mail)

Answer: This question involves two potentially conflicting statutes. On the one hand, Section 718.113(2)(a) of the condominium statute states that there shall be no "material alteration" of the common elements except as permitted in the declaration of condominium or, if not provided for in the declaration, by a vote of 75% of the owners. A change in the color or style of the shutters would likely be a "material alteration" to the common elements, and this law would apply.

However, Section 718.113(5) of the same law states that installation, replacement, operation, repair and maintenance of shutters, in accordance with specifications adopted by the board of directors will not be considered a "material alteration." The law also says that the board is obligated by law to adopt hurricane shutters that comply with the building code, and may also specify the aesthetics of the shutters (such as color). In general, any action which a board can take, a board can amend. On this basis, the board could change the specifications, including solely aesthetic issues.

There are no cases addressing this issue, so the answer to your question is not clear. The conservative approach would be to get owner approval to amend the specifications, since the appearance of the building will change. If the owners properly approve a change in specifications, the new specifications will be valid regardless of the effect on the appearance of the condominium.

Question: Our condominium association has a long-standing rule that dogs must be under 20 inches at the shoulder. This rule has not been enforced and there are a handful of dogs in the condominium that exceed this size limit. The board has recently enacted a fine of $50 per month for all current owners of dogs that exceed this size limit. Is this legal? K.G. (via e-mail)

Answer: It is legal for a board to enact reasonable pet rules as long as the board is granted rule-making authority and those rules do not conflict with other provisions of the condominium documents. However, if an association has not enforced an existing rule in the past, any attempt to enforce the rule now would likely be met with claims by the members that the association has either waived its right to enforce the rule or that the association is selectively enforcing the rule. Therefore, the board most likely will not succeed in enforcing the rule and the new fine against current violators, but can begin to enforce the rule against future members or future pet owners by taking corrective action. Specifically, the board can republish the rules, reaffirm its intention to enforce the rule in the future in a written notice to all members, and actually enforce the rules, including the imposition of a fine if fines are permitted by the condominium documents.

If the association has not waived the pet restriction, and it is enforceable, a fine is one way to do so. The recorded condominium documents must permit the levy of fines. Fines for ongoing violations are permissible, if authorized by the documents, but cannot exceed one thousand dollars in the aggregate.

No fine may be levied until the unit owner is given notice and an opportunity for a hearing before a committee of unit owners who are not board members. If the committee does not agree with a fine proposed by the board, the fine cannot be levied.

Question: I have a question about the replacement responsibility of doors that lead out to a open patio on the second floor of a condominium. I believe the association is responsible for replacing the doors, but one of the board members says that the association is only responsible for replacing the front doors on units. I recently saw a new statute regarding repairs for condominiums that sets forth what associations throughout Florida are responsible for, and what the unit owners are responsible for. Would you please clarify this law? P.L. (via e-mail)

Answer: I am not sure which "law" you are referring to, however I believe you may be confusing this with new insurance provisions that are found in the Condominium Act. Those provisions set forth insurance obli-

gations of both associations and unit owners. However, insurance obligations are often different from repair and maintenance obligations. For example, an item that is the maintenance obligation of an owner may be the insurance obligation of the association.

Regarding the maintenance, repair and replacement responsibility of the sliding doors on the lanai, you will need to refer to your declaration of condominium to determine whose responsibility that is. Typically, you must first determine the boundaries of your unit, and then look at the maintenance, repair and replacement provisions in the declaration. Generally, a unit owner will have the maintenance, repair and replacement responsibility for the "unit", and the association will have that responsibility for the "common elements." There are instances, however, when certain portions of a unit may be designated as the maintenance, repair and replacement responsibility of the association, and where owners can be required to maintain "limited" common elements. Since condominium documents can vary greatly, each will need to be looked at on a case-by-case basis.

If the need to replace the doors was caused by some insurable event, you will also need to look at the insurance and casualty repair provisions contained in the declaration of condominium. You also need to look at the insurance sections of the Condominium Act. Even if the doors turn out to be the maintenance, repair or replacement responsibility of an owner, they are most likely the insurance responsibility of the association, assuming they were originally installed by the developer.

Question: I live in a homeowner's association comprised of "quad" unit buildings, with individual open patios that are only several feet apart from each other. After last year's hurricane, our homes had no electrical power for several days and therefore we kept our windows open because of the heat in the homes. One of the owners brought in a portable generator and ran it from her patio. The generator was very noisy and exuded dreadful fumes. The residents in our association are mainly elderly, with fragile health. We have a documented rule that inordinate noise from any unit is not permitted after 10:00 p.m. I would like to know what the legal status is for generators, with their attendant dangers, in a situation such as ours, and would appreciate any suggestions that you might have. B.W. (via e-mail)

Answer: I am not aware of any specific laws that regulate the use of power generators. Certainly, one must exercise caution when using these generators, and should follow all safety guidelines such as proper ventilation. After last year's hurricanes, many people purchased generators to compensate for the loss of electricity so they could continue to run such electrical items as refrigerators, air conditioners, televisions, etc.

Many associations have "nuisance" and "quiet hour" provisions in their documents that might come into play based upon the noise generators make (regardless of the time of day) as well as the fumes that they exude. In many situations in life, including the enforcement of association restrictions, common sense may serve as the only guidepost in dealing with unusual circumstances. I believe the association could enforce safety standards (for example, prohibiting generators in un-vented common areas) and could also impose some reasonable time limits on the operation of generators to ensure that the neighbors could get some sleep at night. I doubt a court would uphold an outright ban, given the extreme conditions created by the storm.

Your inquiry presents an interesting question, certainly a close call, and one I hope we do not have to think about again for a long time to come. ■

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Records Laws Have Some Similarity

Fort Myers The News-Press, June 23, 2005

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During the past two decades, community associations have proliferated in Florida. In addition to the condo boom, virtually every new housing development includes mandatory membership in a homeowners' association.

As with any form of government, the balance of powers, rights, and responsibilities is a subject of constant debate. Numerous advisory groups and task forces have been empanelled to study the laws and make recommendations for improvement.

Undoubtedly, one of the most frequently debated issues, and one of the greatest sources of contention in associations, involves access to the books and records of a community association.

Today's column continues our review of records access issues in Florida's community associations, both condominiums and homeowners' associations (see, Records Access Set by Statute, June 16, 2005).

As noted in last week's column, records access for condominiums is governed by Section 718.111(12) of Florida's statutes, while the HOA counterpart is found at Section 720.303(4) and (5) of the statutes.

Although there are some slight differences between the two laws, recent legislative efforts have focused on trying to create some consistency in the laws for condominiums and homeowners associations. Here are some of the highlights:

- **Place Where Records Must Be Kept.** Both laws require that official records be maintained within the State of Florida.

- **Right To Inspect And Copy.** Both laws confer the right of inspection and copying on every member of the association (parcel owner or unit owner) as well as their "authorized representative." Therefore, an association member can permit a third person to act as his or her agent when inspecting association records.

- **Time For Compliance By Association.** Here, there is a slight difference between the two laws. The condominium law requires that the association make the records available for inspection within five working days after receipt of a written request. After ten working days, a presumption arises that the condominium association has willfully failed to comply with the unit owner's request. For homeowners associations, there is ten working days provided for compliance with a records inspection request.

- **Statutory Minimum Damages.** Both laws provide that an association which willfully fails to comply with an owner's inspection request is responsible for actual damages, plus statutory minimum damages of $50.00 per day, up to a

maximum of $500.00 in statutory minimum damages.

- **Entitlement to Attorney's Fees.** Both laws provide that any owner who is wrongfully denied access to association records may recover their attorney's fees in a court action to compel delivery of the records.

- **Copying.** Both laws permit owners to copy association records in connection with their inspection of them. In next week's installment, we will further explore some of the challenges involved with records copying.

- **Board Right to Control Inspection and Copying.** Both laws allow the board of directors to adopt reasonable written rules regarding the frequency, time, location, and notice requirements for records inspection. Next week's column will also focus a bit more on these concepts.

Associations have been described by the courts as "democratic sub-societies." Thus, like our other elected levels of government, there is little tolerance in the law for secrecy in association affairs, or as the popular express goes, everything must be done in the sunshine. ■

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Q&A: Ask Current Manager or Attorney About Records

Question: One of the unit owners in our condominium community used to be the property manager. We now have a new property manager. As the board president, I was primarily responsible for changing property managers. Now this individual owner constantly sends emails complaining about items in the condominium. The ironic part is that the former property manager should have addressed many of the items that he is now complaining about. We are still having trouble getting financial information from the former manager. What can I do to complain about the way that the former manager handled our affairs? (R.S. via e-mail)

Answer: Managers provide an important service for associations. They can relieve the Board of the many day-to-day functions required to operate an association, and can provide experienced-based guidance on many important aspects of community operations. With limited exceptions, any person who manages community associations must be licensed and receive such a designation from the state of Florida.

To become a licensed community association manager, an individual must undergo a background check, pass a state of Florida-administered examination, and must then meet continuing education requirements. These continuing education requirements include 20 hours of classes every two years to keep up with changes in the industry.

Chapter 468 of Florida statutes contains guidelines as to what a manager is authorized to do. The Department of Business and Professional Regulation also promulgates rules governing managers' conduct, including "Standards of Professional Conduct". For instance, managers are bound by their license to be certain all the association funds are placed in the proper accounts. The Florida Administrative Code also requires the manager to relinquish the books, records, accounts, funds and other property of a community association when requested by the association. The manager must provide such items within 20 business days after receipt of a written request from the association, even if there is a pending contract dispute between the association and the manager. The law deems violation of this rule to be "gross misconduct."

Your situation points out something I have always felt strongly about, that being business relationships between unit owners and the associations in which they are members should be avoided in most cases. Particularly where a unit owner serves as manager, there is too much potential for confusion about what pertains to the individual as an owner (with their attendant rights) and what pertains to them as manager (with their attendant duties).

I would recommend that you ask your current manager (if they have a good relationship with the former manager), or your attorney, to try to get you the records that you need, and move on. If the manager remains uncooperative, then you could seek recourse from the appropriate licensure authorities.

Should it become necessary, complaints can be filed against most regulated professions through the office of the Department of Business and Professional Regulation, including on-line filing. The DBPR's website is www.myflorida.com/dbpr.

You also ask about complaints regarding the manager's performance of his job duties. This is not an area where I would waste valuable time or expend negative emotional energy. After all, it is the board of directors that is responsible to see that the manager is doing his job correctly. In some sense, that is akin to complaining about your own actions.

There is little an association can effectively do to stop unit owners from sending e-mails. When a unit owner abuses their privilege to obtain or receive information by e-mail, I typically advise an association to simply not respond. The law does not require you to acknowledge

or respond to unit owner e-mails, only certain letters sent to you from the unit owner by certified mail.

Question: I recently volunteered to be part of our condominium association's board of directors, and I was elected the treasurer. In recent months, I have realized that this position is not a good fit for me, and that I do not wish to continue with my position as treasurer. What steps must I follow so I can resign my position? (K.A.C. via e-mail)

Answer: Resignations of directors and officers are governed by the Florida statutes governing corporations (Chapter 617 for not-for-profit corporations). If you wish to resign from the board, you may do so by delivering written notice to the corporation (written notice to the board president would be sufficient). The resignation would be effective when the notice is delivered, unless the notice specifies a later effective date. If the resignation is made effective at a later date, and the corporation accepts the future effective date, the board may fill the pending vacancy before the effective date, if the board of directors provides that the successor does not take office until the effective date of the pending vacancy.

If it is your intent to resign only as treasurer but remain on the board as a director, the same steps must be followed. You should be clear in your resignation letter whether you are resigning as treasurer, as a director, or both.

Question: I live in a community with a homeowners' association, and have some questions regarding our last election. During election time, most of the property owners are available to be at the election meeting. Some of the homes are rented and those owners receive absentee ballots through the mail. I am troubled because every property owner received an absentee ballot in their mailbox, and their lot numbers were marked on the ballot. If an owner is available to vote in person, why do they get an absentee ballot in the mail box and why were the lot numbers put on them if this is to be a secret ballot? When these ballots were returned, they went into a box in the clubhouse. When the votes were tallied, there appeared to be an inordinate amount of absentee ballots. I was told that this has never happened before. Can anything be done to prevent this from happening in future elections? (J.M via e-mail)

Answer: Chapter 720 of the Florida Statutes, which governs homeowners' associations, states that elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. These procedures are generally spelled out in the by-laws. The law also states that members have the right to vote in person or by proxy, unless otherwise provided in the association's governing documents.

Unlike condominiums, where all elections are handled the same way, each homeowners' association's governing documents differ, and need to be looked at on a case by case basis to determine the proper procedures for elections and voting. Unless your association's governing documents provide otherwise, the board has some degree of latitude in structuring the election papers.

I do not know if your association's governing documents provide for secret ballots when electing directors, but there is no requirement for secret ballots in the law. ■

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Homeowner Groups Face Troubling Requests

Fort Myers The News-Press, June 30, 2005

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During the past two decades, community associations have proliferated in Florida. In addition to the condo boom, virtually every new housing development includes mandatory membership in a homeowners' association.

As with any form of government, the balance of powers, rights, and responsibilities is a subject of constant debate. Numerous advisory groups and task forces have been empanelled to study the laws and make recommendations for improvement.

Undoubtedly, one of the most frequently debated issues, and one of the greatest sources of contention in associations, involves access to the books and records of a community association. Today's column is the third part of our review of this issue. (See, Records Access Set by Statute, June 16, 2005 and Records Laws Have Some Similarity, June 23, 2005). Today's focus, do's and don'ts for boards of directors when dealing with troublesome inspection requests.

In the vast majority of the cases, a parcel or unit owner's request to look at association books does not create tremendous burden on the association, nor portend that the owner is spoiling for a fight. Rather, most people who live in association-operated communities have invested their life's savings in their property. They have a legitimate (not to mention legal) right to look, if they choose, at the details involving the association's operations, and how their money is spent.

However, like in all issues involving associations, there are exceptions to the norm. Common points of friction occur when owners abuse their statutory inspection privileges for purposes of harassing the association, going on a "witch-hunt" for honest mistakes, or simply diverting attention from some other problem between the association and the owner, such as a dispute over the owner's violation of some rule or restriction.

Let's take a look at those areas where the board may establish regulations regarding records inspection in an effort to head off some of these problems:

- Manner of Request. Both the condominium and HOA laws require the owner's request to be in writing, and there is therefore no doubt that such a requirement by a board is reasonable. I recommend that every board require records access requests to be in writing. While it may seem reasonable to respond to a "nice" owner's verbal request for a few pages of documents, the association needs to treat all owners equally, and needs to be in a position to insist that the "not-so-nice" owner submit his or her inspection requests in writing.

- Place of Inspection. In most cases, association inspection rules require that records be inspected at the location where they are kept, typically the condominium office or, at the office of the management company. Sometimes,

official records are kept by a number of different parties (such as the manager, the accountant, and the attorney), and it usually makes sense to require that all records be reviewed at the same location. The place of inspection can be a troublesome issue for associations that are self-managed, particularly smaller groups with many seasonal residents. Even if the board's secretary "goes up north" for the summer, the owners' inspection rights do not take a vacation. As mentioned in last week's column, records must be kept in the State of Florida and made available within a fairly short timeframe. Self-managed associations should make adequate arrangements for inspections under such circumstances.

- Frequency and Duration of Inspections. The most frequent source of contention in records inspections involves how much of its time and resources an association must expend to permit the inspection of records. In my experience, most associations do not want their members "rummaging through" the records, and therefore will typically have a board officer, manager, or association staff person on hand while the records are being inspected. This also helps to guard against the malicious or unintentional alteration of records, their becoming lost or stolen, and the like. This is one area where the law for HOA's is a bit clearer than its condominium cousin. Specifically, Section 720.303(5)(c) of the homeowners' association statute states that an association may not limit a parcel owner's right to inspect records to less than one eight-hour business day per month. For condominiums, the law simply states that limitations on the frequency and time of inspection must be "reasonable". There is one decision rendered by Florida's condominium arbitration group which suggested that a rule limiting a condominium owner to twelve hours per month (three inspection periods of four hours each per month) would be upheld. In either case, the limit needs to be contained in a written rule.

Associations have been described by the courts as "democratic sub-societies". Thus, like our other elected levels of government, there is little tolerance in the law for secrecy in association affairs, and the law clearly favors the rights of the owner. Next week, we will conclude this series by reviewing protocol for an owner's copying of records, and challenges occasionally faced by associations when corporate records are copied. ■

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Q&A: Association Can Receive Lot Once Homeowner Dies

Question: We have been advised that one of the members of our homeowners' association plans to bequeath his lot to the association when he dies. What are the legal requirements of our association in accepting a donation of this type? B.C. (via e-mail)

Answer: Every day, I am bombarded by e-mails and articles, written by self-appointed experts, claiming that there is nothing good about community associations. Their basic tenet, everyone hates community association life, but there is nowhere else to go. Your owner's gesture is a great response to these nay-sayers. What more meaningful statement could a resident make about all that is good with association living.

The Florida Homeowners' Associations Act, Chapter 720, Florida Statutes, does not specifically address your issue. However, almost every homeowners' association is incorporated under the Florida Not For Profit Corporation Act, Chapter 617, Florida Statutes. Section 617.0302(9) specifically authorizes a not for profit corporation to "purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real or personal property, or any interest therein, wherever situated." This authority exists for the association unless the articles of incorporation or bylaws of the association provide otherwise. So it would appear, absent a limitation in the governing documents, that the association can receive the bequest.

The more interesting question concerns the permitted range of uses of the property once received by the association. The governing documents of the association, which include the declaration of covenants and restrictions, the articles of incorporation, the by-laws, and the rules and regulations, must be consulted to determine if there are restrictions on the association's authority to choose what is done with the property. For example, most declarations of covenants and restrictions require approval of the members of the association, in the form of an amendment, before lots can be used for any purpose other than a single family residence. Therefore, if the association proposes to retain ownership of a gifted lot in order to put it to use for the benefit of the association, the approval by the members may be required.

In the absence of some restriction on the board of directors' authority in the governing documents, or the bequest itself, the board would be free to sell the gifted property and apply the proceeds for the community's benefit. The association's accountant should also be consulted for tax planning.

Question: Our condominium association requires that only specific types of window hurricane protection be used by the condominium owners. These cost from $6,000.00 to $10,000.00 and are currently unavailable for 10 to 20 weeks. An owner has requested permission to put plywood up the day a hurricane warning is issued, and take the plywood down within a day after the warning or storm is over. The association refused this owner's request. Can an association refuse to allow an owner to protect his property in this manner? J.C. (via e-mail)

Answer: Before one of the 2004 hurricanes hit, a condominium association in Palm Beach County was dragged through the mud by the press because it refused to allow owners to put up plywood when the storm was threatening. Hindsight being 20-20, it may have made sense to allow owners to risk physical injury to themselves and damage common element property, when the condominium was in the bulls-eye of a Category 4 hurricane.

The problem, of course, is that Florida's coastal condominiums are subject to fairly frequent hurricane and tropical storm advisories, and chaos would reign if every owner could decide when, and in what manner, it is time to protect the building.

That is why the Condominium Act requires an association's board to adopt hurricane shutter specifications for each building within each condominium operated by the association, which specifications are to include color, style, and other factors deemed relevant by the Board, and which specifications must comply with the applicable building code.

It appears that your association has adopted such hurricane shutter specifications. If the association's documents require an owner to obtain approval to install hurricane shutters, the board cannot refuse to approve the installation or replacement of hurricane shutters that conform to the specifications adopted by the board. On the other hand, an owner cannot install hurricane shutters that do not conform to those specifications.

Question: We need to hire a condominium association manager. This is a first for our current board. Our condominium association was self managed from 1970 until about 1990. It hired a management company and has retained the same company for over 15 years. We have agreed to disagree with our current provider over a number of issues and are now in search of new management. Are there public resources that we could access that would give us an "outline" of the types of questions to ask prospective managers and information to obtain from these companies? M.I. (via e-mail)

Answer: Community association management is an occupation regulated by the Department of Business and Professional Regulations. As a regulated industry, the DBPR maintains information as to the role of a community association managers. This information may be obtained by visiting the DBPR website at **http://www.state.fl.us/dbpr/**

Choosing a CAM is an important, and occasionally difficult decision for associations. The association will want to check the credentials of any CAM to ensure the CAM is properly licensed. The association can confirm that the CAM is licensed on the DBPR website. Additionally, the association can review whether complaints have been filed against a particular community association manager, as complaints regarding Community Association Managers are also public record.

Alexandria-based Community Associations' Institute, a national organization involved with association operations, publishes several resources may be of help. Go to CAI's online bookstore at **www.caisecure.net**. Two possible resources include "Choosing a Management Company" and "On-Site Manager". Good luck. ■

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Owners Have a Right to Copies

Fort Myers The News-Press, July 7, 2005

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During the past two decades, community associations have proliferated in Florida. In addition to the condo boom, virtually every new housing development includes mandatory membership in a homeowners' association.

As with any form of government, the balance of powers, rights, and responsibilities is a subject of constant debate. Numerous advisory groups and task forces have been empanelled to study the laws and make recommendations for improvement.

Undoubtedly, one of the most frequently debated issues, and one of the greatest sources of contention in associations, involves access to the books and records of a community association. Today's column is the third part of our review of this issue. (See, Records Access Set by Statute, June 16, 2005, Records Laws Have Some Similarity, June 23, 2005, Homeowner groups face troubling requests, June 30, 2005). Today's focus, copying of records by owners.

The condominium law provides that the right to inspect records "includes the right to make or obtain copies, at the reasonable expense, if any, of the association member." As noted in previous columns, the board may adopt reasonable rules about how copies of association records are obtained. The state condominium agency used to have a rule which provided limitations on board-made rules, including a provision that a condominium association could not charge more than 25 cents per page for photocopies, and only "actual costs" for copies of the condominium documents. This rule was repealed several years ago, as part of the agency's stream-lining of its regulations.

For homeowners' associations, the law is a bit different, and more detailed. The HOA law provides that if the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than twenty-five pages. The law for homeowners' associations goes on to provide that an association may charge up to 50 cents per page for copies made on the association's photocopier, and if the association does not have a photocopy machine available where the records are kept, or in cases where copies exceed twenty-five pages in length and are sent out for copying, the actual costs charged by an outside vendor for copying.

It is important to note that both laws contemplate that copies can be requested by the owner in connection with his or her inspection of the records. Stated otherwise, the law does not give owners in either condominium or homeowners' associations the right to call the association and have records copied and mailed to them, nor made available for their pick-up. Rather, the intent of the law is that if an owner inspects a record and wants to retain a copy, they have the right to do so.

An issue constantly confronted by associations involves an owner's right to inspect or copy audio tapes of board meetings. Many associations keep audio tapes of board meetings for assistance in the preparation of minutes. The administrative regulation for condominiums is very clear on this point. The condo rule provides that if recordings are made of board meetings, the tapes must be maintained as official records at least until the minutes of the meeting which was the subject of the recording are approved. After recording, the tapes may be discarded, but if the association keeps the tapes, they remain an official record. The intent of the rule is not that recordings have to be made, but if they are made, that they be maintained as official records.

The HOA law arguably does not include audio tapes within the definition of official records, since that law only refers to "written records" as part of the "official records." Nonetheless, it is certainly a safe harbor for a homeowner's association to follow the condominium procedure. I also recommend that if tape recordings of board meetings are kept, that they be discarded or destroyed after the minutes for the subject board meeting have been approved.

Another challenge involves computer records. Again, since the HOA law only applies to "written records", it could be argued that there is no right of a parcel owner in a homeowner's association to inspect computer records. For condominiums, the catch-all provision in Chapter 718 states that "all other records" of the association are included within the definition of "official records." In a 2004 arbitration case, the state agency responsible for enforcing the condominium laws ruled that an association could not avoid compliance with statutory access requirements by maintaining records in a cryptic format. The arbitrator ruled that requiring an owner to hack into the association's computer or otherwise figure out how to operate the programs does not make the records available within the meaning of the law. In other words, the association would have to make records that are available in computer format available in a printed format, assuming that the records can be printed.

Associations have been described by the courts as "democratic sub-societies." Thus, like our other elected levels of government, there is little tolerance in the law for secrecy in association affairs, and the law clearly favors the rights of the owner. ■

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Q&A: Column on Smoking Lights up Number of Responses

Question: I read your June 9 article regarding no smoking rules in the condominium setting. Can the developer of a new condominium provide for a one hundred percent non-smoking building, and will that pass muster with the courts? Can violations be punished by fines? V.W. (via e-mail)

Answer: The column on smoking generated an unusual number of additional questions and responses, some of which I will share today.

In my opinion, a provision contained in an original declaration of condominium providing for a smoke-free building would be upheld by the courts. Restrictions contained in the original condominium documents are afforded a presumption of validity, and do not even have to be reasonable. A court would only strike down a restriction found in original documents if it was arbitrary, capricious, or violated some law or fundamental right, which I do not believe is the case here.

Of course, the board of directors and the association's management will need to enforce the rule which might prove as difficult as high school teachers trying to stop kids from smoking on the school campus.

Violations of restrictions found in condominium documents can be enforced in a number of ways. A fine is permissible if authorized by the documents. However, fines are limited to one hundred dollars per violation, and up to a maximum of one thousand dollars for an "ongoing" violation. Arguably, each incident of smoking would be a separate violation, and subject to a separate one hundred dollar fine. Fines can only be levied after notice and opportunity for a hearing.

It is certainly an interesting idea for a developer to create and market a "smoke-free building." As a practical matter, this concept might attract non-smokers, and dissuade smokers from purchasing in the development. Good luck.

Question: I read your recent article regarding smoking, and it is becoming a hot topic. I wanted to give your readers some information regarding a very helpful individual I have dealt with, as I am currently having to deal with a rude and inconsiderate neighbor, who feels it is perfectly appropriate to blow their nasty tobacco smoke directly into my condo. Sonja Bradwell works for the Florida Department of Health and is an advocate of clean air. She can provide you with a great deal of medical research showing how detrimental second-hand smoke can be. Thank you very much and keep in mind "cancer cures smoking." L.K. (via e-mail)

Answer: So noted.

Question: Great article about smoking, you might add "that there are no rights without responsibility." W.C. (via e-mail)

Answer: So added.

