



Ten Resolutions For Board Members and Owners

Following these 'tips' may ease disputes later on

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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 There is at least one rule in every community that some resident despises, or thinks is silly or outdated.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. If you feel a rule is outdated, advocate for change in a respectful manner.

- 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.

Q: A unit in our condominium has been abandoned by the owner. The unit is subject to foreclosure, but the bank is not moving very quickly. It recently came to the Board's attention that power to the unit was shut off. With no air conditioning, we are concerned about the growth of mold and mildew spreading to the common elements and other units. What can we do? **A.L. (via e-mail)**

A: The association is responsible for maintaining the common elements. In most condominiums, the common elements include the drywall on the unit boundaries, which, for simplicity's sake, generally include the four boundary walls and the ceiling. Without air conditioning to cool the air and reduce moisture, it

is certainly possible, if not likely, that mold and mildew will grow on the common element drywall. If the mold and mildew grows unchecked in an abandoned unit, then the bill for remediation is likely to be significant. Therefore, it would be in the association's best interest to address the issue before mold and mildew grows.

In the case of an abandoned unit, I normally recommend that the board have the association's attorney send a letter to the unit owner demanding that power be restored to the unit. Legal counsel for the foreclosing lender should be copied on the letter. The demand should advise that if the problem is not corrected by a certain date, then the association will hold the unit owner legally responsible for any resulting damage to the condominium property. If this demand fails to achieve its intended effect (which will probably be the case with an abandoned unit) then the board may simply have no choice but to have the power restored to the unit at the association's cost. The cost of providing power and some level of interior environment control for the unit is likely much less than the cost of mold and mildew remediation. Because this course of action will involve the use of common expense funds, will depend upon language in your condominium documents, will require access to the unit, and will affect the lender's rights and liabilities, the board of directors should enlist the aid of the association's legal counsel to ensure that all proper steps are followed.

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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Q&A Must Contain Certain Info

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Q: I am in the process of selling my condominium unit. I was recently asked by the buyer's real estate agent for the "Frequently Asked Questions and Answers" document prepared by our Association. I requested this document from our Association, and provided it to the buyer's agent. In doing so, I noticed that the questionnaire includes less than ten questions and answers, and seems somewhat outdated. How much information is required to be included on this document and how often is it required to be updated? **S.P. (via e-mail)**

A: The Florida Condominium Act was amended in 1992 to provide additional disclosure and consumer protection for persons interested in purchasing condominium units. The law was amended to require both developer-controlled associations and unit-owner controlled associations to prepare a "Frequently Asked Questions and Answers" (commonly referred to as a "Q&A Sheet") to assist and protect potential purchasers.

Today, Section 718.504 of the Florida Condominium Act requires the Q&A Sheet to include the following: information regarding unit owners' voting rights; unit use restrictions, including restrictions on leasing of a unit; information indicating 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; a statement identifying the amount of assessment which, pursuant to the budget, would be levied upon each unit type, exclusive of any special assessments, and which shall further identify the basis upon which assessments are levied, whether monthly, quarterly, or otherwise; a statement identifying 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 whether and in what amount the unit owners or the association is obligated to pay rent and land use fees for recreational or other commonly used facilities, and whether membership and recreational facilities association is mandatory and, if so, what fees can be charged per unit type.

The Q&A Sheet must be updated annually and must be kept amongst the association's official records. It must be provided to a prospective purchaser of a condominium unit in connection with resales of a unit. Keeping and updating the Q&A Sheet is one area where many associations are not diligent, and are often in violation of the law.

Q: If in a two story condo, the upstairs unit leaks from a kitchen faucet and damages drywall in the first floor unit, who is responsible? Whose insurance covers the damage? **A.L. (via e-mail)**

A: When repairs to condominium property are necessary, they typically result from one of the following causes: 1) wear and tear to the building components; 2) an act of negligence or intentional misconduct that causes damage to the property; or 3) a casualty loss, which is a sudden fortuitous event which causes damage, such as a fire, hurricane or other sudden event which is not attributed to either of the first two causes of damage.

When damage is the result of wear and tear, the maintenance provisions of the Declaration of Condominium determine whether the repair is the responsibility of the association or the responsibility of the owner.

When damage is caused by negligence or intentional misconduct, typically, the liability for the repair costs is the responsibility of the person whose negligent or intentional misconduct caused the damage.

Casualty losses, on the other hand, are governed by Section 718.111(11), Florida Statutes, which delineates the Association's and the unit owners' insurance responsibilities and essentially provides that each party is responsible for repairing any item that it is required to insure after a casualty. The association is required to insure up to the bare walls, which includes the drywall, while the unit owners are responsible to insure the decorative surfaces within the bare walls, such as carpeting or wallpaper, and the unit interior, such as the cabinets, countertop, furniture, appliances, window treatments, and water heater. Water discharge incidents, particularly bursting pipes, are typically considered casualty events. Conversely, slow, continuous leaks are generally not considered a casualty event.

Q: Our condominium is currently being repainted. The work was funded from our painting reserve account. When the project is completed, there should be a considerable sum of money remaining in the painting reserve account. The board wants to use these funds to replace exterior lighting at the condominium. However, one of the

members of the board advised that we cannot use funds from the painting reserve account for the exterior light replacement. Considering the significant amount of money in the reserve account, this seems like a waste. Is she correct?

P.T. (via e-mail)

A: Your reference to a "painting reserve account" suggests that your Association uses the "straight-line" method for reserves rather than "pooled" reserves. In that case, reserve funds and any interest earned on those funds may only be used for authorized reserve expenditures. They may be used for other purposes only if approved in advance by a majority vote of the association members. Accordingly, if these funds were set aside specifically for painting, then you cannot use the excess for replacement of exterior lights. However, you may put the matter to a vote of the association members. If a majority of the members so approve, then you may utilize the excess funds in the painting reserve account for replacement of exterior lights.

Community Association Leadership Conference

The Law Firm of Becker & Poliakoff, P.A. will be holding its annual Community Association Leadership Conference on Friday, January 15, 2010. The program is open to the public, and is free of charge. The event will take place at the Barbara B. Mann Performing Arts Hall, at Edison College. The facility is located at 8099 College Parkway, S.W., Fort Myers, Florida.

Registration begins at 8:30 a.m. The program starts at 9:00 a.m. and runs to 12:30 p.m. This workshop has been approved by the Florida Regulatory Council for two manager continuing education credit hours (Two Insurance and Financial Management Credit Hours).

This year's program focuses on collection of delinquent assessments and strategies for coping with the realities of our current economic climate.

Register in advance at www.callbp.com/events.php or by calling Franklin Scott at 239-433-7707.

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Association Members Can Place Item On Agenda

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Q: I recently asked the board of directors of my association to consider getting bids for a new landscaping contract. Our current landscaping contract has another year to go, but can be terminated on 60 days notice. I am certain that we can get a cheaper landscape contract. I am happy that the board listened and put the issue on the agenda for its meeting, but disappointed the directors only had a brief conversation and never took a vote. Is there any way I can get them to vote on this, or is there any way that the members can take control and vote to get new bids and terminate the current landscaping contract? **R.R. (via e-mail)**

A: As you may know, the agenda for a community association board meeting is set based upon the provisions contained in the governing documents of the association, most often the bylaws. Some bylaws contain required agendas, particularly for annual members' meetings. Many bylaws provide that the president shall set the agenda, or in some cases that two or more directors may petition to have an item placed on a board meeting agenda.

I assume from your question that you simply raised the issue with the association president and that he or she voluntarily elected to put the item on the agenda. Even if the president had not been receptive to your request, both the Florida

Homeowners' Associations Act and the Florida Condominium Act provide a statutory right for members of the association to have items placed on the agenda of a regular or special board meeting.

Specifically, the Homeowners' Associations Act provides that, if twenty percent of the total voting interests (there is typically one voting interest per home) petition the board to address an item of business, the board shall take the petitioned item up on an agenda at its next regular or special board meeting, but in no event later than sixty days after the receipt of the petition. In a homeowners' association, when a board receives such a petition, it must then provide a 14-day notice of the board meeting to all members. In addition, for items placed on the agenda by membership petition, each member shall have the right to speak for up to three minutes on the matter, provided they sign up to speak at the meeting or submit a written request prior to the meeting. The Homeowner's Associations Act specifically states that the board is not obligated to take any action on the agenda item.

The Florida Condominium Act contains similar provisions, although, the Condominium Act does not require additional notice to members and does not expressly relieve the board from taking any formal action on the item that was placed on the agenda by member petition, although it is in my

opinion that there is likewise no obligation on a condominium association board to take formal action. Simply stated, a director cannot be forced to make a particular motion or to second a motion, and if no motion is made and seconded, then no formal action can be taken by the board. Also, unlike HOA's, condominium unit owners have the right to speak at all board meetings with respect to designated agenda items, whether raised by petition or not.

Absent some special provision in the governing documents of your association, which would be very unusual, the decision to enter into or terminate contracts is generally a decision for the board of directors. Even if the board were to obtain additional bids, there is no obligation that the board must accept the lowest bid. When entering into contracts, the board may take other factors into consideration, such as the qualifications of the contractor and the history and level of service provided by the contractor.

The association members' authority to have a say in the landscape contract (or contracts in general) is generally confined to electing or recalling, the board, or possibly petitioning for a members' meeting to amend the governing documents of the association to limit the board's authority. However, in my experience, limiting the board's authority to enter into basic services contracts would create a very difficult, practical problem for efficiently administering the association.

Q: I moved into my new neighborhood a year ago. Ever since I moved here, several of my neighbors have not followed the association's rules, as they were explained to me, for storing garbage cans inside the garage and for putting garbage out to the street. Our garbage pickup is on Tuesday mornings, and several people put their garbage cans out Sunday afternoon. Also, many of my neighbors do their own lawn maintenance and they will pile lawn debris at the curb on Saturday. Sometimes that debris sits there up to a week before it is removed. The problem seems to be getting worse and complaints to the association

have so far gone unanswered. What can I do to get these rules enforced? **C.D. (via e-mail)**

A: These types of detailed restrictions are sometimes found in the declaration of covenants, but most often are included in rules and regulations. Most homeowners' associations have general rule making authority to regulate the exterior appearance of homes and the common areas. Rules are valid if they do not conflict with any of the other governing documents and are reasonable. Since one of the most compelling reasons for having a deed restricted community is to maintain certain standards for the benefit of owners and to support higher property values, rules requiring garbage containers to be kept hidden, and prohibiting garbage cans from being placed at the curb too early before scheduled pickup, are fairly common and generally considered reasonable. I have seen rules prohibiting garbage cans from being placed at the curb more than 12 hours before scheduled pick up, and others that set the restriction at 24 hours, though something in between is probably most practical to serve all interests. Assuming your association has clear and enforceable rules in place, all that is left is for the board to enforce those rules.

Ideally, a letter to the owner reminding them of the rules and asking for compliance would solve most, if not all, of the violations. I would generally advise informational, non-threatening letters as the first step for your board. If members fail to comply, the Homeowners Association's Act allows fining if the governing documents authorize fining. The statute allows a fine of up to \$100 per violation, provided that the offending owner is given the opportunity for a hearing before an independent panel. That is a heavy price to pay for a violation that would be fairly easy to cure. Moreover, repeated violations can also be met with additional \$100 fines. Fines cannot be the subject of a lien against a home, so the actual collection of a fine can be complicated by the need to file a small claims lawsuit. Accordingly, some consider fining to be a fairly ineffective enforcement tool.

Ultimately, rules can be enforced through court proceedings, although that is always the last option for achieving compliance with day-to-day rules and regulations. If the real issue in your

community is the board's failure to act and enforce the rules, then the members have every right to contact the board and insist upon enforcement.

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Association Should Limit Number of Vehicles

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Q: It is that time of year again when all of my “snowbird” friends come back to their condominium homes. I am genuinely happy to see them since many of them are very good friends. But just as local traffic becomes a problem at this time of year, so too does parking in our small parking lot. Our condominium development was built in the early 1970’s, and the developer gave every owner one carport space and use of a parking lot which does not even have enough spaces for every owner to have a second car. I think every owner limits themselves to two cars total, and many retired couples just keep one car at the condo. However, with family and guests visiting, often for weeks at a time, we have a severe parking problem during the “high season.” The association has not wanted to do anything in the past because the problem is confined to a two-month period and because there is no readily apparent solution. The only other available parking is about two blocks away. Do you have any practical solutions in your experience that might help us to address this situation? **N.Y. (via e-mail)**

A: Your problem is not uncommon. Although development regulations have changed over the years, I am aware of many condominiums which were developed with only one and one-half parking spaces per unit. Many developers chose not to provide extra parking facilities with the goal of maximizing the number of dwellings they could

sell. Obviously, adequate and orderly parking is an extremely important part of any high-density housing development.

Typically, in addition to assigned carport or garage spaces, a developer may also assign uncovered parking spaces to particular units and then reserve a number of parking spaces for guest parking. Where there are no such general parking spaces assigned to unit owners, those spaces are common elements which may be administered by the association. The association may assign use of a particular parking space to a particular unit owner through a lease in exchange for consideration, or simply through general assignment of a particular parking space to facilitate the orderly use of the parking lot. However, there are limitations to the association’s authority in this regard, because the association, in the absence of an appropriate unit owner vote, may not convey the common elements or alter an unit owner’s use rights in those common elements. Therefore, any lease of a parking space must be of a sufficiently short term to not constitute a “disguised sale”, and arguably, any assignment and use scheme should include some sort of rotation system so that everyone gets an equal chance, over time, to use any preferred parking spaces.

Given your description of your problem, it would appear that the best, and probably unavoidable,

solution is that the association must limit the number of vehicles that each owner, including their guests, may have upon the property at any time. While such a restriction could reasonably be placed in board-made rules and regulations, it would be better, and more certainly enforceable, to have the members amend the declaration of condominium to include this restriction. Such restrictions are not uncommon, and while they may cause inconvenience to some owners, the restrictions are fairly and equally applied. In addition to a two vehicle limit, many associations with limited parking space prohibit longer storage of vehicles upon the property while the owner is away, and require that the unit's assigned space be used before a guest space can be occupied.

Q: I serve as the treasurer on the board of our condominium association. Unfortunately, we have some issues with our building. In addition to making some repairs, we have made a demand on the developer for reimbursement. We have consulted with legal counsel and may sue the developer, if necessary. One of our unit owners is selling his unit and the buyer noticed the work being performed when he toured the property. The buyer has asked for information from the association about the condition of the building and the prospects for recovering from the developer. I am familiar with the requirement that the association must provide a prospective purchaser with a letter stating how much assessments are owed on the condominium unit, but I am not aware of our obligation to respond to this inquiry, and was hoping you could shed some light on this issue? **W.R. (via e-mail)**

A: You are correct that the Florida Condominium Act does require an association to provide a timely response to a request from an owner or prospective lender, or either of their designees, for the account balance owing to the association on the unit. The letter that the association provides is called an "estoppel" letter, because the association will then be "estopped", or legally prohibited, from demanding that the new unit owner pay any more than the amount disclosed in the letter. Unit purchasers and their

title insurers use the estoppel letter to make sure that all amounts owing against the unit are paid by the seller at the closing.

However, the estoppel letter is all the association is legally required to provide directly to prospective buyers, although the selling unit owner is obligated to furnish additional information regarding the association. However, it is not unusual, and in fact is becoming more and more common, for a buyer's mortgage lender to send a "lender questionnaire" to the association to inquire about a whole host of issues, including pending litigation. The Florida Condominium Act clearly provides that the association is not obligated to respond to those lender questionnaires, but may do so, and may charge \$150, plus attorneys' fees and costs incurred in responding to the questionnaire. In addition, the association may limit its exposure to liability for responses on a lender questionnaire by including "magic language" from the statute to the effect that the person completing the questionnaire has responded in good faith and to the best of his or her ability.

Even if an association elects to provide answers to the prospective mortgage lenders questionnaire, it is rarely a good idea to provide any details about alleged building defect or to theorize as to the prospects of recovery from the developer or any third party. For one thing, any such disclosure is not confidential and could easily be used against the association if litigation does arise. The association does have a duty to disclose in its "Question and Answer Sheet" any litigation to which the association is a party and in which the association may be exposed to liability in excess of one hundred thousand dollars.

The above being said, many associations have exhibited a more liberal attitude in responding to "lender questionnaires", so as to facilitate transactions in a difficult market. If disclosures regarding pending claims regarding alleged construction defects are going to be made, you should definitely involve the association's legal counsel to ensure that no statements are made

which would harm your case, or cause other problems.

Q: My son has a physical handicap which requires him to be in a wheelchair. We must help him into our Unit because there is no ramp available for his use. It was brought to my attention that the Association may be required to provide handicapped access. However, when I asked the President of our Association about this, he stated that the Association is not required to provide handicapped access. What do you think?

N.C. (via e-mail)

A: The Federal Fair Housing Act provides that it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a

dwelling to any buyer or renter on the basis of race, color, religion, sex, familial status, national origin, or handicap.

The term “handicap” is defined in the law as “a physical or mental impairment which substantially limits one or more of such person’s major life activities.” Where the owner or any other person who uses the dwelling is handicapped, the Association cannot refuse to allow the owner to make a reasonable modification to the dwelling or associated common use areas if such modifications are necessary to afford the handicapped individual full enjoyment of the premises. However, the modifications are made at the expense of the person making the request.

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Pending Bills Would Help Protect Associations

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Q: I have been reading some articles and see that there are some proposals to help associations recoup their lost revenues due to foreclosures. What will it take to get these bills passed? **W.J. (via e-mail)**

A: In my opinion, one of the greatest inequities in Florida law is a lender's preferred status with respect to association assessments. Taxes trump a mortgage lien, which is why mortgage lenders routinely escrow for tax payments. These days, the community association provides many of the services that tax dollars used to pay for, including water and sewer, trash collection, and road maintenance.

However, when a lender takes title after a foreclosure situation, the lender is only liable for six months of unpaid assessments in the condominium context or twelve months of unpaid assessments in the homeowner's association context. Both statutes also provide an alternative liability cap of one percent of the original mortgage debt. The mortgagee is always liable for the lower number.

Several proposals were introduced during the 2009 regular session of the Florida Legislature, but successfully killed by the mortgage banking industry.

2010 looks like it will be another active year in the foreclosure reform area. According to Yeline Goin, Co-Executive Director of Becker & Poliakoff's Community Association Leadership Lobby (CALL) "there are already several Bills in play which we expect to generate a lot of discussion in Tallahassee this year." According to Goin, the legislative proposals that are on the table so far include the following:

- **House Bill 115:** This proposal states that during the pendency of a foreclosure action, if the unit is occupied by a tenant, the association may demand that the tenants pay rent directly to the association, with a right of eviction for non-compliance. This Bill would also permit the condominium association to suspend certain common element use rights for nonpayment, although utility services could not be suspended. Voting rights could also be suspended for delinquencies. Similar amendments are proposed in this Bill for Chapter 720, the Florida Homeowners Association Act.
- **Senate Bill 164:** This proposal requires any mortgagee which has not completed its foreclosure within six months from filing its foreclosure lawsuit to pay the "statutory cap" (six months of past due assessments or

one percent of the original mortgage debt, whichever is less) during the pendency of the lawsuit. This proposal would apply to condominiums only.

- House Bill 329: This proposal would also allow the collection of rents directly from tenants, and permit suspension of certain common element use rights and voting rights. Significantly, this Bill also deletes the statutory cap and would require a foreclosing lender to pay all unpaid assessments if the foreclosure action is not completed within a year.
- House Bill 337/Senate Bill 968: This Bill states that if an owner is delinquent in the payment of assessments, they can be restricted from running for office, holding office, serving on committees, leasing units, or using the common areas.
- House Bill 419/Senate Bill 864: This Bill is similar to a couple of others already discussed regarding the right to demand payment of rents directly from tenants. This proposal also states that an association's claim of lien can include the cost of collection efforts by management companies or licensed managers.
- Senate Bill 780: This Bill would require a financial institution that institutes a foreclosure proceeding to timely pay all fees associated with or owed by that property, including but not limited to homeowner's association fees, maintenance fees, and property taxes.
- Senate Bill 1196: This proposal, similar to several of the others mentioned above, includes the right to collect management company charges as part of the association's lien, permit interception of rents, and permit suspension of common element use rights and voting rights. This proposal is applicable to both

condominiums and homeowners' associations.

- Senate Bill 1270: This Bill would permit a condominium association to disallow use of common area facilities by unit owners who are delinquent in the payment of assessments by more than ninety days.
- Senate Bill 1272: This proposal would change the condominium "statutory cap" from six months of past due assessments/one percent of original mortgage debt (whichever is less) to twelve months past due assessments/one percent of original mortgage debt (whichever is less). This Bill further provides that in addition to the "statutory cap", if a first mortgagee institutes a foreclosure action, the mortgagee is liable for any special assessments levied against a unit during the pendency of such action for damage to the condominium property.

As you can see, there is no shortage of State Legislators who agree that relief for associations is long overdue. If history is any guide, the lenders and their lobbyists will see it differently.

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You know what to do.

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Benefits To Having Experienced Manager

Fort Myers The News-Press, February 7, 2010

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Q: Our 90 unit condominium has been fortunate to have two, long-term directors who have done a wonderful job for us over the past decade. Unfortunately, the day we knew was coming has arrived, and they have both decided not to run for re-election this year. We already know who the new directors are going to be, because they are running unopposed, and our early discussions have turned to whether or not we need a manager now. We know many of the reasons that a manager could help us to run the association. One of the incoming directors insists that a new manager will insulate the board from liability. One of the long time directors tells us that the board had long considered hiring an administrative assistant, not a licensed manager, in order to save on manager's fees while still getting some assistance in administering the association. Could you comment on our situation and give us some advice? **S.F. (via e-mail)**

A: You are correct that there are several, obvious benefits to having an experienced manager. Foremost among them, the manager will do most of the "heavy lifting" and take that burden off the board members. Experienced managers know who to call and how to get things done, and very often can get the best prices on goods and services for the association. Finally, most experienced managers, especially those who work for a management company with good

bookkeeping and accounting back-up, can provide excellent financial services, which are typically the most time consuming and labor intensive functions of an association. If your volunteer board members are not interested in a nearly full-time job, then a manager can be very helpful.