Question: I serve on the board of a condominium in Naples which has received two complaints about smoke from one unit wafting into a co-joined unit. Do you have any case authorities on the nuisance regulations? M.K. (via e-mail)

Answer: As noted in the column, I am not aware of any cases in Florida which have tackled this tough question. The Boston Housing Court case I reported on was said to be one of the first of its kind in the country. If you are interested in more in-depth research, there are several scholarly articles including Get Your Ashes Out of My Living Room!; Controlling Tobacco Smoke in Multi-Unit Residential Housing written by David V. Ezra, published in Volume 54 of the Rutgers Law Review (2001); and an article written by Mark Hanson entitled "Smoke Gets In Your High-Rise; Tobacco Sensitive Tenants Increasingly Sue Over Neighbor's Nicotine Habits, which was published in 1998 in Volume 84 of the American Bar Association's Law Journal.

Question: I read your June 9 article regarding cigarette smoking, which has become a source of contention in our condominium. I thought this was covered by the new Clean Indoor Air Act, but your article seems to say something else. Could you clarify this issue? B.H. (via e-mail)

Answer: The Florida Indoor Clean Air Act, contained at Chapter 386 of the Florida Statutes, provides a uniform state-wide code to keep "work places" free from smoke. The former version of the law specifically dealt with condominium common areas, the new law contains a blanket wide prohibition on smoking in an "enclosed indoor work place." In many cases, this will apply to the common areas of a condominium.

The focus of my previous column, and most of the challenges in condominiums, involve smoking on private property, either within the "unit" (apartment) or a designated "limited common element", such as a lanai or patio. The Clean Indoor Air Act does not apply to regulations within one's home. ■

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Children Often Cause Controversy

Fort Myers The News-Press, July 14, 2005

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One thing we all have in common is that we all once were children. As we well know, kids can be nice, and they can be naughty. Especially when they come from someone else's child, what one person sees as a child's "squeals of delight" can sound like fingernails dragged across a blackboard to the ears of another.

It is not surprising that the behavior of children can become a focal point of controversy in the community association setting. This is especially true in Florida, with its well known large population of retirees and empty-nesters. As one lady told me awhile ago: "I love my grandchildren dearly, two weeks at a time."

It is not uncommon to find association rules which attempt to regulate the conduct of children. As a recent decision from a federal court in California shows, such rules can become the ticket to an expensive discrimination lawsuit.

The Keys is a 792 unit condominium complex in Walnut Creek, California. The community's facilities consist of three swimming pools, a clubhouse/fitness complex, and other recreational amenities (such as tennis and basketball courts). The association's board of directors adopted various rules that included the following:

- The main pool could only be used by adults during the summer months (with limited exceptions), and was used mainly for lap swimming.
- Children under age 15 could not enter the clubhouse (including the billiard room) unless accompanied by an adult.
- Children under age 16 could not enter the gym without a parent, and could not use exercise equipment at any time.

Several families sued the association, claiming that the rules violated federal laws which prohibit discrimination against families with children. The judge was asked to issue an injunction to stop the association from enforcing the rules while the suit was pending.

The judge ruled that the association's stated reason for the adults-only pool, peace and tranquility, did not pass muster under the federal anti-discrimination laws. The judge wrote that a blanket prohibition against use of the main pool by children would be no different than a similar rule aimed at "women, persons born in Iraq or China, or members of the Episcopal Church."

The court decided that it would not grant an injunction against enforcement of the other rules until the association was given the opportunity to justify the reasonableness of those rules at trial. Although pretrial orders from a single federal trial judge are hardly the "law of the land", this case reminds us that rules involving children must be carefully scrutinized to avoid the specter of discrimination litigation.

The Fair Housing Amendments Act of 1988 prohibits discrimination against families with children. With the exception of properly structured "55 and over" communities, the law applies to all condominium associations and homeowners associations in Florida, and also applies to all common area regulations. ■

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Q&A: State Sunshine Law Doesn't Apply to Associations

Question: One of your recent articles implies that Florida's Sunshine Law is applied less rigorously to association boards than governmental bodies. The Florida Attorney General's website says that the Sunshine Law applies "to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before the board for action." Does this apply to condominium boards? M.H. (via e-mail)

Answer: No. Florida's Government-in-the-Sunshine Law, Chapter 286 of the Florida Statutes does not apply to community associations. Although the law regulating associations do contain advertisement requirements (hence the colloquial "sunshine" reference), these laws do not carry the same weight as the governmental counterpart.

One main distinction is that it is a criminal infraction to violate governmental sunshine laws, while violation of association sunshine laws could, at worst, draw a civil penalty. As applied to your question, the government sunshine laws apply to any communication between two or more members of a public board, whereas the association law only applies to gatherings of a quorum. Therefore, while two members of a city council could not privately discuss council business, two association board members are free to do so, unless the board only consists of three persons, in which case the conversation would constitute the gathering of a quorum of the board.

Question: Our association levied an assessment to pay for damage caused by Hurricane Ivan. It now appears that there will be excess funds left over. My question is what can (or must) be done with the excess proceeds, and what happens to refunds when the person who paid the assessment has sold? C.I. (via e-mail)

Answer: Section 718.116(10) of the Florida Condominium Act states that special assessment proceeds can only be used for the purpose for which the assessment is levied. After that work is complete, the board of directors has two choices as to what to do with the money. First, the board can credit each unit owner's account as an offset against future assessments. Alternatively, the board can refund the excess proceeds.

In the event of a refund, the money is known as "common surplus", and passes with the title to the unit. Therefore, the current title holder would get the refund, even if their predecessor paid the assessment. Of course, the parties to the unit's sale are free to make arrangements in their contract for addressing matters of this nature.

Question: We are trying to recall (remove from office) the members of our association's board. I have two questions. First, does the petition to call a special meeting for recall require the date of the meeting to be stated? Secondly, does the "majority of the voting interests" mean a majority of all units, or a majority of those who vote? D.G. (via e-mail)

Answer: In recent years, there has been a constant focus on dissatisfaction in associations. In my experience, most associations are either well run, or run by the only people who will volunteer to do the job. However, there are associations which are poorly run, where politics overtakes business, and where change needs to be made.

That is why those who lead changes in the law have advocated to make recall procedures for both condominium and homeowners associations easy to understand, and user-friendly. The Division of Florida Land Sales, Condominiums and Mobile Homes has made strides in this regard by publishing a web-based resource called "Recall Procedures from A to Z: Beginner's Guide to Recall Procedures" which can be found at http://www.state.fl.us/dbpr/lsc/arbitration/whats_new/recall_procedure_from_a_to_z.htm.

According to Section 718.112(2)(j) of the Florida Condominium Act, recall of the board can be accomplished

by a majority of all voting interests (not just those who vote), with or without cause. In most condominiums, each unit is assigned one voting interest.

There are two ways to get a recall going. The first method is called "written agreement", where no meeting of the members is ever held. Rather, petitions are circulated and, if signed by a majority, served on the board.

The second method of recall (in my opinion much less preferable) is for ten percent of the unit owners to petition to call a special members' meeting to vote on the recall. In that case, Chapter 61B of the Florida Administrative Code contains the details for how the meeting is to be called.

In response to your specific inquiry, a petition serving as a meeting call by ten percent of the members would need to specify the date, time and place of the meeting. There are also other formalities that have to be followed if you are seeking to recall a majority of the board, because you need to make provision for electing their replacement. That is why I feel that written agreement is a more straightforward and understandable way to pursue recall. ■

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Condo Panel Hears Full Range of Concerns

Fort Myers The News-Press, July 21, 2005

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On June 25, 2005, Florida's newly created Advisory Council on Condominiums held its fourth meeting. One of the primary functions of the Advisory Council is to take public input regarding issues and challenges faced by condominium communities, and make recommendations regarding changes to the laws which will address problems identified by the Council.

The June 25 meeting was held in Miami, which obviously contains a significant population of condominium residents. Approximately one hundred condo dwellers showed up for the meeting, with about one-quarter of those providing public input.

It is difficult to pigeon-hole the concerns expressed by those who address the Council, each had their own story. One man's discontent with his board of directors involved his rental car being towed from the community parking lot, while his car was being fixed at the repair shop. A couple of speakers were embroiled in disputes with their associations regarding pet rules.

One common theme was the tremendous hardship created, particularly in older buildings, where proper maintenance is not performed. Unlike Southwest Florida, where most condo construction is less than 25 years old (and most is much newer than that), several of those who addressed the Council in Miami were dealing with problems in buildings which had been in service for more than 40 years, and in one case, a 70 year old building.

There were several speakers who supported their boards, and the status quo in general. Both groups (pro-board speakers, and those who felt that current law places too much power in boards) appeared to agree that educational opportunities need to be enhanced.

Several speakers felt that the Division of Florida Land Sales, Condominiums, and Mobile Homes, the state agency responsible for implementation of the condominium laws should be more aggressive in punishing boards who have violated the laws. The levy of personal fines against board members, as a matter of standard practice, was suggested by at least one speaker, while another suggested that errant board members "should be taken away in handcuffs."

In other business, the Council engaged in a lengthy dialogue with Virgil Rizzo, Florida's Condominium Ombudsman. Mr. Rizzo apprised the Council of the activities undertaken by his office since its inception six months ago.

The Council voted to focus further study to ways by which the Ombudsman's office could be better integrated into the current regulatory scheme. The ombudsman program, the first of its type in the country for condominiums (Nevada has an ombudsman for homeowners' associations) is intended to provide a resource where both boards and unit owners can try to head off problems before they turn into costly legal disputes.

The next meeting of the Advisory Council is set for the first week of August in Orlando. The Council has set its sights on preparing a report of findings and recommendations by the end of 2005. The minutes of past Council meetings, and other information, can be obtained from the Council's website at www.state.fl.us/dbpr/lsc/condominiums/advisory_council. Input by e-mail to the council is also encouraged. Comments can be sent to Condominium.AdvisoryCouncil@dbpr.state.fl.us. ■

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Q&A: '55 and Over' Status Must be Verified by Census

Question: I recently discovered that our mobile home association is not registered with the County. The president of our homeowners' association says that we are registered with the state, and that the state registration is good enough. Can you shed some light on this? S.L. (via e-mail)

Answer: Your president is correct. So called "55 and over" communities must register with the Florida Commission on Human Relations, and must renew their FCHR registration every two years. A Lee County association may verify its registration on-line by going to http://fchr.state.fl.us.

However, registration with the FCHR is not all that is required to maintain your status as a "55 and over community." First, your deed restrictions need to be worded in a manner that requires at least one person age 55 or over to be the occupant of a home, in at least 80 percent of the homes. This usually requires an amendment to the deed restrictions which must be filed with the County Clerk, although not with the state.

The association must also verify by census that at least 80 percent of the homes are occupied by at least one person age 55 or older, and update that census at least every two years. There are other steps the association should take to retain "housing for older persons" status. For example, the association's letterhead, the community's entry signs, and other written materials should designate the park as a 55 and over community.

Question: Our condominium association board does not like the appearance created in the community when people who leave Florida for the summer put their hurricane shutters down. We are thinking of adopting a rule which would state that owners must leave their shutters in the "up" position unless a certain level of storm advisory has been issued, such as a tropical storm watch. Is this legal? J.C. (via e-mail)

Answer: Tough question, I can see both points of view. The condominium statute does not address your question, nor has any court issued a ruling on this point of law.

The condominium law does state that the board of directors can adopt "reasonable" rules regarding hurricane shutters. One could argue that it is reasonable for the association to limit hurricane shutters to their intended use, that being protection of the property when a hurricane is imminent. On the other hand, the reality of the matter is that a significant percentage of our condo dwellers reside elsewhere during the summer months which coincides with hurricane season. In the pandemonium that usually precedes a major storm, who is going to make sure the shutters have been set in place?

I am not the final arbiter of reasonableness. However, having lived through the devastation wreaked on local condominium communities by Hurricane Charley, I would personally err on the side of maximizing protection of the property.

Question: If a condominium association needs operating funds immediately, can the board of directors borrow from the reserve account for a short time until a special assessment can be levied or until an increased budget with increased assessments is approved? E.B. (via e-mail)

Answer: Section 718.112(2)(f)2 of the Florida Condominium Act requires that the funding of reserve accounts be part of the annual budget of a condominium association, unless the members of the association have previously voted to waive this requirement. The reserve accounts are earmarked for expenses that are certain to be incurred in the future, such as roof replacement and painting. In the absence of reserve accounts, unit owners may face a financial crisis in the future when it becomes necessary to collect a large special assessment for the replacement or repair of condominium property.

Because the reserve accounts serve this important purpose, Section 718.112(2)(f)3 prohibits removing funds from a reserve account for any reason other than for the specific, designated purpose. However, this same statute does allow the board to borrow from the reserve accounts and use reserve funds for other purposes if approved in advance by a majority of the unit owners. Therefore, the board cannot "borrow" from statutory reserve funds unless there is a vote of the owners. The only exceptions would be if a reserve fund is not restricted (such as a general contingency fund), or if the association uses pooled reserves, and the money is used for an item in the pool. ■

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Warning About Offender Warranted

Fort Myers The News-Press, July 28, 2005

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Since my recent column regarding sex offenders living in community associations (see Coping With Sex Offender In Your Area, May 19, 2005), grisly headlines continue to remind us that our society has more than its fair share of sociopaths. Unfortunately, those monsters are no less likely to live in association-operated housing simply because of their perversion, and in fact may seek the opportunities presented by the familiarity associated with community living.

Coincidentally, since my recent column, a Florida appeals court has issued a significant ruling that may greatly expand an association's duties in this thorny area.

In March of 2004, a nine year old girl was lured with the promise of toys into the meter room of a Fort Lauderdale apartment complex, and sexually assaulted. Allegedly because the policed advised the management to "avoid hysteria", and because the identity of the perpetrator was unknown, the management took no steps to inform the other tenants of the incident. The internal incident report prepared by management indicated that the victim had seen the attacker before, suggesting that a tenant could be the perpetrator.

Thereafter, a second child was attacked. In this case, a child and her two siblings cut through an opening in the community's fence, while on their way to school. The assailant, the same person who committed the prior offense, and who was indeed a tenant in the complex followed the children, and sexually assaulted one of them at an abandoned building located off the premises.

Although one might ask why this tragedy is of interest to community associations, Florida's courts have consistently applied legal standards applicable to the landlord-tenant relationship in determining the scope of an association's duties regarding security matters. In this case, because the incident occurred off-premises, the issue was resolved in favor of the apartment owner and management in a legal proceeding known as summary judgment. The judge basically decided that management was not negligent, because it had not violated any duties owned to the tenants.

On appeal, a tree judge panel from Florida's Fourth District Court of Appeal reinstated the suit, holding that the landlord owed a duty to warn the tenants about the incident. The appeals court ruled that a jury should be allowed to decide whether or not the landlord fulfilled that duty.

Noting that the law does not generally require one person to protect another from criminal acts committed by a third party, an exception exists where a "special relationship" exists between the parties. The court found such a special relationship to exist and said: "The rule in Florida is well established that a landlord has a duty to protect a tenant from reasonably foreseeable criminal

conduct." Citing a 1999 condominium decision the court went on to note that the landlord must have prior knowledge of similar criminal conduct occurring on the premises.

Even though the attack occurred on property which the landlord had no ability to control, the prior incident, and the fact that the assailant followed the children from the complex were apparently enough for the appeals court to decide that a jury should hear the case.

The case does not specifically address what should be done when a registered sex offender resides in a community but has committed no crime there. As discussed in my previous column, there is no "right answer", but most experts appear to agree that some type of warning is in order. ■

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Plumber's Dispute With Association, Not Unit Owner

Question: Six months ago, my condo apartment's kitchen sink and dishwasher backed up, creating water damage. This is the fifth time this has happened. I was on vacation when the latest incident occurred. The manager called the association's plumber. They now want me to pay his bill, and the plumber is threatening to ruin my credit rating if I do not pay. I thought the condominium association is responsible. J.T. (via e-mail)

Answer: First, you did not hire the plumber, the association did. Therefore, the plumber has no right to threaten your credit standing, and could be subject to penalties if he wrongfully slanders your credit. You should tell the plumber that he should take up his grievance with the association.

Whether you are liable to the association to reimburse the plumber's charges will depend on why the back-ups have occurred, and whether the area where the problem exists is part of the common elements, and therefore the responsibility of the association.

In most cases like yours, the plumbing problem exists outside of the boundaries of the "unit" (apartment) and is therefore the responsibility of the association.

You could be responsible if the pipe is described as a "limited common element" in the governing documents, and if the documents also make you responsible for the pipe. You could also be liable if negligence in the disposal of your out-bound plumbing is causing the problem.

Question: Can you please advise me what Florida Statute allows the board of directors of a condominium association to make alterations to the common areas to enhance the safety of the community. M.L. (via e-mail)

Answer: There is no statute on point. You are referring to what is often called the "necessary maintenance" exception to the "material alteration" rule. This exception has been created by the courts, and is applied to eliminate the requirement for membership approval of common area alterations, when they are necessary for the preservation of the property.

The court decisions which have addressed this topic have limited the exception to maintenance issues, not safety or security.

Florida's condominium law also provides for arbitration of condominium disputes where these issues are adjudicated. Although they do not carry the force of law, arbitration decisions are given some weight as precedent when addressing condominium legal issues.

I am aware of one arbitration case where the arbitrator found that the necessary maintenance exception to the material alteration rule could be applied to permit the installation of security cameras in a condominium parking lot. However, the arbitrator held that the exception could only be applied, and the requirement for a unit owner vote avoided, if there was a history of criminal activity at the condominium which would justify the board taking action without a membership vote.

Question: I am new to condo living and have a problem with giving the association a key to my home. I understand that they may need access, and I am willing to let them in when need be. What is the law on this? R.S. (via e-mail)

Answer: The Florida Condominium Act provides the association with a right of access to each unit for the purposes of maintaining those portions of the condominium property which the association is required to maintain.

Access must be reasonable, which means that the association should only enter a unit during reasonable hours, except in the case of an emergency. In my opinion, reasonableness also means that the association should minimize the intrusiveness of its entry, including the giving of prior notice.

The statute does not deal with the key issue. However, several arbitration cases have found that an association may enforce a key requirement, if the requirement is duly enacted in the written condominium documents. The same arbitrators have also ruled that once an association requires a key to be posted, the burden shifts to the association to ensure adequate security against unauthorized use of the key. ■

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Courts Err on Side of Homeowner

Fort Myers The News-Press, August 4, 2005

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Summer time in Southwest Florida means blistering heat and humidity, vacations, and the ability to eat in your favorite restaurant without an hour's wait in line. For community association attorneys, the summer months are also the time of year where time is set aside to assist clients in updating the legal documents for their community.

As any association which has been involved in litigation knows, a poorly written set of documents can mean losing a case that should have been won. After all, the courts are historically hesitant to enforce restrictions against the free use of property, and typically err on the side of the homeowner when there is ambiguity or vagueness contained in association regulations.

In the next several editions of this column, I will take a look at the issues commonly confronted by associations when bringing their documents into the 21st century.

As avid readers of this column well know, there are some areas where the laws for condominium associations and homeowners' associations are very similar, and some areas where they are quite different. In the document update area, there are some major differences in issues commonly addressed by condominium associations, and those tackled by their HOA counterpart. I will try to highlight the differences, where possible.

I have assisted many community associations in updating their documents, and find some common mistakes, and also some practices which increase the chance of success. In the coming weeks, I will share those too.

First, some definitions are in order. In condominiums, the constituent documents are typically referred to as "the condominium documents." In homeowners' associations, the relevant documents are usually called "the governing documents."

The condominium documents consist of a declaration of condominium, articles of incorporation, bylaws, and rules and regulations. For HOA's, the governing documents consist of a declaration (usually called declaration of covenants, deed of restrictions, or some similar name), articles of incorporation, bylaws, and rules and regulations.

The declaration is in the nature of a deed restriction, or covenant running with the land, and is usually considered the most important document on the totem pole. The declaration will deal with fundamental issues like who owns what (boundaries between units and common elements or boundaries between parcels and common areas), who insures what, provisions regarding repair after casualty (such as a fire or hurricane), general maintenance and repair responsibilities, rental restrictions, transfer restrictions, easements, and the more fundamental use restrictions, such as requirements for single family use and prohibitions

against nuisances. The declaration also creates the two fundamental aspects of community association governance: the requirement to pay assessments secured by a lien for nonpayment; and, provision for mandatory membership in a governing association which passes with title to the property.

The articles of incorporation are sometimes called the "charter" for the corporation, and is the document which is filed with the Florida Division of Corporations to create the association. The articles of incorporation are typically a fairly brief form document, often two or three pages, usually providing for perpetual existence and basic corporate powers and duties.

The next document in the continuum is the association's bylaws. I often refer to bylaws as the "corporate housekeeping rules", because they are typically aimed at providing details about how the association is to be run from a procedural standpoint. Typical issues addressed in association bylaws include the size of the board (how many directors there are), terms of office (for example, whether there are staggered terms), notice requirements, and quorum standards. Bylaws will also establish a list of required corporate officers, how they are seated (most bylaws permit the board to appoint the officers), and whether officers must also serve as directors. A complete set of bylaws will also address meeting procedural issues, such as whether Robert's Rules of Order are to be applied in the conduct of association meetings. Budgeting, assessments, and financial details are usually addressed in the bylaws as well.

The rules and regulations are the "do's and don'ts" for a community. In most condominiums, rules are established by the Board of Directors, although some condos require unit owner approval for rule adoption, and such a requirement is enforceable. Homeowners' associations occasionally have rules and regulations as well, although much less frequently than in the case of condominiums.

Condominium rules are usually aimed at pets, vehicle parking, changes to the property, and other behavioral-oriented issues. Rules for a homeowner's association will often target the same areas, and may also flesh out architectural control standards, supplemental to the building controls contained in the declaration.

Next week, we will take a look at how association legal documents are amended, including the required votes and procedures. I will also share some tips on increasing the chances of success in getting updated documents approved the first time around. ■

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Association Sunshine-Law Course Available Online

Question: You recently wrote a series of columns regarding the sunshine law for association boards. Is that material available on-line? B.H. (via e-mail)

Answer: Community Association Sunshine Law Course 101 is available on-line at the web-site of the Law Firm of Becker & Poliakoff, P.A. To down-load the pamphlet, go to www.beckerlawyers.com. Click on "Areas of Practice." Then, click on "Community Association Law." The Sunshine Law Course is the first document that appears under "Ar-ticles & Publications" and can be downloaded from the Firm's web-site.

Question: I am hoping that you can clarify a question I have about waiving reserve funding. I know you need a "majority vote" to reduce or waive reserves. Our association has 32 units. We received 20 votes on the waiver question. A majority of those who voted agreed to the waiver, but it was not 17 votes. Does a "majority" mean that what a majority of those 20 who voted counts, or do we need 17 votes? The statute is confusing to me. Also, I was wondering if there was a minimum amount of reserves that must be kept by law. I have been told that there is a $10,000.00 minimum, but I have not been able to find anything in the law about that. L.C. (via e-mail)

Answer: The Florida Condominium Act at Section 718.112(2)(f) requires every condominium associa-tion to budget for reserves for deferred maintenance and capital expenditures. The reserve budget must set aside funds for roof replacement, building repaint-ing, and pavement resurfacing, regardless of the cost of those items. Further, reserves must be set aside for any other item where the deferred maintenance costs or capital expenditure exceeds $10,000.00. Common areas in this category would include swimming pools, tennis courts, clubhouses, building plumbing, win-dows (if they are the responsibility of the association) and the like. Reserves must be funded based upon a formula which takes into account the remaining useful life and re-placement cost of a reserve item. For example, if your condominium building's roof has a remaining life of ten years, and you would need $100,000.00 more than is currently on hand to replace it, you would need to set aside $10,000.00 per year in the roof reserve. This is known as "fully funded" reserves.

Florida law permits the waiver or reduction of fully funded reserves, by a majority vote. I agree with you that the statute is not well worded, and several attempts by the Florida Legislature to clarify it by amendment have been less than helpful. The interpretation most commonly applied is that the "majority of the quorum" standard applies. Therefore, as applied to your situa-tion, 11 of the 20 who actually voted could make the decision, you would not need a majority of all 32 own-ers to consent to the waiver.

Question: Our condominium association is facing a difficult dilemma, and I am hoping you can help. Our association's board is comprised of five directors. One has resigned and another sold his unit and is therefore no longer qualified to remain on the board (pursuant to the language in our governing documents). The board was prepared to consider the appointment of two own-ers to replace these directors (four have volunteered to be considered). One of the three remaining directors has decided she does not want to participate because "her candidates" will not likely be appointed to fill the vacancy. This director has "boycotted" the last two board meetings, thus preventing a quorum and filling those seats. What is your opinion on this issue?

Answer: Section 718.112(2)(d)8 of the Florida Con-dominium Act states that unless otherwise provided in the by-laws, any vacancy occurring on the board before the expiration of a term may be filled by the "affirmative vote of the majority of the remaining directors", even if the remaining directors constitute less than a quorum.

As there are three remaining directors, two of them can vote to fill the vacancies, and in my opinion could establish a quorum of two at a meeting limited to that purpose. Therefore, unless your bylaws say something different, I think your two directors can move ahead. The board members would be wise to get a confirming opinion from the association's attorney.

Question: Our condominium association is part of a master planned community. We belong to an "umbrella organization" where issues for the entire community are discussed. My question is whether the umbrella organization must follow the sunshine laws. S.G. (via e-mail)

Answer: It depends. If the umbrella organization is a voluntary group, then the requirements for posting notice of meetings, owner participation rights, minute-keeping, and the like do not apply. This answer presumes that a quorum of your board would not participate in meetings of the umbrella organization.

Conversely, if membership in the entity is mandatory for your unit owners or your association, then the umbrella organization would either be a condominium organization or a homeowner's association. In this case, the "sunshine" laws would apply. ■

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Amend Documents with Care (part 2)

Fort Myers The News-Press, August 11, 2005

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Today's column is the second part of our look at updating the legal documents for your community association. In the first part, we looked at some basic definitions and the functions of the constituent documents (see Courts Err On Side Of Homeowner, August 4, 2005).

Today, we will look at some practical and legal aspects of amending the documents for both condominiums and homeowners' associations.

The community's constituent legal documents have been called a contract by Florida's courts. The contract exists between the developer and unit purchasers; between the association and individual unit owners; and between the unit owners themselves. Like most contracts, the terms can be changed with the consent of the affected parties. However, unlike most contracts, not every party to the contract needs to agree before it can be changed. Stated otherwise, if a hundred different unit owners in a condominium are subject to the terms of the same condominium documents as a contract, some lesser number can change the contract for all one hundred.

Even though times change, human nature for some is to resist change. Some feel "if it ain't broke, don't fix it", and some say they would rather deal with the devil they know than one they do not. For these reasons and others (voter apathy being a major contributor as well), many associations find it exceedingly difficult to get voter support for document changes. Because of this, it is my opinion that associations are well advised, before a formal vote is ever taken, to have the rank-and-file members of the association feel like they are part of the amendment process.