However, one of the statements in your question is misguided. Specifically, a manager will not insulate the board from liability. It is important to note that a board has ultimate responsibility for all of its functions and all of the actions of the association, including those actions taken by a manager. In other words, it is possible to delegate assignments and projects to a manager, but it is never possible to delegate the ultimate, legal responsibility for administering the association. You will find that experienced managers are very careful to understand and seek mutual agreement with the board regarding the limits of their authority. They will insist the board make policy decisions, approve contracts, and make other important decisions. In fact, most management contracts used in this locale include an indemnification provision which actually insulates the management company from liability incurred while taking action on behalf of the association. I recommend that the management company also be required to indemnify the association when their errors or omissions cause harm to the association.

If your association hires a management company, it is strongly recommended that your association's legal counsel review the proposed contract before it is signed. In my opinion, a management contract should always be terminable by either party (the association or the management company) upon reasonable notice (thirty days or sixty days is customary), with or without cause. There should also be a specific listing of the manager's responsibilities, limitations on authority (including expenditure authority), insurance requirements, and the like.

The alternative of hiring an administrative assistant who is not a licensed manager is not uncommon. However, it is important that the association and the administrative assistant understand the legal limits of an administrative assistant's authority.

Chapter 468 of the Florida Statutes regulates and generally requires the licensure of community association managers. "Community association management" is defined to include certain practices that require substantial specialized knowledge, judgment, and managerial skill, including the practices of controlling or disbursing funds of a community association, preparing budgets or other financial documents of a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved in the operation of a community association. The statute does carve out a specific exception for any person who performs clerical or administrative functions under the direct supervision and control of a licensed manager. While not expressly excepted, I believe that an administrative assistant who assists the board under the direct supervision of board members, and who does not engage in any of the above-described practices defined as "community association management", may perform those administrative duties without a license.

In searching for a management company, do not be guided by price alone. Like most things in life, you usually get what you pay for. Your

accountant, your attorney, and other professionals with whom you have existing relationships would likely be willing to provide you with a list of several management companies that they believe would be well suited to bid on your community's particular needs.

Trade Show, Seminars of Interest to Associations

On Friday, February 12, 2010, beginning at 9:00 a.m. and running through 2:00 p.m., the South Gulf Coast Chapter of Community Associations Institute will hold its 16th Annual Conference & Trade Expo. The trade show will take place at the Alico Arena on the grounds of the Florida Gulf Coast University, 10501 Florida Gulf Coast Boulevard South, Fort Myers 33965. FGCU is located off of Ben Hill Griffin Parkway, a mile south of Alico Road.

Over ninety exhibitors will provide service and product information. Vendors who set up booths typically include various contractors (painters, roofing companies, etc.), as well as numerous service providers such as accounting firms, legal firms, insurance agencies, banks, and management companies.

In addition to the trade show, a series of educational seminars will be hosted throughout the day. At 8:00 a.m., I will present a two-hour course entitled "2010 Legal Update." Registration for this course may be obtained by calling Robert Podvin, Executive Director of the South Gulf Coast Chapter of CAI at 239-466-5757.

At 10:00 a.m., there will be a two-hour open forum to discuss "Legal, Insurance, and Accounting Issues Confronting Community Associations Today". Local attorneys, insurance brokers, accountants, and members of CAI's legislative committee will provide information to fuel debate regarding the issues presented.

At 1:00 p.m., CAI's Florida Legislative Alliance will host a program reviewing potential legislation for 2010 affecting community associations

(condominiums, cooperatives, and homeowners' associations) as well as legislative issues affecting community association managers. The Florida Legislative Alliance is a committee which recommends changes to the laws affecting community associations, and also provides comment and analysis regarding other legislative initiatives.

Cash prizes will be awarded to CAM managers throughout the day starting at 9:00 a.m. Exhibitors will be raffling off booth prizes and all community

association residents are welcomed to enter their name at each booth. A "Cruise for Two" will be drawn at the conclusion of the show.

All events provided to managers, condominium and homeowner association board members and residents are free of charge.

Set aside some time on Friday, February 12, 2010 for this event.

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Condo Associations Can Require Owners to Provide Duplicate Keys

Fort Myers The News-Press, February 14, 2010

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Q: Our condominium association would like to institute a program of requiring owners to provide keys to the association. We have had two recent incidents concerning water leaks in units, where the units were left unoccupied by seasonal residents. In one situation, a neighbor had a key to the unit that was leaking, and was able to provide access to the association manager before the leak got out of hand. In the other situation, no key was available and the association manager and maintenance worker were unable to access the unit. They basically stood by for a few minutes while water leaked from under the front door and into the common element hallway. After a few minutes, they forced the door open and turned off the leaking valve, but in doing so, caused damage to the front door and lock. Can the association require owners to provide keys to their units? **R.S. (via e-mail)**

A: The situations you describe are not uncommon, especially during “off-peak” months when many seasonal residents are away from their units. Accordingly, many associations explore the possibility of requiring owners to provide duplicate keys to their units, in the event the association is required to access the unit for maintenance and/or emergency purposes.

The Florida Condominium Act gives each condominium association an irrevocable right to access each unit during reasonable hours when necessary for the maintenance, repair or replacement of any common elements or 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. This right authorizes the association to access a unit for maintenance or emergency purposes. In my opinion, water leaking from under the front door of a unit and into the common element hallway would certainly constitute the sort of emergency contemplated under the statute.

The right of access to a unit does not necessarily authorize an association to require owners to provide duplicate keys to their units to the association. Instead, such right generally stems from a provision in the association’s condominium documents. Preferably, the provision would be contained in the declaration although I have also seen this requirement in an association’s rules and regulations.

There are arbitration decisions by the Division of Florida Condominiums, Timeshares and Mobiles Homes upholding an association’s right to require

duplicate keys from unit owners. Although arbitration decisions are not legally binding precedent, they provide some level of guidance on how similar cases may be decided.

Therefore, in response to your first inquiry regarding unit keys, the answer is yes, an

association may require unit owners to provide duplicate keys to their units, although it would be necessary for the association's condominium documents to contain an express provision along those lines.

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There Are Two Kinds of Common Elements

Fort Myers The News-Press, February 21, 2010

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Q: Last year, I planted some small bushes along the walkway to my condominium door and built some new plant beds in front of my front window. Several of my neighbors have done the same thing, and everybody who sees what we have done comments how nice the plantings look. But now, the association decided to upgrade the landscaping throughout the community and wants to remove the bushes we installed to make all areas uniform. I objected, but the board said the plan was to make the entire community the same. I objected again, but was told I had no legal right to install bushes in the first place. Can you help me and my neighbors save our landscaping? **F.B. (via e-mail)**

A: In most condominiums, the exterior landscaping, including walkway areas, are common elements. Occasionally, walkways and courtyards are defined as “limited” common elements, which is a legal term meaning they are reserved for use of certain owners, and usually maintained by those owners. But most often, all outside areas and landscaping are “general” common elements (a shorthand term often used for common elements that are not limited common elements). The first thing you need to do is confirm whether the areas you improved are limited common elements to be maintained by owners, or general common elements that are

maintained by the association. The answer to that question lies in your declaration of condominium.

If these areas are general common elements, the association has complete control over the area, legally speaking. Even where board approval to alter common elements by adding landscaping is granted, there is no obligation on the part of the association to maintain, or retain, that landscaping. In other words, by allowing members to improve the landscaping on the common elements, or not objecting to it, the association does not forfeit its legal rights.

If the areas at issue are limited common elements to be maintained by unit owners, then the association would not have the right to remove and replace your plantings.

Q: I own a unit week in a timeshare condominium. This year when I received my annual meeting and election packet, I noticed that on the limited proxy was a space to be used for voting for Board members. I was under the impression that proxies were not to be used in condominium elections. Would you clear this matter up for me? **S.B. (via e-mail)**

A: The voting, meeting, and election procedures in Chapter 718 of the Florida Statutes, the Florida Condominium Act are contained in a

number of different sections. In some cases, the general condominium statute specifically exempts timeshare associations. In other cases, there is no exemption for timeshares.

Accordingly, some parts of election rules in the Condominium Act apply to timeshare condominium associations, while other provisions do not. Section 718.112(2)(d)3. deals with the election of directors in a condominium association. The last sentence in Section 718.112(2)(d)3., specifically says: "The provisions of this subparagraph shall not apply to timeshare condominium associations." Therefore, the "two envelope/secret ballot" election procedures in the Condominium Act do not apply to timeshare condominium associations.

Further, Section 718.112(2)(d)2. of the Condominium Act specifically allows timeshare condominium associations to use proxies for the election of directors.

It is well-established in the law that timeshare condominium associations may conduct their board

elections by using proxies, and many, if not most, do so.

Q: In a recent column, you wrote that both the Florida Homeowners' Association Act and the Florida Condominium Act provide a statutory right for members of the association to have items placed on the agenda of a regular or special board meeting. I was not aware of this provision, and have been unable to find it in the latest copy of the condominium statute I have. Will you please tell me where to find it? **G.R. (via e-mail)**

A: The provision was added to Section 718.112(2)(c) of the Florida Condominium Act in 2008. The condominium statute now provides: "If 20 percent of the 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, place the item on the agenda."

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Court Ruling in Coral Lakes Foreclosure Discussed

Fort Myers The News-Press, February 28, 2010

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Before addressing reader questions, I would like to report on a very important case for homeowners' associations regarding assessment collections and mortgage foreclosures.

On February 19, 2009, Florida's Second District Court of Appeal (which has jurisdiction over Lee, Collier, and Charlotte Counties, among others), issued an opinion in the case of Coral Lakes Community Association, Inc. v. Busey Bank, et al. The appeal arises from a first mortgage foreclosure action filed by Busey Bank (the "Bank") against homeowners who had allegedly defaulted in the payment of their mortgage. Coral Lakes Community Association, Inc. (the "HOA") was also named as a defendant in the action because of its interest in the property relating to unpaid assessments. The Bank obtained a final judgment foreclosing its mortgage. The final judgment determined the Bank had no liability to the HOA for past due assessments.

The HOA claimed that it was entitled to past due assessments pursuant to Section 720.3085(2) of the Florida Statutes, a law commonly called the Florida Homeowners' Association Act. The relevant subsection of the statute provides if a first mortgagee takes title to a parcel in a homeowners association through foreclosure, the mortgage holder is obligated to pay twelve months of unpaid assessments which accrued immediately preceding

the transfer of title, or one percent of the original mortgage debt, whichever is less. However, the HOA's Declaration of Covenants and Restrictions in this case provided that if any person acquired title as a result of foreclosure of a first mortgage, the party acquiring title would not be liable for any delinquent assessments owed to the HOA, and which accrued prior to the time of taking title.

The appellate court concluded the Declaration's plain and unambiguous language controlled over the liability established by the statute. The court reasoned that the Bank was a "third party beneficiary" of the Declaration, which is a contract between the HOA and its members, and that the application of the statutory liability upon the Bank would impair the Bank's contractual rights. The court explained "the HOA could have protected itself if, in drafting its Declaration, it had included language that its lien for unpaid assessments related back to the date the Declaration was recorded or that it otherwise had lien superiority over intervening mortgages." The court continued, "however, the HOA took the opposite tack to entice lenders to finance in its community. The statutory change is section 720.3085 cannot disturb that prior, established contractual right."

Since the decision was announced, there has been a great deal of debate as to how far-reaching its impact will be. Clearly, the decision has no effect

on condominium associations, where the law was changed back in 1992 to establish the responsibility of foreclosing lenders regarding payment obligations for past due assessments (in general, a foreclosing lender in the condominium context must pay six months of unpaid assessments or one percent of the original mortgage debt, whichever is less).

Interestingly, the Coral Lakes case arose under a previous version of the Homeowners' Association Act, which has since been amended. Further, the decision hinged upon the specific language found in that community's documents.

Undoubtedly, this case will be argued by lenders as precedent, although how far those arguments will carry remains to be seen. One thing is for certain. Every homeowners' association should look at the provisions of its covenants to determine how they allocate past-due assessment liability.

Q: Several members of my condominium association cannot agree on a very basic issue. Specifically, our bylaws have many notice requirements for member meetings and board meetings that are in stricter than those contained in the Florida Condominium Act. Several members think that the statute takes priority over the bylaws and that we can ignore the bylaws. But I, and a

few others, believe that the association has the right to add additional notice requirements and that those additional requirements are valid. Who is correct? **G.A. (via e-mail)**

A: The example you cite of having greater notice requirements in the bylaws than are set forth in the statute is not a conflict. The statute sets out the minimum notice requirements. However, at least in my opinion, more restrictive notice requirements may be included in the governing documents. Remember, the Condominium Act is, in many ways, a consumer protection act that sets out minimum protections for condominium unit owners. It is not a conflict and not a violation of the Condominium Act to require a 30-day notice for a special members' meeting, although the Statute only requires 14 days notice. Clearly, in that situation, the Condominium Act provision is satisfied.

An example of a more restrictive requirement in the other direction involves the recall provisions in the Condominium Act. The Condominium Act provides that a director can be recalled upon approval of a majority of all unit owners. If a governing document provision called for the approval of two-thirds of the members to recall a director, then the majority requirement of the Condominium Act would control.

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Association is Legally Obligated to Enforce Rules

Fort Myers The News-Press, March 7, 2010

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Q: I live in a community operated by a homeowners' association. I have a question about the board's right to come onto my property to "inspect" the exterior of my home and landscaping. My association has started walking the property quarterly, and between those inspections are follow-up inspections. It seems as though board members and architectural control committee members are constantly on my property. I know that the police need to get a warrant to come onto my property, so I wonder how it is that the association can trespass whenever they want to?

D.H. (via e-mail)

A: One of the most common functions of a homeowners' association is to enforce covenants concerning exterior maintenance and general appearance standards. The most often cited reason for covenants and restrictions is to maintain a certain quality and character of the community, both for the day-to-day enjoyment of people who choose to live in that setting, and for the purpose of maintaining property values. Your association's board has not only the right to enforce the community's covenants and restrictions, it has a legal obligation to do so.

There is no express easement right in the Florida Homeowners' Association Act that would grant authority to the board or other association representatives to come on to your property. Some

declarations of covenants will include a provision granting an easement to the association for this purpose.

The short answer to your question is that if the governing documents of the community provide easement rights for the association to enter your property for inspection purposes, then such a provision would be valid. In the absence of such a provision, there is generally no right of entry upon the land of another. Of course, if violations can be observed from common areas (such as from the roadways), or from the land of another for which access permission has been granted (such as from a neighboring lot), the association could address the issue on that basis as well.

The underlying theme of your question invokes one of the fundamental philosophical debates amongst those who live in mandatory membership communities. Many people want to "live and let live", and just "be left alone." However, I believe that everyone who buys into a deed-restricted community needs to be aware that other people might have made the decision to live in your community because the covenants and restrictions are important to them, or perhaps even because one rule is important to them. While it might not bother you for a neighbor to keep a boat in their driveway, it could drive your next door neighbor

crazy, and the “no boat rule” is why he or she chose to live there.

I think a Florida appeals court said it best some forty years ago. In the 1971 case of *Stirling Village Condominium Association v. Breitenbach*, the court said: “Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.”

Although the *Stirling Village* case was decided in the condominium context, it seems equally applicable in the HOA context these days.

Of course, those who ascribe to the “freedom to do my own thing” theory of private rights will argue that there are few housing choices available in modern society, at least in Southern Florida, that do not involve a mandatory membership association.

Like most things in life, there are reasonable points of view on both sides of the issue.

Q: We have had our first home in our neighborhood lost to foreclosure. The owners just moved out last week and the bank is the new owner. I understand we were fortunate compared to some associations because the owners stayed in the home until the end and took care of the

landscaping and the swimming pool. I do know that the bank is now liable for future assessments, but we wonder who will take care of the lawn and the swimming pool while the house is vacant. Are you able to address our concerns? **B.N. (via e-mail)**

A: The experience you have described is not uncommon these days. I would agree that you are fortunate that the prior owner did not walk away from his obligations long ago, leaving an eyesore to contend with. Presumably, the foreclosing lender will now maintain the property since selling the property for top dollar is likely the only way the lender will recoup its loan, or at least some of it. However, many banks are either too overloaded with foreclosures or simply unwilling to spend funds to protect their collateral.

The good news is that the bank is now not only liable for assessments going forward, but also all responsibilities of being a property owner in your community. With respect to ongoing maintenance of the lawn and sanitary pool care, hopefully the bank will take reasonable steps for its own benefit. If it fails to do so, check the governing documents of your association to determine if they contain covenants and restrictions requiring basic upkeep of the property. If so, the documents might also include what is called an “enforcement of maintenance” provision which would allow the association to demand that the property be maintained, and in the event that the property is not maintained, the association may do the work itself and charge the cost to the current owner.

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Neighborhood Associations Expected to Pay Fees

Fort Myers The News-Press, March 14, 2010

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Q: I live in a large master association that has several neighborhood associations within it. The master association insists that the neighborhood associations collect all of the master association's assessments and send the entire payment to the master association. Unfortunately, we have many owners who are not paying the neighborhood association. It's bad enough that the paying owners in our neighborhood association have to carry the non-paying owners, but it seems ridiculous to me that the master association cannot work with us and let us withhold any amounts we have not yet collected. Are there any laws that would help us to not pay the master association until we collect from our members? When approached about this, the master association suggested they might even sue our neighborhood association if we fail to pay. **A.V. (via e-mail)**

A: As with many questions in community association law, the answer lies in the governing documents of the master association and the neighborhood associations. When the developer first drafted the governing documents for your community, it made a choice as to how assessments would be collected between the various associations. In large master planned communities, it is not unusual for the master declaration of covenants, which is recorded before any of the neighborhood declarations, to require

the neighborhoods to collect the master association assessments.

The reasons for this structure are usually obvious. The logistics of a master association collecting several hundred, or even more than a thousand assessment payments from its members can be expensive and extremely time consuming. Since the neighborhood associations are already collecting money from members, it makes some practical sense to have the neighborhoods collect for the master association.

In some master associations, the initial governing documents clearly state that the neighborhoods are legally obligated to collect the master assessments and pay that neighborhood's "per door" fee, whether they collect from their individual members or not. If so, the neighborhood's obligation is no different than any other contractual obligation, and the master assessment becomes a valid common expense of the neighborhood. In such cases the master association can insist that the neighborhood pay.

In other cases, documents are written in a manner that gives the master association the choice whether to require a neighborhood to collect on behalf of the master, or reserves the right for the master association to collect the assessments itself. In these cases, or where the language of the

documents so suggests, the neighborhood simply acts as a collection agent for the master association. In such cases, the neighborhood is not obligated for “making good” on the defaults of its individual members.

Finally, some master association documents do not address this issue and simply leave the master association to collect its own assessments. All of these approaches are permissible by law.

Q: We live in a master-planned community. There are six condominium associations. There are also single family sections with their own deed restrictions and associations. There is also a master association for the whole project.

All six declarations of condominium, written by the same developer, are identical. They permit owners to have two pets, but prohibit tenants in leased units from having pets. The documents for the homeowners’ associations also limit pets to two per home, but do not prohibit renters from having pets.

One of our condominium associations wants to amend their declaration so that renters can have pets in their section. Is this permissible? **B.H. (via e-mail)**

A: Yes. Typically, the master declaration of covenants would control both the condo and HOA segments. The individual condominium and homeowners’ associations can amend their internal documents to impose restrictions stricter than those found in the master declaration, but not more liberal.

I assume that your master declaration does not prohibit tenants from keeping pets, otherwise it would not be permissible in the single family section.

Each of the neighborhood associations (both condo and HOA) have a right of internal self-determination under their own declarations of condominium or covenants, through proper amendments, as long as their changes do not run afoul of the master covenants for the community.

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Short Sale Raises Issue of Association Fee Payments

Fort Myers The News-Press, March 21, 2010

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Q: One of our unit owners owes our condominium association about \$5,000.00, including attorney's fees. There is a "short sale" that has been accepted by the owner's lender, where the bank will accept less than full payment for satisfaction of the mortgage. The bank has offered to pay the association about \$2,000.00 for a release of the association's claims.

It is my understanding that if a short sale occurs, the buyer must pay the entire amount, so why would the board accept less than half? **R.P. (via e-mail)**

A: Good question. First, there is a fundamental debate as to whether your association can even compromise its claim for delinquent assessments. In general, the Florida Condominium Act prohibits excusing any unit owner from paying their share of common expenses unless all other unit owners are likewise excused.

However, many attorneys argue (and I believe convincingly so) that the "business judgment rule" trumps the aforementioned law, and would permit the association to compromise its claim. Proponents of this point of view would argue that if the association "plays hard ball", you may force the bank to go ahead with its foreclosure. This will result in your only receiving six months of unpaid assessments, or one percent of the original

mortgage debt, whichever is less and which may well be less than the \$2,000.00 you are being offered. More importantly, the association will benefit from a quick closing in a short sale situation so that a new unit owner can take title and be obligated for payment of all assessments going forward.

I have seen some associations successfully hold the line and state they will only accept full payment. In your case, the parties to the agreement may find it in their interest to simply pay your entire past due amount, rather than let the deal fall through over a few thousand dollars. However, if the parties to the short sale are not so inclined, and the lender does need to go through the foreclosure process, the association will likely end up on the short end of the proverbial stick.

Q: Our association has carried a workers' compensation policy for ten years, but our new board has informed us that this has been a waste of money because we have no employees. We do contract all of our work out to local contractors. Thus, with no employees, the association believes that it has no liability if a worker on our property is injured. Our insurance agent feels that a workers' compensation policy covers some unforeseen risks. What if any risks does the policy cover, since we have no employees? **T.M. (via e-mail)**

A: Associations that employ four or more part-time or full-time employees must have workers' compensation insurance under the Florida Workers Compensation Law. However, many condominium and homeowners associations (like yours) which do not employ four or more people still purchase a "minimum premium" workers compensation insurance policy. The primary purpose of this type of policy is to provide stopgap protection in the event an uninsured worker is injured on association premises. The Workers Compensation Law is the exclusive remedy for injured workers, meaning they cannot sue the association, but are entitled to a legally established schedule of benefits to compensate them for their injuries.

As a rule, an association that hires an independent contractor is not liable for injuries sustained by that contractor's employees. However, under recent court decisions, an exception to this general rule exists when the association acts as its own general contractor or otherwise directs, supervises or actively participates in the construction to the extent that it directly influences the manner in which the work is performed or has engaged in "acts either negligently creating or negligently

approving the dangerous condition resulting in the injury or death to the employee." Under these decisions, associations may be held liable for a worker's injuries if that worker can prove that the association actively participated in the work being done, or if the association negligently created or negligently approved of the dangerous condition that resulted in the injury or death.

If an association has secured workers' compensation coverage for its employees by entering into an employee leasing arrangement, the association is still required to identify coverage for each employee. The employer must notify the employee leasing company of the names of all the covered employees and any additional employees that are working on a jobsite that may have been excluded from the employee leasing arrangement. Any change in job duties performed by the employees must also be reported to the employee leasing company.

Associations may also consider entering into an employee leasing arrangement with a professional employer organization (PEO) that has secured workers' compensation coverage on behalf of its clients.

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Homeowners Have Issues With Developer Control

Fort Myers The News-Press, March 28, 2010

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Q: My community, which is a homeowner's association, is in limbo because of the bad real estate market. The developer stopped building after about half of the homes were completed. While homes are still for sale, it doesn't look like the neighborhood will be completed anytime soon. In the meantime, the developer controls the association and is not doing the greatest job in many ways. In addition, there are some concerns that the developer is not properly paying its share of the assessments to the association. Is there anyway we can get control of our association or force the developer to take a more active interest in keeping up our neighborhood? **D.S. (via e-mail)**

A: Unfortunately, your situation is not unique. Of course, developers always would like to complete a development and turn over control of the association as soon as possible. That is what they are in business to do. Further, many developers are not well equipped, nor really inclined, to operate an association over the long term.

There are clear, legal obligations imposed on the developer-controlled association arising from the Florida Homeowners' Association's Act and presumably from the declaration of covenants governing your community. The Homeowners Associations' Act establishes legal standing for any member of the association to bring a legal

action against the association, any member, any director or officer, or any tenants, guests or invitees occupying the parcel. So you and all of your neighbors have legal rights available to you at this time. However, as a practical matter, it is difficult for individuals to assert rights because most are disinclined to finance professional assistance (such as attorneys or accountants) on their own. Many communities in your situation put together a "pre-transition ad-hoc committee". Many times, these groups will pool resources and hire an attorney at least to get some basic advice about their rights, responsibilities, and what they might expect going forward.

As you may know, the Florida Homeowners' Associations Act does not require a developer to turn over control of the association until after 90% of the lots in the community have been sold. There is no maximum time deadline in the statute for turning over control of a homeowners' association, as contrasted with the Florida Condominium Act, which requires turnover after seven years from starting the project under all circumstances.

With respect to ensuring that the developer is paying its fair share of assessments, every association member has the right to inspect the "official records" of the association, and must be provided with access to such records within ten business days of the association's receipt of a

written request. There should be separate accounting records which will enable you to identify whether the developer is properly paying assessments. Most developers elect a “deficit funding guarantee” option, rather than the obligation to pay assessments on their inventory lots. Under a deficit funding guarantee, the developer does not have to pay assessments on its inventory lots, but must make up any shortfall in the operation of the association (i.e., deficits), which cannot be paid from assessments receivable from the non-developer owners.

Q: I am writing to you with a question about financial reports by condominium associations. I have lived in my condominium for nearly 10 years, and each year, no later than March 1st, I have received financial reports in the mail. This year, those reports have not been received, and when I called the manager to ask about the reports, I was told that they would not be sent unless I made a written request to receive a copy of the report. Of course, I sent a written request, but I believe that all owners should be sent a copy of the report. I don’t understand why the Board this year did not send the reports as in years past. Isn’t this a requirement under the law? **P.R. (via e-mail)**

A: As you may know, the Florida Condominium Act requires certain levels of financial reporting depending upon the total annual revenues of a condominium association. Not less than 90 days after the end of the fiscal year, or 90 days after an annual date as provided in the bylaws, the association shall prepare and complete, or at least sign a contract for the preparation and completion of, the required financial report for the preceding fiscal year. A condominium association must have its financial report completed not later than 120 days after the end of the fiscal year or a designated annual date. But there is no statutory requirement to send or deliver a copy of the financial report. However, if the association does not send out a copy of the year-end financial report, it must send a notice to all unit owners indicating that a copy is available, free of charge. An owner may then make a written request and receive a copy of the report. In that case, the association must mail or hand-deliver the report to the owner without charge.

Residents in homeowners’ associations may be interested to know that the same, general financial reporting thresholds and timelines apply to homeowners’ associations.

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Committee Meeting Notices Aren't Required

Fort Myers The News-Press, April 4, 2010

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Q: Our homeowners' association has several standing committees, including a beautification committee and a social committee. Are these groups required to post notices of their meetings and keep minutes as well? **P.O. (via e-mail)**

A: Probably not.

In the homeowners' association context, the only "committees" which must conduct their business "in the sunshine" are committees with architectural review/approval authority, and any committee that is authorized to spend association funds. If your committees are authorized to execute either of those functions, they would need to post notice of their meetings and allow other owners to attend their meetings.

The law does not, in general, require committees to keep minutes. However, 617.1601 of the Florida Not For Profit Corporation Act requires that minutes be kept for any "committee of the board of directors in place of the board of directors on behalf of the corporation".

However, I believe it is good practice for all committees to keep minutes of their meetings, whether legally required or not. Further, the board can impose whatever requirements it chooses when it appoints a committee. For example, a board could require a committee to post notices, allow

other owners to attend, and keep minutes, even if not legally required.

The law in the condominium context is slightly different. Generally speaking, any committee which makes recommendations to the board of directors regarding the budget (usually called the "budget committee"), as well as any committee that can take final action on behalf of the association, must follow the "sunshine" rules. Many attorneys refer to these committees as "statutory committees", and they must always follow the notice posting requirements and allow unit owner attendance and participation.

Other condominium association committees (sometimes called "non-statutory committees") must also follow the "sunshine" rules unless the bylaws provide otherwise, in which case those committees are exempt. As in the case of homeowners' associations, the board can also impose additional requirements on non-statutory committees above what is contained in the law.

Q: I have a question about removal of a board member for nonpayment of assessments. Our association was involved in a situation where a board member was removed from office for not paying a special assessment as well as regular monthly assessments. At the time the director was removed, he was about sixty days late with the

payment of monthly assessments and thirty days late with the special assessment. I thought the director had to be more than ninety days delinquent in order to be removed. **C.R. (via e-mail)**

A: You are correct. Section 718.112(2)(n) of the Florida Condominium Act was amended in 2008 to provide that a director or officer “more than 90 days delinquent in the payment of regular assessments shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.” Accordingly, the director whose seat was “taken away” could “reclaim” the seat if he had made up his monthly maintenance fees within the ninety-day deadline. If he had not, even though prematurely removed, he would be deemed to have “abandoned” his office on the ninety-first day.

Per the terms of the current statute, special assessment delinquencies may not be considered for the purpose of removal of officers or directors based on delinquency.

Q: Is the organizational meeting of our association’s newly-elected board, where officers

are elected for the upcoming year, supposed to be an open meeting? **A.B. (via e-mail)**

A: Yes.

For condominiums, cooperatives, and homeowners’ associations, the law is the same. The only board meetings which may be closed to unit owners/parcel owner observation are meetings with legal counsel to discuss pending or proposed litigation. In the homeowners’ association context, there is an additional exception for meetings with legal counsel to discuss “personnel matters.”

It is also important to note that in all associations, directors must generally vote “on the record”, with their individual vote for any particular matter being recorded in the minutes of the meeting. However, in the case of the board’s annual election of its officers, the statutes permit voting by secret ballot.

Accordingly, while owners are entitled to attend a board’s organizational meeting, if the board wishes to have “secrecy” in terms of the election of officers, the board may elect its officers by secret ballot.

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Term Length Doesn't Mean Same Thing as Term Limit

Directors are elected for one-year period

Fort Myers The News-Press, April 11, 2010

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Q: Our condominium documents state that our association is to be managed by a three-member board. There is no limitation on the number of times a person can be elected to the board in our documents. At each annual meeting, the unit owners vote for a new board. The board is then responsible for electing a president, vice president, secretary, and treasurer. The current three board members have served for two terms. Those directors have elected different people among themselves to serve as different officers during the past two years. One unit owner has said that it is illegal for any of the current board members to be candidates at the next election. Some unit owners believe that the two-year limitation in the statute is only for officers. What is the law? **J.M. (via e-mail)**

A: I believe that your unit owner is mistaken. He or she is apparently confusing a recent change to the law on term lengths with the concept of term limits.

A 2008 change to the Florida Condominium Act provides that, in general, directors are to be elected for one year terms. There is a limited exception where two-year staggered terms are permitted, if approved by a vote of a majority of the entire membership.

However, the provision that elections for each board seat take place every year (or every other year where the members have voted two-year staggered terms) is not the same thing as “term limits.” A term limit means that once someone serves for a specified number of years, they must “sit out” for a stated period of time.

There has been much debate as to whether term limits are advisable, or even legal. Many years ago, the state agency which regulates condominiums (known as the Division of Florida Condominiums, Timeshares, and Mobile Homes) issued a ruling in an arbitration case suggesting that term limits, if contained in the bylaws, would be valid.

However, a couple of years ago, the Division reversed its position in a formal agency pronouncement known as a “Declaratory Statement”, and ruled that term limits are not valid in condominiums, even if the bylaws provide otherwise. The Division’s rationale is that the statute provides that “any unit owner” may place their name into nomination for the board at each year’s election. This issue has never been addressed by the courts.

Q: We live in a community that operates as a homeowner’s association. Our manager claims

that no one other than the board of directors are allowed to know his salary or that of our other employees. Is this correct? **B.B. (via e-mail)**

A: The law is more fuzzy on this question. Section 720.303(5) of the Florida Homeowners Association Act specifically exempts “personnel records” from the definition of “official records.” As such, “personnel records” are not available for inspection by members in the homeowners’ association context.

Whether salary information is or is not a “personnel record” has never been addressed by an appellate court, nor does the statute define what a “personnel record” is. I have heard both sides of the case argued, and have been told that even different trial judges who have been confronted with the issue have ruled differently. This is certainly an area where some legislative clarification would be helpful.

Q: Our condominium association rules state that wall-to-wall carpeting is required in bedrooms, living rooms, and dining rooms, for all units above the first floor. Does the Florida Condominium Act allow tile installation in these areas and would this override our association rules? **D.G. (via e-mail)**

A: No.

The Florida Condominium Act generally defers to the provisions of the declaration of condominium and rules and regulations regarding use restrictions in specific condominiums.

“Hard flooring” restrictions are common in condominiums, and also a frequent point of contention. There is little doubt that no flooring dampens noise like carpeting does. However, particularly in the Florida environment and climate, many people like to have “hard flooring”, including tile, wood products, and the like.

Your association’s situation will be governed solely by your condominium documents. If the declaration of condominium contains a rule requiring carpeting in these areas, and assuming the board has consistently enforced the rule, it is a valid and enforceable restriction.

Q: I thought I read in a previous column that the law was changed to require the condominium association to maintain our air conditioner compressor. My condominium association disagrees. Can you clarify? **V.B. (via e-mail)**

A: The responsibility for maintenance, repair, and replacement of air conditioning units is not addressed in the Florida Condominium Act. Rather, the allocation of such responsibility is solely a function of the declaration of condominium.

However, the law was changed in 2008 to require the condominium association to insure air conditioner compressors. The law was also amended to generally require that the association pay for casualty repairs, including expenses not covered due to the deductible, for items it insures. There is also a procedure to “opt out” of this rule.

Most declarations of condominium delegate maintenance, repair, and replacement responsibility for air conditioner compressors to the unit owner. If that is what your declaration provides, it is your responsibility. However, if the compressor were damaged by a “casualty”, such as a lightning strike, the association would be responsible for the replacement of the unit, and payment of any uninsured expenses, including those resulting from a deductible.

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Meeting Agenda Dictates Rules of Resident Notification

Condo Board Defines What is “Conspicuous”

Fort Myers The News-Press, April 18, 2010

By Joe Adams

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Q: I live in a condominium association where the condominium units are free-standing buildings that look just like single family homes. My association apparently conducts meetings without sending notice to the members, but instead just posts the meeting notice. This concerns me because I understand the meetings involve important issues, like changing the insurance obligation to make every owner obligated to insure his own free-standing condominium building. Can you confirm that these meetings are not proper without notice being mailed to members at least fourteen days before the meeting? **J.M. (via e-mail)**

A: I am assuming from your question that members’ meetings are what is at stake. If the board of directors is only conducting board meetings (as opposed to members’ meetings), there is no need for mailed notice to the unit owners, forty-eight hours posted notice is typically sufficient. There are two exceptions to this rule. Board meetings where rules regarding unit use will be adopted and board meetings where special assessments will be adopted, must be noticed in the same manner as annual membership meetings (fourteen days posted and mailed notice).

The Florida Condominium Act provides that the bylaws shall set forth the method of calling

meetings of unit owners, including annual meetings. The statute goes on to require at least fourteen days written notice of the annual meeting be sent or delivered to the members. The Condominium Act also requires that notices of special owner meetings shall be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner, but no time-frame is spelled out in the law.

Your board of directors is obligated to adopt a rule or resolution which specifies the “conspicuous posting” location for notices of both members’ meetings and board meetings. This is a technical legal requirement that “falls through the cracks” with many associations.

The statute requires that notices of annual meetings be posted at a conspicuous location on the condominium property at least fourteen days in advance. The statute also requires posting of notice of special members’ meetings but again contains no specific time requirement for posting of notice of special members’ meetings.

It is permissible under the Condominium Act for free-standing condominium buildings comprised of no more than one building in or on a unit to be insured by the unit owners and not by the

association, if the declaration so provides. Accordingly, I am assuming that a membership meeting would need to be called for voting on the change. Clearly, mailed (or delivered) notice is required for amendment votes. Conversely, if the board has only been meeting to talk about the advisability of such a proposed amendment, 48 hours posted notice would be sufficient.

Q: Recently, our condominium association conducted a vote on proposed amendments to our declaration of condominium that addressed a contentious issue regarding use rights in our apartments. The vote did not pass, but many of our owners did not send in a proxy or cast a ballot. Some people feel that if another vote is taken, and people are contacted and encouraged to vote, the result will be different.

Our board is more or less “neutral” on the issue. Most of the directors favor the change, but many feel the voters have spoken and the matter should be dropped. The board recently received a request from one of our unit owners to conduct a re-vote immediately. We understand a petition may also be in circulation. What are the board’s obligations? **F.I. (via e-mail)**

A: It is not unusual for amendment votes to fail simply due to voter apathy, and re-votes are indeed common. Of course, the process needs to be started over, with a new meeting notice, proxy, and the like.

Initiation of a vote on proposed amendments to your declaration is not addressed by the applicable statute. Rather, the provisions of your declaration of condominium will control.

Most declarations provide that proposals to amend the declaration may be initiated by the board of directors. In such case, it is up to the board to determine whether another vote should be conducted, and if so, when the vote will be taken. The board could decide to hold another vote immediately, wait until next “season”, wait until the next annual meeting, or simply let the matter drop.

Most declarations of condominium also contain a process whereby unit owners can petition for changes. There is no “standard” provision regarding the required number of signatures for an amendment petition, ten percent and twenty-five percent seem to be the two most common standards.

If your members properly petition for another vote on the amendment, regardless of the board’s feelings on the issue, the board of directors will need to act on that petition. Absent a provision in the bylaws specifying a certain time-frame, it is the board’s duty to act within a “reasonable” time in calling a special members’ meeting to vote on the proposed amendment. I would say that sixty days is probably at the outer limits of a reasonable time for action in that case.

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Turnover Changes Developer's Rights

Fort Myers The News-Press, April 25, 2010

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Q: Our condominium association recently had our turnover meeting. The developer's representative showed up at the meeting and put some ballots in the box. I thought that the developer could not vote for the board once the association was turned over. What is the rule on this? **F.L. (via e-mail)**

A: The Florida Condominium Act states that when transition of control (commonly called "turnover") occurs, unit owners other than the developer are entitled to elect a majority of the board of directors. It is important to note that the law does not state that the developer loses all voting rights, only the right to cast its votes (for the remaining units it owns) toward the election of a majority of the board of directors.

It is also important to note that a developer retains the right to appoint one member of the board so long as the developer is holding at least five percent of the units for sale in the ordinary course of business (or two percent for condominiums of more than 500 units).

An example using some easy arithmetic may demonstrate how this works. Let us say that your condominium consists of 100 units. The developer calls for the turnover meeting. Your bylaws provide for a five member board. The developer is still entitled to appoint one director because it is

holding more than five percent of the units for sale in the ordinary course of business, leaving four seats open for election.

Let us further assume that five people put their name into nomination for these four seats, so an election needs to be held. In this scenario, the developer would have to use a special ballot and could vote for one of the four candidates. In other words, by having the right to cast its votes toward one candidate, and appoint a second candidate, the developer is exercising its voting/appointment rights as to a minority of the board of directors, but not the majority. In our hypothetical, unit owners other than the developer would each be entitled to vote for the four candidates of their choice. The developer votes and non-developer votes would be aggregated, and the four highest vote recipients seated to the board, along with the developer's appointee.

As a practical matter, when developers turn over control of condominiums they develop, many (perhaps most) waive the right to appoint a board member. In fact, many developers also choose to forego the exercise of their minority voting rights, for a variety of reasons, including the fact that a developer vote cannot really be secret since the developer would be the only unit owner casting a different number of votes on their election ballot than all the other unit owners.

Q: Our homeowners' association operates a subdivision with about 70 single family homes. The association has a rather limited area of responsibilities, primarily taking care of a road, an unmanned entry gate, and a couple of ponds. The association is also responsible for architectural review, but all of the homes have been built and there is never much activity on that front. For years we have had a management company, but are thinking of going to self-management. However, we were told that because we are over 50 units, we must have a licensed manager. Is that correct?
C.M. (via e-mail)

A: Yes and no.
If you have a manager, they must be licensed. However, you are not legally obligated to have a manager. Setting aside the merits of professional management versus "self-management", this seems to be an area of constant confusion regarding what the law actually requires.

Part IV of Chapter 468 of the Florida Statutes defines certain functions as the practice of "community association management." In general, these include: controlling or disbursing association funds; assisting in the noticing or conduct of board or membership meetings; coordinating maintenance for a community; and preparing budgets or other financial documents for an association.

Any person who performs any of the aforementioned tasks for remuneration must be licensed as a Community Association Manager (CAM). There is a "de minimis" exception for someone who manages a community of less than 10 units. The de minimis exception used to be 50 units, and that is perhaps the source of the misinformation which you have been given.

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Management companies are also now required to be licensed.

So, if your association does have a CAM or management company, they must be licensed. However, if the above-listed tasks are performed by the board of directors or others, and no pay or other consideration passes to the board or others, then there is no licensure requirement for the board members or other volunteers.

Q: Our homeowners' association has been beleaguered by delinquencies. Many of them end up in a mortgage foreclosure. Since most of these owners are "under water", the association has only been getting twelve months of unpaid assessments from the banks after the bank completes its foreclosure. We are now being told that we may not even be getting the twelve months of assessments anymore. What is happening with this?
C.S. (via e-mail)

A: I would refer your attention to my column entitled "Court Ruling In Coral Lakes Foreclosure Discussed" which was published on February 28, 2010. All of my past columns are posted both on my Law Firm's website, and on the News-Press' website.

In short, a bad situation just got worse by virtue of the Coral Lakes decision. Basically, if your HOA documents provide greater "safe harbor" to a foreclosing lender than state law, your documents will control. Accordingly, it is important for every HOA to take a look at the relevant provisions of their governing documents and discuss with their legal advisors whether amendments to their governing documents may improve their collection rights in mortgage foreclosures.



Association Probably Not Liable for Dry-Out

Fort Myers The News-Press, May 2, 2010

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Q: Recently, a common area water heater burst and the water leaked into my unit. The water heater is located outside, under a stairway. I had to call a carpet company to pull up my carpet and pad. Fortunately, they were able to dry it out and reinstall it. Is the association responsible for my dry-out costs, since a common element failure caused damage? **A.H. (via e-mail)**

A: Probably not.

You should understand that there are two distinct issues which come into play in these situations. First is the application of property insurance, sometimes also called casualty insurance, or hazard insurance. Property insurance is a “first party” policy, and provides coverage for a loss caused by a casualty, regardless of fault.

Under Florida law, the condominium association must carry a first party policy (commonly called a condominium master policy) on all of the structural components of the condominium property, including interior unit structural components such as drywall and doors.

Conversely, first party insurance responsibility for various interior portions of the premises, including carpeting, is the responsibility of the unit owner. Accordingly, if the water discharge event was a covered “casualty” (generally, a sudden, fortuitous

event), your individual insurance policy, called the HO6 policy, should cover your dry-out costs. Of course, most HO6 policies carry a deductible, I believe \$500.00 is common.

A second issue that arises in these cases is the concept of negligence. If the negligence of the association causes damage to the interior of a unit, the unit owner may have a claim against the association. However, one (or perhaps even two or three) water intrusion incidents from the same source does not necessarily constitute negligence. Rather, the party claiming negligence (here, you as the unit owner) would bear the burden of proving that the association did not exercise reasonable care in maintaining the common elements, thus causing you damage.

Negligence claims made against an association are usually covered by insurance known as liability insurance. Liability insurance differs from the insurance coverage discussed above, in that it is considered a “third party” type of insurance, meaning that it provides the insured with coverage when a third party makes a claim of wrongful conduct against them. In my experience, if the unit owner carries adequate insurance, their only “real” damage is their deductible, which rarely justifies making a claim against the condominium association. Further, if a unit owner does make a claim against a condominium association, they also

need to involve their insurer to ensure that the insurer's "subrogation" rights, to the extent they may exist, are not compromised by a settlement with the association.

In summary, the HO6 policy typically provides you with protection against events over which you have no control, including most sudden water discharge incidents. Your deductible is basically the portion of loss which you "self-insure."

Q: In response to your recent column regarding opting out of the rule that requires condominium associations to pay for casualty repairs to items such as air conditioner compressors, what is the procedure for "opting out." **M.L. (via e-mail)**

A: Section 718.111(11)(j) of the Florida Condominium Act provides that any portion of the condominium property insured by the association which is damaged by casualty shall be reconstructed, repaired, or replaced as necessary by the association, as a common expense.

As discussed in several previous columns, this is what most refer to as the "Plaza East Rule" (although that is not a formal legal term), because this issue arises from a ruling known as the Plaza East case. The Plaza East holding was later codified in the statute.

The new law probably has the most impact with respect to interior drywall repair cases. Many declarations of condominium require unit owners to repair interior walls, especially non-load bearing interior partitions. However, because the association insures these items, the new law would require repair by the association after a casualty, such as a bursting water pipe from an upstairs unit.

This would include payment of deductibles by the association, as a common expense.