There are several ways an association can accomplish this, not all of which are necessary in every case, nor will necessarily work in each community:

- **Establish A Committee:** While finding people willing to roll up their sleeves and spend hours pouring over tedious legal documents is certainly a challenge, having an independent committee provides some degree of insulation against criticisms that the board is trying to grab too much power, or otherwise upset the apple cart. For example, one of my association clients has a committee of non-board members who are past presidents of the association. They obviously command great respect and legitimacy.

- **Give Owners The Opportunity To Comment Before The Vote Is Taken:** There are different ways to accomplish this objective. Some associations hold a series of workshop meetings that are open to members where the documents are worked on. Others hold "town hall" meetings to discuss the final product, before it is submitted to a formal vote. Other associations provide owners with the opportunity to make written comments about proposed changes, or changes that owners perceive need to be made.

- **Proceed Deliberately:** A common mistake made by many associations is thinking they can find a boilerplate set of governing documents used by the community next door, change the names, and update the documents in a few weeks. Each community has its own needs, its own perception of appropriate regulation, and its own history of issues that may need to be addressed.

In addition to the practical and political sides of the amendment process, there is also a legal aspect which needs to be followed. This is one area where I find that do-it-yourself boards wanting to save legal fees usually end up spending several times more in correcting technical problems, or attempting to defend documents that were not properly adopted.

The first area which needs to be considered in this regard is how amendments are to be presented. The procedure is dictated by law for condominium associations, and is usually specified in the governing documents for the HOA. Let us assume, for example, that the association wants to amend the bylaws to change the required annual meeting date from the fourth week in December to a time during the first quarter of each year determined by the board. While some associations may be tempted to send out a mail-back ballot saying: "Do you want to change the annual meeting date from the fourth week of December to a date during the first quarter of the year selected by the board?", such an amendment would be invalid for condominiums, and many HOAs as well. Rather, the condominium law requires the text of proposed amendments to be included in the notice of a meeting where an amendment will be considered. The proposed amendment must underline proposed additions, and strike through proposed deletions. Therefore, using our example, a properly worded amendment would read:

> The association's annual meeting shall be held each year ~~during the fourth week of December~~ during the first quarter of each year, at such date, time, and place determined appropriate by the board of directors.

Amendments to legal documents can be considered at the association's annual meeting, although many associations find it preferable to call a special members' meeting for the purpose of voting on document changes, so as not to consume the time allotted for the annual business gathering with discussion and voting about potentially lengthy or controversial document amendments.

In either case, in order for the amendments to stand up to challenge at a later time, all proper meeting procedures must be followed. This will include mailing the notice and proposed amendment to the owners sufficiently in advance of the meeting (usually fourteen days, some by-laws may provide lengthier notice requirements). The Association should also permit owners to vote on the amendments by a "limited" or "directed" proxy (again, required by law for condominium associations, recommended for homeowners' associations).

Some associations choose to amend documents without a formal member meeting, using what is known as "members' action without meeting", sometimes referred to as "members' action by written agreement." This is a permitted procedure in some circumstances, although it can be more cumbersome and complicated than a meeting procedure.

Next week, we will explore how to interpret the documents to understand the required vote for amendment, and what actions must be taken after the amendments have been approved to ensure their legal enforceability.

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Condo Assessments Don't Always Have Equal Basis

Question: I am the treasurer for our condominium association. I am trying to rectify an inequitable situation. All of our owners pay the same monthly maintenance fee, even though some have assigned garage spaces (while others do not) and some have huge patios with three times more glass than others. Naturally, the bigger units sell for a higher price, even though we all pay the same maintenance fee.

I would like to change our condominium documents to base assessments on relative value between the units, or square footage, plus add a fee for the garages. Unfortunately, about half the owners enjoy the current free ride, so we probably cannot get the required two-thirds vote.

Am I correct in my views on this subject, and do any other laws apply which might help me? G.L. (via e-mail)

Answer: Condominium living is unique. I always respond to questions like yours with a reminder that those who live on the first floor still have to pay when the elevator needs to be fixed, just like those who cannot swim must pay to keep the pool in order.

Your question is not uncommon, and your point of view is shared by many. Unfortunately (at least for goal), this issue is strictly regulated by Florida's condominium statute, Chapter 718.

First, Chapter 718 provides that assessments can only be shared in one of two different ways, either equally, or based upon the relative square footage of the units. There is an exception for older condominiums, where the documents can provide a different method of sharing expenses. Therefore, you could not change to a market value-based method of sharing assessments.

In order to change from equal assessments to assessments based on square footage, you would need one hundred percent of all unit owners to consent, as well as any holders of liens or encumbrances against the units, such as mortgage holders. A two-thirds vote would not be sufficient, unless your original documents provide for amendment of this issue on less than unanimous approval, which would be rare indeed.

If the garage spaces are considered "limited common elements", your declaration of condominium can be amended to make only those who are assigned garages responsible for paying to maintain them. In my opinion, this would not take one hundred percent, but whatever the "regular" procedure is for amending your declaration of condominium.

With respect to other maintenance items, you need to determine whether they are considered common elements by the documents. If, for example, the balcony glass is part of the common elements, it must be maintained by the association, as a common expense, and (in your case) all owners would have to share the costs equally, even if some feel that there is a "free ride" involved. After all, the method and percentages by which you share expenses is a contract which was presumably part of every purchaser's decision, and is one of the contract terms which the law requires unanimous approval to change.

Question: Who is responsible to maintain the driveways in a condominium, is it the unit owner or the association? Our driveways look terrible, with oil and rust stains. I.A. (via e-mail)

Answer: It depends.

In most condominiums, the unit boundaries are within the physical structure of the buildings, and the driveway would be part of the "common elements." If that is the case, the association is responsible for maintenance.

One exception to this rule may apply if the driveway is described as a "limited common element", meaning

that it is reserved to the exclusive use of one or more units, to the exclusion of other units, and is listed as such in the declaration of condominium. If that is the case, the declaration of condominium may address the matter in one of three ways. First, the declaration can require the unit owner to maintain the limited common element. Secondly, the declaration can require the association to maintain the limited common element, and for all unit owners to share in the expense. Thirdly, the declaration can require the association to maintain the element, but only at the expense of the benefiting owner or owners.

Conversely, if the driveway is part of the "unit", you have a "land condominium." In this case, the unit owner would be responsible for driveway maintenance, unless otherwise provided in the declaration.

Question: I live in a golfing community that is called a "country club." However, we call our board a "master association", and they manage the affairs of the golf course, clubhouse, restaurant, pro shop, etc. Our community consists of both condominiums and single family homes.

As a reader of your column, I am aware that Chapter 718 addresses how condominium associations must operate, and that Chapter 720 is the guide for homeowners' associations. My question is what, if any, Florida statute would influence our type of association. B.F. (via e-mail)

Answer: Based upon the information you have provided, it is likely that your association is a "homeowner's association", and is governed by Chapter 720.

First, you have to determine whether membership in the association is mandatory for either the individual homeowners, or their constituent neighborhood associations.

Secondly, the master association must have the right to file a lien for unpaid assessments.

If these two tests are met, and assuming that the "single family" properties are not regulated by the condominium law, the HOA law (Chapter 720) applies. However, if your "single family" section is a "land condominium", and all members of the master association are also condominium unit owners, then you are what is called a "condominium master association", and are governed by Chapter 718.

I would ask this question of your board's president. I am sure that it has come up in the past. It is a fundamental question, and the association's legal counsel and board should know the answer from the top of their heads. ■

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Use Vote to Amend Papers (part 3)

Fort Myers The News-Press, August 18, 2005

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Today's column is the third part of our look at updating the legal documents for your community association. In the first two editions, we learned some basic definitions, discussed the functions of the constituent documents, and the procedure for presenting proposed amendments (Court Error on Side of Homeowner, August 4, 2005; Amend Documents With Care, August 11, 2005).

Today, we will focus on the required votes to amend association legal documents and what to do once the amendments have passed. As always, the first place to look is in your documents themselves.

Every constituent legal document should contain a clear statement about how it can be amended. In those rare cases where the documents do not contain an amendment clause, the governing statutes will provide a default level for amendments, at least for some of the documents.

With the exception of the rules and regulations, amendments to the constituent legal documents (declaration, articles, and bylaws) will almost always require a membership vote. Except in rare circumstances, these documents are not amendable by the board of directors, although some documents will permit the board to make amendments to correct errors. Conversely, most documents permit the board to amend rules, but there are exceptions and limitations here as well.

Although most people understandably wish to avoid "legalese" in writing their documents, it is important to remember that as legal documents, their ultimate interpretation will go before a court if people cannot agree about a document's meaning. Therefore, while writing documents in "layman's language" or "understandable English" is a laudable goal, there are some clauses which simply should be written in legal vernacular. The amendment clause is one of these provisions.

Most documents will state that they can be amended by a certain percentage vote, let us say two-thirds, for purposes of illustration. Let us also assume we are dealing with a one hundred unit community, for easy math. If a document states that it can be amended by a vote of "two-thirds of the unit owners," how do you count units that may have more than one owner, such as husband and wife? They are each "unit owners," but each of them would not be entitled to a separate vote.

Rather, the preferred verbiage is the statutory term "voting interest." Although "voting interest" is not a household term, it is a defined legal term which will eliminate ambiguity. The legal documents will typically assign one voting interest to each unit or parcel. Thus, in our hypothetical example, it is clear that 67 votes would be required for an amendment, regardless of how many units or parcels were owned by multiple individuals, since there are 100 "voting interests."

A greater source of confusion, and one of the most contentious issues in document amendments (and perhaps association governance as a whole) is how you interpret the required voting threshold.

Staying with our example, let us assume that the declaration for our hypothetical one hundred unit community states: "This declaration may be amended at a meeting of the association by a two-thirds vote." As we all know, a quorum must be established at the meeting in order for a vote to be taken. In condominiums, the standard quorum is a majority of the voting interests (although the documents can provide a lower number), and state law sets the maximum quorum requirement for homeowner associations at thirty percent.

Let us assume in our situation that a meeting is properly called and 70 units (voting interests) are represented at the meeting, either in person or by proxy. Let us further assume that 60 vote in favor of the amendment, and 10 are opposed. Did the amendment pass?

The Division of Florida Land Sales, Condominiums and Mobile Homes, the state agency charged with enforcement of the condominium laws, addressed this exact issue several years ago in a dispute between a Fort Myers condominium association and one of its unit owners. An arbitrator ruled that the amendment required 67 votes, not simply two-thirds of those who voted (the actual number of units in the real case were different, but the point is the same). That ruling was upheld by a local trial judge, and also the Second District Court of Appeal.

Many associations face apathy and low voter turnout. When super-majority approval is necessary for document amendments, getting amendments passed can be challenging, to say the least. Using our hypothetical example, even though the amendment was approved by a six to one margin, it would have failed.

Although the vast majority of original documents drafted by developers provide for amendment based upon the entire population, many associations amend their documents to base approval on those who actually vote. After all, we elect the President of the United States based upon those who go to the polls, not the total number of registered voters.

A document which is amendable based upon the percentage of those who vote (as opposed to a percentage of the entire membership) might read something as follows: "This declaration may be amended by a vote of 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." Keep in mind, however, that amending documents to lower the required voting threshold (from the entire population to a percentage of those who votes) still requires compliance with the original document, however it is written.

As discussed in last week's column, there is a set format which must be followed when voting on document amendments. The condominium law requires the "strike-through" method of presenting proposed amendments, where proposed additions are underlined and proposed deletions stricken through. There is an exception when a clause is completely rewritten, where certain further disclosures are required. Owners must be afforded the opportunity to vote on amendments through a "limited proxy," sometimes called a "directed" proxy. Although the law for HOAs does not impose these same requirements, they may be imposed by the governing documents, and are good practices to follow in any case.

I recommend, unless prohibited by the documents, that all voting be done in writing. For those who do not use a limited proxy, I recommend signed ballots. That way, "recounts" can be easily done, as there is significant opportunity for error during counting in the hub-bub that often surrounds association meetings.

Assuming that the amendments are approved, amendments to the declaration, articles, and bylaws need to be recorded in the county land records. Amendments to articles of incorporation also need to be filed with the Division of Corporations in Tallahassee. Amendments to rules and regulations do not need to be recorded of filed, although it is typically recommended to do so if the pre-existing rules have been recorded in the land records.

One of the most common mistakes committed by associations is to record amendments without the assistance of legal counsel. Typically, the certificates must be executed with the formalities of a deed, and certain disclosures must be made so that the amendments appear in the "chain of title" for future buyers. This is definitely one of those areas where an ounce of prevention is worth a pound of cure.

Next week, we will get into some of the nuts and bolts of amendments, starting with a focus on what is often the most controversial amendment, rentals in the community. ■

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Don't Withhold Payment of Assessment as Protest

Question: I own a Florida condo unit. Our association has told us that our maintenance fee is going up because there are repairs that have to be made, and we are short of money. They also recently imposed an assessment of one thousand dollars per unit. Can they just do that? They had a meeting stating their case, and mailed us the notices. We feel that mismanagement of the fees must have occurred for things to get to this point. Do we have a right to withhold payment until we get some answers? A.D. (via e-mail)

Answer: First, under no circumstances should you withhold payment of an assessment. In almost every case I have seen, "rent strikes" backfire. Florida's courts have consistently held that a condominium owner cannot withhold duly levied assessments as a protest against some other claim, such as mismanagement. You would subject yourself to potential default, which could include the levy of interest, late fees, attorney's fees, and the ultimate foreclosure of your home.

The fact that the association is increasing maintenance fees, or needs to levy an assessment, is not an indication of mismanagement in and of itself. In fact, I have found that some of the most badly managed associations are those who skimp on required maintenance, in the interest of keeping the monthly maintenance fee low. While this may generate some self-congratulation in the early years, we are seeing more cases of people being forced from their homes because they cannot afford assessments for the tens of thousands of dollars necessary to rehabilitate seriously neglected property.

A condominium association's board may levy a special assessment if authority to do so is provided in the condominium documents, which should be easy to check. The board must give a fourteen day notice about the need for the assessment, and follow certain procedures. Once the board levies the assessment, a second notice must be sent out indicating when the assessment is due, the amount, and again notifying the owners what the assessment was for. The assessment can only be used for the purpose for which it was levied, and thereafter must either be returned to the unit owners or issued as a credit against future assessments. Unit owners who do not like yearly budget increases do have a remedy for that issue. If your assessment

exceeds the previous year's by more than fifteen percent, there is a procedure where you (and a certain percentage of your neighbors) can petition the board to have the budget re-examined and voted on by the unit owners. This procedure is found in Section 718.112(2)(e)2.a. of the Florida condominium statute, which is available on-line.

However, note that non-recurring expenses are not counted toward calculating the fifteen percent.

Question: Do amendments or additions to existing rules and regulations of a condominium association have to be filed with the State of Florida or be recorded in Lee County records to be effective and enforceable? (G.L.)

Answer: An association does not have to file or record rules adopted by the board. Amendments to the rules and regulations of a condominium are valid even though they are not recorded, unless the superior recorded documents require them to be recorded.

It is important, however, to ensure that the Board is empowered to adopt rules. That authority is not conferred by law, only by the superior governing (recorded) documents.

If the current rules and regulations are recorded, however, it is recommended that the Association record subsequent amendments.

Question: I am writing about the waiver of reserves for a condominium association. In your August 4 column, you stated that the waiver of reserves was sufficient if approved by a majority of those who voted at a meeting. I believe that a majority of all unit owners must approve the waiver of reserves. I contacted the Florida Office of the Condominium Ombudsman regarding this question, and they agreed with me. As an associate at the Ombudsman's Office said, "if you only had two people show up at a meeting, you wouldn't want that small minority making the decision for the entire association." Who is right? M.L. (via e-mail)

Answer: You were either informed incorrectly or misunderstood what was told to you. For example, two members could not vote to waive reserves unless you lived in a three unit condominium, you must have a quorum for a meeting to be held.

Section 718.112(2)(f)2 of the Florida Condominium Act states that reserves may be reduced or waived "by a majority vote at a duly called meeting of the association." Although the statute should be written more clearly, the Division of Florida Land Sales has consistently interpreted the law in the manner set forth in my previous column. For example, although technically applicable only to multi-condominiums, Rule 61B-22.005(8) of the Florida Administrative Code specifically states that reserve voting is based upon "a majority of those present in person or by limited proxy."

This is also what the State of Florida teaches condominium board members and unit owners in its educational materials. For example, in the State's book called "Budgets & Reserve Schedules Made Easy – A Self-Study Training Manual for Beginners" page 45 says: "[Pursuant to] the Condominium Act, once a quorum at a unit owner meeting is established, the vote required to waive or reduce the funding of reserves is the approval of the majority of the voting interests who are present at that meeting. A quorum is a majority of the total voting interests unless a lower number is set forth in the documents." I don't know what could be clearer than that.

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****.* ■

Pay Attention to Rental Restrictions (part 4)

Fort Myers The News-Press, August 25, 2005

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Today's column is the fourth part of our look at updating the legal documents for your community association. In the first three editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, and analyzed the required votes for amendment (Courts Err on Side of Homeowner, August 4, 2005; Amend Documents With Care, August 11, 2005; Use vote to amend papers, August 18, 2005).

Today, we will focus on what is always a hot-button issue in community associations, amendments regarding rentals. There is probably no topic that generates more dispute during amendments. There are a number of reasons for this.

First, developers rarely put meaningful rental restrictions in their documents. Understandably, they want to attract the largest pool of potential purchasers, including investor owners who buy units as a rental property, as well as working age out-of-staters, who often buy Florida properties with an eye toward rental now, and retirement later.

On the other side of the coin, renters are considered by many associations to be more likely to have loud parties, damage common property, or think that the rules do not apply to them. Most of us have been renters at some time in our life, and it might be argued that people who are bad tenants are just as likely to be bad owners, regardless of whether their name is on a deed or a lease.

In any case, it is clear that rentals do have some affect on property values, to the extent that mortgage financing is difficult to obtain in communities with a high percentage of rentals.

Therefore, it is no surprise that a prime area of focus in updating governing documents is to address the rental clause in the declaration of condominium, or declaration of covenants. The following are typical areas of concern:

- Duration and Frequency of Permitted Rentals: Associations which permit rentals of less than thirty days, more than three times per year, fall under Florida's hotel laws, and are also likely required to comply with the Americans With Disabilities Act. Many associations which consider their communities residentially oriented do not like the "revolving door" affiliated with short-term tenants, while resort properties expect heavy traffic. The establishment of minimum lease terms, as well as the frequency of permitted leases (such as the number of times per year a property can be rented) is a frequent amendment topic.

- **Prior Approval of Leases:** Many residential communities engage in some level of "screening" of potential renters, which typically involves a pre-occupancy application, a background check, and an approval process. If an association is going to have the authority to approve tenants,

the documents should set forth grounds for disapproval. In my opinion, a tenant's credit history is of little interest to an association, while criminal history may be of great concern.

- **Transfer Fees:** If an association is going to approve tenants, it should be entitled to reasonable compensation for the time and effort involved in the process. The condominium law permits tenant application fees of up to one hundred dollars per application, but the authority for the fee must be set forth in the documents. There is no counterpart in the law for homeowner's associations, although those HOAs which do engage in review of rental applications also typically charge a reasonable administrative processing fee.

- **Security Deposits:** One common complaint about tenants is damage they cause to common areas, particularly when moving in and moving out. The condominium law allows an association to charge tenants a security deposit equal to one month's rent. The authority for the charge must be set forth in the documents. Like the application fee, there is no guidance in the statute for HOAs about security deposits, although I am aware no reason why a similar deposit could not be authorized through a homeowners' association document.

- **Dealing with Bad Tenants:** One of the most frustrating situations faced by associations is when the problem of a bad tenant is exacerbated by an uncooperative unit owner. A well drawn set of documents will give the association some "teeth" in dealing with tenant problems, including the ability to initiate eviction proceedings on behalf of the owner, if the owner does not take timely and appropriate steps to address tenant problems. This can be very helpful in persuading owners to nip tenant problems in the bud.

- **Fining:** Both the laws for condominiums and homeowners' associations permit the levy of fines directly against tenants. However, the authority for the fine must be contained in the governing documents.

A common question which arises when considering rental amendments is how to enforce them against existing owners. For example, what of the working-age out-of-state owner who buys a Florida condo unit with the intention of retiring there in ten years, but is counting on rental income in the meantime to make the mortgage payments? This issue was definitively addressed by the Florida Supreme Court several years ago, in a landmark case called Woodside Village v. Jahren.

In the Woodside case, the high court reasoned that people who buy into condominium communities do so with notice that their rights are subject to change, through the amendment process. The court upheld retroactive application of an amendment which substantially limited leasing rights for existing owners, specifically by banning annual leases.

However, the Woodside case does not end the story. Apparently feeling that changing the rules in mid-stream is unfair, the 2004 Session of the Florida Legislature essentially "overruled" the Woodside case. Section 718.110(13) of the Florida Condominium Act now 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."

As explored in previous editions of this column at some length, the new rental law has wreaked havoc in many associations, due to its expansive wording, and its contradiction of previous court rulings which have disfavored associations having different

classes of owners. However, until the new law is either again changed by the Legislature, or stricken by a court, many associations are grappling with it by "grandfathering" all existing owners when creating new rental restrictions. After all, it seems rather unfair to punish those owners who cooperate with the association and vote for the amendment, while rewarding those who vote against it (or do not vote at all) with grandfathered status.

Neither the governing statute nor reported court cases lend any guidance whatsoever on the issue of retroactive application of rental amendments in homeowners' associations. Many simply follow the old condominium laws (Woodside) for guidance, others argue that an entirely different set of rules should apply.

Next week, we will take a look at establishing guest restrictions in your documentation update. ■

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Board-Made Rule on Tenant Restrictions can be Tricky

Question: I read you recent article regarding sex offenders. My question is whether the board of a condominium association can pass a rule to implement the screening of tenants, or whether the community's documents need to be amended? D.R. (via e-mail)

Answer: It depends. In order for a board-made rule to stand up, it must meet several stringent tests. One requirement is that the rule cannot contravene rights which are "inferable" from the recorded documents. Since most recorded documents mention the right to lease in some fashion, it is typically better for the right to approve tenants to be contained in the declaration of condominium, either as originally recorded, or through a proper amendment.

However, you should also read my other column of today, regarding the need to "grandfather" current unit owners regarding any amendment which "restrict unit owners' rights relating to rentals", which would likely include the implementation of a screening procedure.

More associations need to bring this problem to the attention of their Legislator. While I can live with grandfathering owners regarding changes to minimum lease terms (and that is how the amendment to the law started out), the current version of the law is a tremendous disservice to condominium associations.

Question: I live in a single-family neighborhood. Our community's recorded covenants are over twenty years old, and say nothing about pets (other than that livestock cannot be bred in the community). Our board has said that they do not have the authority to make rules, and that amending our recorded covenants is too difficult.

One of my neighbors exercises very poor pet management, including her dog entering my yard and leaving a mess behind. The dog often also runs unattended. Will Lee County help me with this? S.A. (via e-mail)

Answer: Section 6-38 of the Lee County Code states that it is unlawful for any person to allow their animal to become a nuisance. The code specifically provides that the owner of every animal is responsible for the removal of any excreta deposited by the animal on public or private property. Further, unless you have given your neighbor permission to bring the dog onto your lot, it is private property, and the entry of the animal may constitute trespass.

Lee County's Code further provides that it is unlawful for pets to make unreasonable noises (including barking or howling), for pets to roam at large, or for pets to turn over garbage containers.

I would suggest that you call your neighbor and express your objections, and you might even want to follow up with a letter. If that does not do the trick, you may want to call the animal control authorities.

Question: I live in a "55 and over" adult community. I am in the process of selling my home. The association, which is still under control of the builder, says I have to get the person that I sell to approved. They also said that my buyer has to be age 55 or over.

I thought there was a Florida law that twenty percent of the population can be under 55. Could you give me some direction on this? J.P. (via e-mail)

Answer: It depends on how the covenants and restrictions applicable to your community are written. In order to qualify as "55 and over" housing, federal law requires that at least 80% of the occupied units be occupied by at least one person age 55 or over. Ownership of the units is not important, occupancy is what counts.

Although the law was up in the air for a number of years, the United States Department of Housing and Urban Development issued its final rule several years ago, stating that HUD did not care how the twenty percent was treated.

Some documents are written so that the 20% is a "set aside", meaning that owners can sell to whomever they wish, as long as the 80% threshold is met

The more common approach is for the 20% to be treated as a "cushion", to deal with situations where non-age qualifying persons may move into units, such as inheritance situations, the death of an age-qualifying spouse, or the purchase of a unit for a healthcare giver.

The answer in your case will depend entirely on how the documents are written. ■

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Guest Usage can Become Contentious Condo Issue (part 5)

Fort Myers The News-Press, September 1, 2005

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Today's column is the fifth part of our series about updating the legal documents for your community association. In the first four editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendment and looked at rental amendments (Courts err on side of homeowner, Aug. 4; Amend documents with care, Aug. 11; Use vote to amend papers, Aug. 18; Pay attention to rental restrictions, Aug. 25).

Today's topic is restrictions in the legal documents addressing guest usage.

As the old saw goes, fish in the refrigerator and house guests have one thing in common: both start to smell bad after three days. On a more serious note, property ownership in America is often said to carry a "bundle of rights." After all, our home is our castle and the homeowner is the king or queen thereof. However, Florida's courts have specifically ruled that individual freedoms in the multi-residential housing setting must occasionally give way to a greater collective good.

As all of us who are transplants to Florida know, we seem to become more popular with friends and relatives than when we lived in more frigid parts of the country. So when Mr. and Mrs. Smith decide that their grandson and 15 of his fraternity brothers ought to be able to use their beach condo for spring break, where do you draw the line?

Obviously, having a clear and well-defined set of guidelines in the association's documents is a good starting point.

There are basically a few different scenarios where the regulation of guest usage comes into play:

- Non-overnight guests while the owner is in residence: Most associations do not have major problems in this area. After all, if Mr. and Mrs. Smith wish to have five other couples over for dinner, why should the association care? Typically, regulation in this area is limited to two points of contention. First, if the community has scarce parking, it may be necessary to establish regulations on where visitors should park during their visits. Obviously, the couple's next-door neighbor will be upset if they come home from work to find a dinner guest

  parked in their assigned spot. A second area where disputes occasionally arise involves the use of the common recreational amenities. For example, the Smiths may not play tennis, and might see no harm in letting their dear friends, Mr. and Mrs. Jones, come over and play tennis in the community. Others might see it differently.

- Overnight guests while the owner is in residence: Again, this is an area where minimal regulation is usually sufficient to stem problems. Parking and access to amenities are again occasional chal-

lenges in this arena. Additionally, the number of permitted occupants in a home can present issues. While few would object to the Smiths having their children and grandchildren visit for a week or two, even if the grandkids have to sleep on a couch, 15 fraternity brothers in sleeping bags might evoke a different reaction. Unit density can become particularly controversial in condominiums where water consumption and related sewage expenses are charged to all owners as a common expense.

- Non-overnight guest usage while the owner is absent: A high percentage of condominium units and single-family homes sit empty for much of the year, due to seasonal occupancy trends, investor-owned units waiting for the next tenant, and the like. It is not uncommon for owners of these properties to ask a friend, relative or paid caretaker to stop by and check on the unit from time to time. In fact, it is good for this to happen. The rub arises when the owner allows someone who is not occupying the home to come and use the community's beach access, swimming pool or other recreational amenities. For example, should our hypothetical Smith family be allowed to let their housekeeper host her child's birthday party at the condo pool, even though the Smiths are away for the summer?

Next week, we will wrap up the guest usage issue, including overnight guest usage of the property while the owner is absent, the unique challenges involved with guest usage of units being rented by tenants, and some drafting tips. ■

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Use Cooperative Approach to Resolve Carport Issue

Question: In December of 2004, my daughter and I bought a condominium unit for her to live in. The complex does not have carports for every unit. The deed to our unit states that a carport comes with the unit, and taxes for a carport appear on the tax bill. When my daughter moved in, we went looking for her carport, but could not find it.

After checking the County's tax records, we determined that someone else is parking in that space. A letter was sent to the board, requesting clarification on this issue. In January, the president called me saying that he agreed that we own a carport, and that he would get with the association's attorney. Nothing has happened since that time. What do you recommend? B.A. (via e-mail)

Answer: First, you should follow up with another call to the association's president. I have always found that a cooperative approach in dealing with condo problems goes much further than an adversarial tone. After eight months though, the board and its attorneys should have been able to come to some conclusion on your question.

The Florida Condominium Act requires an association to respond to "inquiries" received from unit owners, by certified mail, within at least thirty days of receipt of the inquiry. The deadline can be extended to sixty days if the association refers the matter to an attorney, and so notifies the owner within the thirty day time-frame. If the association does not respond within the designated time-frame, there are potentially stiff penalties available.

Therefore, I would follow your call to the association with a polite, but direct, certified letter seeking a substantive response to your inquiry. If you are unable to address the matter through that avenue, you and your daughter should consult an attorney. An assigned parking space is a valuable right, and if you bought and paid for it, you should see that you get it.

Question: We would like to install wood floors in our fifth floor condo. The rules say that only kitchens and bathrooms can have tile or hard surfaces on the floor. All other areas must have rugs. Can this restriction be enforced, or do I have the right to install wood floors with appropriate sound cushioning? A.C. (via e-mail)

Answer: The law confers no right for you to install any particular type of flooring.

Restrictions that require the use of carpeting in living areas are common in high-rise condominiums. While some associations allow hard flooring with sound-deadening underlayment, some do not.

Assuming that the rule was properly enacted, it is enforceable, also assuming that the association has enforced it with respect to known violations.

Violation of covenants and restrictions applicable to condominiums can result in legal action. Typically, a dispute of this nature would start through the state's mandated arbitration program. There are a number of arbitration decisions where owners who have violated hard-flooring regulations have been required to remove the hard flooring. In addition to that expense, you might also be liable for the association's attorney's fees, should you end up in a legal battle and lose.

Most condominium documents provide some method for petitioning for change. You should review the petition process in your documents and determine if your neighbors would support a change to the existing regulations.

Question: What is the law about the board getting and having a key from each unit owner? Some people feel it is an infringement on their privacy. I am the president of our condominium association. K.O. (via e-mail)

Answer: The Florida condominium statute states that an association has an irrevocable right of access to units. The law says nothing about keys.

If the requirement for posting of a key is contained in the recorded condominium documents, or in a properly-enacted board rule, it will be upheld.

Once the association takes possession of keys to individual units, it also takes on additional responsibility and liability for the proper safe-keeping of the keys.

Question: I live in a "55 and over" community. Everyone in the development seems to agree on the rules for occupancy, including that leased units must have at least one occupant age 55 or over. However, there is a division of opinion about ownership. Some feel that anyone can own regardless of age, others feel that the buyer must be age 55 or over. Who is correct? R.G. (via e-mail)

Answer: Unless the governing documents for the community specifically require buyers to be age 55 or over, that is not necessary to comply with the so-called "55 and over exemption" to the Fair Housing Amendments Act of 1988, as amended by the Housing For Older Persons Act of 1995. These federal laws focus on occupancy, not ownership. The law requires that in order for the exemption to be claimed, at least eighty percent of the occupied units must be occupied by at least one person age 55 or over.

Question: Thank you for your recent article entitled Coping With Sex Offenders In Your Area. I am on the board of an association in Collier County, and we recently learned that a registered sex offender is living in our community. We have been struggling with this issue, and I wanted to share the column with our board. Is this permissible? M.C. (via e-mail)

Answer: Yes. All past editions of my columns (both the Question and Answer column as well as the regular column), are posted on the web-site of Becker & Poliakoff, P.A., the Law Firm with which I am affiliated. Go to www.beckerlawyers.com, click on publications, then articles, and scroll down to the list of my articles.

The article you referenced is dated May 19, 2005, and will be listed as such (articles are posted in chronological order). Please also note my follow-up column on that topic (see Warning About Offender Warranted, July 28, 2005). ■

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Guest Rights can Become Contentious (part 6)

Fort Myers The News-Press, September 8, 2005

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Today's column is the sixth part of our series about updating the legal documents for your community association. In the first five editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendment, looked at rental amendments and began a discussion of guest usage restrictions (Courts err on side of homeowner, Aug. 4; Amend documents with care, Aug. 11; Use vote to amend papers, Aug. 18; Pay attention to rental restrictions, Aug. 25; Guest usage can become contentious condo issue, Sept. 1).

Today's column continues a review of guest usage issues, with a focus on two of the more contentious items — tenants' rights and guest usage while the owner is not in residence.

- **Tenant guest rights** When one party rents property from another, it is often said that the entire "bundle of rights" that goes with property ownership passes to the tenant during the term of the lease. In community association living, this is not entirely true.

  The Florida Condominium Act does provide that tenants must be afforded the same use rights with respect to common elements generally available to the owners. This would include most recreational amenities. For example, an association could not adopt a rule that permitted tenants to only have three guests at the swimming pool at a time, with no limit for unit owners.

  Conversely, the condominium law does permit differential treatment of unit owners and tenants with respect to use of the units (apartments), as distinguished from common element use, where no distinctions are permissible. For example, one decision from the state's condominium arbitration program upheld a restriction which permitted unit owners to keep pets, but not tenants. The law on these points for HOAs is less developed.

  As applied to guest occupancies, I see no reason to treat tenants differently than unit owners while the tenant is in residence, provided that the documents adequately restrict use of all units to single-family purposes (more on that topic in a later edition). The rub usually arises when the tenant is away and wants to have "guests" use the unit. These situations frequently arise when there is an attempt to avoid sub-leasing restrictions in the documents. Although perhaps considered harsh by some in its application, it has been my experience that most associations which study this issue find it best to require that if a tenant is going to have guests, the tenant must be in simultaneous residence.

- **Guest occupancy in the absence of unit owners** As mentioned in last week's column, a substantial number of properties in Southwest Florida

sit vacant for much of the year, while the owner is in residence elsewhere. This typically occurs during the summer months that we refer to as "off-season," and usually involves units owned by seasonal retirees.

Most owners in this category consider one of the benefits of ownership being the ability to have friends or family come enjoy the property, even if they are not there. In most cases, this creates few problems, but in some cases, contention abounds.

I have handled more than one case over the years where a company or businessperson from "up North" purchases a unit as a "perk" for good customers, well-performing employees, etc. In communities with strict rental policies and a general residential nature, friction is likely to develop.

In my experience, most associations find it consistent with the will of its membership to place minimal restrictions on visitation by family members, even though the unit owner is absent. There may be special challenges in "55 and over" communities, which will be discussed in a future edition of this series.

Restrictions involving guest usage by nonfamily members when the owner is absent is a topic commonly addressed in an updated set of community association legal documents. Some associations prohibit it altogether, some allow a set number of nonfamily guest usages in the owner's absence.

- **Registration of guests** While most boards and community association managers have little desire to act as police officers, I think it is entirely appropriate to require that guests who will be staying in an owner's home, in the owner's absence, to register with the association prior to their arrival. This enables the association to ensure that density limitations in the documents (the number of people permitted to stay in a unit) are being adhered to, and can serve an important security and safety function in the event of a catastrophic occurrence in the community, such as a fire or hurricane.

- **Drafting tips** As promised, here are some drafting tips to consider when addressing the guest usage issue. First, the more significant restrictions (such as limitations involving guest usage in the owner's absence) should be contained in the declaration of condominium or covenants, as opposed to a board-made rule. While a board rule might withstand a legal challenge, the courts in Florida have held that properly enacted amendments to declarations of condominium or declarations of covenants are presumed to be valid. However, the details of implementation, such as registration procedures, are best left to board-made rules, as conditions and needs of an association frequently change.

Next week, we will take a look at restrictions involving the transfer of units, the approval process, and the issue of "screening." ■

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Do HOAs have right to restrict short-term rentals?

Question: I am very confused regarding the issue of rental restrictions imposed by HOAs, as opposed to condos. My wife and I purchased a house in Florida a year ago. The house was purchased with the intention of renting the house to subsidize our expenses until we are older and will be able to spend more time there.

Inquiries were made at the time prior to purchase, to the management company for the HOA, as to whether short-term rentals were permitted, and we were informed that there were no restrictions in the association's documents. However, the HOA recently passed an amendment to restrict rentals to a minimum of one year, to eliminate vacation rentals.

We now don't really know where we stand legally, and would really appreciate some guidance. — S.B. via e-mail

Answer: Florida's courts have not, as yet, had the opportunity to address the extent of a homeowners' association's ability to amend covenants regarding rental rights.

As has been explored at length in previous editions of this column, Florida's Supreme Court held that a condominium association, through properly enacted amendments to the declaration of condominium, could substantially limit (perhaps eliminate) rental rights. The Florida Legislature subsequently tempered the high court's decision by enacting a provision in Florida Condominium Act, which provides that amendments restricting rental rights cannot be applied retroactively to condominium unit owners, unless they consent to the amendment.

Florida's law applicable to homeowners' associations currently provides that only particular amendments require unanimous approval, such as amendments that change how expenses are shared. Rental amendments are not on that "protected list." A previous version of the HOA law said that "vested rights" could not be taken away.

There are two sides to the argument. Folks in your position would argue that you bought into a set of rules and you should be entitled to rely on them. Others would argue that the rights created by your covenants are amendable by a vote of the members of your association, and are therefore subject to change from time to time.

I cannot predict how Florida's appellate courts would address this issue if it reaches them, but my guess is that the right to amend rental rights would be upheld, even if applied retroactively.

Question: When a gas grill has been donated to a condominium association to be used by those who want, should the association supply the propane gas when it is empty? My main thought is that everyone does not use the grill and would this cause a problem using condo funds? Thank you for any consideration you give this. —S.R. via e-mail

A: There is nothing in the law which would prohibit the association from accepting, as a gift, a barbecue grill. However, once the association accepts the property, it becomes the property of the association. I think that if the grill is available for everyone to use, the association can pay for the costs of operating it.

Therefore, I believe the association would become responsible for buying the gas, and would also be responsible for the proper care of the grill, as well as ensuring that it is maintained in a safe and proper condition.

Question: We have lived in our townhouse for a number of years, in relative peace and quiet. My husband and I both work, and we are busy with our children

in their after-school activities. We stay out of community politics, and like to be left alone. Unfortunately, the classic "neighbor from hell" just bought the town house next to ours and moved in. He hosts parties that last until all hours of the night, and the ruckus has become unbearable. I called the management company to complain and they said there is nothing they can do since none of the other neighbors has complained. What can we do?— G.B. via e-mail

Answer: I would start by calling your neighbor and explaining to him that his lifestyle is negatively affecting you and your family. While an unfortunate minority of people in our society feel that the rules do not apply to them, or are made to be broken, it may be that your neighbor is simply oblivious to your concerns. Hopefully, he will make a genuine effort to tone things down if you approach him directly and amicably.

If that does not work, you should review the governing documents for your homeowners' association. They probably contain a restriction against nuisances. While your neighbor certainly has the right to host social functions, he does not have the right to interfere with your quiet enjoyment of your property.

The role of the association in cases like yours is a difficult question. Many associations do not feel that they should intervene in neighbor-to-neighbor disputes, unless a sufficient number of neighbors complain.

I would write a letter to the association, and ask the board to formally address this issue at a meeting of the board. Whether to intervene should be a decision for your board, not the management company.

If the association chooses not to get involved, you have rights under your community's governing documents and the law that you can pursue on your own. This may entail the expense of hiring an attorney — you will have to decide if it is important enough for you to do so. ■

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Restrictions can Limit Sales of Property (part 7)

Fort Myers The News-Press, September 15, 2005

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Today's column is the seventh part of our series about updating the legal documents for your community association. In the first six editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments and considering guest usage restrictions (*Courts Err On Side of Homeowner*, August 4; *Amend Documents With Care*, August 11; *Use Vote to Amend Papers*, August 18; *Pay Attention to Rental Restrictions*, August 25; *Guest Usage Can Become Contentious Condo Issue*, September 1, and *Guest Rights Can Become Contentious*, September 8).

Today's topic, amendments restricting the sale of property, with a focus on pre-sale applications, screening, and association approval.

American law derives its roots from the English system, known as common law. Common law is based on rules developed by appellate courts. Well embedded in Florida's common law is the notion that unreasonable "restraints on alienation" are impermissible. Restraints on alienation are agreements which unduly restrict a party's ability to transfer his or her property.

When updating the community's constituent legal documents, many associations ask about the pros and cons of pre-sale approvals. While every association has a legitimate interest in knowing who its members are (and therefore obtaining information after a sale has occurred), there is some debate as to the legal underpinnings for a pre-sale application and approval process. After all, the right to approve implies the right to disapprove, which is a restraint against alienation. The question still left open in the law is whether it is an unreasonable restraint.

Many (if not most) declarations of condominium contain a pre-sale application and approval process. Although less common in homeowners' associations, a significant number of HOAs also have similar requirements in their governing documents.

In the 1970's, there was a substantial amount of litigation in Florida as to the validity of pre-sale application and approval clauses in the condominium context. Basically, the courts found that an association's pre-sale application and approval process would not constitute an unreasonable restraint against alienation if the documents also required the association to furnish an alternate purchaser, or itself purchase the unit, if the application was denied. This has become known as the "right of first refusal", and it seems well settled that rights of first refusal are valid in the common law.

However, as a practical matter, very few associations can find an alternate purchaser or secure the funds to purchase property in the short time-frames typically allotted in the community's legal documents. The question that is asked by many associations is whether an approval right (and accordingly an ability to disapprove a sale) will be upheld if the association

does not have to line up an alternate purchaser, and if so, under what circumstances.

The answer seems to be "maybe." In an often-cited case arising from Naples, a Florida appeals court held that an association's duty to furnish an alternate purchaser was not triggered until the buyer/applicants "facially qualified" for membership in the association. The 1977 case of Coquina Club v. Mantz arose prior to the 1988 amendments to federal law which generally outlawed "adults only" housing. At the time of the prospective purchaser's application, the Coquina Club Condominium was a lawful "adults only" condo. When someone with children wanted to buy a unit, the association turned down the application.

The frustrated seller of the unit argued that although the association could turn down the applicants, the association was obligated to supply an alternate purchaser to close on the same terms and conditions. The appellate court held that the right of first refusal was not triggered unless a bona fide application was presented, otherwise, there was a possibility for collusion that could frustrate the purpose of the approval clause.

Therefore, at least in the condominium context, the common law provides that an association may reject a proposed purchaser, without a corresponding obligation to furnish an alternate purchaser, if the applicant fails to "facially qualify."

On the other end of the spectrum, Florida's Fourth District Court of Appeal analyzed a pre-sale application and approval clause in a 1993 case called Camino Gardens Association, Inc. v. McKim. The declaration of covenants for Camino Gardens prohibited the sale of a home in the subdivision to anyone who had not pre-qualified as an approved member of the association. The association's bylaws required applicants to be "of good moral character" and to establish that they were of "sufficient financial responsibility to maintain a house and property of the character to be purchased" and further that the applicant "shall not have been convicted of a felony involving moral turpitude."

The court attempted to distinguish the holding of its sister court in Coquina Club, and found the clause to be an unreasonable restraint against alienation, and therefore invalid.

Next week, we will continue the discussion of the pre-sale application and approval process, with a focus on typical pre-sale screening requirements, and what grounds for rejection of an application may pass legal muster. ■

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Condo's New Owner may be Entitled to Refund

Question: Our condominium association has finally completed the clean-up and reconstruction of damage caused by Hurricane Charley. Our board levied two assessments for clean-up and repair, and is in the process of reaching a final agreement with the association's insurance carrier. I have heard that the association may be getting more insurance money than it thought, and that a refund of part of the assessment may be in the works. I am planning to sell my unit, and want to know if I would be entitled to the refund after closing, since I paid the assessment. L.M. (via e-mail)

Answer: That is a tough call, and may to some extent depend upon what the assessment was for, and the language in your condominium documents. However, as a general matter, an association's excess proceeds are known as "common surplus" and typically pass with title to the unit. Therefore, the buyer of your unit would likely be the party entitled to a refund. You are free to make provision for this issue in your Purchase and Sale Agreement, and ask for a post-closing credit from the buyer to you. This would need to be addressed directly between you and the buyer.

Question: Our condominium holds its annual meeting in December of each year. Many seasonal residents, including myself, are unable to attend. The minutes of each year's annual meeting are not approved until the following year.

It seems unreasonable that I cannot be informed of what has occurred at the annual meeting and have to wait a whole year, until the previous year's minutes are approved. I requested a copy of the unapproved minutes and was denied access to that document by the association. Our bylaws require minutes from all meetings to be drafted within thirty days of the meeting. Are unapproved minutes part of the "official records" and am I entitled to inspect them? R.L. (via e-mail)

Answer: Both the statutes for condominiums and homeowners' associations contain a broad "catch-all" clause which states that "all other records" of an association are subsumed within the definition of "official records." In my opinion, this clearly includes unapproved minutes.

While the association cannot guarantee you that the minutes will not be changed or corrected when they submitted to a vote for approval at the next year's annual meeting, they should be made available to you for your perusal in the meantime.

Question: I was reading one of your recent columns about dissolved homeowners' associations. My question is if a homeowner's association is administratively dissolved for failure to file an annual report, can the board reinstate the association without a vote, and bind the other residents? J.W. (via e-mail)

Answer: Dissolution for failure to file an annual corporate report is an administrative process, and really does not have anything to do with whether or not you are bound to deed restrictions and membership in your association.

Membership in a homeowner's association typically derives from a recorded deed restriction, such as a declaration of covenants. As long as that document is still in force and valid, the administrative reinstatement of the association appears to be entirely appropriate.

Question: In a previous column, you mentioned the new phenomenon of "prescription pets." Will you please expound on how this affects a "no pet rule" for a condominium association. R.B. (via e-mail)

Answer: State and federal fair housing laws generally require the provider of housing (including a condominium association or homeowner's association) to make

reasonable accommodations in its policies and procedures so as to enable handicapped persons to fully enjoy the premises.

For example, it is clear that a condominium association with a "no pet rule" would have to permit a blind person to keep a seeing-eye dog.

The area where the law continues to develop is in the area of so-called "companion animals." A seventy year old person with arthritis might feel depressed about their lack of mobility. Many doctors are willing to write a note saying that a pet will "make them feel better."

There is some disagreement in the courts as to whether an "emotional support animal" needs to have discernable skills in order to trigger the fair housing laws. Associations faced with requests for "prescription pets" should take the matter up with their legal counsel. There are potentially significant exposures for failure to follow the applicable laws. ■

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Exercise of Rights Can Mean Litigation

Fort Myers The News-Press, September 22, 2005

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Today's column is the eighth part of our series about updating the legal documents for your community association. In the first seven editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments and considered guest usage restrictions, and began a discussion of transfer restrictions.

Today's topic: further discussion of sales restrictions.

As noted in last week's column, "restraints on alienation" are disfavored in the law. At least as to condominiums, and arguably as to homeowners associations, an association's approval rights will be upheld if the association is obligated to purchase the property, or furnish an alternate purchaser, in the event of disapproval of a transaction.

As was also discussed last week, Florida's courts have also stated that disapproval can be appropriate, without a corresponding right of first refusal, if the applicant "facially fails to qualify for membership" in the association.

The question that still begs to be answered is what type of "just cause" an association can establish for disapproval of a transaction, without triggering the right of first refusal. The following are common grounds cited in documents drafted by attorneys who represent community associations:

- **Criminal past.** As has been discussed at length in past editions of this column, a hot topic in community association law involves the role of an association when a sex offender plans to move into the community. In my opinion, a properly worded clause that states that registered sex offenders do not qualify for membership in the association (or residency in the community) is likely to be upheld. Conversely, trying to turn down someone who was convicted of drunk driving 20 years ago would probably put the association on the losing end of a lawsuit.

- **Financial capability.** There is some divergence of opinion on this issue. As stated in previous columns, I do not believe that a tenant's financial position has any relevance to review of his application. Admittedly, a buyer will have a financial relationship with the association, since he will be obligated to pay assessments. Some argue that if the buyer pays cash, the association is well secured, and if there is a mortgage, his financial strength has already been vetted by the bank, leaving no reason for the association to poke its nose into the situation.

Others will argue that the association has a vested interest in an applicant's financial wherewithal, since the association's right to collect assessments for services rendered is essentially a credit relationship. The Coquina Club discussed in last week's column suggests that disapproval for

financial reasons would trigger the right of first refusal. Nonetheless, many documents specify a history of financial instability as just cause for disapproval of an application.

- **Stated intent to violate the documents.** This is probably one area where a "just cause" standard would be upheld. After all, the court in the Coquina Club case held that an association could turn down a sale, without triggering a right of first refusal, when a family with children planned to move into an age-restricted community.

  Presumably, this is still good law in "55 and over" communities, and could be extended to other areas where the application information indicates that the buyer intends to violate the governing documents. For example, if an applicant states he is buying a unit for rental purposes in a community which does not permit rentals, it is arguable that just cause is shown.

- **Unpaid assessments.** Many documents provide that a transfer will not be approved until all assessments against the unit are paid. While this would probably be upheld as just cause, this is rarely a stumbling block in the final analysis. Unpaid assessments are almost always cleared up at closing, and when the unit owner is delinquent in the payment of assessments the association usually wants him to sell so the account can be paid up.

- **Incomplete application submittals.** Many documents require a copy of the purchase and sale agreement, as well as the association's application form to be filled out. I believe that a well-written set of documents will state that the association's approval obligations do not begin to run until all materials required are received. While refusing to approve an application is not necessarily the same thing as disapproving it, documentary provisions along these lines are usually quite effective in making sure that the parties to the transaction (as well as their real estate agents, who stand to earn the commission) cooperate in the process.

When all is said and done, transfer restrictions are fairly common in condominium documents, and not unusual in the governing documents of a homeowner's association either. As a practical matter, the exercise of rights under these clauses has a tendency to generate litigation, or at least threats of it.

Next week, we will look at insurance clauses in the documents. ■

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Condominium Leasing Rights Frequently Amended

Question: Our condominium association is trying to limit the number of nonresident-owned units by changing our condominium documents. They are proposing to hold a "special meeting via proxy," by a mail-in ballot, without a closing date. The amendment would ban annual leases and require a unit to sit empty for three months of every year, or be occupied by the unit owner during those three months. I have two questions. First, can a vote be held without a closing date for the mail-in ballot submission? Secondly, the new change would "grandfather" existing owners. This would seem to make the unit less valuable and thus a "taking without just compensation." Is this legal? — H.S. (via e-mail)

Answer: Amendments to condominium documents addressing leasing rights are common. A couple of years ago, the Florida Supreme Court ruled that an association could, through proper amendment to the documents, substantially limit (if not eliminate) leasing rights.

Some people felt that this could be harsh on people who counted on rental income when purchasing, so the law was changed in 2004 to create a "grandfathering" situation. Specifically, Section 718.110(13) of the Florida Condominium Act now 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."

Accordingly, the amendment which provides for "grandfathering" appears entirely appropriate, and is not an "illegal taking."

Typically, amendments are considered at meetings. The form you are referring to is probably what is called a "limited proxy," which serves the same function as an absentee ballot. There is no requirement for a "closing date," as long as all proxies are submitted by the time the meeting is called to order, or at any lawful adjournment thereof.

Question: Can you tell me when the next association seminar is going to be held?

Answer: The Law Firm of Becker & Poliakoff, P.A. will be hosting a seminar on Tuesday, Oct. 4, titled, "Hurricane Recovery and Rebuilding Seminar." The seminar will be at the Seven Lakes Auditorium, 1965 Seven Lakes Boulevard, Fort Myers. The seminar is free and runs from 8:30 a.m. until 12:30 p.m. You can register at (239) 433-7707 or at www.beckerlawyers.com/seminars.

Question: I was interested in knowing how to find the "sunshine law" for condominium associations and how I can get a copy of the condominium law. — F.M. (via e-mail)

Answer: The so-called "sunshine law" for condominium associations is found in Section 718.112(2)(c) of the Florida Statutes. I would recommend going to the Web site of Florida's Department of Business and Professional Regulation, the state agency which regulates condominiums. The Web site is www.myflorida.com/dbpr/. Then, go to the link to "Land Sales, Condomini-ums and Mobile Homes." Click on "Condominiums." There, you will find a wealth of information, including a link to Chapter 718, the Florida Condominium Act.

Question: I am new to condominium living, and want to know if the association's board is out of line, or whether I am being overly sensitive. My unit was in very bad condition when I bought it. It has been under construc-tion ever since, unfortunately a matter of months. Af-ter two months, complaints started. A member of the board has started contacting me to check on the status. Does the law give them the right to tell me what to do in my house? I also did not like the landscaping around

my home, and bought some better landscaping and had it installed. What do you think? — P.R. (via e-mail)

Answer: Condominium living is an eye-opener for some. Florida's courts have consistently said that although we are the kings of our castle, our fiefdom must yield in condominium living for the collective good.

While the association normally has no concern about what happens behind closed doors, remodeling jobs are a frequent source of contention. After all, your neighbors may be affected by noise from your contractors, workers coming and going, dust and dirt, etc. Many associations regulate interior renovations for these reasons, and some even prohibit extensive remodeling during certain times of year (such as the holidays and winter "season" months).