Section 718.111(11)(k) of the statute states that an association may, upon approval of a majority of the total voting interests in the association, "opt out" of the law and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded, or as amended. Therefore, it is important to have your "opt out vote" prepared by your association's attorney, if it is in fact the association's desire to "opt out." Before making the decision on "opting out", you should ask your legal counsel for the pros and cons.

If your association then decides to take an opt out vote, your attorney should prepare the voting documents. Most attorneys will draft a resolution for consideration by the membership. As noted above, the association may "opt out" of the law and may allocate expenses as provided in the declaration as originally recorded, or as amended. Therefore, one question will be whether the declaration provisions that you previously had are sufficient, or whether further amendments are advisable or desirable. This can only be properly analyzed and explained by an attorney. Further, pursuant to a 1996 ruling from the Florida Supreme Court, the preparation of limited proxy forms (with certain ministerial exemptions) constitutes the "practice of law", and therefore must be performed by a licensed attorney.

This is a routine matter for attorneys conversant in this area of the law, but involves significant policy issues, with potentially gigantic financial consequences in the event of a major calamity, such as a hurricane. It is neither legally appropriate nor a good idea for board members or managers to prepare such documentation.

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Senate Bill Would Affect Association Operations

Fort Myers The News-Press, May 9, 2010

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On April 28, 2010, the Florida Legislature passed a Bill that will affect the operation of community associations in several areas. Senate Bill 1196, unless vetoed by the Governor, will become the law on July 1, 2010. Once the fate of the Bill is sealed by the Governor's action or inaction, and assuming it becomes the law, we will take an in-depth look at the various provisions of the new statute in future editions of this column.

In the mean time, here's a sneak-peak at the highlights of the Bill, which has garnered a fair amount of attention in the media.

Condominium Insurance: SB 1196 would eliminate the mandatory unit owner insurance requirements written into the law in 2008. The statute also eliminates the requirement that the board meeting where deductibles are set be preceded by a special form of notice, although 14 days mailed and posted notice of that board meeting will still need to be given.

Condominium Assessment Liability: In a change that will delight many associations, a foreclosing lender's "safe harbor" has been increased from 6 months of unpaid assessments to 12 months. The cap of one percent of the original mortgage debt still applies, so the foreclosing lender would pay the lesser of 12 months of unpaid assessments or one percent of the original mortgage debt.

Remedies For Delinquencies: The statutes for condominiums, cooperatives, and homeowners associations would all be amended by the Bill to add a few more options for associations in dealing with delinquents. New remedies would include suspension of common element use rights and suspension of voting rights for condominiums (already statutorily permitted for homeowners' associations). Significantly, SB 1196 would allow associations to directly attach rents, without need for court action, if there is a tenant occupying a unit or parcel for which delinquencies exist.

HOA Fines: SB 1196 would restore the ability of a homeowners' association to file a lien to secure an unpaid fine, as long as the fine is more than one thousand dollars (and the declaration of covenants would also presumably have to authorize a lien for fines). Condominiums and cooperatives would still be precluded from filing liens for unpaid fines.

Board Vacancies: A glitch created by 2009 legislation would be straightened out, and all community association (condo, co-op, and HOA) board member vacancies could be filled by the remaining board members, for the unexpired term of the seat, unless otherwise provided in the bylaws. Under current law, board vacancies in cooperatives and homeowners' associations are only filled until the next annual meeting.

Employee Records: The Condominium Act would be amended to provide that personnel records of association employees, including payroll records, would be exempted from the definition of "official records", and thus not subject to unit owner inspection. Employee payroll records would also be specifically exempted from member inspection rights in the homeowners' association context.

Owner Privacy: The statutes applicable to condominiums and homeowners' associations would be amended to say that the telephone numbers and email addresses of owners/members are not part of the official records, with a limited exception for cases where an owner/member has consented to receive meeting notices by electronic means. This presumably means that the association is not supposed to be giving this information out, which could wreak some havoc in communities who like to publish member directories (some kind of waiver form will probably suffice).

Fire Sprinklers: Buildings that are required to retrofit fire sprinklers based on changes made to the state building codes adopted in 2000, will have until 2019 to comply, but must apply for their building permit by the end of 2016. Associations would still be permitted to "opt out" of the retrofitting requirement, and the required vote has been reduced from two thirds of the units to a majority. Further, associations can now also opt

out of common area retrofitting. Opt out votes must be completed by the end of 2016.

Rental Amendment Grandfathering Law: The 2004 change to the statute which made it much harder for condominium associations to impose rental restrictions would be relaxed a bit. Under the new law, grandfathering would only apply to amendments that restrict the minimum rental term, or the number of times a unit can be rented in a given period of time.

Bulk Internet and Telephone Service Contracts: Condominium associations would be empowered to contract for expanded telecommunication services on a bulk basis, including telephone and internet.

HOA Board Elections: Homeowners' associations whose bylaws permit secret balloting in the election of directors would be required to use the "two envelope" system now used in condominium board elections.

There are many more details in this 103 page Bill including provisions affecting distressed condominiums, HOA reserves, board member liability, and director compensation. Stay tuned.

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Smoking Bans In Individual Units Controversial

Fort Myers The News-Press, May 16, 2010

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Q: I am on the board of directors of a condominium association. We were approached by an owner who wants to make our building smoke-free. She was told that she needed a petition with twenty percent of the voting interests to get her request on the agenda for a board meeting, which she has done. Is this allowed by Florida law? Can you enforce no smoking requirements in private condominiums? How does the board respond to this request? **J.C. (via e-mail)**

A: A growing number of condominium associations across the country have implemented smoking bans both on common elements, and in a few cases, inside of units (apartments).

The law is clear that the board has the authority to prohibit smoking within indoor common elements. The Florida Clean Indoor Air Act, found at Section 386.204 of the Florida Statutes is a uniform state-wide code that bans the smoking of all tobacco products in enclosed, indoor “work places.” Therefore, in all indoor meetings of the board, committee meetings, and meetings of the membership, smoking would be prohibited because “work” is being performed. Furthermore, cleaning or maintenance of an enclosed common element is sufficient “work” to impose a ban on smoking within these areas as well. Further, the statute specifically states that smoking is prohibited in

specified condominium common elements, including hallways, corridors, aisles, water fountain areas, restrooms, stairwells, entryways, and conference rooms.

The statute does not apply to outdoor common elements, such as a parking lot or open swimming pool area. However, it is my view that if the board of directors is granted rule-making authority over the common elements, which is usually the case in condominiums, the board could adopt a rule banning smoking in outdoor common elements as well. As a practical matter, given the highly addictive nature of tobacco and nicotine, some associations designate an outdoor “smoking area” on the theory that it is better to have a given place where people can smoke, as opposed to having to deal with people who will break the rules because they simply cannot quit smoking.

The authority to ban smoking inside of units (apartments) is a much more controversial topic. After all, smoking tobacco is a lawful activity in and of itself, and your home is your “castle.” Although some attorneys would argue that a board of directors might be able to ban smoking within units by board-made rule, that would certainly be an aggressive tactic. In my opinion, an amendment to your declaration of condominium which bans smoking inside the units would likely be upheld, although there have been no appellate court rulings

in Florida to support the validity of such an amendment.

If an amendment to the declaration of condominium is going to be put up for a membership vote, there are typically two ways that this can happen. First is by action of the board. Second is by petition of unit owners. However, the petition you have received does not appear to be a petition for amendment, but rather a petition for the call of a board meeting.

Twenty percent of the unit owners have the right to petition the board to call a board meeting and consider an issue, but the board is not required to take any specific action as a result of this type of petition. Stated otherwise, your board is probably obligated to take up the unit owners' request that a smoking ban be considered, but the board is not obligated to move the issue forward. However, declarations of condominium also contain a petition process (different than the process for having the board call a special meeting) where unit owners can propose an amendment to the declaration of condominium on their own accord. If this type of petition is received, the board would be required to put the amendment up to vote whether it agreed with it or not.

Some associations that have considered smoking bans also ask about "grandfathering" existing smokers. These are all fairly tricky legal issues, and the board of directors also has to be willing to enforce a smoking ban if it is enacted. Therefore,

you should involve your association's legal counsel in this process, preferably at the early stage so that your community's specific governing documents can be examined, and the board advised as to its options in addressing the members' petition. Please keep in mind that the board is required to call a meeting to address a petition signed by twenty percent of the voting interests no later than 60 days from its receipt.

Q: I live in a small condominium, there are only eight units. We are not sure if we must follow the condo law as it is or can we drop parts of the law. **L.G. (via e-mail)**

A: In general, Chapter 718 of the Florida Statutes, known as the Florida Condominium Act, applies to all condominiums regardless of size.

There are a few provisions of the statute which specifically exempt smaller associations. For example, in condominiums of ten units or less, co-owners of units may serve on the board. As another example, in condominiums of less than fifty units, certain year-end financial reporting requirements (such as mandatory audits when annual receipts exceed a certain level) are not applicable.

However, with respect to the vast majority of issues, the statute will apply equally to small condominiums.

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Rec Facility Use Can Be Suspended For Nonpayment

Fort Myers The News-Press, May 23, 2010

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Q: We have a few owners who have not paid their dues in over two years, but still live in our complex. It really irritates many of us to see these people using the fitness room, swimming pool, and other recreational amenities while they are not paying a dime to help maintain them. Can't we ban them from using these facilities until they pay up? **T.A. (via e-mail)**

A: It depends. If your community is governed by the Florida Homeowners' Association Act, Chapter 720 of the Florida Statutes, the answer is yes. Specifically, Section 720.305(2)(b) of that statute allows an association to suspend common area use rights for those who are delinquent in the payment of assessments. The association cannot suspend rights of access (ingress and egress) nor parking rights. However, use of recreational facilities can be suspended for non-payment.

Such suspensions are not self-implementing. First, the governing documents (typically the declaration of covenants or bylaws) must contain the authority for suspension. Secondly, the board of directors must actually impose the suspension. I recommend that the board have a uniform collections policy which will authorize the president or manager to implement a suspension, without need for further board action. This accomplishes a couple of objectives. First, the suspension can be implemented without having to

wait for a board meeting. Secondly, having a standing order to implement suspensions for delinquencies eliminates the need to discuss particular delinquencies at open board meetings, which can potentially give rise to legal claims by the debtor/owner.

If your association is a condominium association, you are governed by the Florida Condominium Act, which is found in Chapter 718 of the Florida Statutes. If that is the case, the answer to your question is no. The Condominium Act does not currently permit suspension of use rights for non-payment of assessments. However, Senate Bill 1196 which was sent to Governor Crist on May 17, 2010 would allow suspension in condominiums as well.

At deadline time for this column, it is not known whether the Governor will approve SB 1196. Three things can happen. First, the Governor can sign the Bill, and it would become law on July 1, 2010. Secondly, the Governor could veto the Bill and it would not become law (unless the veto is overridden, which would be highly unlikely). Thirdly, the Governor can take no action (neither sign nor veto) and once the Bill has been before him for fifteen days (i.e., until June 1, 2010), it becomes the law without his signature (and again would become effective July 1, 2010).

Q: Our homeowners' association board holds "workshop" meetings. There is no agenda for these meetings. Notice of these meetings is posted and they are open for homeowners to watch, but not speak. No votes are taken at the meetings, they primarily involve the development of agendas for future board meetings, discussion of long-range planning issues, and similar matters. Is this legal?
R.S. (via e-mail)

A: Yes.

The gathering you describe is a "meeting" of the board, since a quorum of the board has gathered and association business is being "conducted", even though no votes are taken.

However, the only legal requirement for your board is that they post notice of the meeting and allow homeowners to attend and observe, which your inquiry indicates is the case. Members in homeowners' associations are not given the right to speak at board meetings by statute, except in limited circumstances where a special type of petition has been filed with the board, or where the association's bylaws confer such a right.

Q: We have a volunteer board and no manager or management company. Our board consists mostly of people who have a "live and let live" attitude. However, there are a couple of families in the neighborhood who apparently feel that the rules do not apply to them. Our board members do not feel like they signed up to be a police force, so they

turn a blind eye to most of these situations. I am very frustrated because I live close to one of the homes where the rules are always being violated, loud parties being the most constant offense. What are my options? **D.M. (via e-mail)**

A: The situation you describe is not uncommon. Many board members find the enforcement of restrictive covenants and rules and regulations to be one of the least desirable aspects of board service because they are often ridiculed as being "nit-picky", "condo commandos", "control freaks", and the like.

One thing that I can say for sure is that courts routinely impose a "use it or lose it" standard on subdivision and condominium restrictions. Stated otherwise, the failure to enforce restrictions by a board will eventually render them unenforceable, at least in many situations.

Of course, you have the prerogative to run for the board and volunteer to help solve the problem, if a problem indeed exists. Alternatively, your association's restrictions constitute a contract amongst the neighbors, and every owner has legal standing to enforce those contract rights with other owners. Stated otherwise, if your neighbors are engaging in conduct which rises to the level of a legal nuisance, you have the right to address the matter directly with them in a formal legal setting, regardless of whether your association chooses to get involved or not.

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Bills Affecting Associations Await Crist's Signature

Fort Myers The News-Press, May 30, 2010

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A couple of weeks ago, I reported on Senate Bill 1196, the major piece of legislation affecting community associations which was adopted in the 2010 Session of the Florida Legislature (see "Senate Bill Would Affect Association Operations" published May 9, 2010). As of deadline time for this column, the Governor still has not signed or vetoed SB 1196. The Governor has until June 1, 2010 to act. Unless the Governor vetoes the Bill before June 1, it will become law (on July 1, 2010) without his signature, and of course would likewise become law if signed by the Governor.

A number of other Bills affecting community associations were also presented to the Governor on May 17, 2010. The Governor likewise has until June 1 to act on these Bills, and as of May 26, 2010, has still not taken action. Here are the highlights of those Bills.

HB 663—RELATING TO BUILDING SAFETY

Elevator Retrofitting: HB 633, HB 1035, and SB 1196 have similar provisions with respect to elevator retrofitting. However, there are some slight differences, and whichever becomes law last will control. All three bills provide that updates to the Safety Code for Existing Elevators and Escalators, ASME A17.1 and A17.3, which require

Phase II Firefighters' Service on elevators may not be enforced until 2015, or until the elevator is replaced or requires major modification, whichever occurs first. The exception applies to elevators in condominiums or multifamily residential buildings, having a certificate of occupancy issued before July 1, 2008. The exception does not prevent an elevator owner from requesting a variance and does not prohibit the division from granting variances. The bills also provide that the Division may grant variances for undue hardship, but may not grant a request for a variance unless it finds that the variance will not adversely affect the safety of the public.

Elevator Keys: HB 663 would permit building owners to install a uniform lockbox containing keys to all public elevators, in order to allow access to the lockbox by emergency responders.

Condominium Inspections: HB 663 would repeal 718.113(6) which is the provision requiring buildings 3 stories or more in height to have prepared an inspection report every 5 years.

HB 663 addresses a number of other issues including, but not limited to home inspection services, mold assessment and remediation, building code inspections and enforcement, and the authority of State Fire Marshal.

HB 713—RELATING TO DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

This bill amends a number of provisions dealing with the licensing of professions by DBPR including home inspectors, mold assessors, community association managers (CAMs), real estate brokers, sales associates, and appraisers.

HB 1411—RELATING TO TIMESHARE FORECLOSURES

This bill establishes a “trustee foreclosure proceeding” as an alternative to judicial foreclosure of timeshare interests. The managing entity may foreclose a time-share assessment lien by either filing a judicial foreclosure, or as an alternative, the managing entity may initiate a trustee procedure to foreclose an assessment lien under s. 721.855. Purchasers will have the option to object to the trustee foreclosure proceeding and require the managing entity to proceed by filing a judicial foreclosure action.

This bill also establishes a limitation of liability for officers, directors, or agent of an owners’

association, similar to that in Chapter 718, Florida Statutes.

SB 2044—RELATING TO INSURANCE

This bill requires all hurricane claims, supplemental claims or reopened claims by property owners and condominium associations to be filed within three years as opposed to the current law which allows filings within five years.

The bill also allows carriers to change the terms of the policy upon renewal and modifies the prompt payment requirements on the part of the insurance carriers. The carrier would be permitted to pay “actual cash value” minus the deductible, regardless of whether the homeowner paid for replacement cost coverage. The carrier then only pays additional amounts once a contract for reconstruction is in place and the costs are incurred (as the work progresses).

This bill also amends the law related to public adjusters and the amounts that public adjusters can collect for their services.

Of course, we will monitor all of these Bills and provide updates as circumstances warrant.

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Fate of Several Condo Association Bills Decided

Fort Myers The News-Press, June 6, 2010

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On June 1, 2010, Governor Charlie Crist signed Senate Bill 1196, which will become law on July 1, 2010. The highlights of SB 1196 were addressed in a previous column (see “Senate Bill Would Affect Association Operations”, published May 9, 2010). Now that it is clear that these sweeping changes will take effect within the month, the next several editions of this column will be devoted to an in-depth look at the new laws.

Prior to dissecting SB 1196, I would report that a few other bills affecting community associations, some of which were addressed in last week’s column (see “Bills Affecting Associations Await Crist’s Signature”) have also had their fate decided by the Governor. SB 663 relating to elevator retrofitting, elevator keys, and condominium inspections was signed by the Governor and will become law on July 1, 2010. HB 1411 relating to timeshare foreclosures was also approved by the Governor and became law on May 27, 2010.

SB 2044 relating to insurance (including shortening the time for making of hurricane claims from five years to three years) was vetoed by the Governor. Likewise SB 1964 was vetoed. SB 1964 would have limited the liability of design professionals for economic damages caused by a design defect. The Governor concluded that such a limitation of liability would “grant unique privileges to design professionals by removing a

consumer’s right to bring a tort action against them for economic damages caused by their negligence”.

One of the most watched provisions in SB 1196 involves a topic that has been near and dear to the hearts of all condominium dwellers’ since the hurricanes of 2004-2005, property insurance. The new law states that for individual unit owner insurance policies (usually called “HO-6” policies) issued on or after July 1, 2010, the policy must include at least \$2,000.00 in “property loss assessment coverage for all assessments made as a result of the same direct loss to the property”. Deductibles for such coverage may not exceed \$250.00 per loss. This is a modification of the 2008 amendment to the law which required insurance for “special assessments” to be included in HO-6 policies, creating substantial confusion in the industry as to what was actually covered. The new change should clarify that issue.

The reference to “hazard insurance” has been replaced throughout the new statute with the term “property insurance”. Also, the association’s insurance obligations are now consistently stated in the statute to be based on the “replacement cost” of the property, deleting the term “full insurable value” previously used in some portions of the statute.

The law regarding the setting of deductibles under the association's master policy has also been modified. Pursuant to a 2008 change to the statute, the board was obligated to set deductibles at an open board meeting, preceded by fourteen days' mailed and posted notice. The mailed notice which was sent to unit owners was required to contain a detailed disclosure of the proposed deductible, potential special assessments, and various other information. The new law eliminates the requirement that a detailed proposed deductible statement be included with notice of the board meeting. However, deductibles must still be set at open board meetings preceded by fourteen days' mailed and posted notice.

The 2010 change to the insurance section of the condominium statute also eliminates the previous requirement that the association be an additional named insured and loss payee on the individual unit owners' HO-6 policies.

Most importantly, the 2008 change to the law implementing mandatory HO-6 insurance for unit owners, and granting authority for an association to "force-place" such insurance, has been removed from the law. Although the statute still states that

the insurance of various internal unit items (such as coverings, cabinetry, and fixtures) is "the responsibility of the unit owner", there is no longer an affirmative right granted to the association to require proof of insurance nor "force-place" such insurance (buy the insurance on behalf of the unit owner and file a claim of lien against the unit if the insurance cost is not reimbursed). In my opinion, an association can still mandate HO-6 insurance through the declaration of condominium if it so chooses, and likewise through the declaration can determine appropriate remedies for non-compliance.

I believe that these changes in the law will meet mixed reviews. Some associations liked the concept of mandatory HO-6 insurance and enforced it vigorously. Others did not like the administrative burden and enforced the law half-heartedly. Many associations simply ignored it.

Next week we will continue with our review of SB 1196 with an emphasis on assessment and collections, including increased mortgagee liability and a new statutory right to attach rental income from delinquent owners.

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New Remedies Offered For Delinquent Assessments

SB 1196 Provides for Suspension of Some Rights

Fort Myers The News-Press, June 13, 2010

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Today's column continues our review of SB 1196, which becomes effective July 1. Today's topic, some new remedies for delinquent assessments.

The 2010 Session of the Florida Legislature saw numerous Bills aimed at improving the lot of condominium and homeowners' associations and their relative position in the current financial crisis. From an association's perspective, the more helpful legislative proposals focused on requiring banks to start and complete their foreclosure actions more quickly. These proposals were analyzed at some length in a previous column (see "Pending Bills Would Help Protect Associations" published January 31).

Perhaps predictably, none of the more beneficial proposed reforms survived objections from the banking industry. However, associations did score a few points in terms of available remedies when addressing delinquencies.

For condominium associations, common element use rights may now be suspended when a unit owner is delinquent in the payment of any "monetary obligation" to the association. Notably, this would not only include regular assessments, but also interest, late fees, and attorney's fees, as well as special assessments and unpaid fines. The authority to suspend common element use rights

does not need to be contained in the condominium documents, and no hearing is required. However, the law clearly states that common element use rights may not be suspended unless the suspension is approved at a properly noticed meeting of the board.

Notice of the suspension, once approved by the Board, must be sent to the unit owner, or his or her tenant, guest, or invitee after the board meeting. I recommend that the posted notice of the board meeting not specifically name the owner nor list the unit number when a suspension is contemplated. Rather, the association should stick to a generic agenda disclosure such as "consideration of suspending rights of delinquent unit owners."

The law goes on to say that suspension of common element use rights cannot restrict access to the unit, use of elevators, or parking rights. The Association also cannot cut off "utilities" (water and sewer service, for example). However, there is a legitimate argument that cable television service is not a "utility", and can be cut off (assuming that common element infrastructure must be used to receive the signal and further assuming that the cable operator will agree to suspend services for non-payment).

Suspensions in the condominium context can only be imposed for monetary obligations that are more than ninety days past due. Suspensions can only be levied for a “reasonable” time. I believe that a suspension which is co-extensive with the period of delinquency would be considered reasonable. Stated otherwise, it would appear that the suspension can last for as long as the delinquency lasts.