As to the landscaping, even though you thought you might be "improving" the area, the outside area is typically "common elements," even if it is near your home. This is within the exclusive jurisdiction of the board of directors, unless the documents state that the area is a "limited common element" and give you the privilege to improve it.

Question: I have what may be a unique situation. There is a retention pond in our neighborhood, which is designated as a common area. There is approximately three feet of land between the edge of each lot and the water's edge. I like to fish in the pond, and the board of directors does not have a problem with it. One of the neighbors tells me I am trespassing and has threatened to call the police. What is your opinion? — C.R. (via e-mail)

Answer: It depends. Most documents confer easements of enjoyment on every parcel owner in the common areas, for the purposes for which they are intended. Since the lake is intended for water management, it is doubtful that your documents confer the absolute right for you to use it for any other purpose. If the association's regulations permit fishing, then you should be permitted to fish in the lake, as long as you do not go onto someone else's property. Unless there is an access strip that allows you to get to the lake, or unless you yourself own a lakefront lot that would allow you to get to the lake, you could not access the lake without trespassing. You would not have the legal privilege to cross a neighbor's lot. ■

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Colleague Made Difference in SW Fla.

Fort Myers The News-Press, September 29, 2005

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For the past two months, this column has been dedicated to a study of common issues confronted by community associations when updating the constituent legal documents for their association. Today's column was supposed to continue that series, with a discussion of insurance issues.

However, that topic seems rather unimportant to me today.

This column runs every Thursday. My weekly routine usually consists of drafting an outline for the following week's column on Friday, writing it over the weekend, editing it on Monday morning, and submitting it to The News-Press editors by Monday afternoon for my deadline.

This past Friday, before I dove into my typically hectic workday, I received an early-morning telephone call. I was told that my dear friend and partner, E. Austin White, passed away unexpectedly the previous evening, at the age of 56.

Like me, Austin was a community association lawyer, primarily focusing his practice on assisting condominium and homeowners' associations in their daily operations. Austin practiced in both the Naples and Fort Myers offices of Becker & Poliakoff, and served as counsel and trusted adviser to many local community associations.

Austin had practiced law in Florida since 1976, relocating his family and his practice to Naples in 1999. During the past six years, I came to know Austin as an immensely talented attorney, a caring and compassionate man, and one of the world's truly good guys. Austin had an uncanny knack for engendering confidence and trust, qualities that are sadly becoming more scarce in my profession.

In addition to his association clients, Austin was also greatly regarded for his skills in land use and real estate development law, a craft he plied for some of Florida's largest developers.

Austin took great pride in drafting documents for developers that would not only address the developer's business objectives, but also work for the community after the developer had sold out the project and moved on. His legacy will live on in many local communities, such as Reflection Lakes and Spanish Wells, where his legal work serves as the constitution for the community.

I knew Austin well enough to know that while he would be proud to be remembered for his legal talents, it is more important to remember him as a person. The center of Austin's world was his young son, Robert Jackson White, whom he leaves behind to cherish his memories.

Austin was raised in Bethesda, Md., and graduated from Gonzaga High School in Washington, D.C., in 1967. He was an outstanding athlete and was later inducted into the Gonzaga High School Football Hall

of Fame. He received a degree in criminology from the University of Maryland in 1972 and obtained a law degree from Stetson University College of Law in 1976.

He is survived by his son, Robert Jackson White, his mother, Joan White, sister Nettie White and her daughter Emily Rose White. Austin loved life and cherished the time he spent with his beloved son, Jackson. He'll be greatly missed by many friends and family and all those touched by his fun-loving spirit.

Austin was one to look for the positive side of all things. Since this column is intended to give practical advice, my advice is to keep things in perspective when sweating the small stuff, take time to smell the roses, and tell those you should that you love them, every day. ■

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Condominium Leasing Rights Frequently Amended

Question: Our community consists of 1,200 homes. There are 20 housing clusters, each with its own association. The overall project is governed by a "Community Services Association," with an elected board of directors, to whom the general manager reports directly. My question is whether we are entitled, under Florida laws, to know the salaries of the general manager, and those who are employed by the master association. — N.B. (via e-mail)

Answer: I am assuming that your master association is a "homeowner's association" governed by Chapter 720 of the Florida Statutes. In this regard, Section 720.303(4)(j)4 of the law states that any records which "identify, measure, record, or communicate financial information" are part of the "official records" of the association, and therefore subject to inspection by any homeowner, after 10 days' written notice. Employee salary information would appear to fall within that category.

However, there is also a list of documents that are specifically exempted from the definition of "official records," and which are not available for inspection. These include attorney-client privileged documents, information the association obtains in connection with the approval of a sale or lease of a parcel, and certain medical records. Further, the law exempts "disciplinary, health, insurance, and personnel records of the association's employees."

The law does not define what is meant by "personnel records." In my opinion, the definition of "personnel records" is broad enough so as to include employee salary information, at least on an employee-by-employee basis. Therefore, I believe those records are not to be made available by the association. However, the law is not entirely clear on this point.

Conversely, if all of the clusters in your development are made up of condominiums, then your master association is what is known as a "condominium master association." In that case, there is no exemption in the governing law (Chapter 718) for personnel records, and the salary information would need to be made available.

Question: My question involves how you define a quorum for a "meeting" of your association's board, which entitles owners to attend a board meeting. Are board members allowed to send e-mails to each other discussing association business? Stated otherwise, does e-mail constitute a "meeting" of the board of directors? — B.D. (via e-mail)

Answer: I would refer your attention to a series of columns I wrote called "Community Association Sunshine Law, Course 101," which are available on the Internet. The articles ran in a seven-part series, starting on Jan. 20, 2005. The series was also produced into a written booklet, which is available at various educational seminars.

As stated on Page 3 of the booklet, this is definitely a gray area in the law.

In the days of old, if Director A wrote a letter to Directors B, C, D and E, that letter was not a meeting because there was no "gathering" of the board. If Director B replied with a letter to Director A, and copied Directors C, D, and E, that letter was likewise not a "meeting," although the letters would be considered part of the "official records" and would need to be retained in the association's files.

Now, correspondence which used to take a couple of days to be received is received within a couple of seconds. We know that many board members set up board e-mail groups, and items of association business can be debated by e-mail ad infinitum, to the point where not only does the development of ideas occur, decisions may actually be made.

To throw a bit more sauce into that mix, there are also situations where an agent or executive officer of the association (such as a board president or community association manager) may already have the authority to do something, but would like to "poll" the other board members for support. If the president already has the authority to take a specific action (for example, counseling an employee about perceived problems), does getting e-mail support for that action turn it into a vote?

These are all questions that will need to be sorted out by the courts, the relevant enforcement agency, or preferably through further guidance in the governing statutes. In my view, until the law is written otherwise, e-mail interactions are not technically "meetings." However, I am aware of at least one case where a condominium association received a stiff fine for conducting all of the association's business through e-mail, and never holding board meetings.

Therefore, discretion is clearly the better part of valor (not to mention legal protection) when in doubt.

Question: I live in a condominium association with an annual budget of more than $1 million. The 2004 audit has still not been received. Am I correct in believing that the law requires this to be done by March 31 of each year. What are the consequences for non-compliance with the statute? — N.P. (via e-mail)

Answer: Section 718.111(13) of the Florida Condominium Act requires an association with receipts in excess of $400,000 to produce an annual audit. The only exception permitted by the law is if your members have, by majority vote, voted to waive the audit and permit a lower-level financial report. This vote must take place before the end of the fiscal year.

Assuming that no waiver vote was taken, the report must be made available no later than 120 days from the end of the fiscal year. The association is not required to mail out the audit, but instead can mail out a notice that the audit is available, free of charge, for those who want it.

Failure to comply with the association can result in administrative action against the association by the Division of Florida Land Sales, Condominiums and Mobile Homes. The association could be subject to a fine of up to $5,000 for repeated violations of the statute. ■

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Guidelines for Condo Insurance

Fort Myers The News-Press, October 6, 2005

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Today's column is the ninth part of our series about updating the legal documents for your community association. In the first eight editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest usage restrictions and talked about transfer restrictions.

Today's topic: insurance requirements for condominium associations. The Florida condominium law simply provides that an association must maintain "adequate" insurance. The law does not define what "adequate" means, nor generally the required types of insurance which an association may carry. In my opinion, it is important for the declaration of condominium to specifically guide the board on what type of insurance requirements apply to the association. The following is a list of the different types of insurance coverage generally applicable to condominium associations.

- **Casualty insurance:** This is the insurance policy that pays to reconstruct the property after a calamity such as a fire, tornado or hurricane. State law mandates the condominium association's insurance of the structures. The statute should be carefully consulted for an understanding of exactly how the line is divided between the association's insurance obligations and the obligations of the individual unit owner. Contrary to popular belief, insurance and maintenance obligations may be entirely different for the same item. For example, most documents require the unit owner to maintain interior doors, while state law requires that they are to be insured by the association. Often, older condominium documents will impose stricter insurance requirements than what is generally available in the market. For example, while many documents require full replacement cost insurance, most associations now place insurance which contains a deductible. A well-written set of documents also will discuss how deductible expenses are allocated in the event of an uninsured or under-insured loss.

- **Flood insurance:** Many condominium associations carry a master policy of flood insurance. For communities located in federally designated flood hazard areas, mortgages will not be written unless adequate flood insurance is in place. The condominium statute states that an association "may" carry flood insurance. As stated in my Sept. 9, 2004, column, I believe that flood insurance is legally required under the auspices of "adequate insurance" in many situations, and is a good idea in every case. In any event, the declaration of condominium should contain clear guidance on this point.

- **Liability insurance:** The general liability insurance policy is the insurance the association buys for most types of personal injury claims. For ex-

ample, if someone trips on the property and files a suit, the general liability policy is the insurance that provides protection. I recommend that the declaration specifically require the board to obtain liability insurance. Many older documents require minimal amounts of insurance (such as $300,000), which is no longer commensurate with modern day risks.

- **Workers' compensation:** Unless the association employs four or more employees, workers' compensation is not legally required. However, many associations which do not employ four or more people still purchase a "minimum premium policy." The purpose of the minimum premium policy is to provide stop-gap protection in the event an uninsured worker is injured on association premises. The benefit of workers' compensation is that it is the exclusive remedy for injured workers, meaning they cannot sue, but are entitled to a legally stipulated schedule of benefits to compensate them for their injuries. This should again be addressed in the declaration of condominium.

- **Fidelity bonding:** Sometimes called "crime coverage," "employee dishonesty coverage," or "fidelity bonding," this type of insurance is basically designed to protect against theft or embezzlement by employees, directors, management personnel, or others who might have access to association funds. It is important to understand that a management company having its own fidelity bond may not be sufficient to protect an individual association. For condominiums, there is a statutory requirement that the minimum amount of the fidelity bond be equal to the maximum amount of money that could be stolen (i.e., the maximum amount of money on deposit in all association accounts at any given time). Since this is a fluctuating number, the association should make certain that adequate coverage is in place, particularly in situations where large amounts of money may be at hand due to a special assessment. Although the law sets the minimum amount of coverage required, I think it is a good idea for the documents to contain a specific obligation for fidelity bonding, so that the layman board member who may not read the law will know from reading his or her documents that the bond is required.

- **Directors and officers liability insurance:** Usually called D&O insurance or E&O (errors and omissions) insurance, this is one of the most important policies for the association. The purpose of the D&O policy is to provide coverage in a defense (a lawyer) if a suit is brought against the association (other than for personal injury) or its directors. I do not believe anyone in her right mind would serve on an association board that did not have D&O coverage, and I strongly believe it should be mandated through the declaration of condominium, not a permissive decision to be made from time to time by the board of directors or property manager.

Next week, we will take a look at insurance issues applicable to homeowners' associations, and if space permits, discuss the provisions regarding repair of property after casualty. ■

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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Director May Vote, Even with a Conflict of Interest

Question: The secretary on our board also works for our management company and votes on all issues regarding contracts. This appears to be a conflict of interest. I know that a board member may abstain from voting because of a conflict of interest, but where in the statute does it state that the board member cannot vote if there is a conflict of interest. — R.R. (via e-mail)

Answer: First, I assume that the association's secretary is also a board member. You are correct that a board member may abstain from voting in the event of a conflict of interest. In the condominium setting directors may only abstain from voting when there is a conflict of interest. In a homeowner's association setting the relevant statute does not limit abstentions to only conflict of interest situations, and thus a director in a homeowner's association can abstain from voting for some other reason as well. However, neither the Condominium Act nor the Homeowners Association Act state that a director cannot vote when there is a conflict of interest.

Notwithstanding, when there is a clear conflict of interest, a director should abstain from voting based upon fiduciary duty. For example, if a vote being taken by the board dealt with granting approval for a unit owner to take some type of action (for example, enclosing a lanai), if the unit owner was on the board he should abstain from voting on that issue. Similarly, if your board was voting on an issue that dealt with the contract with the management company, the board member who works for the management company should abstain from such a vote, and should excuse himself or herself from the room while the issues are being discussed.

As relates to contracts, there is a specific section in the Florida Not-For-Profit Corporation Act, Section 617.0832, which provides that a contract between a corporation and one of its directors will not be void or voidable because of such relationship or interest if certain criteria are met. First, the fact of such relationship or interest must be disclosed or known to the board which authorizes the contract by a sufficient vote without counting the votes of the interested director. Secondly, the fact of such relationship or interest must be disclosed or known to the members entitled to vote on the contract, and they authorize it anyway. Finally, the contract must be fair and reasonable as to the corporation at the time it is authorized by the board.

Question: Our developer wants to complete the transition of control of our condominium association (turnover), but members of the association do not want to assume control until the developer takes care of several outstanding issues. Can we stop the turnover by refusing to sign off? Can we stop the turnover by refusing to appear at the turnover meeting and ensuring that less than a quorum attends? — E.A. (via e-mail)

Answer: You may know that developers are required by statute to turnover control of a condominium association by a certain date that is determined by the date that a threshold percentage of units are sold in the development. Most governing documents also permit the developer to turnover over control of the association at any time prior to the statutorily required dates.

The "turnover meeting" does not require a quorum of members nor is the membership required to formally accept or even acknowledge the assumption of control of the association. If the developer gives proper notice of the turnover meeting, then the developer-controlled board of directors may resign their positions and make the statutorily required documents available for pickup by the membership. If the membership does not take steps to elect a new board, there will simply be an association with no board of directors.

Therefore, you cannot stop a properly noticed turnover of a condominium association. However, you may be

comforted to know that any claims the membership or association has against the developer are not affected by the turnover. Any "sign-off" that the new board grants should be limited to an acknowledgement of receipt of documents only, and should not address any substantive issues.

Question: I have a question about whether someone who is not a unit owner in a condominium can run for the board. I manage a condominium where a husband and wife live in the unit, but only the wife's name is on the deed. The husband has submitted a candidacy form to run for the board of directors. Our condominium documents are silent on the issue. Can the husband run for the board? — C.F. (via e-mail)

Answer: The only requirement for service on a condominium association board established by law is that candidates must be natural persons at least 18 years old. Further, convicted felons are not entitled to serve on an association board unless their civil rights have been restored.

The condominium documents, usually the bylaws, can impose additional criteria for board membership, such as term limits and ownership requirements. However, in the absence of the requirement for ownership in the condominium documents, there is no such requirement in the law.

Therefore, assuming that the association's legal counsel agrees that the documents are indeed silent on the issue (managers are precluded by law firms rendering legal opinions), the resident/husband, even though not a titleholder, should be permitted to stand for election. ■

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Insurance Should be Boards' Business

Fort Myers The News-Press, October 13, 2005

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Today's column is the 10th part of our series about updating the legal documents for your community association. In the first nine editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage restrictions and transfer restrictions, and discussed condominium insurance requirements.

Unlike the condominium requirements discussed last week, the Florida statute applicable to homeowners' associations, Chapter 720, makes no mention of HOA insurance requirements. Rather, the standards for the HOA will be set by the governing documents and concepts of good business judgment and fiduciary responsibility. Like its condominium cousin, the homeowner's association board will want to ensure the governing documents provide guidance and a directive to obtain liability insurance, fidelity bonding and workers' compensation, if required.

The HOA's governing documents will also usually require the association to obtain hazard insurance (fire, windstorm and hurricane, flood, etc.) if there are common area structures, such as a clubhouse or meeting facility. Hazard insurance on the individual homes is a bit trickier. Many homeowners' associations operate in a quasi-condominium setting, and insure the basic building structure against casualty losses. This is especially true in attached-dwelling communities, such as town house communities, "quads," and similar structures with party walls. In these cases, since there will be no default to the condominium statute for guidance, the documents need to be carefully and precisely written as to who is responsible to insure what, against what type of losses, and who will be assessed (the individual owner or all members of the association) if there are insufficient insurance proceeds for rebuilding.

Another issue occasionally confronted by associations involves scenarios where a homeowners' association amends the governing documents to take over maintenance of a particular part of the individual homes, such as the roofs. In such cases, it is important to make sure that the insurance and repair after casualty clauses in the documents also match up. Otherwise, the individual owners and the association could each be thinking the other is insuring the roofs, only to find out that no one has done so.

Finally, an issue often confronted in updating documents is whether, in a typical HOA setting of single-family detached homes, the association has any business in whether owners carry insurance, or whether they should be permitted to "self-insure." I submit that as a consequence of our recent hurricane experiences, it is entirely appropriate for a homeowner's association to make sure that individual homeowners carry adequate insurance to rebuild their homes after a calamity such

as a hurricane. Otherwise, everyone's property values could suffer if homes in the neighborhood sit unattended for months or years, with the owners choosing to have "walked away," and a likelihood that nothing will happen until a bank forecloses a delinquent mortgage or a real estate investor sees an opportunity.

Next week, we will take a break from the amendment series and talk about the Florida Advisory Council on Condominiums, which is coming to town. The week following, we will pick up the series again with a discussion of amendments to the governing documents regarding the repair of community association property after a casualty, such as a fire, flood, or hurricane.

LEE COUNTY LOSES POPULAR MANAGER

I am saddened to report that Beatrice Diller, a well-known community association manager in Lee County, passed away recently, after a courageous battle with cancer.

Those of us who called Beatrice a friend, business associate, or steward of our community, mourn her untimely passing at age 53. Beatrice was the owner of Top Management, one of Lee County's most well-respected management firms, and one of the longest-tenured woman CEOs in a somewhat male-dominated business.

I will always remember Beatrice for her unflappable nature, her calmness during periods of crises, and her knack for finding practical solutions to tough problems.

Beatrice served as longtime adviser to local communities such as Kelly Greens, Cinnamon Cove and Harbour Isle. Her leadership in those communities, and many others, will long be remembered, and missed. ■

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It's Never Too Early to Learn How Association Works

Question: I live in a new development that is set up as a homeowner's association. Our builder/developer is preparing to turn over control of our association to the homeowners. I was wondering if you could point me toward some resources, a Web site, or other materials that would help us prepare. Our board of homeowners has not yet been elected, but a group of our homeowners is trying to understand the process so that we can operate our community in an orderly and efficient manner.— M.W. (via e-mail)

Answer: I am not aware of any Web-based resources directly on point.

I am aware of one book geared toward the operation of homeowners' associations in Florida which many readers have told me is a concise and understandable layman's guide to operations of homeowner's associations. It is called "The Homeowners Association Manual," Fifth Edition by Peter Dunbar and Marc Dunbar, creators of a similar guide for condominium associations. I believe it is available in most large bookstores, and can be ordered online as well.

Your community is fortunate to have a group of interested citizens who want to protect your investment. As a practical matter, there is little that you can do legally until elected to the board. However, that does not mean that you should not understand the process and, so to speak, have your ducks in a row.

Those who are interested in serving on your association's board should study the governing documents for the community; the declaration of covenants; articles of incorporation; bylaws; and rules and regulations (if there are any).

I would recommend that your homeowner's association retain an attorney who is conversant in this area of the law to be available for consultation as questions arise. You should also determine whether the community is going to be self-managed, or if you are going to hire a management company. Most management companies will provide proposals, and free-of-charge interviews, even before the turnover occurs. You will also want to establish relationships with a certified public accountant and an insurance agent.

Homeowners' associations governed by Chapter 720 of the Florida Statutes come in all shapes and sizes. Some have thousands of members, own significant assets (golf courses, clubhouses, etc.) and employ scores of personnel. Others' jurisdiction may be limited to ownership of a street, or some other minimal common area, and the enforcement of covenants and restrictions for the community. The exact nature of your community will largely dictate how much "due diligence" is necessary to pursue in connection with your turnover. At the least, you need to insure that the common areas are properly deeded over to the association, free and clear of liens and encumbrances. You should also inventory the contracts to which the association is a party, so that you are aware of the association's contractual obligations, contract renewal dates, and the like.

More substantial associations in terms of size and jurisdiction will also need to look at issues like surface water management, personnel, and common area warranty issues.

One of the most important things for the association, when you take over control, is to make sure that all required insurance is in place. Many associations do not carry directors and officer's liability insurance prior to turnover, and one of the first orders of business should be to make sure that your volunteer directors and officers are protected against lawsuits through insurance.

If your community was created after Oct. 1, 1995, the developer must also comply with the turnover requirements found in Chapter 720 of the statute applicable to homeowners' associations. In general, this requires all of the books and records of the association to be turned over from the developer-controlled board, to the homeowner-controlled board, within 90 days of the turnover meeting. Good luck.

Question: We have 31 members in our association. My question is how you determine what a "majority" is for voting purposes. For example, if 15 votes favor a measure, 14 vote against, and two do not vote, is that "majority approval," or do we need 16 votes? Can you shed any light on this issue. — G.O. (via e-mail)

Answer: This is a common question, and unfortunately there is no one-size-fits-all answer.

First, you need to read each of the governing documents for your community; the declaration of covenants, articles of incorporation, and bylaws. Each of them should spell out specific voting requirements for certain actions, such as amendments of each of those documents.

In a homeowner's association, each home (usually referred to as a parcel, lot, or unit) is normally assigned one vote, which is called a "voting interest." Let us say for example that the bylaws provide that they can be amended "by a majority of the entire voting interests." Here, it is clear that you would need 16 votes for an amendment.

Conversely, the bylaws might say something like "these bylaws may be amended by a majority of the voting interests present and voting, in person or by proxy, at a duly called meeting of the association at which a quorum is present." In this scenario, you would only need to establish a quorum for a meeting (typically 30 percent in a homeowner's association) and the majority of those who vote (in person or by proxy) would carry the measure. Therefore, in your example, the measure would carry with 15 in favor, 14 opposed, and two not voting.

Unfortunately, many documents are not clearly written on this point. For example, if the bylaws simply say that they may be amended by a "majority vote," does this mean a majority of the entire voting interests, or only a majority of those who vote? While Robert's Rules of Order suggest that voting is based upon those who actually vote, Robert's Rules of Order are not part of Florida's law, and are not incorporated into many documents. Further, even if the documents incorporate Robert's Rules, I am aware of at least one condominium arbitration decision which found that a majority of the entire voting interests would need to approve the measure under that language.

In order to protect the board of directors from challenges to association actions, when in doubt, ask the association's attorney for an opinion on the required vote to pass a particular measure. An attorney experienced in this area of the law should be able to provide an answer with minimal research and expenditure on your part. ■

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Condo Council Coming to Area

Fort Myers The News-Press, October 20, 2005

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The Florida Advisory Council on Condominiums will be coming to Fort Myers on Monday, October 24, 2005.

The Council was created by the Florida Legislature during the 2004 legislative session, and held its first meeting in January of this year. The Council consists of 7 members, 3 of whom are appointed by the Governor, two being appointed by the Speaker of the Florida House of Representatives, and two appointed by the President of the Florida Senate.

Council members serve two year terms, with seats taking effect on October 1 and ending on September 30. Council seats are staggered, so that 3 members are appointed in odd numbered years (2005, 2007, etc.) and 4 members are appointed in even numbered years (2006, 2008, etc.)

The Advisory Council was an idea that was tried in the early 1990's, and was abolished by the Legislature as its meetings were poorly attended by condo dwellers. Because of all of the recent focus on the balance of rights and responsibilities between association members and boards, the legislature apparently felt the idea was worth another go.

The Council has held 5 meetings so far. The first two were held in Tallahassee and were organizational in nature. Subsequent meetings have been held in Panama City Beach, Miami, Orlando, and Fort Lauderdale. The Council has held its "public input meetings" at times that will enable working people to attend, either Saturdays or evenings.

The October 24th meeting in Fort Myers will begin at 5:00 P.M., and will run until 10:00 P.M., or until all public input has been heard. The meeting will be held in the Seven Lakes Condominium Community, which is located in South Fort Myers, on U.S. 41, directly across from the Bell Tower shopping complex.

Members of local legislative delegations are typically notified of and invited to attend Council meetings, and 5 of the 6 meetings have been attended by at least one member of the Legislature. Turnout at Council meetings so far has been sporadic, with Miami's meeting drawing a crowd of nearly a hundred, while the Orlando meeting only attracted about 10 participants.

The Council's purpose is to listen to what members of the public have to say about condominium living, and make recommendations to the Legislature as to whether the laws need to be changed, and if so, how. The Council is specifically tasked with reviewing the role of the Division of Florida Land Sales, Condominiums, and Mobile Homes, the state agency that is responsible for enforcement of the law. Among other responsibilities, the Council is to determine if the Division's education of its condominium constituents, both unit owners and board members, can be improved.

There are many opposing points of view about the best way to encourage peace and harmony in condo living. The so-called "consumer advocates" typically rail for a more punitive regime, such as the levy of personal fines against board members if the law (or their interpretation of it) has been violated. On the other end of the spectrum, some feel that homeowners' associations seem to get along just fine without mandatory government regulation, and that condominium associations would be less fractious if governed like most corporations, under the law of contract.

The Council has focused much of its effort on the appropriate role for the new Office of Condominium Ombudsman, which was established by the same law that created the Advisory Council. The Council has met with the Ombudsman twice, and has also reviewed his legislative recommendations, which include four year term limits for all board members, and a proviso that no person could hold the same office, such as serving as president of the board, for more than one year.

The Council has voted to issue a report of recommendations to the Legislature in late November or early December of 2005. So the Fort Myers meeting may be the last chance for public input before the Council's recommendations are made. Whether you are for more laws, less laws, different laws, or no laws at all, this is your chance to be heard.