A condominium association may now also suspend the voting rights of a member due to the non-payment of any monetary obligation due the association which is more than ninety days delinquent. The authority for suspension of voting rights likewise does not need to be contained in the condominium documents. The voting suspension ends upon full payment of all obligations due the association. In my opinion, unless otherwise provided in the condominium documents, a unit whose voting rights have been suspended is not subtracted from the number of voting interests used to calculate a quorum, nor other voting requirements.

In the homeowners’ association context, the new law seems to have gone backwards. For some time, HOA’s could suspend use rights for non-payment of assessments if authorized by the governing documents. Pursuant to SB 1196, a homeowners’ association can now suspend common area use rights if a member is delinquent for more than ninety days in the payment of any monetary obligation to the association, until such monetary obligation is paid. The right to suspend no longer needs to be contained in the governing documents.

Similar to the new law for suspension of condominium use rights, HOA suspensions cannot apply to portions of the common areas used for

providing access to the parcel, nor may “utility services” provided to the parcel be cut off. As in the case of condominiums, suspensions of common area use rights in the HOA context may be imposed for non-payment of any “monetary obligation” (including fines), not just unpaid assessments.

The unfortunate part of the new law for HOA’s, which appears to be a drafting glitch, is that a homeowners’ association cannot impose a suspension without at least fourteen days’ notice to the person sought to be suspended and an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, nor the spouses or relatives of such persons. Under previous law, a homeowners’ association did not need to afford an opportunity for a hearing when suspending common area use rights for non-payment of assessments.

Finally, continuing the regrettable tendency of the Florida Legislature to ignore the legislative needs of cooperative constituents, Chapter 719 of the Florida Statutes was not amended by SB 1196 so as to permit suspension of common area use rights for non-payment of assessments, rents, or other financial obligations. Accordingly, it would appear that suspension is still not a remedy available to cooperative associations.

Next week, we will continue with our review of SB 1196 and remedies now available with respect to delinquencies, including increased mortgagee liability for unpaid assessments and the right of associations to attach rental income directly from tenants occupying delinquent units.

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Foreclosing Lender Liability Covered in SB 1196

Fort Myers The News-Press, June 20, 2010

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Today's column continues our review of SB 1196, which becomes effective July 1, 2010. One change to the law created by SB 1196 involves the liability of a foreclosing lender for unpaid condominium assessments. For many years, the law has provided that a first mortgage is superior to the association's lien. However, when a first mortgagee takes title to a unit through foreclosure, the foreclosing lender is liable for six months of the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the six months immediately preceding the lender's acquisition of title, or one percent of the original mortgage debt, whichever is the less.

Let us assume that Mr. Smith took out a \$250,000.00 mortgage to buy a \$300,000.00 condominium unit. The unit is now worth \$200,000.00, and Mr. Smith has stopped paying both his mortgage and condominium assessments. Let us further assume that the association's assessments are \$300.00 per month. When the lender forecloses on its mortgage and wipes out the association's lien, the lender would be liable to the association for \$1,800.00, six months of unpaid assessments.

SB 1196 amends the law by providing that the lender's liability is now increased to twelve months of unpaid assessments. However, the one percent cap was not changed. Using our same hypothetical

scenario, a foreclosing lender would now owe the association \$2,500.00, one percent of the original mortgage debt. Twelve months of unpaid assessments would be \$3,600.00, so the lender has the advantage of the one percent cap.

There are a number of questions that remain unanswered about this new law. For example, does the law only affect mortgages entered into after July 1, 2010, or does it affect existing mortgages as well? Another question is whether a condominium association whose documents incorporate the old six month mortgagee liability language needs to amend its documents to take advantage of the new law, it would seem at least prudent to do so.

There is also a significant question as to how the mortgage markets will react to this change in the law. Many banks that lend money to consumers for the purchase of real estate, including condominium units, do not hold on to the mortgage debt in their portfolio. Rather, many loans are sold on what is known as the "secondary mortgage market", which involves, among others, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac").

Section B4-2.1-06 of Fannie Mae's lending guidelines states that if a condominium or PUD

project (which would typically include a homeowners' association) is located in a jurisdiction that allows for more than six months of regular common expenses to have priority over Fannie Mae's lien, Fannie Mae will not purchase a mortgage loan secured by a unit in the project.

The law for homeowners' associations has contained a twelve month liability standard for several years, and I am not aware of that issue having impacted the availability of mortgages for single family homes. How the secondary mortgage market will react to Florida's change in the condominium law remains to be seen. Obviously, Florida is a major market for real estate and the related industries of lending money and the packaging and selling of mortgage loans.

A second significant change in the law made by SB 1196 applies equally to condominiums, cooperatives, and homeowners' associations. Each of the relevant statutes has been amended to state that if a unit or parcel is occupied by a tenant, and the unit/parcel owner is "delinquent in paying any monetary obligation due to the association", the Association may make a written demand "that the tenant pay the future monetary obligations" related to the unit or parcel directly to the association. An association can evict a tenant who does not comply.

There are several key points to keep in mind. First, the association may demand rent be paid over when the owner is delinquent in paying "any monetary obligation." Presumably, this would apply not only to regular assessments, but also special assessments, fines, and other charges which an owner might owe to the association.

One issue which is already being heavily debated is whether the statute's statement that the tenant must "pay the future monetary obligations" related

to the unit means only assessments and obligations that accrue after the association demands the rent, and not past-due obligations. Such a restrictive interpretation would certainly blunt the effectiveness of the new law.

Proponents of a broader interpretation of the law argue that the "future monetary obligations" related to the unit or parcel refer to the tenant's obligations, which is all the rent the tenant owes to the landlord/unit owner. It has also been argued that when a unit owner is delinquent in the payment of monetary obligations to the association, his or her "future monetary obligations" include all past-due amounts, since those sums are still due and owing, and are a continuing obligation. Also, the law provides that "any payment received by an association" must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to delinquent assessments. Under this logic, since existing law requires that payments received by the association be applied to oldest debts first, and keeping in mind that statutes are supposed to be read in harmony with each other, one would argue that the association may justly demand receipt of all rents until the unit's account has brought current.

Since the law is not even effective yet, it is impossible to predict how all of these issues will play out.

Next week, we will shift gears and look at some significant operational changes required by SB 1196, including how official records are kept, new owner privacy laws, and the availability of personnel and payroll records of association employees.

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SB1196 Has Changes Regarding Privacy Rights, Records

Fort Myers The News-Press, June 27, 2010

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Today's column continues our review of SB 1196, which becomes effective July 1, 2010. Today's topic, some significant changes regarding owner privacy rights and official records.

The changes to the law involve both condominium associations and homeowners' associations, basically making the two laws the same, though there are some subtle differences. Regrettably, the Legislature ignored cooperatives in these changes.

Both the Florida Condominium Act (Chapter 718) and the Florida Homeowners' Association Act (Chapter 720) basically provide that every record kept by the association is an "official record" and available for inspection by an association member upon written request. The member need not say why they wish to inspect a record, general corporate laws requiring demonstration of "proper purpose" are inapplicable in the association context.

Notwithstanding the broad requirement that all records be made available for member inspection, the statutes contain several exceptions, meaning that certain official records are not to be produced for member inspection. The exemptions which have existed in both statutes for quite some time include certain attorney-client privileged and

"work product" information, medical records of owners, and information obtained by an association in connection with the approval of the sale, lease, or other transfer of a unit or parcel.

The Condominium Act was amended in 2008 to also exempt social security numbers, driver's license numbers, credit card numbers, and certain other "personal identifying information." SB 1196 adds these exemptions to the homeowners' association statute as well. Additionally, under both laws, "personal identifying information" of any person may not be provided except the person's name, unit designation, mailing address, and property address.

Most significantly, both statutes have now been amended to specifically exempt e-mail addresses, telephone numbers, emergency contact information, and any address of a unit or parcel owner other than as provided to fulfill the association's notice requirement from the ambit of "official records." Stated otherwise, it is now (or will be as of July 1) a violation of the statute to provide unit owner or parcel owner e-mail addresses or telephone numbers to the association membership, either under the auspices of an official records request, or generally.

Many associations publish directories which include the name of association members, address information, telephone numbers, and even e-mail addresses. Under the new law, these directories are no longer proper. Presumably, association members who wish to voluntarily disclose private information would have the right to waive their privacy rights under the new statute, for example by permitting their telephone numbers and/or e-mail addresses to be included in an association directory. Such a waiver should be clear in scope, and prepared or reviewed by the association's legal counsel.

There is one exception to the rule on e-mail privacy. Where an association provides notice to members by "electronic transmission" (which is permitted by law if so authorized in the bylaws), and a member has consented to receive notice of association meetings by electronic transmission (which must be done in writing and can be revoked at any time), the member's e-mail address is part of the "official records", since that is where official notices to the owner are sent. However, once a member revokes their consent to receive notices by electronic transmission, the e-mail address must be removed from the association's official records.

The condominium statute now provides that the association is responsible for misuse of information provided to an association member if the association has an affirmative duty not to disclose such information. For whatever reason, a similar clause was not added to the Homeowners' Association Act.

Both statutes have also been amended to provide that personnel records of association employees, including but not limited to disciplinary, payroll, health, and insurance records are exempt from the definition of "official records", and thus not available to association members. This is a completely new concept in the condominium statute. In the homeowners' association context,

the previous statute exempted disciplinary, health, insurance, and personnel records, but did not specifically apply to payroll records. SB 1196 clarifies that payroll records are also exempted for HOAs. This exception only applies to association employees, and would not apply to independent contractors, such as a management company.

Both statutes also add a couple of more exemptions. First, any electronic security measures that are used by an association to safeguard data, including passwords, are exempted from official records. Also, software and operating systems used by an association which allow the manipulation of data are exempt from the official records, even if the unit or parcel owner owns a copy of the same software used by the association. However, the data itself is part of the official records of the association, which presumably means that it would need to be supplied in a printed format.

Several changes were also made in the homeowners' association statute which do not appear in the condominium law. First, Chapter 720 now provides that an association's failure to provide access to records will only create a rebuttable presumption of willfully withholding the records if the parcel or unit owner request was submitted by certified mail, return receipt requested. Further, Chapter 720 now provides that if an owner requests copies of records which exceed twenty-five pages in length, and the copies are made by the association's management company, the owner may be charged the actual cost of copying (including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or association).

Next week's column will continue our review of SB 1196 with an emphasis on changes to annual meeting and board election procedures.

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Directors Can Vote to Fill Vacancy For Unexpired Term

Fort Myers The News-Press, July 4, 2010

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Today's column continues our review of SB1196, which became effective July 1, 2010. Today's topic, changes to the housing statutes involving board member qualifications, the filling of vacancies on boards, and annual meeting procedures.

Of interest to cooperative and homeowners' associations, SB1196 addressed a glitch created by the 2008 amendments to Florida's Not-For-Profit Corporation Act (Chapter 617 of the Florida Statutes). The 2008 glitch resulted in a law which required vacancies on cooperative and HOA boards to be filled only until the next annual meeting, rather than for the unexpired term of the board seat in question. Now, Section 719.106(1)(d)6 of the Florida Cooperative Act mirrors the condominium statute by providing that unless otherwise provided in the bylaws, a vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of a majority of the remaining directors, for the unexpired term. As is the case with condominiums, the cooperative board also has the option of filling vacancies by election, rather than appointment. Different rules apply in recall situations. Likewise, Section 720.306(9) of the Florida Homeowners' Association Act has been amended to provide for the filling of vacancies on

HOA boards for the unexpired term, unless otherwise provided in the bylaws, and basically follows the same rules for condominiums and cooperatives.

For condominiums, several election-related changes are noteworthy. First, SB1196 fixed another glitch from 2008, regarding situations where an insufficient number of candidates put their names in for open board seats. The 2008 law stated if an insufficient number of people ran for the board, the incumbent directors, even if they did not stand for re-election, were automatically reappointed to the board. SB1196 reverts to previous law and simply provides that the incumbent directors are eligible for reappointment, but not automatically reappointed.

The new law also tweaks another change from 2008, regarding the general prohibition against co-owners of a condominium unit serving simultaneously on the board of directors. Under the new law, co-owners of a unit are still generally prohibited from simultaneously serving on the board. However, there is now an exception for cases where co-owners own more than one unit. Another exception created by the new law involves situations where there are not enough eligible candidates to fill vacancies on the board at the time

of vacancy. In such cases, co-owners of a unit may likewise serve simultaneously on the board.

Section 718.112(2)(d)3 of the Florida Condominium Act has been amended by SB1196 to eliminate the requirement that the first notice of the association's annual meeting contain a "certification form" wherein candidates for the board must attest that they have read the governing documents of the association, and state that they understand them. Now, instead, SB1196 provides that within 90 days after being elected or appointed to the board, each newly elected or appointed director must certify in writing that he or she has read the condominium documents, that he or she will work to uphold such documents, and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. Alternatively, a director may provide evidence of completion of a state-approved educational course. A director who fails to timely file written certification or an educational certificate is suspended from service on the board until compliance is achieved. However, somewhat curiously, the statute goes on to say that the failure to have such certification or educational certificate on file "does not affect the validity of any action."

The 2008 amendments to the condominium statute imposed a new rule of law stating that any person who was delinquent in the payment of any fee or assessment to the association would not be eligible for board membership. The new statute provides that non-payment of a fine is now

additional grounds for disqualification from board service. Further, the new law provides that an existing director or officer who is more than 90 days delinquent in the payment of any monetary obligation due the association (which would include regular assessments, special assessments and fines) is deemed to have abandoned their office, creating a vacancy in the office to be filled according to law. Under previous law, sitting officers and directors could only be removed for non-payment of regular assessments.

Section 720.306(8)(b) of the Florida Homeowners' Association Act has been added as a new election law for HOAs. This new subsection of the statute states that if the governing documents of a homeowners' association permit voting for the election of directors by secret ballot, such ballots must be placed in an inner envelope with no identifying markings and mailed to the association in an outer envelope bearing identifying information reflecting the name of the member, the lot or parcel for which the vote is being cast, and the signature of the lot or parcel owner casting that ballot. The law goes on to set forth the procedures for processing such ballots, which are very similar to those found in the condominium statute.

In next week's column we will continue our review of SB1196 with a focus on some changes regarding financial operations, including threshold requirements for year-end audits, homeowners' association reserves, and special assessment procedures.

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Review Changes To Statutes On Financial Operations

Fort Myers The News-Press, July 11, 2010

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Today's column continues our review of SB 1196, which became effective July 1, 2010. Today's topic, changes to the statutes involving association financial operations and procedures.

In 2008, the Florida Condominium Act was amended to impose personal exposure to civil penalties upon any person (including directors, officers, or managers) who knowingly or intentionally defaced or destroyed association accounting records. The 2008 law further imposed the same liability upon any person who knowingly or intentionally failed to create or maintain required accounting records. The latter situation (failure to create an accounting record) has caused some concern, since a failure to act is typically not the type of malicious or reckless conduct that justifies imposition of personal liability in the law. The 2010 version of the law still imposes liability in these instances, but further stipulates that the destruction of an accounting record, or the failure to create a required accounting record, must be done with intent to cause harm to the association or its members. In the absence of such intent, a director, officer, or manager will not be personally subject to a civil penalty.

SB 1196 made a significant change to the condominium statute regarding year-end financial reporting requirements. As most are aware, a condominium association must always provide its

members with a year-end financial report (or notice that a report is available, free of charge) within 120 days of the end of the fiscal year. The level of required financial report depends upon the association's annual revenues. Associations with revenues of more than \$400,000.00 must produce an audit. Associations with revenues of \$200,000.00 to \$400,000.00 must produce a review. Associations with revenues of \$100,000.00 to \$200,000.00 must produce a compilation. Associations with revenues of less than \$100,000.00 must produce a report of cash receipts and expenditures.

The required year-end financial reports can be waived to a lower level (but for no more than three consecutive years) by majority unit owner vote, and the board always has the prerogative of obtaining a higher-level report than the minimum required by statute. Also, the bylaws may impose stricter financial reporting requirements than the minimum set forth in the statute.

Under previous law, associations operating fewer than 50 units were exempt from the law, regardless of the level of annual receipts, provided that the association would still be required to prepare a report of cash receipts and expenditures. SB 1196 raises the exemption to associations which operate "fewer than 75 units." In other words, a condominium association operating between 50

and 74 units will be impacted by the new law, and will now be exempt from the compilation-audit-review requirements of the statute. However, a report of cash receipts and expenditures is still required.

SB 1196 amends Section 718.115(1)(d) of the Florida Condominium Act to expand the types of communication services which may be purchased in bulk by condominium associations. Under the previous statute, an association could purchase master antennae television or duly franchised cable television service. The new law permits communication services, information services, or Internet services to be purchased in bulk.

Switching gears to the homeowners' association side, Section 720.303(6) of the Florida Homeowners' Association Act has been amended regarding budgets and reserves. Specifically, the new law recognizes that HOAs may keep "reserve" funds, which are not necessarily what I refer to as "statutory reserves", borrowing condominium terminology, and referring to reserves that have been established by majority vote of the membership or the developer.

Under previous law, even if an association kept voluntary reserves, the year-end report for the

association was required to contain a boldface disclosure, in capitalized type, noting that reserves were not kept. This did not make sense to many associations since they were indeed keeping "reserves", simply not those directly regulated by the statute. Under the new law, an association which keeps non-statutory reserves must still include a bold-face disclosure in the year-end financial report, but the nature of the disclosure has been changed to note that voluntary reserves are being kept, and as such, the funds are not subject to the restrictions on use set forth in the law as applies to "statutory reserves."

Finally, SB 1196 amends Section 720.315 of the Florida Homeowners' Association Act to provide that before the developer turns over control of the HOA to the members, the HOA board may not levy a special assessment unless a majority of the parcel owners other than the developer have approved the special assessment by a majority vote at a duly called special meeting of the membership at which a quorum is present.

Next week, we will continue our review of SB 1196 with a focus on changes involving physical plant issues, including changes in elevator and fire-safety requirements for condominium buildings.

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Law Includes Changes Involving Fire Safety, Elevators

Fort Myers The News-Press, July 18, 2010

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Today's column continues our review of SB 1196, which became effective July 1, 2010. Today's article focuses on changes involving fire safety and elevators.

The issue of elevator retrofitting in condominium buildings has been a "hot button" issue for the past couple of years. Because of changes in the building codes, many condominium associations were being required to spend significant funds to upgrade their existing elevators. SB 1196 provides some relief by amending the law to state that building code changes which require the addition of "Phase II Firefighters' Service" on existing elevators may not be enforced on elevators in condominiums for five years, or until the elevator is replaced or requires major modification, whichever occurs first. This extension of time does not apply to a building for which a certificate of occupancy was issued after July 1, 2008.

Significantly, not all required elevator upgrades are addressed by this legislation. The five year extension of time is limited to the addition of a Phase II Firefighters' Service, which is a system that allows a firefighter to operate an elevator during a fire, using an emergency code while inside the elevator car.

Another change in the law involves generators for elevators. The law previously required that any

person, firm, or corporation that owns, manages, or operates a residential multifamily dwelling, including a condominium, that is at least 75 feet high and contains a public elevator, shall have at least one public elevator that is capable of operating on an alternate power source (i.e., a generator) for emergency purposes. SB 1196 permits condominium associations to opt-out of this requirement by a vote of a majority of the voting interests in the affected condominium. Further, the law altogether exempts buildings that were either under construction or under contract for construction as of October 1, 1997 from the requirements for an alternate power source (i.e., a generator).

Moving on to the subject of fire safety, SB 1196 provides that a condominium, cooperative, or multifamily residential building that is less than four stories in height and has a corridor providing an exterior means of egress is exempt from installing a manual fire alarm system as required in Section 9.6 of the most recent edition of the Life Safety Code adopted in the Florida Fire Prevention Code.

With regard to fire sprinklers, another "hot button" issue, SB 1196 extends the deadline for sprinkler retrofitting for high-rise condominium buildings from 2014 to 2019. By December 31, 2016, an association that is not in compliance with the

requirements for a fire sprinkler system and has not voted to forego retrofitting, must initiate an application for a building permit for the required installation demonstrating that the association will become compliant by December 31, 2019.

Prior law prohibited high rise buildings from opting out of fire sprinklers for common areas and required the opt-out vote for units/apartments to be approved by two-thirds of all voting interests. The new law provides that associations may opt out of retrofitting for the units and the common areas by the affirmative vote of majority of all voting interests. Also, if there has been a previous vote to forego retrofitting, a vote to require retrofitting may be called for by a petition signed by ten percent of the voting interests. Such a re-vote may take place once every three years.

The underlying requirements for existing high rise buildings to retrofit is found in the National Fire Protection Association code. Under this code, buildings must be equipped with either a fully automated sprinkler system, or an Engineered Life Safety System ("ELSS"). The new law removes the references to an ELSS opt out vote.

The Legislature also adopted HB 663 during the 2010 legislative session. HB 663 also has an effective date of July 1, 2010, and addresses a number of other fire safety and building issues impacting condominium associations. Significantly, HB 663 repeals the law that was adopted a couple of years ago which required condominium buildings 3 stories in height or higher to have a physical inspection report prepared every 5 years. HB 663 also permits building owners to install a uniform lockbox containing keys to all public elevators, in order to allow access to the lockbox by emergency responders. This provision will eliminate the need to re-key all of the elevators so as to allow access by a master key.

Next week, we will continue our review of SB 1196 with a brief overview of the "Distressed Condominium Relief Act", which is a new law intended to stimulate the acquisition and sell-out of the many distressed condominium projects which exist because of the recent melt-down in Florida's housing and real estate market.

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Distressed Condo Relief Act a Sales Stimulus

Fort Myers The News-Press, July 25, 2010

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Today's column continues our review of SB 1196, which became effective July 1, 2010. Today's article focuses on the "Distressed Condominium Relief Act", which is a new law intended to stimulate the acquisition and sell-out of the many distressed condominium projects which exist because of the recent melt-down in Florida's real estate economy.

The Distressed Condominium Relief Act was actually adopted by the Legislature in 2009, but the Bill in which the Act was contained was vetoed by Governor Charlie Crist, for unrelated reasons (the Governor vetoed the 2009 statute because of his stated concerns regarding provisions of the Bill that dealt with opting out of fire sprinkler retrofitting in certain high-rise condominium buildings). The Distressed Condominium Relief Act was carried over to the 2010 statute, and is now law.

The statute contains some remarkably blunt and far-reaching legislative findings. For example, the new law specifically states that the "Legislature acknowledges the massive downturn in the condominium market which has occurred throughout the State and the impact of such downturn on developers, lenders, unit owners, and condominium associations." The statute goes on to say that numerous condominium projects "have failed or are in the process of failing" and due to

the inability to find purchasers of inventory units in distressed projects, developers are defaulting to lenders, and lenders "are faced with the task of finding a solution to the problem in order to receive payment for their investments."