The Council will also be meeting the following day, Tuesday October 25, 2005 at 10:00 a.m., to work on its report. The meeting will be held at 14241 Metropolis Avenue, Suite 100, Fort Myers, Florida. This meeting is also open to the public, although no public testimony will be taken at the Tuesday meeting. ■

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Focus on Correct Terminology to Understand Budgets

Question: Our manager has suggested that our board switch over to what she refers to as "cash flow" reserves. I think we should keep high reserves, and do not favor reducing them. We have many elderly owners in our condo who cannot afford large special assessments, and that is why we keep a healthy reserve fund. Our manager says that we can lower our monthly maintenance fee, but still have a full reserve fund. I don't understand this, could you please explain. (A.L., via email).

Answer: With the exception of "sunshine law" questions, I get more inquiries about budgets and reserves than any other topic. The laws are a bit complicated, but manageable to understand, if you focus on the correct terminology.

Your association's annual budget has two parts, the operating side and the reserve side. The operation budget covers insurance, professional fees, payroll, management, and other day to day expenses. In most associations, the board adopts the operating budget, without the need for approval from the association members.

The reserve side of the budget is for items that are usually addressed less than annually, called deferred maintenance and capital expenditures. The condominium statute requires that reserves be set up for building painting, roof replacement, pavement resurfacing, and any other capital expense or deferred maintenance item that exceeds $10,000.00.

Each reserve account must be funded based on a mathematical formula which takes into account the useful life and replacement cost of the item. The board must "fully fund" each of these reserve accounts through the annual assessment, unless the owners vote to reduce or waive the funding of the accounts. Such accounts, when fully funded, are known as "straight line funding". By law, the reserves can only be used for the purpose for which they have been accrued unless a vote of the owners is taken.

The "cash flow" or "pooling" method of reserves is still theoretically a fully funded account. Instead of segregating each reserve item, the accounts are "pooled". The association attempts to predict in a given year when a capital asset will need to be replaced, and funding is adjusted each year. Unlike the straight line method, money in the "pool" can be used for any proper reserve purpose, without a vote.

The cash flow law is fairly new, so it remains to be seen if it is all it is cracked up to be. One benefit for the board is greater flexibility.

The board has the authority to switch from straight line funding to cash flow funding, as long as the proper disclosures are made in the reserves schedules. However, existing funds in straight line accounts cannot be moved over to the pooled fund unless a vote of the association members is taken.

Question: We are having a debate in our homeowners association as to whether the law requires minutes of our board meetings to be mailed out. Our board meets when many of our residents are at work, and the records are kept in the Secretary's home, since we do not have a management company. I say that the minutes must either be posted or mailed out to our members. Is that correct? (M.L., via email).

Answer: No.

Chapter 720 of the Florida Statutes, the law applicable to homeowners' associations, requires minutes to be kept of all board meetings, and maintained for at least 7 years (I recommend maintaining board min-

utes perpetually). The minutes are part of the "official records" of the association, and are available for inspection and copying by any homeowner, on 10 days written notice to the association.

However, there is no requirement in the law that the minutes be mailed out or posted. Obviously, boards should strive to keep the association members informed of the community's business, and mailing out minutes is a good way to do so. However, this entails both expense and the need for volunteer labor, which are often both stiff challenges in associations, particularly smaller communities and self-managed associations.

Posting the minutes is inexpensive, if there is a place to do so. Setting up a website is an alternative, as is an email list so the minutes can be sent out. A newsletter is another alternative.

You might consider volunteering to help your board by getting the minutes published in one of these manners. In my experience, they would likely jump at the chance for some help

Question: Are the documents created by a professional property management company employed by a homeowners' association board subject to the same "official records" rules as those created by the board itself? (R.F., via e-mail).

Answer: Section 720.303(4)(a) through (l) of the Florida Homeowners' Association Act defines "official records". Subsections (a) through (k) of that section identify items such as plans and specifications, articles and bylaws, meeting minutes, contracts and financial records, all of which are undeniably records of and pertaining to the association. Such items are clearly official records of the association, regardless of their authorship.

Subsection (l) of section 720.303(4) includes, "All other written records of the association not specifically included in the foregoing which are related to the operation of the association." The question then becomes, "what documents created by a management company are "related to the operation of the association?" Because a management company is an agent of the association, any documents not subject to confidentiality under the statute that are created by a management company on behalf of the association are clearly included within the definition of "official records". ■

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Wilma's Visit Means Dealing with Repairs

Fort Myers The News-Press, October 27, 2005

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Talk about timing!

Today's column was supposed to continue our series about updating the constituent legal documents for your community association, with today's emphasis on the provisions of the documents which provide guidance about repair after casualty. Never in my wildest imagination did I think that a late-October column about disaster repair issues would qualify as a "current events" piece.

As with Hurricane Charley 14 months ago, Southwest Florida took one directly on the chin from Wilma. Like Charley, Wilma was moving at a brisk pace, as far as hurricanes go, when it made landfall here. As with Charley, although moderate flooding was experienced in some localities, we did not see the catastrophic storm surge that might accompany a slower-moving storm of this magnitude. Additionally, although there appears to have been widespread wind damage, it does not appear to have been as intense as when Charley made its more compact buzz-saw path a bit further to the north on August 13, 2004.

Nonetheless, nearly every community association will be dealing with post-hurricane repair issues, which may be as mundane as cleaning up landscape debris, or as significant as re-roofing buildings. Therefore, while we will get back to the discussion of legal document amendments in a couple of weeks, I would like to pass on some post-hurricane tips for community associations:

- **Shore-Up:** The first order of business for an association is to ensure that the community can be safely accessed as soon as the local government authority has permitted entry back onto the property. This will include clearing landscape debris and assessing the premises for dangerous conditions, such as broken glass, jagged metal, or exposed electrical lines.

- **Dry-In:** As soon as the property can be safely entered, the association must make sure that the buildings are protected from further damage, particularly water intrusion. Although we were "fortunate" to have Wilma followed by some cool-dry weather, there is no guarantee that it will hold. The association's insurance policies likely require taking reasonable steps to mitigate damage. Appropriate dry-in techniques will vary between different types of construction, often involving patches or temporary roofs on high-rise buildings, and the ubiquitous "blue tarps" on low-rise structures. Windows and sliding glass doors may need to be boarded up, although in some cases the building will need fresh air circulation.

- **Dry-Out:** One of the most important steps in preventing mold taking hold is to extract water from the buildings. Keep in mind that even though parts of a building may appear "dry" a day or two after the storm, water "wicks" (saturates into the gypsum-board and migrates downward). This situation should be monitored

closely, carefully, and continuously. A common source of dispute is when water invades only a single unit, such as in a case where water is wind-driven under a unit's door, or enters through a blown-out or leaky window. This is especially problematic in many condominiums because, even in late-October, a fair number of units are still unoccupied by their seasonal residents. My general advice is for the association to take the lead in getting the water out now, and you can argue later about who should pay the extraction costs.

- **Inspect and Re-Inspect the Units:** I recommend that the association inspect every unit within its jurisdiction. Hopefully, the association has a key. Remember, even if no problems are detected a day or two after the storm, that does not mean problems will not manifest themselves sometime later.
- **Engage an Expert:** The best protection for the association and the board of directors is to have a qualified professional assist in post-disaster assessment and remediation. This will typically be an independent engineer or licensed construction consultant. In my opinion, relying on a property manager (who is not licensed to dispense technical advice), a contractor (who stands to benefit from the advice given) or even an attorney (who is trained in the law, but not engineering) is unwise. Every situation will present different dynamics, and under Florida's "Business Judgment Rule", the board is entitled to rely on the opinion of professional consultants in deciding the best course of action. Remember "haste makes waste", and the decisions the board makes next week, may be examined under a microscope next year.

Next week we will talk about traps for the unwary in post-hurricane construction contracts. ■

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Association Should Have Storm Shutter Specifications

Question: I live in a condominium on the second floor. I would like to have hurricane shutters installed. I want roll-down shutters because the only way to get to the back window of my unit is with a very long ladder, making it difficult and costly to have panels put up and taken down each time we have a hurricane warning. The Board will not allow me to install roll-down shutters because they do not want anything permanent attached to the building. Is this legal? RBC (via e-mail)

Answer: The association, through the board of directors, is charged with the responsibility of administering and maintaining the common elements of the condominium, which typically includes the exterior of multi-unit buildings. Section 718.113(2)(a) of the Florida Condominium Act prohibits any "material alteration" of the common elements unless permitted by the declaration or, in the absence of a provision in the declaration, unless approved by seventy-five percent of the owners. Therefore, the board is, itself, restricted as to what it can and cannot approve to be installed on the building.

However, Section 718.113(5) of the condominium statute requires that the board adopt hurricane shutter specifications, and further provides that any owner who proposes to install shutters in accordance with those specifications must be permitted to do so. The process of adopting hurricane shutter specifications is part of the board's rulemaking authority. All rules enacted by the board must be reasonable.

Therefore, the answer to your question is a question of fact concerning whether it is reasonable to require you to endure the cost and difficulty of installing the panels in light of the board's competing desire and obligation to maintain the appearance of the condominium. A 1995 decision from the Division of Florida Land Sales, Condominiums and Mobile Homes' arbitration program does specifically include the difficulty in losing the type of shutters that are approved by a condominium board as one consideration in determining the reasonableness of the specifications.

Therefore, as long as your board's specifications meet the applicable building code, the specification will be upheld as long as it is "reasonable." What may be "reasonable" in one type of building may not be in another.

In my opinion, especially after the experience of the past two years, condominium associations should go the "extra mile" in encouraging the installation and use of hurricane shutters. You are correct that when removable panels must be installed on the upper levels of a building, it can be difficult as a storm approaches. Many owners are away for the summer, many are not in adequate physical shape to be climbing on ladders (nor would the association want them to) and finding contractors in Southwest Florida is always a challenge, let alone the day or two before a major hurricane strikes.

Permanent-type hurricane shutter specifications can be adopted which, if consistently applied, should have minimal aesthetic impact on the buildings. I think your board should reconsider its position on this issue.

Question: I read with great interest your recent article regarding condominium rental restrictions. We own a second-home type of condo unit in a 46-unit complex. I am a member of the board, and we are struggling with rental restrictions.

Our rental numbers have nearly doubled recently, and this is slowly destroying the family atmosphere we bought into. The typical new owner is an

investor-type buyer who is banking on appreciation, and renting to the hilt in the mean-time until they can get their price. What they do not understand is that the more rentals we have, the lower our property values go.

I made a presentation on the topic at our last annual meeting, and there was near unanimous support for full rent restrictions for new owners. After further study, including review of your past columns, it appears that a "yes" vote would apply to any owner who votes in favor of an amendment. We were thinking of a different angle, such as stating that a unit owner must hold title for a set time, say two to five years, before they could lease. Would that stand up in court? S.K. (via e-mail)

Answer: Regulation of rentals is probably the most contentious issue in condominium governance. While you say that more rentals hurts property values, your neighbor may feel the exact opposite. I can tell you that it is harder to get mortgage financing in a project with a high percentage of rental units.

Each community must address their rental situation individually, there is no one-size-fits-all answer. What works for a "55 and over" mobile home park primarily populated with seasonal retirees would have little relevance to a beach-front condo with a rental program.

Florida's condominium law was amended effective October 1, 2004 to provide that 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.

I feel that an amendment which requires a person to hold title for a set time before leasing would be upheld, if done as a properly enacted amendment to the declaration of condominium. However, under the new law, you could not apply that clause retroactively to anyone who did not consent to the amendment. Human nature being what it is, why would anyone consent to the amendment? People do not think it is fair for their next door neighbor to have greater rights than they have.

Although the courts have historically frowned upon creating different classes of owners through "grandfathering dates", I believe that the new law leaves associations who wish to enact rental restrictions with little choice but to use a "grandfathering" approach. I believe that you could write an amendment that says that people who take title after a certain date would have to hold title to the unit for a set time before they could rent. You would basically be "grandfathering" all owners as of the effective date of the amendment.

Legal counsel competent in community association law should be engaged to prepare the amendment, provide the board with an opinion as to the required percentage for adopting it, and also assist with the procedural aspects of adoption of the amendment, including preparation of the voting materials and recording the amendment if it has been approved.

Question: We are a small homeowners' association (100 homes) and want to look at management alternatives. What is the best way to select a manager? How do we know if they are meeting our needs? R.J. (via e-mail)

Answer: There are basically two types of management arrangements common in community associations. The first is the on-site manager, where the association employs an employee (the manager), who oversees the operation of the community. On-site managers are

typically found in larger communities and in many high-rise buildings. It would not be common for a homeowners' association consisting of 100 members to have an on-site manager.

This leaves you with the management company alternative. Typically, the best way to start is to select three or so (maybe four or five) management companies that you would like to bid on handling your association's business. You can create your bidder's list through recommendations from your legal counsel, other community associations you may be familiar with, or an experience someone on your board has had in a past residence. ■

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Do's and Don'ts of Repairing

Fort Myers The News-Press, November 3, 2005

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As the inimitable Yogi Berra once said, this is like *deja vu* all over again.

Although Hurricane Charley caused much misery and negative financial impact, local condominium associations at least can learn from their neighbors' lessons about the "do's and don'ts" of post-hurricane contracting.

As many associations unfortunately learned from Charley, leaping before you look in post-hurricane contracting can result in a disaster greater than the hurricane itself.

The following are some tips for associations:

- **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.

While associations may not have the luxury of extensive negotiations for immediately-required services (such as dry-in of buildings), the biggest mistake made by associations after Charley was signing what started as temporary repair contracts, but turned into major reconstruction contracts, with no legal protection. While the shortage of materials and qualified contractors that follows disasters entices many to take what they can get, this is usually a Category 5 mistake. ■

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Compare Management Teams Apples to Apples

Question: We are a small homeowners' association and want to look at management companies. How do we know if they will meet our needs? R.J. (via e-mail)

Answer: Management companies will typically provide a bid package including their marketing materials, as well as the price-quote for their services. Prices are usually quoted on a "per door" basis. However, be careful when comparing prices, you want to compare "apples to apples." You especially need to review those services for which the management company will be charging extra.

For example, I have seen a clause in some management contracts which permits the management company to extract a percentage fee for any insurance claim they help the association process. In my opinion, this is a terrible idea. As we have learned from the past two years' hurricanes, disaster claims can involve millions of dollars, and there is typically little relationship between what a management company will be asked to do after a significant casualty, and a percentage of the proceeds. On the other hand, the management company cannot be expected to provide extraordinary services for free, so an additional hourly charge at an agreed sum may be entirely appropriate.

It is also important to make sure that you know who will be handling your association's business. Most management companies have a number of managers, each of whom manages a specified number of association accounts. Most management companies will provide a free-of-charge interview if their bid is being considered. In addition to the principal of the management company, ask that the manager who will be assigned to your account also be present at the interview. Ask them about their experience.

There is no clear way to tell if a management company is meeting your needs. Obvious factors include their producing required records (financial reports, minutes of board meetings, etc.) in a timely fashion, and your owners perceiving them as being helpful when addressing problems. I am aware of some associations who have maintained a relationship with the same management company for many years. I have seen other associations go through a new management company every year.

The best way to protect the association is to make sure that the agreement can be canceled by either the manager or the association, with or without cause, on reasonable written notice (such as 30 days).

Good luck.

Question: I'm the president of a small association. The problem we have is with one resident who is feeding Muscovy ducks. Early this summer, we had four or five ducks and a couple pairs nested (suecess fully – unfortunately).

Long story short, we now have close to fifty ducks on the pond, this owner feeds them two times a day. We are getting numerous complaints from the residents because the ducks are all over the subdivision now and they are leaving a mess everywhere.

I have called animal control, the Fish and Wildlife Commission, and code enforcement, and they don't do anything about these ducks even though there are ordinances prohibiting their feeding.

What can we do to make this stop? Can we — as a board — hire a trapper to remove the ducks and bill the owner for the removal? Are there any other options? C.S. (via e-mail)

Answer: Communities often consider Muscovy ducks to be nuisance birds. The black and white

birds, with warty red flesh around their bills, leave common areas covered in feces, potentially creating respiratory problems for residents. The birds can also carry various flu viruses.

Section 6-39(a), Lee County Code authorizes the animal control agency to declare unsanitary conditions created by Muscovy ducks to be a health nuisance. If a health nuisance is determined to exist, the animal control agency may break the eggs and humanely euthanize the ducks. Where a nuisance is created by a Muscovy duck or ducks, and the ownership of or person responsible for the ducks can be determined, the owner or responsible person may be issued a citation for contributing to the creation of a health nuisance.

The nuisances created by these ducks may also give the board grounds to seek removal of these ducks as the association has a responsibility to protect those who use and occupy the common areas of the community from foreseeable hazards. The association's governing documents should be reviewed to verify the board's authority to act.

Question: I live in a "55 and over" condominium. We have a board of directors member that only has a "life estate interest" in the unit he occupies. His son is the "remainderman." Is there anything in Florida law that says that a life estate equals ownership? Our declaration of condominium and bylaws state that directors and officers must be unit owners. N.W. (via e-mail)

Answer: A life estate is measured by a "measuring life" and terminates at the end of the measuring life. A remainder interest is what follows the life estate. By law, a life tenant's use and enjoyment is only restricted in that he or she may not "permanently diminish or change the value of the future estate of the remainderman."

Under Florida law, the life estate holder is considered the unit owner, and is entitled to the use and enjoyment of his unit. This includes rights provided to the unit owners via the governing documents, for instance, the ability to vote on association matters and eligibility as a board member. Therefore, the unit holder as a life estate holder, is eligible to be a board member. ■

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Assigning Costs after a Calamity

Fort Myers The News-Press, November 10, 2005

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Today's column is the eleventh part of our series about updating the legal documents for your community association. In the first ten editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage restrictions and transfer restrictions, and discussed condominium insurance requirements.

Today's topic, how the documents allocate the responsibility and cost for repair after a calamity.

This clause in the declaration, usually called "repair after casualty", is one of those provisions that usually leads to glazed eyes and yawns when talking about document updates. While people naturally tend to focus their attention on amendments aimed at use and behavior (rental restrictions, pets, parking, etc.), the casualty repair provision is arguably the most important section of the documents, at least in terms of financial consequences. Just ask any condominium association which went through one of the 2004 hurricanes and is still fighting about how to allocate post-hurricane rebuilding costs.

There are several key elements which need to be considered when updating the clause on casualty repairs. Remember, this section of the legal documents will not only apply in cases of major catastrophe (such as a fire or hurricane), but also in more mundane situations, such as allocating repair and cost responsibilities after a hot water heater bursts and spews water for a couple of days on all of the neighbors below. Here are some basic points:

- **Vote For Rebuilding:** Many older condominium documents provide that if a set number of units are rendered "uninhabitable" as the result of a casualty, the condominium is automatically terminated unless a vote to rebuild is taken within a short time-frame of the event causing damage, often sixty or ninety days. The 2004 hurricanes taught several lessons in this regard. First, it is difficult to define what "uninhabitable" means. There are many buildings that should not or cannot be occupied for some period of time after a catastrophe, but certainly are not in a state where they will eventually be torn down. Secondly, after a major disaster devastates an area as Hurricane Charley did, it is virtually impossible to make decisions of this magnitude within sixty to ninety days. Factors contributing to this problem include the shortage of insurance adjusters, unreliable repair estimates, and the owners being scattered all over the country. It is preferable to provide in the declaration that the property will be automatically rebuilt (as opposed to automatically terminated) unless a vote of the owners is taken for termination. This basically reverses the presumption of automatic termination to automatic rebuilding.

- **Who Is Responsible To Fix What:** In condominiums, we are generally familiar with the concept of the unit owner taking care of the unit, and the association repairing common elements. However, as we learned in a previous installment in this series, the association will be responsible for insuring portions of the property that it neither owns nor has the general obligation to maintain. Interior partition drywall is a classic example. A well-drafted set of documents will be clear as to when the association can step in and undertake major portions of a rebuilding effort, even if portions of the individually-owned property (unit) are involved.

- **Allocation Of Deductibles:** One of the most confusing and contentious issues in condominium governance is how insurance deductibles are to be allocated. There are a number of sub-threads to this issue, including the fact that the association's master policy and individual unit owner's policy will both provide coverage (sometimes overlapping) when there is a casualty loss, each with its own deductible. This issue can have significant financial impact in a hurricane loss, where association master policy deductibles often run at an average of three percent of each building's value. The clearer the road map in your documents on deductible allocation, the less headaches the board will have when it needs to make the tough decision on how to spread the pain in terms of assessments.

- **Discretion In Rebuilding Specifications:** Many older documents provide that the association must reconstruct the buildings in accordance with the original plans and specifications. This presents a couple of problems. First, many communities cannot locate the original plans and specifications. More importantly, although significant damage from major calamities is a dark cloud indeed, there can be some "silver lining" in terms of an opportunity, with participation from insurers, to make desirable improvements to the property. Installation of hurricane-rated glass is one of those issues. Obviously, to the extent the documents give the board leeway in post-casualty repair, the less problem the association faces with "material alteration" challenges. On the other hand, it is probably not wise to give a board carte blanche authority to entirely change aesthetic features.

Obviously, the 2004 and 2005 hurricane seasons have heightened the awareness of the need for proper documentation which will serve as a guidepost in sorting out highly emotional and financially weighty issues. If you believe the weather experts, we are in for a 10 to 20 year cycle of heightened tropical storm activity. So, the upcoming months may be the time to look into that ounce of prevention, which is always cheaper than the pound of cure.

In the next installment of this series about document updates, we will consider the clauses in the document that allocate maintenance responsibilities as between the unit owner and the association. ■

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Self-insurance Law Complexity Deters Attempts

Question: I live in a condominium which has about 200 units. Because of the escalating cost of insurance, our board is considering being "self insured." Can this be done under Florida law? — A.D. (via e-mail)

Answer: Section 718.111(11) of the Florida condominium statute requires an association to maintain "adequate insurance." To the extent "self insurance" means that you would assess owners for uninsured losses, this would not be legal.

The condominium law does permit an association or group of associations to self-insure by complying with Section 624 of the Florida Statutes. However, this law requires establishment of loss reserves, annual audits, and oversight by professional insurance actuaries. The law is complicated enough that I have never heard of any condominium association or group of associations attempting to self insure under it.

Also, many condominium documents require the association to obtain insurance through companies with a specified track record, often tied to some type of commercial rating index.

Question: During both hurricanes Charley and Wilma, I was the only owner in our condominium who had a generator. I ran the generator while power was disrupted at our condominium. I understand that our board has received complaints about my generator running, and is considering proposing a rule or an amendment to our documents that would prohibit the use of generators at the condominium. What do you think? — J.N. (via e-mail)

Answer: Solomon himself would have a tough time with this one.

I have received numerous e-mails from column readers about the "generator issue," and they seem to largely run in opposition to generators being used at condominiums. Noise is usually cited as the main beef.

Obviously, you cannot run the generator indoors, and therefore it is necessary to operate it on the common elements, which you do not own (or which, technically speaking, you own in common with all of your neighbors).

If the board adopted a rule prohibiting post-hurricane generator use on common elements, it would be subject to the test of "reasonableness." Reasonableness is in the eyes of the beholder. I think that a blanket prohibition against the use of generators, through a board-made rule, might be suspect. A more narrowly tailored rule (such as one that prohibited running the generator during nighttime hours when people are trying to sleep) might have a better chance of passing muster.

If the ban is enacted through an amendment to the declaration of condominium, the courts have held that the restriction is not subject to a reasonableness test; it simply cannot be arbitrary or contrary to law. I think a declaration amendment would have a reasonable chance of passing scrutiny.

Question: I live in a village of condominium buildings and townhomes. One of the townhome associations does not enforce any of its rules. The association in question has allowed their owners to rent out rooms in their units. Some of the renters have old junker cars which make a lot of noise, are horrible looking, and often have no license plates. One of these renters has a pitbull which is too large for the rules on pets. We also have a problem with extended families who visit during the winter holidays and spring break. They take over the swimming pool and by sheer number and lack of discipline of the chil-

dren, make it impossible for anyone else to enjoy it. Everyone has complained, but because this association refuses to enforce any rules, there is little which can be done. Help! — M.M. (via e-mail)

Answer: AIt sounds like you live in a master planned community with different "sub-associations," each of which is responsible for administering its own regulations.

In most communities of this nature, there is also a "master association," which may have regulations that apply to the entire community, and are enforceable by the master association board. I would start by looking at that angle.

If you cannot obtain relief through the master association, your only resort would be to code enforcement, if any of the complained-of uses violated applicable laws or ordinances. If you are not a member of the neighboring sub-association, you do not have "standing" to enforce its regulations, nor insist that it do so.

Question: At what percentage of the homes sold (closed) is it suggested for the owners to start getting involved in the turnover process? How is the turnover committee organized and how are committee officers/directors elected? — C.T. (via e-mail)

Answer: For homeowners associations, the owners are entitled to elect a majority of the board no later than three months after 90 percent of the parcels in all phases of the development have been conveyed (a deed is given) to purchasers. The time at which condominium unit owners are entitled to elect a majority of the board may be determined by one of five different methods as set forth in Section 718.301(1), but the most common calculation for condominium association turnover is also no later than three months after 90 percent of the units that will be operated ultimately by the association are conveyed to the unit owners.

The formation and involvement of an "ad hoc" turnover committee is an important event at a key time in the life of an association, but there are no established statutes or rules governing these committees. The form of the committee, be it incorporated as a not-for-profit corporation with detailed bylaws, or just maintained as a loose organization of neighbors, is entirely up to those who organize it.

Typically, the developer will maintain contact with homeowners and will give sufficient advance notice that turnover is on the horizon to allow the members to get organized. Some developers, however, refuse to recognize "ad hoc committees," and will only address issues of common interest after a board has been duly-elected after the turnover. However, in my opinion, this does not mean that the neighborhood still is not well-served by having such a committee. I have dealt with many transition committees over the years, and find that, in general, they have a positive impact on the community and facilitate a smoother transition. ■

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Programs Provide Education

Fort Myers The News-Press, November 17, 2005

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Residents of local community associations are hungry for knowledge and education. While much is said about the need for more and better educational opportunities, the truth of the matter is that many board members, owners, and managers are unaware of existing programs.

Here's a look at some free programs and events available in Southwest Florida.

Edison College

For the past five years, the adult continuing education arm of Edison College has run a program in Naples aimed at condominium unit owners and board members. This year, Edison has decided to bring the program to Fort Myers as well.

A series of five classes are slated over the next several months. The first class was already held, and focused on the so-called "cash flow" or "pooling" method of establishing condominium reserves.

Here's a list of the remaining classes:

Disaster Planning and Recovery: Responsibilities of the Board of Directors
December 6, 2005 - Holiday Inn Bell Tower, Fort Myers: 9:00 a.m. – 11:00 a.m.
December 7, 2005 – Collier County Athletic Club, Naples: 9:00 a.m. – 11:00 a.m.