The legislative findings go on to state that investors exist who are willing to buy the remaining inventory units in these projects, and then sell them to end purchasers, but such investors "are reticent to do so because of accompanying liabilities inherited from the original developer". According to the legislative findings, these uncertainties result in "unquantifiable risks that the potential purchaser is unwilling to accept." As a result, or so the Florida Legislature says, condominium projects stagnate, "leaving all parties involved at an impasse and without the ability to find a solution."

The new law distinguishes between two types of bulk purchasers. The first is a "bulk assignee", which is a person who acquires more than seven condominium units and who receives a written, recorded assignment of the previous developer's rights. Under the new law, a bulk assignee assumes and is liable for all duties and responsibilities of the developer, except most warranties for pre-existing construction, certain pre-turnover auditing requirements, liabilities arising from actions of the board appointed by the

previous developer, and the previous developer's failure to fund assessments or fund deficits. These are very significant exceptions.

However, a bulk assignee who receives an assignment of the rights of the developer to guarantee assessments (and who is therefore excused from having to pay assessments) is liable for obligations of the previous developer with respect to the budget guarantee. A bulk assignee who does not receive an assignment of guarantee rights is not liable for the previous developer's guarantee funding failures, but does become liable to pay assessments on its units in the same manner as all other unit owners.

A "bulk buyer" (as opposed to a "bulk assignee") is defined as a person who acquires more than seven condominium units but who does not receive an assignment of developer rights. However, a "bulk buyer" can still be exempt from capital contribution obligations, exempt from an association's right of first refusal, and can be granted certain marketing rights, without losing "bulk buyer" status. "Bulk buyers" appear to have substantially less liability under the new law than "bulk assignees."

In general, a bulk buyer is liable for the duties and responsibilities of the previous developer only to the extent specifically provided in the new law, which is generally limited to filing updated offering documents with the Division of Florida Condominiums, Timeshares, and Mobile Homes, updating financial information (with a provision for excusal when the financial records cannot be readily reconstructed), and updating certain other records of the association.

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Although the law is not entirely clear on the point, it appears that when units are transferred to a "bulk assignee", such transfers do not count in triggering transition of control of the association to unit owners other than the developer (commonly called "turnover"). However, it appears that if units are transferred to a "bulk buyer", those units are considered in the calculation of the triggering event for calling the turnover meeting.

Clearly, the new law is intended to impose substantially less liability than existed under previous law on purchasers of blocks of units who have historically been referred to as "successor developers." This is especially true in the areas of construction warranties and pre-turnover financial obligations.

Proponents of the new law will argue that the Act is a necessary evil to stimulate absorption of the substantial backlog of inventory units that still exist in many projects. Detractors will argue that those who already have been harmed the most by the crash of the real estate market (existing unit owners who are meeting their obligations to the association, but have seen their property values plummet) will now be left holding a heavier bag. Time will tell. The law "sunset" (ceases to be law) on July 1, 2012, although I suspect we may see efforts to extend its life if current economic conditions continue.

Next week, we will shift gears and review some of the provisions in SB 1196 that apply exclusively to homeowners' associations.



Changes Affect Chapter 720 HOAs

Fort Myers The News-Press, August 1, 2010

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Today's column continues our review of SB 1196, which became law effective July 1, 2010. Today's article focuses on a few changes found in SB 1196 that are applicable only to homeowners' associations governed by Chapter 720 of the Florida Statutes, commonly called the Florida Homeowners' Association Act.

In past columns, we have already touched upon some issues that affect HOAs, including: suspension of use rights (June 13, 2010); attachment of rental income (June 20, 2010); official records (June 27, 2010); board vacancies (July 4, 2010); and reserves (July 11, 2010). Past editions of this column can be reviewed at www.becker-poliakoff.com.

Here's a look at a few more changes brought about by SB 1196 which apply only to Chapter 720 homeowners' associations:

- **Closed Board Meetings:** In what I would characterize as a significant change, Section 720.303(2)(b) now permits the board of a homeowners' association to meet in closed session (i.e., without parcel owners being present) to discuss "personnel matters", with no requirement that an attorney be present. This change does not apply to condominium associations or cooperative associations. Presumably, "personnel

matters" would be limited to the discussion of specific issues pertaining to employees of the association.

- **Director Compensation and Conflicts:** SB 1196, substantially expanding previous law, prohibits a director, officer, or committee member from receiving any salary or compensation from the association for the performance of his or her duties as a director, officer, or committee member. Perhaps more significantly, the law also states that a director, officer, or committee member "may not in any other way benefit financially from service to the association." In my opinion, this means that directors, officers, or committee members cannot work as association employees, could not serve as a paid manager, nor could the association contract with firms or business entities in which such persons hold a financial interest. This substantially goes beyond previous law, which would generally permit contracts with "interested directors" if the existence of the director's financial interest was disclosed, if the contract was fair and reasonable, and if the interested director refrained from voting. There are a couple of exceptions to the new rule, including any fee or compensation authorized in the governing documents, and

any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by proxy at a meeting of the members.

- **Display of Flags:** SB 1196 states that although parcel owners in homeowners' associations are granted relatively broad rights to display various flags, flag poles and flag displays are still subject to all building codes, zoning setbacks, and other applicable governmental regulations, including but not limited to lighting ordinances. Further, flag poles and flag displays may also be subject to "setback and locational criteria contained in the governing documents."
- **HOA Voting:** There has always been a fair amount of confusion as to how homeowners' associations should conduct their board elections. Many like to follow the "one size fits all" procedure used in condominiums, because it is secret, fair, and there are well established rules. The condominium election system is often called the "two-envelope" system, because secret ballots are used with an unmarked envelope being placed in a signed envelope, and then they are separated for the secret vote (thus "two-envelopes"). Chapter 720 has never expressly authorized the use of the two-envelope voting method in HOA board elections or other voting issues. Rather, the law has simply deferred to the bylaws, and generally still does. However, SB 1196 now states that if the governing documents permit voting by secret ballot by members who are not in attendance at a

meeting, a two-envelope system must be used. Essentially, the new law clarifies that a homeowners' association may use the two-envelope voting method in its board elections, but it must be authorized by the governing documents. Further, it appears that the governing documents may also permit absentee voting in matters other than the election of directors, using a secret ballot /two-envelope procedure.

- **Acquisition of Interests in Recreational Facilities:** In apparent reaction to a fair amount of litigation over the past several years where previously voluntary country clubs are made a mandatory condition of association membership, SB 1196 incorporates language into Chapter 720 which is very similar to language that has been in the Condominium Act for a number of years. Under the new law, a homeowners' association may enter into agreements to acquire leaseholds, memberships, and other possessory or use interest in lands or facilities, including but not limited to country clubs, golf courses, and other recreational facilities, provided that (with some exception for early development agreements) the transaction must be approved by seventy-five percent of the total voting interests of the association.

Next week, we will wrap up our review of SB 1196 with some miscellaneous changes that have not been addressed so far in this column.

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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Miscellaneous Changes in SB 1196 Discussed

Fort Myers The News-Press, August 8, 2010

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Today's column is the tenth and final edition in our review of SB 1196, which became effective July 1, 2010. The previous nine editions of the series, along with past editions of this column, can be reviewed at www.becker-poliakoff.com.

Today, we will complete our review of the statute with a few "miscellaneous" changes to the law that have not been covered in the previous columns.

- **Amendments Affecting Rental Rights:**

The Florida Condominium Act was amended in 2004 in reaction to a Florida Supreme Court decision which basically held that a condominium association could enact unlimited rental restrictions through an amendment to the declaration of condominium. The 2004 amendment to the statute provided that any declaration amendment "restricting" an owner's "rights relating to rentals" could not be applied to those unit owners who did not approve the amendment, but would only be binding on those who purchased from them. The 2004 so-called "Rental Amendment Grandfathering Law" created some confusion as to whether all amendments that dealt with rentals were subject to grandfathering. SB 1196 provides, perhaps in the way of clarification, or perhaps as a substantive change, that only amendments

that prohibit a unit owner from renting their unit, alter the duration of permissible rental terms, or restrict the number of times unit owners are allowed to rent, are subject to the grandfathering rule.

- **Exemption of Time-Shares:** SB 1196 exempts time-share condominiums from the requirement that board members may only stand for election to one-year terms (there is an exception if an affirmative "opt in" vote is taken, in which case two-year staggered terms are permissible). In other words, the governing documents for a time-share condominium will be the sole source which governs the duration of board terms in the time-share context. Condominium associations that include time-share units or time-share interests are also now exempt from the general prohibition against co-owners of a unit simultaneously serving on the board of directors.
- **Fire Alarms:** SB 1196 amended Section 633.0215 of the Florida Fire Prevention Code to provide that condominium buildings less than four stories in height, with an exterior means of egress, are exempt from requirements in the law that they install a manual fire alarm system.

- **Limited Common Elements:** SB 1196 creates a new provision in the Florida condominium statute which states that a portion of the common elements that is not designed and intended to be used by all owners may be reclassified, through an amendment to the declaration of condominium, as “limited common elements.” SB 1196 states that the new language in the statute is a clarification of existing law, and that unanimous approval is not required for such amendments. Rather, the association need only follow the process it regularly follows when amending its declaration. This amendment clears up a gray area in the law which has not been consistently treated through the state’s arbitration program and the courts as to whether an association can amend the declaration of condominium to shift maintenance responsibilities for certain portions of condominium buildings. Air conditioner compressors are a prime example of how the new law operates. Most air conditioners are located outside of the unit and are therefore “common elements.” If the declaration of condominium does not define them as a “limited common element”, and provide for the unit owner’s maintenance of the equipment, the association would typically be obligated to maintain the air conditioner. The new change in the law clarifies that an association could, in this instance, amend

the declaration to designate the air-conditioner as a “limited common element” and thus also amend to require that the air-conditioner unit be maintained by the unit owner.

- **Condominium Fining:** In what I would characterize as a significant change, the Florida condominium statute has been amended to permit the levy of fines against units, even in the absence of authority to levy fines in the declaration or bylaws. Most other basic rules regarding fining in the condominium context were not changed by SB 1196. The maximum permissible fine is still \$100.00 per violation, with a maximum of \$1,000.00 for ongoing violations. Fines still are not secured by liens against the condominium unit and cannot be levied without fourteen days notice and opportunity for a hearing before a specially appointed committee. However, the statute was specifically amended by SB 1196 to state that a fine must be levied at a duly noticed meeting of the board of directors. Further, SB 1196 changes the law regarding fines against unoccupied units. The previous law prohibited the levy of fines against unoccupied units. SB 1196 repealed this restriction.

Next week, we will resume the customary question and answer format for the column.

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Governing Documents Should Answer Question

Fort Myers The News-Press, August 16, 2010

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Today's column resumes our standard question and answer format. The previous ten editions of the column discussed the changes to the condominium, cooperative and homeowners' association statutes enacted by Senate Bill 1196, which became effective July 1, 2010. Past editions of the column, including the entire series on SB 1196, can be viewed at www.becker-poliakoff.com.

In the way of errata, the August 1, 2010 column dealing with homeowners' associations stated that SB 1196 changed the law so that the governing documents could permit absentee voting in both elections and matters other than the election of directors. As the referees in pro football say when they goof up, after further review, that statement does not appear to be accurate. Rather, the new language in SB 1196, which is now part of Section 720.306(8) of the Florida Homeowners' Association Act, limits the reach of the new law to the election of directors only, and not voting on other issues.

Q: Do residents in Florida's homeowners' associations have the right to vote on all issues appearing before the board? We are being told that we only get to vote once a year, to elect new board members. Our board recently adopted a rule to require all vehicles to be parked in the garage overnight, but the homeowners never voted on it. The board also changed another rule to say that all

exterior plantings are our personal responsibility, even though the association took care of all exterior landscaping previously. **G.K. (via e-mail)**

A: The answer to your question will depend upon how your governing documents are set up. In most homeowners' associations, the members (also known as parcel owners) typically only have the right to vote on certain items, although these are important items. The governing documents for most homeowners' associations state that all of the powers and duties of the HOA are vested in the board of directors, except when a vote of parcel owners is specifically required by law or another provision of the governing documents.

By law, parcel owners are entitled to vote to elect the board of directors, and also to recall the board. Parcel owners also have certain other voting rights conferred by statute, including voting to waive or reduce minimum financial standards as applied to certain types of reserve funds, and year-end financial reports.

Most governing documents also require parcel owner approval, usually a super-majority, for amendments of the governing documents themselves. The prime document in the hierarchy of governing documents is your property covenants, sometimes called a declaration of covenants, or covenants, conditions, and

restrictions (CC&R's), or deed of restrictions. Typically, parking regulations and the allocation of landscape responsibilities are addressed in the covenants, and any change regarding those items would require a vote of the membership, not just the board.

However, the governing documents may confer authority on the board to make rules and regulations. Board-made rules and regulations fall into two categories, those which pertain to the common areas, and those which pertain to the parcels (lots and homes). Most governing documents confer rulemaking authority on the board for common areas. A board's common area rule will typically be upheld unless it is in conflict with the covenants or is unreasonable.

Some HOA governing documents also grant the board rulemaking authority over the privately owned property, known as the parcel (your lot and the home which sits on the lot). If the governing documents grant the board rulemaking authority as to parcels, such rules will be valid provided that they do not conflict with the covenants or any provision which is inferable from the covenants. The rules must also be reasonable. Further, board-made rules regarding the use of parcels are subject to heightened public advertisement requirements, typically fourteen days' mailed and posted notice to each member of the association prior to the board's adoption of such a rule.

Q: I am one of five board members in a homeowners' association. I have been told that any time three or more members meet, we have to

post notice of a board meeting. For example, does this mean that if three members of our board want to meet with our management company, landscaper, or a vendor for informational purposes only, that we cannot do this? We would not be voting on any issues, just gathering information. This seems cumbersome. What is the law on this issue? **T.M. (via e-mail)**

A: Section 720.303(2)(a) of the Florida Homeowners' Association Act states that a "meeting" of the HOA board "occurs whenever a quorum of the board gathers to conduct association business."

In your situation, three board members is a quorum. If they "gather" (in person or telephonically), a "meeting" occurs if association business is "being conducted."

While there are no reported appeals court cases interpreting this law, by analogy to cases applicable to public officials, nearly all attorneys will opine that votes need not be taken in order for business to be "conducted." While I have heard it argued that gatherings of a quorum of the board which are simply for fact gathering purposes do not constitute "meetings", I believe that the law would be construed in favor of homeowners' "sunshine" rights. Accordingly, it is my belief that the types of gatherings you describe should be open to the membership and preceded by at least forty-eight hours posted notice if a quorum of the board will be there.

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By Vote of Owners, Audit Rule Can Be Waived Down

Fort Myers The News-Press, August 22, 2010

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Q: Please clarify the law regarding condominium association audits. Our association has revenues which exceed \$400,000.00, but we have never had an audit. Can this requirement be waived completely, or can we waive down one level only, and have a review performed? **H.T. (via e-mail)**

A: The Florida Condominium Act requires associations with annual revenues exceeding \$400,000.00 to produce a year-end audit within 120 days of the end of the fiscal year. By majority vote of the owners, your association can “waive down” to a lower level report, a review, a compilation, or a cash statement of receipts and expenditures (“cash report”). The owners can vote to “waive down” to the lowest level report (cash report) and there is nothing in the law that says you can only “waive down” one level.

The law has, for many years, excluded associations of less than 50 units from this rule, regardless of the level of annual revenues. These associations are only obligated as a matter of law to prepare a cash report. SB 1196, which has been reported on in previous editions of this column, raised the exemption to condominiums of less than 75 units. Stated otherwise, condominiums between 50 and 74 units are now also subject to the exemption in the law and are only obligated to prepare a cash report, regardless of the level of annual revenue.

The condominium law was amended in 2008 to provide that an association cannot waive required financial reports for more than three years. Accordingly, if your association falls into the audit category (annual revenues of more than \$400,000.00) and is not exempt because the association operates less than 75 units, you will need to have an audit done at least once every four years. Please also keep in mind that your association’s bylaws may impose more stringent financial reporting requirements than those which are set forth in the law.

Q: Our homeowners’ association board would like to hold a “workshop” meeting where no votes will be taken. This would be more of a planning meeting, including the development of agendas for future meetings. You have previously stated that such “workshop” meetings are valid as long as the notice is properly posted and the meeting is open to the owners. We would plan to post a notice and invite owners to our workshop. However, I think we will be challenged and would like to know specifically what law permits “workshop” meetings. **K.M. (via e-mail)**

A: Chapter 720 of the Florida Statutes, commonly referred to as the Florida Homeowners’ Association Act, defines a “meeting” of the board as any gathering of a

quorum of the board at which HOA business is conducted. Clearly, long-range planning and agenda development is “conducting business”, even if no votes are taken.

Accordingly, if the association wishes to hold such a board meeting and it is properly noticed and open to members, it is permitted by Section 720.303(2) of the statute. The law does not specifically mention “workshop” meetings, but such meetings are “board meetings”, as would be a regular board meeting where voting takes place.

Q: I was recently informed that because of the 2010 changes in association laws, boards can no longer send out e-mails to all of our members and “cc” each individual. Is this true? **C.C. (via e-mail)**

A: You are presumably referring to the amendments to the “official records” segments of the condominium and homeowners’ association laws which became effective July 1, 2010. These laws state that “e-mail addresses” are “not accessible” to owners in the community. It is not entirely clear why the Florida Legislature saw the need to enact this change. The formal legislative history reports offer little guidance. I have seen some materials that suggest that some associations may have been selling their e-mail lists to outsiders for profit, and that “data mining” was occurring. While perhaps grounded on good intentions, this part of the new law seems universally unpopular with association boards. As the law is only a

month old, there are still many unresolved questions arising under it, and perhaps room for debate on some of the finer points.

As to e-mails that are sent to a significant number of association members, I am assuming that the owners signed up to receive those e-mails, and receive them for informational purposes (upcoming maintenance projects, report of recent criminal activity, event reminders, etc.). SB 1196 does not expressly prohibit e-mail communications from the association to its members. SB 1196 does prohibit making an individual unit owner’s e-mail address “accessible” to others.

Therefore, if an association sends out an e-mail to a voluntary group of owner recipients, it is my interpretation of the law that such is proper provided that any e-mail recipient cannot “reply to all”, nor otherwise determine the e-mail address of other recipients. I am certainly no technology wizard, but I am told that in most computer operating systems, simply sending an e-mail to yourself with a “bcc” to the other recipients will suffice on both accounts (the recipients will not be able to “reply to all” nor ascertain the e-mail addresses of the other recipients).

The new law only applies to the association. If groups of unit owners wish to set up e-mail groups amongst themselves outside of the auspices of the association, they also have that right.

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Board Members May Remove Officers, Not Directors

Fort Myers The News-Press, August 29, 2010

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Q: Our homeowner's association board has had many problems. They have addressed these problems by simply removing and replacing board members. Our bylaws state in two different sections that the board may remove both officers and directors, with or without cause. However, it was my impression that members of the board cannot remove other board members. What is the law on this? **J.W. (via e-mail)**

A: In general, the members of the association (parcel owners) elect the board of directors. The board then appoints its officers (president, vice president, secretary, and treasurer).

Pursuant to Florida's Not-For-Profit Corporation Act, officers serve at the pleasure of the board and may be removed with or without cause by board vote. For example, a board which is not happy with its president, could vote in a new president at any time, with or without cause. However, even if an officer is removed by the board, that officer would still remain a board member (assuming they were a board member in the first instance).

Although there has been some confusion regarding the interplay between Chapter 617 of the Florida Statutes (the Florida Not-For-Profit Corporation Act) and Chapter 720 (the Florida Homeowners' Association Act), any inconsistency was laid to rest by SB 1196, which became effective July 1,

2010. SB 1196 specifically provides that recall of HOA directors is not governed by Chapter 617, and is therefore solely governed by Chapter 720.

Pursuant to Section 720.303(10) of the HOA statute, directors may only be removed from office, with or without cause by a majority vote of the total voting interests of the membership (there is usually one voting interest per lot or parcel). Certain procedures have to be followed in the process as set forth in the statute. To the extent your bylaws permit directors to remove other directors, they probably violated the applicable statutes under previous law. As a result of SB 1196, the provision is now clearly invalid.

Q: There is a rumor in our homeowners' association that the developer is going to make our residents assume control of the board, even though a small percentage of lots have been sold. Is a developer allowed to do this? **B.L. (via e-mail)**

A: That is a somewhat complicated question, and may depend upon when your community was created and the language in your governing documents. The most likely answer is that the developer would have the right to cede control of the board of directors to the homeowners other than the developer.

Chapter 720, the Florida Homeowners' Association Act, applies certain standards to HOAs created after 1995 regarding when a developer must turn over control. However, there is nothing in the statute that says that the developer cannot turn over control earlier, and many developers in fact do so. Most governing documents also specifically permit the developer to decide to turn over an association "early" if it so chooses.

Although there may be exceptions to the rule, I am aware of very few situations where the non-developer homeowners would find it in their interest to resist transfer of control. In my experience, purchasers in common interest developments wish to have control of their affairs through a democratic election process, and are often frustrated with how things are run when the developer is in charge. Taking control of the association does not, as a general matter, let the developer "off the hook" for legal obligations it may have.

Q: We are updating and restating our condominium documents. However, amendment of each of the documents requires approval of two-thirds of all owners to pass them. We have a great deal of voter apathy in our community and are not confident that we can get the required vote. What do you recommend? **E.P. (via e-mail)**

A: Your problem is a common one. In my opinion, the best solution is to amend each of your governing documents so that they can be amended by two-thirds of those who vote at a duly noticed meeting of the association at which a quorum is present, rather than two-thirds of all unit owners. This way, those who choose not to vote are not voting "no".

Some people are of the opinion that governing documents should be difficult to amend. After all,

three-fourths of all states must approve amendments to the United States Constitution. I would counter by arguing that only those who show up at the polls elect our President. Further, every unit owner is entitled to notice of the meeting where amendments will be considered (along with the text of the proposed amendment) and has the right to vote (even if they are against) by limited proxy.

In any case, you have a "chicken and egg" problem, since you would not be able to amend your document amendment standards to a lower threshold unless you obtain the higher threshold currently required. I have no advice other than to "beat the bushes" for proxies. Many associations appoint a committee and follow up with owners who have not returned proxies, encouraging them to vote, even if they are against the measure on the table.

Q: A special meeting of our condominium association is being held for the purpose of voting on whether to fully fund, partially fund, or not fund our reserves. The building is still under developer control, not having been turned over to the owners yet. Does the developer have the right to vote each of its units on the reserve question? **A.C. (via e-mail)**

A: Pursuant to Section 718.112(2)(f)2 of the Florida Condominium Act, the developer may vote to waive the reserve or reduce the funding of reserves for the first two fiscal years of the association's operation, beginning with the fiscal year in which the declaration of condominium is recorded. After that time, the developer may not vote and reserves may only be waived or reduced by a vote of a majority of non-developer voting interests, voting in person or by limited proxy at a duly called meeting of the association.

Joe Adams has focused his practice on the representation of community associations since 1987, and has provided legal counsel to well over one thousand community associations throughout the state. Joe has served as Chairman of the State Advisory Council on Condominiums and has written this column since 1995.

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Housing Statutes Have Their Own Sunshine Rules

Fort Myers The News-Press, September 5, 2010

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Q: I live in a resident-owned community. What part of the Florida Sunshine Law pertains to us? **D.D. (via e-mail)**

A: Technically speaking, Chapter 119 of the Florida Statutes (the law which generally makes “public records” available to citizens) and Chapter 286 of the Florida Statutes (which generally deals with open access to governmental meetings) do not apply to condominium associations, cooperative associations, or homeowners’ associations. The reason is because these entities are not “agencies” as defined in the statutes.

However, each of the relevant housing statutes (Chapter 718 for condominium associations, Chapter 719 for cooperative associations, and Chapter 720 for homeowners’ associations) has its own “sunshine” standards. In general, each law requires that meetings of the board of directors be preceded by a written notice, posted on the property forty-eight hours in advance of the meeting. The condominium and cooperative laws are identical. There are a number of subtle differences in the homeowners’ association context.

For example, members have the right to speak at all condominium and cooperative association board meetings with reference to designated agenda items. However, no such right exists in the

homeowners’ association context, unless required by the governing documents, or in limited circumstances where twenty percent of the voting interests petition for the call of an HOA board meeting.

The condominium and cooperative laws require posting of an agenda and limit business conducted at the meeting to what is set forth on the agenda (with limited exceptions in certain “emergency” situations). The law for homeowners’ associations does not.

In general, all three statutes require fourteen days’ notice for certain types of board meetings, and such notice must also be mailed to each owner (in addition to posting). These heightened notice requirements typically apply to meetings where special assessments will be adopted or where rules regarding use of the privately-owned property (parcels or units) will be adopted.

All three laws permit the board to meeting in private regarding pending or proposed litigation, so long as an attorney is present. A homeowners’ association board can meet in private, without an attorney, regarding “personnel” matters, while there is no similar right for condominium or cooperative association boards.

Q: I am new to the board of our condominium association. At one of our first meetings, the board voted to replace all of the railings in our condominium building. There will be significant expense involved. I was surprised that the board did not suggest getting a vote from our owners for this expenditure. Is a vote of the members required? **J.D. (via e-mail)**

A: It depends.

If the railings are part of the common elements (which is the case in most condominiums), their maintenance, repair, and replacement is the responsibility of the association. The only exception would be if the railings are defined as a “limited common element”, and the declaration of condominium specifically required the individual owners to maintain, repair, or replace the railings.

If the railings are part of the common elements, the board of directors would typically have the authority to decide when they should be replaced, and no unit owner vote is required. The board of directors does have a responsibility to act in a fiduciary capacity. When significant expenditures for physical maintenance are involved, it is prudent to obtain an engineer’s opinion that the work is appropriate.

The manner of funding the railing project will also likely be a board decision. However, if the board is going to use reserve funds that exist in other accounts, and assuming that the association does not use “pooled” reserves, the association would need to obtain unit owner approval to use reserves for a non-scheduled purpose.

Some associations finance large construction projects through a bank loan. It is the generally held view that this is also a board decision, provided that the condominium documents do not contain limitations on the association’s borrowing authority. I have seen documents which require a

membership vote for borrowing, and in such cases, a vote should be taken.

If the work is to be funded by a special assessment, the board is typically granted the authority in the declaration or bylaws to levy a special assessment. However, I have seen documents which require special assessments to be approved by the association membership. I have heard it argued that a requirement for unit owner approval of special assessments is not valid (because the Florida Condominium Act requires the association to properly maintain the common property). However, that argument has never been addressed in the appeals courts, and good arguments exist on the other side as well.

In some cases, if there is going to be a material change in the appearance of the building, the new railings could constitute a “material alteration” to the common elements. If that is the case, then a vote of the unit owners may also be required. In general, the Florida Condominium Act states that there can be no material alterations or substantial additions to the common elements except as provided in the declaration of condominium. If the declaration of condominium is silent, seventy-five percent of all voting interests (typically one voting interest per unit) must approve the material change. The law also contains exceptions to the “material alteration rule” when changes are necessary for the preservation of the condominium property or compliance with law.

Finally, assuming that the railing job will exceed five percent of the association’s budget, Section 718.3026 of the Florida Condominium Act would require the board to obtain competitive bids for the work before letting the contract. At least two bids must be obtained (there is no requirement in the condominium law for three bids, although at least three bids would seem to be a good idea). The board need not accept the lowest bid.

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Availability of Manager Contract Discussed

Fort Myers The News-Press, September 12, 2010

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Q: One of our owners recently asked to see a copy of our manager's contract. One of our board members said she thought it was now illegal to give out that kind of information. Is this true?
A.L. (via e-mail)

A: First of all, I am assuming that your manager is an employee of the association, and not an independent management company. If a management company contract is involved, it is clear in the law that the contract must be made available to your unit owners for inspection, and if they wish, copying. If you are dealing with an employee's contract, a different set of considerations apply.

This subject is one that is being heavily debated following the adoption of Senate Bill 1196 during the 2010 Legislative Session, which went into effect on July 1, 2010. By way of SB 1196, Section 718.111(12)(c), Florida Statutes, was amended to further limit the "official records" to which condominium unit owners have access.

Among those official records which are now "not accessible" to the unit owners are "personnel records" of condominium association employees, including, but not limited to, "disciplinary, payroll, health, and insurance records." The obvious question is whether an employee's contract is a "personnel record" protected by the new

exemption.

One point of view is that an employment contract is akin to a management contract or other contract to which the association is a party, a category of official records for which there is no exception to an owner's access rights. Section 718.111(12)(a)(9) of the Florida Condominium Act, provides that official records are to include "[a] current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility." Under this analysis, the association is required to provide a requesting unit owner with the contract for review.

However, the argument can be made that, while an employment contract is an "other contract to which the association is a party", the Legislature intended to provide an exemption to disclosure by stating that "personnel records" are exempt from inspection, "including but not included to payroll records." Unfortunately the law does not define either "personnel records" or "payroll records" and arguments can be made on either side of the case.

My personal opinion is that the association may properly supply a copy of the contract to those unit owners who request it. They used to say that someone's opinion, plus a nickel, would get you a

cup of coffee. I think you need five bucks to cover the cost these days.

It would be wise to obtain your new manager's express written consent to disclose the contract, which would probably eliminate some of your exposure if the other point of view is interpreted to be the meaning of the law. Of course, a board should always consult with its association legal counsel when presented with situations requiring interpretation of the law, and the possible exposures involved in different positions that might be taken.

Q: In a past article, you stated that a homeowners' association could vote by written consent pursuant to the procedures in Chapter 617. I cannot find the written consent procedure you mentioned. Could you tell me what section of the law that involves? **T.V. (via e-mail)**

A: Section 617.0701(4) of Florida's Not-For-Profit Corporation Statute is entitled "Consent to Corporate Actions Without Meetings."

This law states that unless otherwise provided in the articles of incorporation, action required or permitted to be taken at a membership meeting may be taken without a meeting, if the members entitled to vote on such action consent in writing.

The action must be evidenced by one or more written consents describing the action taken. The written consent forms must be dated and signed by the approving members having the required number of votes to pass the measure, and the written consents must be delivered to the association.

All written consents must be delivered to the association within a ninety-day time-frame. Within thirty days of obtaining the required authorization by written consent, notice of the action must be given to those members who are entitled to vote on the action but who have not consented in writing. The notice must fairly summarize the material features of the authorized action.

Assuming that your homeowners' association is a not-for-profit corporation, which is the case ninety-nine percent of the time, this law would apply to your operation. Therefore, unless your articles of incorporation provide otherwise, your homeowners' association may act by written agreement in lieu of a meeting.

Frankly, I am not a big fan of actions without meeting. First, as a general matter, I think that owners should be given the opportunity, if they so choose, to attend an open meeting and debate the subject for which a vote is being taken. Also, I have found that many associations have trouble following the detailed procedures involved in the statute, and often forget to notify the members within the thirty day timeframe after approval of the action. Also, some bylaws contain stricter standards for deadlines to be followed, based upon older versions of the statute.

A limited proxy can serve the same purpose as a written consent, and you have the added benefits of an open meeting. However, written consents are legal in homeowners' associations unless prohibited by the articles, and are in fact used with some frequency.

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“Plaza East” Ruling Now Florida Law

Issue is ability to opt out of repair

Fort Myers The News-Press, September 19, 2010

By Joe Adams

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Q: I read one of your previous articles regarding a condominium association’s ability to “opt out” of paying for the repair of damages that are below the amount of the association’s deductible. My question is how the association is supposed to conduct the “opt out” vote, and what it means to “opt out.” Can the “opt out” be accomplished by a board vote, or do the documents need to be amended? If the association does vote to “opt out”, will the unit owners then be responsible for repair work that is below the association’s deductible? **L.W. (via e-mail)**

A: Several years ago, the state agency which regulates condominiums, the Division of Florida Condominiums, Timeshares, and Mobile Homes, issued the “Plaza East” decision. Plaza East was a ruling known as a “declaratory statement”, which basically held that when a condominium association insures an item of condominium property, the association must pay to repair the item after a “casualty”, even where the declaration of condominium provides otherwise. The Plaza East ruling was codified as the law of Florida by the Florida Legislature in 2008.

For example, an association has always been required by the law to insure interior, non-load bearing partitions, since these walls are part of the original improvements of the building. However,

prior to Plaza East, most governing documents would allocate financial responsibility for uninsured casualty losses to drywall on these walls (such as damage from sudden water discharge events) not covered by insurance (usually because of the amount of the deductible under the association’s master policy) to the unit owner. The 2008 amendment to the statute, codifying Plaza East, shifted the responsibility for the internal drywall cost shortfalls to the association provided that a casualty loss was involved (as opposed to regular wear and tear). There may be other instances where there would be a conflict between the Plaza East result and the actual provisions of the governing documents, including areas such as screening, windows, and sliding glass doors. The 2008 statute also stated that an association could “opt out” of the new statutory rule, and follow the provisions of the declaration of condominium, by vote of a majority of the entire voting interests (there is usually one “voting interest” per unit in a condominium).

Accordingly, the “opt out” vote must be approved in accordance with the statute, by a majority of all voting interests. Board action alone is not sufficient. Opt-out votes should be prepared by the association’s legal counsel, not a board member or manager. There is little doubt that the preparation of the opt out vote constitutes the “practice of

law”, and as such, should only be undertaken by a licensed attorney. Additionally, the consequences of a mis-step in the process could mean millions of dollars being allocated in some manner other than intended, particularly after a calamitous event such as a hurricane loss. Accordingly, in addition to the preparation of opt-out votes by non-lawyers probably being illegal, it is an exceedingly bad idea from a personal risk management standpoint.

The attorney preparing the documentation should explain to the association specifically what is involved in their particular case, which involves at the outset an analysis of how the documents allocate post-casualty repair costs. In some cases, the association will want to simply incorporate the provisions of the “old documents”, in which case no amendment is necessary. In such cases, a resolution is usually used, and there is a specific incorporation/ re-adoption of the documentary sections being opted back into. In other cases, the association may need to amend the pre-existing declaration of condominium to achieve their desired result. If that is the case, counsel will need to advise of the required vote, as amendments to the documents may require a super-majority vote,

in which case the statutory level of a majority would not be sufficient.

In any type of vote, a specific form of limited proxy must be used, and all procedural requirements of the opt out statute need to be followed. An association should not blindly “take an opt out vote” because they heard it was a good idea from a neighboring association, or remember reading an article about it. Rather, the association’s attorney should explain the pros and cons and the board should decide whether a change in status quo is worth recommending to the unit owners. In many cases, the association will decide that it may be better to follow the 2008 statute and not “opt out” at all. At the end of the process, assuming a vote is taken and passes, a very specific type of legal notice needs to be recorded in the public records where the condominium is located.

Although I would have predicted a rush by associations to take “Plaza East opt-out votes”, it has not really been the case, at least in my experience. This is definitely one area where there is no “one-size-fits-all” answer as to what is best for a particular community.

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Association Must Allow Wheelchair Lift

Fort Myers The News-Press, September 26, 2010

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Q: A unit owner has requested approval from the association to install a wheelchair lift on a common element stairwell leading to his unit. Must the association permit him to install it? **N.E. (via e-mail)**

A: The Federal Fair Housing Act makes it unlawful to make a dwelling unit “unavailable” to a person resulting from discrimination because of a handicap. Discrimination includes “a refusal to permit, at the expense of the handicap person, reasonable modifications . . . [that] may be necessary to afford such person full enjoyment of the premises . . .” Accordingly, a condominium association must generally permit a handicapped person to install a wheelchair lift on a common-element stairwell, provided that the accommodation is a reasonable modification, and is installed and maintained at the expense of the handicapped person.

Q: A unit owner has requested approval to install hurricane shutters on our building. However, no one else in the condominium has installed hurricane shutters and the board believes that the shutters will detract from the look of the building. Can the board deny the owner’s request? **E.N. (via e-mail)**

A: According to the Florida Condominium Act, every condominium association board must

adopt hurricane shutter specifications for the condominium. If a unit owner requests to install hurricane shutters that meet those specifications, then the board may not refuse the unit owner’s request. If your board is concerned with aesthetics, the law specifically states that the specifications may include color, style, and other relevant factors. Therefore, your board can adopt specifications with aesthetics in mind. A word of caution though - “looks” cannot be the only criteria. All hurricane specifications adopted by a board must at least meet the applicable building code. An outright prohibition against shutters would violate the law.

Q: When a condo association owns land on which there is a road easement to allow another condo association access to their units, who is responsible for the repair and upkeep of that road? **E.V. (via e-mail)**

A: The owner of the land upon which the easement runs is known as the “servient” owner, and the holder of the easement is the “dominant” owner. The lands of the dominant owner benefit from the easement, and the lands of the servient owner are burdened by the easement. At common law, and in the absence of an agreement to the contrary, the dominant owner is responsible for maintaining the easement. The dominant owner’s easement rights allow him to prepare, improve, maintain, and repair the easement in order to

facilitate its use, consistent with the scope and terms of the easement. However, the dominant owner's right to maintain the easement is not a duty, and absent an agreement to the contrary, the servient owner cannot compel the dominant owner to perform maintenance. The servient owner is required to refrain from using his property in a way that interferes with or obstructs the easement.

A stalemate can occur when the dominant owner is willing to live with a deteriorated easement and put off needed maintenance, but the servient owner, who has no duty to maintain the easement, is dissatisfied with the unkempt look of the property.

In order to avoid unnecessary conflict, the best practice is for the parties to prepare a written agreement regarding all terms of the easement. This agreement can cover the scope of the easement, maintenance issues, insurance, indemnities, etc.

It has been my experience that for most easements affecting condominium communities, there is some form of written agreement of record, whether it be a separate easement instrument, or terms in a master declaration or in the association's declaration of condominium.

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Homeowners Association Act Clarifies Pay Issue

Law Addresses Officer Compensation

Fort Myers The News-Press, October 3, 2010

By Joe Adams

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Q: Is it legal for an officer in a homeowners' association to simultaneously serve as the association's property manager? This seems like an inherent conflict of interest to me. Your thoughts would be appreciated. **R.S. (via e-mail)**

A: Your question is timely considering the Florida Legislature recently amended Chapter 720 (commonly referred to as the Florida Homeowners' Association Act) with respect to prohibited compensation for directors, officers and committee members of an association.

The new law, which became effective on July 1, 2010, provides that a director, officer, or committee member of the association may not directly receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member and may not "in any other way benefit financially from service to the association." In general, this would prohibit a board member or officer from also serving as a paid manager.

However, the statute does permit a director, officer or committee member to receive compensation if authorized by the governing documents, or authorized in advance by a vote of the majority of the voting interests in person or by proxy at a meeting of the members.

Q: I thought I read in one of your past articles that a condominium association could not stop an owner from placing a satellite receiver on or around a condominium unit as long as the receiver does not look bad. Can you refer me to the legal source that prohibits the association from refusing the owner's request? **J.G. (via e-mail)**

A: You are referring to a rule adopted by the Federal Communications Commission ("FCC") in 1996, commonly known as the Over-the-Air Reception Devices ("OTARD") Rule. The OTARD Rule prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the air reception devices, including what are commonly referred to as "satellite dishes" of one meter (39 inches) or less in diameter.

The Rule applies to any area of the condominium property that is within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property. In other words, the Rule applies to an owner's unit or to the limited common elements exclusively serving an owner's unit, but not to common elements shared by all owners at the condominium. Whether the

antennae looks “bad” or “good” is not a relevant legal standard.

Q: I live in a neighborhood governed by a homeowners’ association. One of the directors has failed to pay assessments for some time and is in arrears by a considerable amount. There is no provision in our governing documents which requires a director to be current in the payment of assessments to remain on the Board. Is there anything in Chapter 720, Florida Statutes, which provides that a director cannot serve, and must resign, if assessments are not timely paid. **T.K. (via e-mail)**

A: The Florida Condominium Act, at Subsection 718.112(2)(n), specifically provides that a director or officer who is more than 90 days

delinquent in the payment of any monetary obligation due the association shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law. Thus, in the Condominium setting, a director is automatically removed from the Board and cannot reclaim the seat by simply coming current as to all monetary obligations.

However, the Florida Homeowners’ Association Act does not contain a similar provision. As such, it is my opinion that an HOA director could only be removed from office by vote of a majority of the entire voting interests of the homeowner’s association. Such recall may be approved by the members with or without cause.

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Group Dedicated To Interests In Areas Resident-Owned

Fort Myers The News-Press, October 10, 2010

By Joe Adams

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Q: We are a non-profit organization dedicated to the interests of manufactured home communities typically known as “Resident Owned Communities”. Would you be willing to help us get the word out in your column? **J.T. (via e-mail)**

A: Glad to. I can do it best by reprinting the press release which you sent to me.

South West Florida Resident Owned Communities, Inc. (SWFROC) is a "not for profit" organization of resident owned manufactured/mobile home communities formed for the purpose of providing a forum for community association board members and their community managers to meet and exchange information and ideas to better manage their communities and to provide a unified voice of those communities at various levels of government. Membership is open to communities located in Lee, Charlotte, Collier, Sarasota, and other Southwest Florida counties. SWFROC meets on the third Wednesday of every month from September through April. For more information contact Jim Toth at (239) 656-6994 or jamto@embarqmail.com.

Good luck.

Q: We are dealing with a situation where an owner is attempting to lease his home in our homeowners' association to a group of college students. Our homeowners' association's documents are very old and do not appear to address this situation. We were wondering if such a lease would be against a county code or ordinance. **A.B. (via e-mail)**

A: While municipal and county ordinance and code requirements vary from jurisdiction to jurisdiction, it is likely that the only way for an association to limit the leasing of a home within the community to multiple unrelated individuals, even if those individuals are college students, would be through restrictions found in the recorded covenants. Covenants can include restrictions on the leasing and subleasing of properties, and often contain a restriction that states the property within the community must be used as a “single-family residence”. Unfortunately, many covenants fail to define what a “single-family” is. In such cases, the courts would usually look to how that term is defined in the local codes and ordinances.

While codes and ordinances vary from jurisdiction to jurisdiction, they do not limit residency in areas zoned for single-family use to members of the same “family” in the traditional blood or marital

relationship sense. In fact, it would be constitutionally impermissible to do so. Rather, most local codes restrict the occupancy in single-family dwellings to some number of unrelated adults, a certain number of individuals per bedroom, a certain number of individuals based on square footage, or some combination of the foregoing.

For example, Lee County Land Development Code defines a “family” as “one or more persons occupying a dwelling unit and living as a single, nonprofit housekeeping unit, provided that a group of five or more adults who are not related by blood, marriage or adoption shall not be deemed to constitute a family”. The Code goes on to say that the term “family” shall “not be construed to mean a fraternity, sorority, club, monastery, convent or institutional group.”

Q: There is disagreement in our community as to whether the 2010 amendment to the Florida Statutes requires members of a homeowners’ association to ask to inspect official records by certified mail. What is your opinion on this?
M.K. (via e-mail)

A: SB 1196, which became effect July 1, 2010, did change the law with respect to this issue.

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The statute still provides (and was not amended in this regard) that the official records of an HOA are available for inspection and photocopying by members or their authorized agents at reasonable times and places within 10 business days “after receipt of a written request for access”. Under previous law, if the records were not made available within 10 business days, a “rebuttable presumption” would arise that the association had violated the law. A presumption is basically a shift in the burden of proof.

Pursuant to SB 1196, the “rebuttable presumption” against the HOA now only arises if the HOA member has requested access to records by certified mail. In other words, if the member requested the records in some other medium (such as through regular mail), the member (parcel owner) would bear the burden of proving that any failure to provide access to records was “willful”, which triggers certain penalties under the statute.

The law also allows the Board to establish reasonable rules regarding records access. For example, it is my opinion that an association could adopt a rule prohibiting records requests by e-mail. Reasonableness is the applicable standard.



Condo Owners Want To Be “55 and Over” Community

Act spells out the criteria that must be met to qualify

Fort Myers The News-Press, October 17, 2010

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Q: I am on the board of directors of a small condominium association. A number of the owners in the community are interested in becoming a “55 and over” community. What is necessary to make this change? **A.F. (via e-mail)**

A: In 1988, the federal fair housing law was amended to make it unlawful to discriminate in any activities relating to the sale or rental of a dwelling because of “familial status.” Familial status is defined as one or more individuals (who have not yet attained the age of 18 years) being domiciled with a parent or guardian or a designee of such parent. Essentially, this law outlawed “adults only” and other age-restricted housing.

The 1988 law (which became effective in March of 1989) contained several exemptions, one of which was the so-called “55 and over” exemption. The exemption required an association to provide “significant facilities and services” designed to meet the needs of older persons. Many communities were uncertain as to whether they needed to provide an assisted living type of environment in order to qualify for the exemption.