Human Relations For Board Members
January 3, 2006 – Holiday Inn Bell Tower, Fort Myers: 9:00 a.m. – 11:00 a.m.
January 4, 2006 – Collier County Athletic Club, Naples: 9:00 a.m. – 11:00 a.m.

Growing Green: Obtaining the Best Value for the Landscaping Dollar
January 31, 2006 – Holiday Inn Bell Tower, Fort Myers: 9:00 a.m. – 11:00 a.m.
February 1, 2006 – Collier County Athletic Club, Naples: 9:00 a.m. – 11:00 a.m.

A Legal Update: What's New? What's Coming?
February 28, 2006 – Holiday Inn Bell Tower, Fort Myers: 9:00 a.m. – 11:00 a.m.
March 1, 2006 – Collier County Athletic Club, Naples: 9:00 a.m. – 11:00 a.m.

The courses are free, but prior registration is required. For further information, please call Beth Hagan at 239-947-8085 or e-mail at BHagan7@aol.com.

Condominium Courses through CAI and DBPR

The Department of Business and Professional Regulation, through its Division of Florida Land Sales, Condominiums and Mobile Homes, is tasked with providing educational opportunities to condominium unit owners and board members. The DBPR's main educational pro-

gram is a series of courses which are provided through a contract with Alexandria, Va.-based Community Associations Institute.

The CAI/DBPR courses focus on condominium operations, regulation, financial management, and conflict resolution. There are parallel courses designed for cooperatives.

The next class to be held in Fort Myers will take place on Wednesday, December 7, 2005 from 9:00 am to 12:00 pm at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Ft. Myers.

This 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.

Florida Advisory Council on Condominiums

My October 20, 2005 column announced a meeting of the Florida Advisory Council on Condominiums to be held in Fort Myers on October 24, 2005. As we all know, Wilma decided to visit on that day, so the meeting was cancelled.

The Advisory Council's Fort Myers visit has been rescheduled to December 5, 2005 (Monday evening) and December 6, 2005 (Tuesday).

The December 5, 2005 meeting will run from 5:00 p.m. to 10:00 p.m. at Seven Lakes Condominium, located in South Fort Myers, directly across from the Bell Tower shopping complex. The December 6, 2005 (Tuesday) will take place at 14241 Metropolis Avenue, Suite 100, Fort Myers, FL. The Tuesday meeting is also open to the public, but public input and comment will be limited to the Monday evening meeting. ■

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****.*

Changes in Expense Sharing Need Unanimous Approval

Question: The developer of our condominium built the project in three phases. There are three different unit types, ranging from 1,305 square feet to 1,817 square feet, for a total of 116 units. Our declaration of condominium states that assessments are shared on a 1/116 basis. Many of us feel that the larger apartments should be sharing a greater share of the expenses. Our declaration of condominium states that no amendment can increase the owner's share in common expenses. My basic question is whether that clause can be changed so that we can share expenses on a square footage basis? E.C. (via e-mail)

Answer: The Florida Condominium Act was amended in 1990 to provide that common expenses of a condominium association can only be shared in one of two different ways. First, sharing can be done a proportionate basis, based upon the relative square footage of the units to each other. The only other legally permissible alternative is for equal sharing of common expenses.

Your developer obviously chose the equal sharing method. Section 718.110(4) of the Florida Condominium Act states that no amendment may change the manner in which unit owners share common expense without one hundred percent approval, plus the approval of all lienholders, such as mortgage companies. The only exception is if the declaration of condominium, as originally recorded, provides otherwise.

The language you have quoted in your declaration specifically controls this question. Therefore, you could not change from equal sharing to a square footage-based formula without unanimous approval of all unit owners and their mortgage holders and other recorded holders of liens. I would place your odds at successfully getting unanimous approval for such a measure to be zero, if not lower.

Question: You recently wrote that a board-made rule banning the use of generators after a hurricane may not be upheld as being "unreasonable." Our condominium association was advised by our local fire department that generators should not be used on lanais or walkways, as the fumes could be dangerous to other condo dwellers. What do you think? J.W. (via e-mail)

Answer: As stated in my previous column, any board-made rule would need to be reasonable. I think there is little doubt that running generators on lanais would cause potential fume problems, and that an association ban on using generators on lanais would be upheld.

As to other out-of-door areas, it depends on the physical configuration of the condominium. Obviously, if a condominium is constructed so that its walkways would not safely permit the escape of carbon monoxide, there is no doubt that a board-made rule prohibiting use of generators there would be upheld.

As with most things in the law, there is no one-size-fits-all answer. For example, there probably is nowhere in a high-rise building with interior hallways where a generator could be safely operated. Conversely, in a condominium consisting of detached, single-family dwellings, another set of circumstances may apply. Again, the entire picture will be looked at for reasonableness. Life-safety factors will be paramount, but noise factors will be relevant as well. It seems that every association, in connection with its disaster-preparedness plan, ought to have a policy on this issue. Thank you for your input.

Question: Our condominium consists of detached, single-family homes, but the roofs are under the association's responsibility. After Hurricane Wilma, a number of the board members, who are retired

people, got up on ladders to trim fallen trees and inspect the roofs for damages. I am concerned about two things. First, no one asked to climb onto the roof of my home. Secondly, I was worried that someone would fall and create liability. What do you think? L.F. (via e-mail)

Answer: While it may have been more polite for the board members to ring your doorbell and let you know they were going onto the roof, there would be no legal obligation for them to do so if the roof area is described as a common element in your governing documents, as it appears to be.

I would share your liability concern. While condominium associations cannot function without volunteer services, I think it is prudent to draw a line as to what services are acceptable to be provided by volunteers.

I do not recommend that volunteers engage in inherently dangerous activities, the use of power tools, cutting trees, climbing on ladders, or going onto roofs. The Association is best advised to require that such tasks only be performed by properly licensed and insured contractors. While there will be extra costs involved, there will be greater protection against potential liability.

Question: Recently our condo board voted to "oust" a sitting board member who happened to be our treasurer. This action is being contested by the supposedly ousted treasurer, and remains unresolved and in dispute. There does not seem to be any reason for his removal other than the president and treasurer just don't like each other. In the meantime, I volunteered to help out on the board and was appointed to finish the term of the ousted treasurer. Over the last three weeks, I have asked our president and management company several times, in writing, for information regarding our finances, books, contracts, checks, etc, as related to the role of the treasurer. I am getting no response, yet the management company has posted an announcement in our complex stating that I am the new treasurer. How can this be, when the existing treasurer is contesting his ouster, and I, as the supposed replacement, have been given no information about our finances ? What should I do ? Thanks for any response. M.E. (via e-mail)

Answer: It is important to understand the distinction between removal of an officer and a director.

In general, the board of directors appoints officers (usually a president, vice president, secretary, and treasurer). The board of directors has the right to remove officers from office, with or without cause.

Conversely, directors can only be removed from the board by a vote of a majority of the entire membership. Further, certain legal procedures must be followed to remove a director from office.

It is also important for your association to check its bylaws and confirm that the board can appoint officers who are not also directors. If your association's bylaws permit non-directors to serve as officers, the board has the right to appoint you as the treasurer, without regard to any "contest" from the former treasurer. ■

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Clarity of Repair Tasks Important

Fort Myers The News-Press, November 24, 2005

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Today's column is the twelfth part of our series about updating the legal documents for your community association. In the first eleven editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage and transfer restrictions, and discussed condominium insurance and casualty repair requirements.

Today's topic, the allocation of responsibilities for maintenance, repair, and replacement of property within the community.

For homeowners' associations, the law and typical allocation of maintenance responsibilities is usually straightforward. In general, the association will maintain the "common areas", which are normally the areas deeded to the association for the common use and enjoyment of the residents of the community. These areas will typically include roadways, common landscape features (cul-de-sacs, entryways, etc.), and recreational amenities such as swimming pools, clubhouses, and the like.

The individually-owned property in an HOA is known as the "parcel." In most cases, the parcel consists of a deeded lot and the improvements constructed thereon, usually a single family home. There are some homeowner association communities with a different set-up, such as townhouse and "zero-lot-line" projects, where the owner may be deeded only a "metes and bounds" area, sometimes the "footprint" of the residential structure.

The declaration of covenants for some homeowners' associations will designate maintenance, repair, and replacement responsibility for portions of the "parcel" to the association. The most common area of designation is landscape maintenance, usually involving lawn mowing, fertilization and pest control, and perhaps the care of shrubbery and trees. Some homeowners' associations go a step further and make the association responsible for the maintenance, repair, and replacement of certain portions of the homes themselves. For example, some associations will take care of roofs, paint building exteriors, or even assume condominium-like responsibilities for greater portions of the structure.

It is essential when updating a declaration of covenants to have a clear road map for how maintenance, repair, and replacement responsibilities are to be allocated in the HOA. It is generally preferable to specifically list those items where deviation from the normal rule (association maintains common area, owner maintains parcel) occurs. Further, thought must be given to what "maintenance" means. For example, if an association is responsible to paint the exterior of a building, who is responsible for replacement of rotted wood discovered when it is time to paint the building? Who will be insuring the item, and does that differ from the general maintenance obligations? These are

issues that can and should be addressed in a well-written declaration of covenants in the homeowners' association context.

For condominiums, the law is much more specific, but there is still room for choice, and still a need for clarity when drafting the documents. As a general rule, the association maintains, repairs, and replaces the "common elements", which are those portions of the condominium property located outside of the "unit." There is an exception for "limited common elements", which are defined in the law as portions of the common elements reserved to the particular use of a single unit or group of units, to the exclusion of other units. Typically limited common element areas include balconies/lanais, carports and garages, boat docks, and storage lockers. However, it is important to note that not all declarations of condominium uniformly describe such areas as limited common elements.

Conversely, the unit owner is generally responsible for the maintenance, repair, and replacement of the "unit", which is the individually-owned portion of the condominium property. It is extremely important to understand that this is not a one-size-fits-all situation, since each declaration of condominium may describe the unit boundaries somewhat differently. In most cases, the drafter of the declaration (the developer) will use the "interior shell" concept of unit ownership, wherein the unit owner owns the air space within the four boundary walls, the floor slab, and the airspace below the ceiling. However, there are many condominiums where the unit boundaries extend to the exterior of the building. Further, some declarations define the balconies/lanais as part of the "unit", while they are designated as "common elements" in other condominiums.

Accordingly, it is crucial to start with a basic understanding of the physical ownership within the particular condominium. For example, condominiums where the units are described with the "interior shell" form of ownership will typically result in the windows in the building being "common elements." Conversely, where the unit boundaries extend to the exterior of the building, the windows would be part of the units. One can see how it is important to understand your community's particular legal structure before deciding how maintenance obligations should be allocated in the declaration of condominium.

Typical areas where many developer-drafted boilerplate documents leave room for interpretation include areas like windows, sliding glass doors, screens and screen frame assemblies, air-conditioner and heating apparatus (compressors, air handlers, and the lines between them), doors, and drywall. In my opinion, a well-drafted declaration of condominium will specifically call out areas like this, and others, and designate who is responsible for maintenance, repair, and replacement.

One of the lessons learned from the 2004 and 2005 hurricanes is that it is also important to ensure that the repair after casualty clause in the declaration of condominium (see Assigning Costs After A Calamity, November 10, 2005) lines up with the maintenance, repair, and replacement section of the declaration. This can be particularly complex in that the insurance of various areas is mandated by state law, whereas maintenance, repair, and replacement is typically addressed by contract (i.e., the declaration of condominium). For example, in most condominiums, the interior unit doors (such as a bedroom door) are the maintenance, repair, and replacement responsibility of the unit owner. However, by state law, the association is obligated to insure interior doors against casualty damage, such as a fire. It is important to specifically spell out how insurance proceeds will be distributed in such situations, and how shortfalls will be handled, such as those occasioned by a deductible.

Another challenge typically encountered in this arena is the level of the board's discretion in deviating from the original construction when the association must execute its maintenance, repair, or replacement responsibilities. Windows are a classic example, since many buildings' older windows cannot be obtained in today's market, and would not meet current building codes. What is the board to do when it is time to change-out the buildings' windows, and the only available options may constitute a "material alteration" of the common elements? Again, careful drafting can provide clear guidance on points of this nature.

In the next installment of this series, we will further explore the concept of alterations of the condominium property, both those undertaken by the association and alterations requested by unit owners. ■

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Board has Discretion in Landscape Work

Question: Hurricane Wilma destroyed most of the trees at our condominium. Our board of directors is unsure what the rules are regarding the replacement of trees. Does the board have the right to decide to plant different types of trees, or must we replace the trees with what was destroyed? If a change in the landscape plan is desired, does the board have the authority to approve it, or does the new plan need to be submitted to a vote of the unit owners. C.J. (via e-mail)

Answer: The issue you raise is whether a change in the landscape plan would be deemed a "material alteration or substantial addition to the common elements." In general, Florida law provides that a condominium association can only make material alterations or substantial additions to the common elements in the manner provided in the declaration of condominium, and if the declaration of condominium is silent on the issue, seventy-five percent of all unit owners must approve.

"Material alterations" and "substantial additions" are those which perceptively alter the function, use, or appearance of the condominium property. For example, changing the color of a condominium building's exterior paint has been deemed a "material alteration." Obviously, replacing (for example) a ficus tree with a palm tree would also be a "material alteration."

However, there is an exception to the "material alteration rule" known as the "necessary maintenance exception." The necessary maintenance exception has developed from court cases which recognize that a board of directors must be given some latitude in authorizing changes to condominium property, when it is necessary for the preservation and maintenance of the property. For example, if maintenance work would require a new product to comply with applicable building codes, the board would have latitude in that regard.

Disputes regarding whether alterations are "material" or whether additions are "substantial" are submitted to resolution through a mandatory arbitration program sponsored by the Division of Florida Land Sales, Condominiums and Mobile Homes. In general, the arbitrators tend to find many changes to be "material" or "substantial" but nonetheless exhibit fairly wide latitude toward boards with respect to landscaping decisions.

In one of the most often cited arbitration decisions, the arbitrator ruled that changes in landscaping may have altered the common elements somewhat, but that such alterations were made pursuant to the association's duty to maintain the landscaping, and no vote of the unit owners was required. The arbitrator noted that a different result may have been reached if the landscaping scheme was radical. The arbitrator stated: "For instance, a change from a South Florida landscape look to a Japanese Water Garden would most likely result in a material alteration to the common elements."

Question: What would reasonable liability coverage for an association board member be? T.D. (via e-mail)

Answer: I believe you are referring to what is commonly called directors and officer's insurance (sometimes D&O insurance) or errors and omissions insurance (sometimes called E&O insurance). This is the insurance policy that provides coverage to the association if the board members are sued for acts or omissions arising from their service to the association.

I would say that the most common level of coverage under D&O policies is one million dollars. However, it is my understanding that three million dollars' worth of coverage can normally be obtained for a few dollars more, and in my opinion would be

well worth the extra expense. These days, a million dollars does not buy what it used to, and I would recommend minimum coverage of three million dollars, perhaps more if the association has any unique exposures.

Question: Our condominium association is set to hold its annual meeting in December. Our documents call for a seven member board. However, only five people put their names into nomination. Do we have to start the election process over again? H.N. (via e-mail)

Answer: No. Under Florida law, the five people who automatically submitted their names will be elected to the board.

The law is a bit fuzzy about those whose terms expire, but who did not seek re-election. The law states that directors serve on the board until their successors are duly elected and qualified. Presumably, any incumbent who did not re-run does not wish to serve, and should submit a written resignation for the purposes of properly documenting the association's files, and avoiding liability for themselves.

The remaining five directors would have the authority to fill the two vacancies on the board, by appointment. ■

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Updating Property's Look Difficult

Fort Myers The News-Press, December 1, 2005

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Today's column is the thirteenth part of our series about updating the legal documents for your community association. In the first twelve editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage and transfer restrictions, discussed condominium insurance and casualty repair requirements and the allocation of responsibilities for maintenance, repair, and replacement of property within the community.

Today's topic, issues surrounding alterations within the community.

Remember mood rings, lava lamps, or pet rocks? If your community was developed when such items were in vogue, its a safe bet that the community common areas were adorned with the same sense of style. From the green shag carpeting in the social room, to the burnt orange wallpaper in the lobby, developers have a tendency to follow current trends when establishing the "look" of the community.

In decades-old developments, it is also likely that non-aesthetic structural installations, such as the building's windows, no longer meet current building codes, cannot be replaced with like-kind, and would be foolish to install even if they were available, given new technologies. As folk balladeer Bob Dylan noted in one of his most famous pieces: "The times, they are a changin'."

As most everyone knows, the Florida condominium statute says that there can be "no material alteration or substantial addition" to the common elements, except as provided in the declaration of condominium. If the declaration of condominium is silent on the topic, seventy-five percent of all unit owners must approve material or substantial changes.

Therefore, one of the most important clauses in an updated declaration of condominium is the so-called "material alterations clause." As with many issues in the constituent legal documents, there is no "right way" to address this issue, but rather a range of choices that should reflect the collective will of the community in establishing parameters for authorizing material changes or additions. On the one hand, it is probably not a good idea to give every future board a blank check to make significant changes that could range from the trendy to the whimsical. On the other hand, the board should be given a certain degree of latitude to meet changing technology and products in the face of the need for maintenance and repair, without having to worry about the political fracas that sometimes permeates the decision-making process in condominium associations.

I typically recommend that a board be given the authority to authorize changes and additions up to a certain dollar amount. Many associations consider five percent of the annual budget as a good benchmark for setting the board's authority for alterations or additions, before a unit owner vote

becomes required. The board should also be given the discretion to perform necessary maintenance, regardless of cost.

The required level of membership approval set forth in the updated documents also presents a choice. Most associations that I have worked with feel that significant changes should be authorized by a super-majority of the membership, usually two-thirds or seventy-five percent. However, I am also a staunch proponent of the notion that voting in an association should be based upon those who actually vote (in person or by limited proxy), and not based on the total number of eligible voters. After all, we elect the President of the United States based upon those who take the time and effort to go to the polls, and those who do not vote do not count.

An issue closely related to alterations by the association is the scope of an individual unit owner's right to change the appearance of the condominium property. After all, the landmark case defining what alterations are material and what additions are substantial is a decision known as Sterling Village v. Breitenbach, which was decided by a Florida appeals court in 1971. That case involved an association challenging a unit owner's enclosure of a screened lanai with glass jalousie windows. In finding the change to be material, the court made the following pronouncement, which is still cited as the law today:

We hold that as applied to buildings the term "material alteration or addition" means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its functions, use or appearance.

Clearly, any unit owner-requested change affecting the exterior of the community should have to be submitted to the board for approval, and the documents should specifically require this to be done. Further, because many people buy into condominium communities because of a desire for uniformity, many documents will also require unit owner exterior changes to also be approved by the association membership.

If an "approved" type of improvement is the standard for a community, such as a certain type of balcony enclosure, there is probably no need to submit successive requests to repetitive votes of the members.

The declaration should also provide that any duly-approved unit owner alterations, even if made on common element property, must be insured, maintained, repaired, replaced, and reconstructed after casualty by the unit owner who made the improvement, or their successors in title.

In the next installment of this series, we will look at other actions that associations occasionally take, and how the documents can draw the line between what may be approved by the board, and what must be approved by the members.

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‘Prescription Pet’ Murky area for Condo Regulations

Question: Our association has a “no pets rule” in the recorded documents, which is one of the reasons that I purchased in this condo. I am not an animal lover, and I do not like the noise or mess that goes along with living among animals. I also have allergies to most pets. Recently, I saw one of the other residents in the building with a dog in the elevator. I waited for the next trip when so I did not have to ride in the elevator with a dog. I asked the building manager why the board was allowing a violation of our rules. I was told that the resident had a note from her doctor, and that the board’s attorney told the board that they could not evict the pet. Could this be possible? Don’t I have rights too? A.M. (via e-mail)

Answer: Your situation probably involves a recent legal phenomenon known as the “prescription pet”. There are a growing number of advocates who feel that association pet restrictions should be illegal. These groups have internet sets complete with “sample doctor’s notes” for use by those who want to get around the pet restriction they agreed to when they bought into a no-pets community.

Although these advocates cite the Americans With Disabilities Act as the basis for their position, the truth of the matter is that the ADA does not apply in most condominiums and homeowners’ associations, because they are not places of public accommodation. The law that does apply to associations is the federal Fair Housing Amendments Act of 1988 . This law prohibits discrimination on the basis of “handicap”, which is broadly defined in the law to include most physical or mental maladies that impair a major life function.

The Act also requires housing providers, including associations, to make “reasonable accommodations” in their policies and procedures so as to enable handicapped persons to fully enjoy the premises. For example, there is no doubt that even with a strict no-pets rule, an association would have to permit a blind person to keep a “seeing-eye dog”, and no one would argue with this.

Where the law gets trickier involves so-called “emotional support animals.” Let’s say for example that Jane Smith is 75 years old. She suffers from several maladies not uncommon in people of that age, including arthritis, osteoporosis, and thyroid problems. She takes many medications, has trouble getting around, and stays home most of the time. Her daughter buys her a cute little dog as a companion. Jane’s condo association, citing the 20 year old no-pet rule, goes ballistic.

Jane then brings a note from her family doctor, Doctor Goodfellow. The good doctor scribbles a note on his prescription pad that Jane’s maladies make her feel depressed, and that the dog will “provide therapeutic benefit”. Jane flies the note with the board, and threatens litigation if there is any further talk of removing the dog.

This is the classic prescription pet case, and your association is probably dealing with some permutation of this type of fact pattern. In my experience, many of these requests are entirely legitimate, and should be granted. Others are completely bogus. Of course, many fall into the famous void that lawyers refer to as the gray area.

Where your association’s situation falls in that continuum is something your board has hopefully explored with legal counsel. If so, you are probably stuck with the situation. You could claim that your allergies are a handicap and that the board must somehow regulate the animal’s presence on the elevator or other common areas.

Of course, all for no pay, your board gets to be the judge of whose rights are more important.

Question: One of our owners just filed a request with the condominium board, which I chair, to install a satellite dish. We have a 7 member board, but one member was absent for the meeting at which the request was considered. Our documents say that no antennas can be installed on the common areas without approval of the board. The vote was 3 in favor and 3 opposed. We have a raging debate going on now. Some say the request failed and should be considered denied and final . Others say we should vote again with all 7 members. The "know it all" in our condo said that the owner can put up the dish without board approval. What do you say? F.A. (via e-mail)

Answer: The motion to approve the installation failed if the vote ended in a tie. As president of the board, I believe you have the power and discretion to put the matter on the agenda for another meeting, where the full board can be present.

However, you might want to give the association's attorney a call, as your "resident expert" may be right. The federal Telecommunications Act provides that condominium associations can not prohibit, or even require prior approval of, certain "Over The Air Reception Devices", the most common of which involves satellite dishes of one meter (39 inches) or less in diameter.

The Federal Communication Commission's so-called OTARD Rule provides that condo dwellers have an absolute right to install these dishes in areas they own, or over which they have exclusive control. The association could not, for example, prohibit a dish completely within a private lanai, but probably could prevent (or at least regulate) puncturing the building. Conversely, the association could prohibit the placement of such a dish on the roof of a high rise building.

Question: Our building was damaged by Hurricane Wilma. Our documents say that the owner is supposed to care of the windows in the apartment. We were told, however, that the law changed in 2004, and that these are now the responsibility of the association. Can you explain? S.F. (via e-mail)

Answer: This is an urban legend that took hold after the 2004 hurricanes. Although the law was amended in 2003 (effective in 2004), the association has been responsible for insuring windows since the 1979 version of the condominium statute. The 2004 change did not substantially change who insures what portions of the property as between the association and the individual owner, but rather eliminated a series of confusing grandfathering dates found in older versions of the law.

Therefore, the association's insurance should provide primary coverage for Wilma damage to the windows, even if the individual owner is responsible for their regular maintenance. ■

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Association Members, Board Split Many Duties

Fort Myers The News-Press, December 8, 2005

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Today's column is the fourteenth part of our series about updating the legal documents for your community association. In the first thirteen editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage and transfer restrictions, discussed condominium insurance and casualty repair requirements, the allocation of responsibilities for maintenance, repair, and replacement of property within the community and issues surrounding alterations within the community.

Today's topic, determining which actions of the association may be approved by the board, and which should be submitted to a general membership vote.

Under Florida law, there are certain actions of a community association which must always be decided by the membership of the association, unit owners in a condominium, and parcel owners in an homeowner's association. These items include:

• **Election of Directors:** Both the condominium law and the statute applicable to HOA's require that board members be elected by the membership of the association, at the annual meeting. The condominium law sets forth a detailed election procedure which must be followed. The homeowners' association laws are a bit looser, and generally defer to the association's bylaws. Unlike condominiums, nominations from the floor must be permitted at the homeowner's association's annual meeting. The association's bylaws should set forth a clear procedure as to how elections should be conducted. The bylaws should include the number of board members (I do not recommend a "range" of board members, but rather a fixed number). The directors' term of office should also be stated in the bylaws. Most associations find some value in having staggered terms for boards, so that there is some continuity. Term limits are not prescribed by law, but may be included in the bylaws.

• **Reserve Voting:** The law for homeowner's associations does not require reserves, so this provision would not be found in bylaws for a homeowner's association unless the bylaws also require the HOA to keep reserves. For condominiums, reserves can only be waived or reduced by a majority vote. Although the waiver vote is covered in the law, it is a good idea to have guidance on the topic in the bylaws, since many boards may not be familiar with the intricacies of state statutes, but would typically refer to the bylaws for guidance on procedural issues.

• Waiver of Audits and Other Year-End Financial Reports: Both the condominium law and the statute applicable for homeowner's associations require a certain level of financial report, depending upon the association's receipts. Both laws require year-end audits for an association with receipts in excess of $400,000.00. The law permits waiver of these requirements by a majority vote, so it is not legally

necessary to state the required waiver vote in the bylaws, although (for the same reasons applicable to the reserve vote), it is a good idea to do so.

• **Removal (Recall) of Directors:** Both condominium and HOA regulations permit the members of the association, with or without cause, to remove any director from office by a vote of a majority of the entire voting interests (there is usually one voting interest per lot or parcel). This is a higher standard than the waiver of reserves or financial reports, which are based upon the majority of the quorum. Again, while both laws contain detailed recall procedures, a well-written set of association bylaws will provide additional guidance on the right of recall, including petition procedures and the required vote.

• **Amendments to Documents:** As was covered in more detail in an earlier installment of this series, each of the constituent legal documents should contain a clear procedure as to how they are to be amended.

There are also some areas where the law does not mandate a unit owner vote, but provides that the Board cannot act unless the governing documents confer the authority. These areas include:

• **Material Alterations of Condominium Property:** As discussed at length in last week's column, enabling authority for "material alterations or substantial additions to the common elements" should be included in a declaration of condominium. The law for homeowner's associations does not regulate this area.

• **Acquisition of Real Property:** Again, the condominium law is stricter. The condo statute provides that an association may not acquire title to real property except as authorized by the declaration of condominium. If the declaration is silent, seventy-five percent of the entire voting interests must approve the acquisition. It is helpful in the governing documents for both types of associations to have guidance on the right to acquire property. In my experience, most associations will want to have membership approval for the acquisition of real property, since it could involve significant expense. One exception would be in the area of the acquisition of a unit or parcel at a foreclosure sale, where the board of directors should be empowered to act.

• **Termination of Condominiums:** The Florida condominium law provides that a condominium may not be "terminated" without unanimous approval of the association members, unless otherwise provided in the declaration of condominium. Termination is becoming a hot topic as real estate available for development shrinks, and the highest and best use of an existing development may be knock it down and build something else. Termination also comes into play when property suffers significant casualty damage, such as a major hurricane strike. The law for HOA's does not contain any guidance on termination. In a future edition of this column, we will take a more detailed look at the termination clauses in the documents.

In the next installment of this series, we will take a look at those items of association powers and duties which are usually vested in the board of directors, but which should be set forth in the governing legal documents. ■

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FCC Prohibits Most Restrictions on Satellite Dishes

Question: One of our owners is requesting to install one of those small satellite dishes. The installation will not penetrate the roof, nor protrude from the exterior of the building. Our rules prohibit antennae or satellite dish without approval of the board. The board is split on whether to approve this request. What is the current thinking on this issue? L.P. (via e-mail)

Answer: Assuming that the satellite dish is one meter (39 inches) or less, the board's discretion is substantially limited by federal law.

The Federal Communications Commission, pursuant to the Telecommunications Act of 1996, has adopted the "Over The Air Devices Rule" curtailing the ability of condominiums to ban or impede the installation of satellite dishes. Specifically, the rule prohibits any restrictions that either:

- Unreasonably delay or prevent installation, maintenance or use of satellite dishes designed to receive direct broadcast satellite service or a video programming service where the satellite is one meter (about 39 inches) or less in diameter;
- Unreasonably increases the cost of installation, maintenance or use of such satellites; or
- Precludes reception of an acceptable quality signal.

Accordingly, associations may no longer enforce restrictions that cause any one of these impairments.

The FCC rule prevents restrictions impairing the installation and use of satellite dishes on property that is "within the exclusive use or control of the antenna user, where the user has a direct or indirect ownership interest in the property." The FCC has recently clarified that residents of condominiums may install satellite dishes on a balcony, deck, patio or other area where the individual resident has exclusive use or control, which will be dictated by the condominium documents. Conversely, the FCC has concluded that its rule does not apply to, and Associations may restrict, the installation and use of reception devises on common elements not within the exclusive use or control of a particular viewer, which in most condos would include walkways, hallways, exterior walls, or the roof. Additionally, an owner does not have the absolute or unfettered right to install a satellite dish antenna on a balcony or terrace of a condominium unit, if the installation will penetrate or intrude upon the common elements or other portions of the property maintained by the Association.

Further, the rule allows associations to restrict the installation of satellite dishes and antennas where clearly defined safety objectives exist, but here are caveats. First, the restriction cannot be more burdensome than necessary to accomplish the safety objectives stated in the restriction. Secondly, a safety restriction is only valid if the same kind of safety considerations are applied to other devices that are comparable in size and in weight and pose a similar or greater safety risk. For example, the rule would not allow an association to enforce a ban on satellite dishes and antennas if it claimed there was a safety objective, unless an existing rule banned the devices of similar size and weight such as air conditioning or pool equipment.

Question: We were told that according to Florida condo law, a condo owner with water damage caused by a leak from a unit above is responsible for repairs and files the claim with his insurance company. This does not seem fair as the damage may be caused by neglect of the owner above. Do you know if any associations have amended their by-laws to state

that the owner above would be required to pay the insurance deductible that the owner of the damaged unit must cover at his own expense? M.C. (via e-mail)

Answer: The Florida Condominium Act and most declarations of condominium are designed so that insurance is the first source of recovery in the event of a casualty loss. The statute requires that the Association's insurance cover all condominium property, including common elements and portions of the unit as initially installed, subject to certain exceptions for items including carpeting, window treatments, built-in cabinets and other items listed in Section 718.111(b)(3) of the law. The individual unit owners are well-advised to adequately insure the remainder of their property. However, the damage that occurs when a washing machine hose leaks or a water heater fails often does not meet the Association's insurance deductible, leaving someone with a bill to pay.

Most well-written declarations of condominium include an express provision making an owner liable to the association or to other unit owners for intentional or negligent acts that result in damage. Some declarations establish criteria to define negligence, such as requiring water valves to be turned off when nobody will occupy the unit overnight, or even requiring certain maintenance or replacement schedules for equipment that is likely to cause damage. I am aware of some associations including a "strict liability" provision in the declaration, making a unit owner responsible for any damage caused by that owner or his/her property without regard to fault. However, there is some question as to whether such a strict liability obligation will be covered by insurance, so that the owner who effectively caused the damage, even if the damage occurred through no fault of his own, may get stuck with a large, uninsured damage bill. ■

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Association Authority Defined

Fort Myers The News-Press, December 15, 2005

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Today's column is the fifteenth part of our series about updating the legal documents for your community association. In the first fourteen editions we: learned some basic definitions; discussed the functions of the constituent documents; considered the procedures for presenting proposed amendments; analyzed the required votes for amendments; looked at rental amendments; considered guest-usage and transfer restrictions; discussed condominium insurance and casualty repair requirements; explored the allocation of responsibilities for maintenance, repair, replacement of property within the community; analyzed issues surrounding alterations within the community; and which actions of the association must be mentioned in the documents.

Today, we will look at clauses that address association authority, and particularly whether board action alone is sufficient, or whether a membership vote should be required. The following list involves typical issues:

- **Borrowing Money.** Surprisingly, neither the statute applicable to condominium associations nor the one that applies to homeowners' associations says whether an association has the authority to borrow money. Most attorneys conversant in this area of the law take the position that unless the governing documents contain limiting language, the board has borrowing authority. I believe that the documents should clearly confer upon the board of directors the authority to borrow money. There are many times when this can be important, especially in the post-hurricane environment. I also believe that if the board is going to mortgage real property owned by the association, membership approval should be required.

- **Acquisition of Real Property.** The Florida condominium statute states that an association cannot acquire title to real property except as provided in the declaration of condominium, and if the declaration is silent, seventy-five percent of all membership interests must approve the acquisition. The HOA law contains no guidance on this point. A well-written set of governing documents will contain specific direction on this point. Because the acquisition of real property can have a material impact on the financial obligations of the association, I believe that a membership vote should generally be required, except perhaps in de minimis situations, such as the conveyance of originally-designated common areas in the homeowner's association setting. It is my belief that there should also be an exception permitting the board to acquire units or parcels, particularly at a foreclosure sale if the association has to foreclose its lien for assessments. Other exceptions might include acquisition of a unit or parcel in connection with an exercise of a right of first refusal.

- **Conveyance of Real Property Owned by the Association.** Typically, in the condominium setting, associations do not own real property. There is an exception in some cases, for what is

known as "association property", as distinguished from "common elements." Ownership of property in the homeowners' association context is common. The condominium statute provides that the conveyance of association property requires a seventy-five percent vote unless otherwise provided in the declaration. Again, the HOA statute is silent. Generally, there should be limits on a board's authority to convey the association's real property.

- **Authority to Grant Easements.** The condominium statute states that the board of directors has the authority to grant or modify easements without approval of the unit owners. There is no guidance in the homeowners' association law. Again, clear guidance in the constituent legal documents will avoid disputes.

- **Bulk Cable Television.** Many communities enter into arrangements for the purchase of cable television services on a bulk-billing basis. The Florida Condominium Act states that this authority is vested in the board of directors. Once again, the law for homeowners' associations is silent on the point. Further, it is desirable to specify how cable charges will be shared, and whether there are situations where a party is excused from paying his or her share of bulk cable television expenses (the most common of which would be vacant lots in the homeowners' association setting).

- **Other Ancillary Services.** Condominiums and to a lesser degree homeowners' associations occasionally provide bulk services to residents, such as interior pest control, air-conditioner maintenance contracts, or even kitchen appliance maintenance agreements (common in resort condominiums). If association funds are to be spent for these purposes, it is preferable to list them in the constituent legal documents.

- **Right to Charge Fees for Use of Common Elements or Association Property.** Many associations permit the private use of association amenities, such as the rental of a community clubhouse for a wedding reception or anniversary party. The documents should address whether the board has the authority to permit private use of common amenities, and the right to charge fees related thereto including security deposits, cleanup fees, and rental for use of the facility.

- **Lease of Common Elements or Association Property.** There are many situations where an association might want to consider leasing a portion of its property to some third party. Cellular telephone antennae on high-rise condominium rooftop buildings is a prime example. Rental of association office space is another. The authority for such actions is best specifically addressed in the constituent legal documents.

In the next installment of this series, we will conclude our review of document amendment tips and strategies with a review of customary bylaw provisions regarding the seating and election of the board of directors. ■

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Board Worried About Errors in Financial Statements

Question: I am on the board of a condominium association and we are concerned about errors that are appearing in our monthly financial statements. In one instance funds from our restricted reserves were used to pay for a roof at another association. We are into the third month since this was called to the management company's attention, and a correction has not been made. We have lost both principal and interest to this point.

In another instance, a large unused insurance claim which was reported on the July statement has not appeared on the August to October statements.

If the management company cannot fully explain and correct the accounts, what steps should we take? For instance is there a Florida governmental department or agency to whom we can appeal for assistance? J.G. (via e-mail)

Answer: As with all contractual relationships involving a community association, the first step is to review the contract between the association and management company. For example, you need to understand whether the contract requires the management company to be responsible for the monthly financials, or whether that work is actually performed by an entity with which the association has another direct contractual relationship, such as an accounting firm.

Like any other contractual relationship with a service provider, the board should continually monitor whether it is getting value for the fee being paid. If not, it might be time to think about shopping around for another management relationship.

If the board is considering a change, it is very important to review the contract for termination procedures. I always recommend that contracts with service providers, particularly community association managers, be terminable by either party, with or without cause, on reasonable notice (such as thirty or sixty days). However, I have seen many management contracts which contain lengthier terms, often one year, sometimes three years.

If the association is subject to an agreement that is not terminable at will, then cancellation would only be permissible if there is a breach of contract which is not cured. This would typically require the association to give the manager written notice of deficiencies and the opportunity to correct them.

If the board feels that the relationship is worth salvaging, which may well be the case, I would recommend that the board ask the top executive from the management company to attend a meeting of the board. The board should lay out its concerns, and determine if the management company has the willingness and ability to correct the deficiencies in performance.

The mistakes and omissions which you describe are certainly material. If you have lost interest on deposits, the management company should make good on it.

Community association managers in Florida are regulated by the Department of Business and Professional Regulation. The DBPR does not get into routine contract and performance disputes, but can discipline licensed managers for legal violations, or acts of gross misconduct. Further information can be obtained from the DBPR by navigating its website at www.state.fl.us/dbpr/.

Question: I live in a condominium that is a series of duplex buildings. In other words, I share a party wall with one neighbor, and the other buildings are located along a common street. My next-door neighbor is a nice person, but has an annoying habit of playing his saxophone into the late hours of the evening. When it is cool, he keeps his windows open, which makes things that much worse. I work in the medical field and must leave for work very early every morning. I read our association documents and saw there is a section that says that the association can stop nuisances in the condo. I do not want to start World War 3 with my neighbor, but I feel like I am a prisoner in my own home. What do you recommend? L.A. (via e-mail)

Answer: I recommend that you call or visit your neighbor and lay out your concerns. It may be that he is unaware of the noise he is creating. Unfortunately, many condominiums are not known for the sound-proof quality of their buildings.

If your neighbor is unwilling to work with you, you will then need to consider whether to take the matter a step further. The nuisance clause in your condominium documents confers rights upon you, not just the association. You may have legal recourse to seek relief from the nuisance, although you should obviously take all steps to resolve the matter without resorting to the legal system.

The role of the association is tricky in matters like this. In my experience, many associations are hesitant to enforce nuisance complaints, because they are perceived as picking one neighbor's side over the other's. Obviously, playing a saxophone is a lawful activity, your neighbor is doing it within the confines of his home, and the question is where the line should be drawn in balancing your rights against his.

For example, many associations decline to become involved in "neighbor vs. neighbor" noise disputes, unless more than one owner has filed a complaint about the noise. If all else fails, you should investigate buying some earplugs. Good luck.

Question: I received a violation notice from my homeowners association to remove my U.S. flag which is affixed to the front of my townhome. I have heard there is a recent law forbidding an association from forcing homeowners from removing a U.S. flag. I am a combat veteran from Iraq and I am very upset about this. Could you please advise me of the law allowing me to fly a U.S. flag. S.H. (via e-mail)

Answer: Generally, an association has the right to create rules and regulations, including such rules and regulations that deal with displaying flags. However, the association cannot prevent an owner from displaying a United States flag that is displayed in accordance with Florida law.

In the homeowners association setting, Section 720.304(2), Florida Statutes states:

> Any homeowner may display one portable, removable United States flag or official flag of the State of Florida in a respectful manner, and on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day may display in a respectful manner portable, removable official flags, not larger than 4 ½ feet by 6 feet, which represent the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, regardless of any declaration rules or requirements dealing with flags or decorations.

The Condominium Act contains a nearly identical provision, but does not reference the "flag of the State of Florida".

Also in the homeowners setting, Section 720.3075(3), Florida Statutes states:

Homeowners association documents, including declarations of covenants, articles of incorporation, or by-laws, may not preclude the display of one portable, removable United States flag by property owners. However, the flag must be displayed in a respectful manner, consistent with Title 36 U.S.C. Chapter 10.

Therefore, so long as your United States flag is displayed in conformity with the above-referenced statues, the association cannot require you to remove it. ■

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Address Elections in Bylaws

Fort Myers The News-Press, December 22, 2005

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Today's column is the sixteenth and final installment of our series exploring issues commonly confronted by community associations when updating the constituent legal documents for the community. We have considered issues ranging from use restrictions to maintenance provisions, from leasing regulations to insurance requirements. Today, we will take a look at some helpful hints in drafting bylaw provisions regarding the election and seating of the board of directors.

A common theme in this series has been the difference between the statutes for condominiums and homeowners' associations. The condominium laws have been in effect for some forty years, and predictably are much more specific than the HOA counterpart. There remains constant ongoing calls to "condominiumize" the homeowners' association statute, which in my opinion would be good for some issues, bad for others.

One area where the homeowners' association law would benefit from adapting condominium procedures is the procedure for electing directors to serve on the board. In my opinion, the main flaws in current HOA procedures are two-fold.

First, unless prohibited by the bylaws, proxies may still be used in homeowners' association elections. Not only does this negate the ability to cast secret votes by absentee owners, the use of proxies in elections opens up the process to charges of undue influence by the sitting board, since the board will typically be the proxy holder.

The second major flaw in HOA elections involves nominations from the floor at the annual meeting. While permitting floor nominations seems rather democratic at first blush, it often leads to mass confusion in preparing a ballot for the meeting. It also tends to drag meetings out, since ballots cannot be counted at the beginning of the meeting (as is done in condominiums), because counting cannot start until the nomination process is closed, and the ballot modified to add floor-nominees. Further, as a practical matter, floor-nominees have little chance of getting elected in a contested election, since a large number of owners will have voted in advance, and may not be present at the meeting to consider whether a new candidate may be a more worthwhile choice. Nonetheless, unless Chapter 720 is amended to eliminate the requirement that HOA's accept floor nominations, that remains an issue which much simply be dealt with in conducting the homeowners' association election.

By comparison, the condominium law is much more stream-lined. The association must send first notice of the date of the election/annual meeting out at least sixty days before the meeting. Anyone wishing to run for the board must submit their self-nomination, in writing, at least forty days before the meeting. Then, secret

ballots are prepared for the election, and if there are less candidates than open seats, no election need be held.

Within the existing legal framework, there are some provisions which both condominium associations and homeowners' associations should include in their bylaws to ensure a smooth election:

- **Eligibility To Run For The Board:** Contrary to popular belief, one does not need to be a property owner within a community association to be eligible to run for the board. Rather, Florida's not-for-profit laws state that any natural person age eighteen years or older may serve on a corporation's board. Many associations are uncomfortable with the notion of non-owners operating the association, and include a provision in the bylaws that board eligibility is limited to record owners of parcels or units. Some associations extend the privilege to spouses of record owners, since many properties may be titled in the name of only one spouse for estate or tax planning reasons. A well-drafted set of association bylaws will also address who is eligible for board service when the property is owned in trust, which is a common form of ownership in Florida.

- **Number Of Directors:** I recommend that the association have a fixed number of board members specifically set forth in the bylaws. "Sliding scale"–sized boards (such as no less than three nor no more than nine directors) is unworkable in condominium elections (since the size of the board has to be set when the ballot is prepared, weeks before the meeting) and also can create confusion in HOA elections. In my experience, five directors is the most common number. Three directors may be appropriate in smaller associations, and seven directors in larger associations. Very large associations sometimes have nine directors.

- **Term Of Office:** Most associations find it worthwhile to create "staggered" terms for board members, which must be specifically set forth in the bylaws. A common provision for a five member board would involve two year terms, with three directors being up for election one year, two seats open the following year, three being elected the following year, etc. There are other methods that work, but two year terms seem easiest to keep track of, and may encourage more candidates, as some people are unwilling to sign up for a three-year stint.

- **Filling Of Vacancies:** Particularly when terms exceed one year, there should be a clear statement as to how vacancies are filled on the board. I recommend that vacancies be filled through appointment by the remaining directors, for the unexpired term of the person leaving office.

When things heat up in associations, one of the most common means of attacking the actions of the association is to claim that there is an "illegal board" in place. When the association does not have a clear road map for seating its directors, these challenges often have merit.

This series of columns regarding amendment tips will be produced in pamphlet form and will be available at a later time, free of charge, as is our previous series called Community Association Sunshine Law Course 101. ■

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Group Wants to Keep Hurricane Shutters Hidden

Question: I was recently introduced to your articles in The News-Press. They are a wonderful community service. We just took over our association from the builder and I am afraid we are off to a bad start. We have a small group of residents calling themselves the "full-time residents" who dislike the appearance of installed hurricane shutters. They have taken over our new board and now want to restrict the amount of time the hurricane shutters can remain installed. This last hurricane season, some shutters were up the entire season. I am frequently absent from my home and do not want to have restrictions placed on how I protect my home from hurricane damage. It is terribly expensive to hire someone to install the hurricane shutters in my absence if a hurricane threatens, and installers are not always readily available. Is it legal for my association to place limits on shutter use? The shutters are part of the original equipment of the home, which construction was approved by the master association and the builder who ran the developer-controlled board for the sub-association. This issue is potentially very divisive. Too bad the board cannot pass a policy eliminating hurricanes. D.T. (via e-mail)

Answer: First, when you refer to "installing" hurricane shutters, I presume you are referring to the erection of what are often referred to as "panel" shutters, which are removable (as opposed to "roll-down" shutters, which are permanently affixed to the building).

In a 1994 condominium arbitration decision, a condominium association's board enacted a rule that prohibited closing hurricane shutters unless a hurricane watch had been ordered or a hurricane was imminent. The arbitrator determined that the rule was invalid. The arbitrator went on to explain that while the rule may or may not be unreasonable if it also required the association to simultaneously assume the responsibility of closing the shutters upon the approach of a storm, where there is no such responsibility there is no assurance in any given case that the shutters of a non-resident owner can or would be closed in the often limited time available after the issuance of a hurricane watch or warning.

If your association adopted hurricane shutter specifications where the shutters can only be closed at certain times, but also where the Association assumed the responsibility of closing the shutters upon the approach of a storm, it is arguable that such specifications would be valid. In such a case, I believe the Association also needs to consider the additional liability it is taking upon itself to ensure that hurricane shutters are properly closed, and that no damage is caused when closing and opening the shutters.

Question: I have a situation where two huge trees fell on my villa, which is in a condominium. One fell on my covered and screened patio roof. The association said the patio is my responsibility. However, we had been complaining about those two trees since we moved in five years ago as their roots had cracked the tile floor of the patio. The association agreed to remove them and some others at the other end of the complex, but they did not remove the trees near me. Can the association be held responsible now since they did not remove the trees? C.S. (via e-mail)

Answer: A property owner is generally not liable for damage caused when another wise healthy tree located on his property falls as a result of wind so of other natural causes and damages neighboring property. However, in the 1998 Florida case of Vann v. Bailey, the court held that a landowner in an urban area has a duty to exercise reasonable care to prevent unreasonable risk of damage to adjoining property arising from defective or unsound trees on his or her premises. Therefore, if a landowner has actual knowledge, or should have known, that a tree is defective or unsound, then he has an obligation to take care of that problem and could be liable for any damage caused when the tree falls.

The prior problems caused by the trees roots do not seem to indicate that the tree was unsound and in danger of falling, so I do not believe that fact helps your case.

In any case, if your patio is part of the original construction of the building, the loss should be covered by the condominium association's master insurance policy.

Question: I am trying to figure out whether the community where I live is a homeowner's association or a condominium association? How do we know one way or the other? Is it possible we are a mixed-bag; part homeowners association and part condominium association? B.H. (via e-mail)

Answer: Your questions can be answered by reference to specific provisions of the Florida Condominium Act (Chapter 718 of the Florida Statutes) and the Florida Homeowners' Associations Act (Chapter 720 of the Florida Statutes).

The Florida Condominium Act defines a condominium association as "any entity responsible for the operation of Common Elements owned in undivided shares by unit owners [which means a record owner of legal title to a condominium parcel], any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership." In summary, a condominium association governed by Chapter 718, Florida Statutes, is an association that is comprised exclusively of condominium unit owners and in which membership is mandatory. If your development includes any parcels of real property that are not condominium parcels, then your association is not a condominium association.

The Florida Homeowners Associations' Act defines homeowners' association as "a Florida corporation responsible for the operation of a community or a mobile home subdivision 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, and which is authorized to impose assessments, that if unpaid, may become a lien on the parcel." Therefore, a homeowners' association governed by Chapter 720, Florida Statutes, is any mandatory membership association that operates a community or mobile home subdivision which has the authority to impose assessments and place a lien on the parcel.

It is not possible to have a "mixed-bag" association, which is part homeowners association and part condominium association. It is, however, possible to have a homeowners association (often referred to as a master association or property owners association) that is sort of an "umbrella association" that also governs a condominium within the development. However, all condominiums must be administered by a separate "Condominium Association" in accordance with Chapter 718. ■

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Resolutions Helpful for Association

Fort Myers The News-Press, December 29, 2005

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

For the owners and residents:

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

- Volunteer to do one thing for your community during the upcoming year. Whether it is typing up an edition of the community's newsletter, or serving on a committee, 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, it probably will not take long to break some of these resolutions, but it is worth a try. ■

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****.*

Board Has Authority on Some Issues; Owners Others

Question: Can you provide a simple guideline on what actions of a condominium association can be taken by a board, and which actions require a vote of the association members? Our condominium consists of forty-six units, with a seven member board. Many of the votes on the board are four to three. The board addresses issues such as pets, leasing, whether to have a management company, auditing, and standards of elevator and foyer maintenance. Is there a simple answer to what the board can decide and what the owners must decide? J.F. (via e-mail)

Answer: There are certain decisions which the law states can only be made by a vote of the unit owners. These include election of the board, recall (removal) of the board, the waiver of reserves, and the waiver of required financial reporting standards, such as an audit.

There are other items that will usually require a vote of the owners, such as amendments to the declaration of condominium, articles of incorporation, or bylaws (I have seen a few sets of these documents which permit the board to amend them, but they are a rarity).

There are also certain actions which require a unit owner vote unless authority is delegated to the board. These would include material alterations to the common elements, and acquisition of real property by the association.

There are several decisions which the law specifically confers on the board, including the grant of easements and the decision to purchase bulk cable television as a common expense.

Therefore, the answer to your question is "it depends" on what the issue is. For example, you raised hiring a management company. In 99 cases out of 100, this is a decision solely vested in the board. A few sets of documents I have seen would require ownership approval, but this would be unusual. Likewise, maintenance standards are typically left to the Board.

Like any elected governing body or corporate board, your association board is vested with relatively broad authority under the law. That authority also carries fiduciary responsibility and the right of those who elected the board to remove board members, with or without cause, by majority vote.

Question: Do rules and regulations of an association have to be recorded in the public records in order to be valid? R.G. (via e-mail)

Answer: No.

Restrictions contained in a declaration of condominium (or declaration of covenants) and any amendments of those documents must be recorded in the public records of the County where the community is located in order to be valid.

There is nothing in the law which requires rules to be recorded. Some associations record their rules, some do not. In my opinion, if the association does record its rules, any changes to the rules should also be recorded.

The benefit of recording rules is that constructive notice" is provided, and new owners cannot claim they were not told about the new rules, did not receive a copy, etc. The down-side of recording rules is that if the association records every change, it needs to keep track of amendments, plus there is typically an additional expense factor.

Question: Our condominium documents provide that covered parking spaces and under-building garage spaces are "limited common elements." Not everyone has one of these spaces. They can be sold within the association for whatever the market will fetch. The County is now assessing these parking areas. Is this legal? T.W. (via e-mail)

Answer: Common elements of a condominium are not separate to subject ad valorem taxation.

However, if a particular limited common element (such as a boat dock, covered parking space, cabana, etc.)

is described as an "appurtenance" to the unit, it is included in determining the fair market value of the unit. Therefore, while a common element cannot be separately taxed, its value to a particular unit can be considered in determining the market value.

Question: Our association is a mobile home park corporation. Our annual meeting is approaching, at which time we vote on various items, including amendments to the bylaws and the budget. It is our understanding that proxies cannot be open or counted until the annual meeting. This makes for a very long meeting. Is there any way that proxies may be counted before the meeting? R.M. (via e-mail)

Answer: It depends on which law applies to your association, the condominium law, the cooperative law, or the homeowner's association law.

All three laws permit the opening of proxies before the annual meeting, and I recommend doing so to avoid dragging the meeting out. If the bylaws prohibit opening proxies until the meeting starts, then you would need to change your bylaws to be able to log the proxies in before the meeting.

Ballots for the election of directors cannot be opened in condominium or cooperative associations until the election takes place. The same rules does not apply in the homeowners' association context, where the bylaws will control that question. ■

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