That issue was laid to rest in 1995 when the “Housing For Older Persons Act”, commonly known as “HOPA” was enacted. HOPA removed the “significant facilities and services”

requirement. Under HOPA, the following criteria must be met to qualify for the “55 and over” exemption: (1) at least 80% of the occupied units must be occupied by at least one resident over the age of 55, and (2) the community must publish and adhere to policies and procedures demonstrating an intent by the housing provider (in this case the association) to provide housing for persons 55 years of age or older.

If your association meets the required 80 percent occupancy threshold, and feels that it can garner sufficient voter support to amend its declaration to provide for the appropriate restriction on the age of residents, the association could likely become a “55 and over” community.

Common questions that are encountered in this process include what types of restrictions may be appropriate on visitation by children (such as grandchildren), rights of heirs after death of an age-qualifying occupant, and how much leeway should be given for dealing with the twenty percent of units that can legally be occupied by non-age qualifying occupants. An attorney conversant in these topics should be consulted before proceeding to formal vote.

Q: I was told that a homeowners’ association which fails to enforce any single bylaw may be at

risk of creating a situation where the bylaws in their entirety become null and void. Is this correct? **J.A. (via e-mail)**

A: No, not exactly.

First, you are probably referring to restrictions found in some type of recorded covenant (a declaration of condominium, declaration of covenants, deed of restrictions, etc.) or a rule imposed by a board. Use restrictions in community associations are usually not found in the bylaws, although occasionally you will find documents drafted with use restrictions contained in the bylaws.

The risks you are generally referring to involve fancy legal names (i.e., “estoppel”, “waiver”, “laches”, and “selective enforcement”). These are legal doctrines that basically stand for the proposition that an association’s failure to uniformly and timely enforce a restriction negates the ability to enforce it at all. This is a very broad statement of the law, with many exceptions and

every particular situation must be considered on its own facts.

However, the general rule is that there must be some nexus between the restriction and the non-enforcement to create the bar against future enforcement. For example, a condominium association that has not enforced its rules about vehicle parking would not, simply because of that fact, lose the right to enforce their pet rule.

One interesting case involved a situation where the condominium documents prohibited pets. The board in that association vigorously enforced the rule against dogs, but apparently “winked” at cats, so long as they were kept in the unit. When a suit erupted over an unauthorized dog, the association argued that its failure to enforce the cat restriction should not bar enforcement against dogs. The appeals court disagreed and ruled “a pet is a pet.” The dog owner won the case. See *Prisco v. Forest Villas Condominium Apartments, Inc.*, 847 So.2d 1012 (Fla. 4th DCA 2003).

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Tape Recording May Not Be Property of Association

Fort Myers The News-Press, October 24, 2010

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Q: The Florida Homeowners' Associations Act allows a parcel owner to record meetings. Our HOA has its own tape recorder, but it is not always used. If a Board member uses his personal tape recorder, is that recording a "private" recording that the Board member can use and keep, or is it owned by the association? **E.P. (via e-mail)**

A: In my opinion, under the facts you have described in your question, the recording would be a privately owned recording that is not association property or part of the association's official records. Unless the recording was made at the direction of the board, or by the secretary acting in his or her capacity as secretary of the association, I do not believe the association has any claim to the recording.

Your question highlights an issue that must always be kept in mind by directors. As you may know, directors have a fiduciary duty to the association to act in good faith and in the best interests of the association. However, this does not mean that directors lose all of their rights as members. The difficult issues arise when a director's actions as a member conflicts with their obligations as a director. For example, if the reason for your question is that there is some dispute over action that was taken at a meeting that can only be resolved by reviewing the recording, then arguably the board member that made a private recording

might reasonably have a fiduciary duty to the association to provide the recording, since doing so would benefit the association. Admittedly, making a legal argument or legal claim out of this issue would be a bit of a stretch, as I am not aware of any cases or established law on this point.

In my experience, the more common issues concerning the tape recording or videotaping of an association meeting involves who makes the tape, and how the taping is done. As you may know, only unit owners are legally entitled to attend board or member meetings. The one exception involves a non-unit owner who has been given a valid power of attorney from an owner. In my experience, it is not unusual for a non-owner videographer, or even a court reporter, to show up at the meeting. The association is entitled to prohibit those people from attending the meeting, absent a valid power of attorney designation. In addition, under both the Homeowners' Associations Act and through administrative rules adopted by the Florida Division of Condominiums, Timeshares and Mobile Homes governing condominiums, the Board is permitted to make rules in advance of the meeting governing the recording of board and member meetings. The rules can require giving prior notice to the board of an intent to record, can require the recording members to stay in one place while recording, and can prohibit equipment from being placed in

inconvenient or distracting locations. Additional lighting can reasonably be limited or prohibited in the case of video recording. Such rules are designed to allow the meeting to progress without interruption or distraction due to the recording.

Q: You recently wrote about a change in the Florida Homeowners' Association Act that precludes a property manager from also being a board member or officer. I could not find this change in the Florida Statutes, could you provide the citation. **A.L. (via e-mail)**

A: As discussed in my October 3, 2010 article

entitled "Homeowners Association Act Clarifies Pay Issue", Senate Bill 1196 amended Chapter 720 of the Florida Statutes, effective July 1, 2010. The new law provides that a board member, officer, or committee member may not be paid for their service, and "may not in any other way benefit financially from service to the association." The new statute is cited as Chapter 720.303(12), Florida Statutes. As noted in the previous column, exceptions exist in the law, including compensation authorized in the governing documents or by a vote of the association membership.

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Husband, Wife Can Serve On Homeowners' Board

Condo Regulations are Slightly Different

Fort Myers The News-Press, October 31, 2010

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Q: I am in a homeowners' association. We have our board election coming up. There is a husband and wife that are both running for the board. Is it legal for both a husband and wife who own one home in the community to be elected to the board of directors of a homeowners' association? **B.D. (via e-mail)**

A: Yes. In a homeowners' association there is no restriction on co-owners, whether husband and wife or otherwise, serving on the board of directors at the same time. Rather, Section 720.306(9) states in relevant part that "[a]ll members of the association are eligible to serve on the board of directors..." Accordingly, any member, including co-owners, are eligible to run and serve on the board of directors of the association at the same time.

Conversely, in a condominium association, co-owners are generally prohibited from serving on the board of directors at the same time. That law was amended this year, effective July 1, 2010, to clarify that co-owners who own only one unit in condominiums containing more than ten units may not serve on the board of directors at the same time, unless there are insufficient eligible candidates to fill the vacancies on the board of directors at the time of the vacancy.

Q: I live in a Condominium Association which prohibits residents from having dogs and parking trucks outside of garages. There are now a number of owners who have submitted a request to the board that the association consider an amendment so as to allow dogs and parking trucks outside of garages. There are others who have threatened to sue the association if such an amendment is approved. Must the association consider this request? **M.M. (via e-mail)**

A: The Florida Condominium Act does not require an association to consider an amendment suggested by a unit owner. Accordingly, it is the condominium documents which control in this situation. Most declarations of condominium provide that the board of directors can propose amendments. Additionally, some documents contain a clause which allows a certain percentage of unit owners to propose an amendment. When a proper petition signed by the requisite number of unit owners is submitted, the Association must allow the unit owners to consider the amendment at a members' meeting.

Q: Recently you wrote about an owner's right to tape record or videotape meetings. I have a follow up question concerning the same issue. Our master association (which is a homeowners' association) will not allow its "regular" board

meetings (by that, I mean those meetings not addressing attorney-client privileged matters or employee matters) to be electronically recorded by any owner. The board insists there is a provision in the bylaws which specifically prohibits the recording of such meetings. My question is would the bylaws supersede the statute on this issue?

D.V. (via e-mail)

A: The short answer to your question is no, the bylaws would not supersede the statute.

Chapter 720 of the Florida Statutes, authorizes any parcel owner to tape record or videotape meetings of the board of directors or meetings of the membership. The statute also authorizes the board

of directors of the association to adopt reasonable rules governing the taping of meetings of the board and the membership.

Accordingly, a homeowners' association may not create an outright prohibition on tape recording or videotaping board or membership meetings. Permissible regulations might include: a prohibition against the use of recording equipment which would interfere or obstruct another owner's view or ability to hear the meeting; a ban on extra lighting for videotaping; and a requirement that all electrical equipment comply with applicable codes.

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Courses Not Mandatory to Serve On Condo Board

But directors must read documents

Fort Myers The News-Press, November 7, 2010

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Q: I read that there is a new law which requires all condominium association board members to take certain mandatory courses in order to be eligible to serve on the board. Is this correct? **A.P. (via e-mail)**

A: No, but courses are an option.

By virtue of SB 1196, which became effective July 1, 2010, the law now reads as follows: "Within 90 days after being elected or appointed to the board, each newly elected or appointed director shall certify in writing to the secretary of the association that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider."

In my opinion, this law does not apply to existing directors unless they were elected or appointed to the board on or after July 1, 2010. If a current director is re-elected or re-appointed to the board,

the new law would apply to them at the time of re-election or re-appointment.

As stated in the statute itself, the director can either "certify" that he or she has read the condominium documents and will attempt to uphold the documents and their fiduciary duty. Alternatively, the director can take a course approved from a provider approved by the state and would not have to sign a "certification" form. It is my understanding that there are currently about a dozen groups that have sought or obtained approval from the state to offer these courses.

Q: I own a condominium where I have been living with my domestic partner for the past four years. We are not married. I would like him to attend our monthly condominium board meetings with me but the association will not permit him to attend because we are not married. Is this legal? **W.S. (via e-mail)**

A: Section 718.112 (2) (c) of the Florida Condominium Act states that board meetings shall be open to all unit owners. The law defines a "unit owner" as the record owner of legal title to a condominium parcel. Therefore, if your partner's name is on the deed to your condominium unit, he is a unit owner and is entitled to attend and participate at all board meetings. However, if his

name is not on the deed, he is not a unit owner and has no right to attend your board meetings.

Q: We are looking for ways to lower our condominium association quarterly maintenance assessments. One idea is to reduce our reserves by forty percent. Can the board do this without a unit owner vote? **S.F. (via e-mail)**

A: No. The Florida Condominium Act provides that the association's annual budget must include certain reserve accounts for capital expenditures and deferred maintenance. Specifically, the annual budget must include reserve accounts for roof replacement, exterior building painting, pavement resurfacing and for any other item which the deferred maintenance

expense or replacement cost exceeds \$10,000.00. The amounts that must be placed in these reserve accounts are computed by a formula taking into account the estimated remaining useful life or estimated replacement cost or deferred maintenance expense for each reserve item. The law requires that the board adopt a budget each year with "fully funded" reserves. In other words, the Board must ensure that each reserve category receives enough money each year to replace each reserve item at the end of its useful life.

The statute does allow the board to adopt a budget with no reserves, or with reserves at less than full funding, upon the approval of a majority of the unit owners voting at a duly called meeting at which a quorum is present.

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Association Can Enter Empty Condo

Maintenance can be used as excuse

Fort Myers The News-Press, November 14, 2010

By Joe Adams

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Q: A unit in our condominium has been vacant for over two years. There is a mortgage foreclosure action pending. Last year the board advised the owner by certified mail, return receipt requested, that the board planned to enter the unit to determine if there were any conditions that might affect the unit or other portions of the condominium. No response was received. We entered the unit and determined that the conditions of the unit at that time was satisfactory. However, the board agreed to reconnect the electrical service so that the air conditioner could be run.

What can the association do at this point regarding the bank's foreclosure and was the association's action in entering the unit and reconnecting the electrical service appropriate? **B.V. (via e-mail)**

A: Generally, the holder of the first mortgage will name the association as a party to the foreclosure lawsuit to ensure that the lender is entitled to the assessment caps provided to mortgage foreclosing lenders by law. Therefore, the association is entitled to actively participate in the suit. Depending on the status of the case, and a cost-benefit discussion with your attorney, the association may be able to take action to push the case forward, such as filing a motion for "case management conference." Further, in many parts of the state, trial judges have recently begun taking

much more aggressive stances in forcing banks to proceed with their pending lawsuits.

Section 718.111(5) of the Florida Condominium Act states that the association has an irrevocable right of access to each unit in the condominium, during reasonable hours when such access is necessary for the maintenance, repair or replacement of any common elements or any other portion of a unit to be maintained by the association or when necessary to prevent damage to the common elements or to a unit or units. Accordingly, it is my opinion that the association had the right to enter the unit to ensure that there was not a condition present which would damage the common elements or units in the condominium.

With regard to restoring the power, the response may be driven by particular clauses in the association's governing documents, including what is typically referred to as an "enforcement of maintenance" clause. I believe that a reasonable argument exists that even in the absence of enabling authority in the condominium documents, providing electricity to the unit for temperature and humidity control could prevent an outbreak of mold, and thus serve to protect the common elements. As a practical matter, the board should realize that it will probably never recover the money spent on the electricity.

Q: I read your newspaper column last week regarding the new state-approved courses that are on condominium law. You stated that these courses were not mandatory, unless a newly elected or appointed director did not wish to sign a “certification form.” Why wouldn’t someone just sign the form instead of sitting through a class?
A.M. (via e-mail)

A: As stated in last week’s column, within ninety days of election or appointment to the board of directors, a new board member (including those who are re-elected or re-appointed) must do one of two things within ninety days. First, he or she must “certify” that he or she has read all of the condominium documents (declaration, articles of incorporation, bylaws, board policies/rules and regulations) and will uphold those documents to the best of their ability. The director must also certify that they will uphold their fiduciary responsibility. Alternatively, a director may forego signing the certification form upon proof of completion of the educational curriculum approved by the state.

I can think of at least three reasons why people would sign up for these classes. First, I suspect that many new directors will sign the certification form, but take the classes anyway. In my quarter century of legal practice here in Southwest Florida, mostly focused on the representation of associations, I can tell you that some folks just want to learn, so that they can do their best. Therefore, these courses will provide opportunity for those of that ilk, which is a good thing since the

state has cut out other condominium education programs due to budget cuts.

The second reason may be political. Although not as much a phenomena on this coast, election to some condo boards is coveted and hotly contested. Certainly, a candidate who can say that they have completed state-approved educational courses may have a leg-up on their opponent, even if they otherwise intend to sign the certification form.

The third reason is legal. The 2008 amendments to the Florida Condominium Act raised a few eyebrows when the law was amended to state, for the first time in the 40 year history of the statute, certain circumstances in which volunteer directors might be held personally liable for their acts or omissions. The 2010 amendment, which now requires the director to “certify” that he or she has read a hundred pages of legal documents might cause a few to pause. Certainly, someone who wants to serve on a board should not sign such a form if they are unwilling to read the condominium documents through and through. Frankly, I believe that the entire notion of requiring laymen to “certify” that they have read through legal documents border on the absurd. I wonder how many members of Congress could “certify” that they have read the United States Code (which is comprised of fifty titles) from beginning to end?

If you are interested in learning about what courses may be available in your area, check out the Division of Condominium’s website at <http://www.myfloridalicense.com/dbpr/lsc/condominiums/BoardMemberEducation.html>

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Vote of Owners Isn't Required For Roof Repair

Association also can levy assessments

Fort Myers The News-Press, November 21, 2010

By Joe Adams

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Q: I am a unit owner in a condominium. Our board of directors is considering a proposal to replace the roofs on all of the condominium buildings at a total cost of \$250,000. The board also intends to levy a special assessment to pay a portion of the cost. In my opinion, some of the roofs are in good shape, and not all of the roofs need to be replaced. Does the board have the authority to do this without a vote of the owners?

L.T. (via e-mail)

A: In accordance with Section 718.113(1), Florida Statutes, maintenance of the common elements is the responsibility of the association. The management and operation of the association is by its board of directors, and the actions of the board do not require approval from the owners unless such approval is required by law or by the governing documents. As an example, if the proposal was to change the roof in a way that would constitute a material alteration or substantial addition to the common elements, then such a change would require approval by the unit owners in accordance with the declaration, or by 75% of the unit owners if the declaration is silent. Under your facts, it does not sound like a material alteration or substantial addition is being proposed. Therefore, absent a contrary provision in the condominium documents (and I have never seen such a provision), the board is obligated and

authorized to maintain the roofs, and a vote of the owners is not required.

With respect to whether or not a particular repair is necessary, the board is typically given broad discretion in its exercise of ordinary business judgment. According to the "business judgment rule", actions taken by the board within the scope of its authority are presumptively correct, absent a showing of mismanagement, fraud, or breach of trust. If there is any question as to whether a particular repair or replacement is necessary, my recommendation would be for the board to obtain a written opinion from a qualified professional. In that way, the members of the board can ensure that association funds are not being wasted, and protect themselves against claims of breach of fiduciary duty.

The association has the clear authority to make and levy assessments under the law. Unless your condominium documents impose some limitation or restriction on the board's authority to make special assessments (and some do), the board has the power to levy a special assessment for proper common expenses without the necessity of a unit owner vote. It should be noted that the law requires that written notice of the board meeting where the special assessment will be considered be provided to the unit owners 14 days in advance

(both by mailing and posting), including the nature, estimated cost, and description of the purposes for such assessments. Funds collected pursuant to a special assessment can only be used for the specific purpose for which they are collected, and after completion of the purpose, any excess funds are considered common surplus, and may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

Q: Can condominium association board members hire spouses or other relatives to work for the association and pay them more than the going rate? **G.W. (via e-mail)**

A: The Florida Condominium Act does not contain an express prohibition against nepotism (neither do the cooperative or homeowners' association statutes for that matter). The governing

documents occasionally impose limitations on the ability of an association to contract with organizations owned or run by officers or directors or their relatives.

Section 617.0832 of the Not-for-Profit Corporation Act regulates director conflicts of interest and provides that a contract between the corporation and an entity that a director or officer has a financial interest in is binding if: (1) the director discloses the relationship; (2) a majority of uninterested directors vote to approve the transaction; and (3) the transaction is "fair and reasonable." Obviously, a contract that was inflated just because a relative is involved would not be "fair and reasonable." This is the same rule for cooperatives. The rule for homeowners' associations is somewhat stricter.

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Damage to Condo's Interior Partition Walls Found

Owner wonders who's responsible

Fort Myers The News-Press, November 28, 2010

By Joe Adams

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Q: Who pays for damage to interior walls in a condo not necessarily caused by a "casualty" loss because the date of the damage cannot be determined? We recently discovered that the studs in our interior partition walls have been damaged over an unknown time period by water, mold and termites. Our association says that it is our responsibility as unit owners because the damage is not caused by a "casualty" and that the new law from 2008 does not apply. Is this accurate? **R.E.** (via e-mail)

A: The 2008 change to the law you are referring to is commonly called the "Plaza East rule", because it is based upon a change to the statute arising from an administrative agency decision by that name. Under the Plaza East rule, when a condominium association insures an item of condominium property, the association must pay to repair the item after damage by a "casualty," even where the declaration of condominium provides otherwise. There is a procedure for "opting out" of the "Plaza East rule", which requires majority approval of the unit owners in each condominium operated by your association.

A 1963 Florida appeals court case defines "casualty" as "something out of the usual course of events, and which happens suddenly and unexpectedly and without design of the person

injured." "Casualty" is also sometimes described as an event due to some sudden, unexpected or unusual cause and does not include progressive decay or corrosion occasioned without any unusual action by the elements. "Casualty" is defined by the government, for IRS purposes, as "the damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual." A bursting water pipe is usually a casualty. A slow, continuous leak usually is not. Damages from storms or other Acts of God are also casualties.

As far as I know, whether or not you can "date" a loss is not dispositive as to whether the cause of damage arose from a "casualty". In any case, it is likely that the conditions which you describe arise from wear and tear and decay, which is typically not covered by insurance because it is not a casualty. In that case, you will need to look to the allocation of maintenance responsibilities in your declaration of condominium. Typically, drywall studs and framework which support interior, non-load bearing partitions are the responsibility of the individual unit owner. Conversely, framework beyond the drywall on the exterior, load-bearing walls is often an association responsibility. This is a document interpretation issue.

Q: I own a cooperative unit. We currently allow rentals in our cooperative, but at our annual meeting we are going to vote to amend our governing documents to prohibit units from being rented. If the amendment is passed, will the units that voted against the amendment be “grandfathered” and continue to be able to allow rentals under Florida Statutes? Will the units that voted in favor of the amendment to prohibit renting also be allowed to rent? Is the cooperative law the same as the condominium law? **S.W. (via e-mail)**

A: The Florida Condominium Act was amended in 2004 in reaction to a Florida Supreme Court decision which basically held that a condominium association could enact unlimited rental restrictions through an amendment to the declaration of condominium. The 2004 amendment to the statute provided that any declaration amendment “restricting” an owner’s “rights relating to rentals” could not be applied to those unit owners who did not approve the amendment, but would only be binding on those who purchased from them. The 2004 change, which I dubbed the “Rental Amendment Grandfathering Law” created some confusion as to whether all amendments that

dealt with rentals were subject to grandfathering. The 2010 revisions to the Condominium Act clarify that only amendments that prohibit a unit owner from renting their unit, alter the duration of permissible rental terms, or restrict the number of times unit owners are allowed to rent, are subject to the grandfathering rule.

The 2004 and 2010 changes to the Condominium Act were not made to the Florida Cooperative Act (Chapter 719, Florida Statutes). As such, the law on this issue is different for cooperatives.

The Cooperative Act does not contain any provisions which address whether a newly adopted amendment will affect cooperative shareholders who voted against the amendment. In my opinion, and barring some contrary provision in your cooperative documents, I would think that any amendment affecting rental rights would be applied retroactively to all in the cooperative context, whether they voted for the amendment or not. I also think the same rule would likely apply in the homeowners’ association context.

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Board of Directors Should Consider Golf Cart Rules

Fort Myers The News-Press, December 5, 2010

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Q: We live in a fifty-five and over gated non-golfing community. Several residents have golf carts and drive them within the community. Being a gated community, I am aware the roads are private. I have noticed children driving these carts alone or sometimes with an adult present. These children are young may be between the ages of nine and twelve. Is this legal? One of our residents was almost hit by one of these children. We do not have any rules in our HOA concerning golf carts. Do golf carts need a license plate to be on our streets? Do you need a drivers license to drive a golf cart? Thank you. **A.L. (via e-mail)**

A: State statutes and local ordinances do not prohibit golf carts from being operated on private roads. Section 316.212, Florida Statutes, provides that the operation of a golf cart upon the "public roads or streets" of the state is prohibited except as otherwise provided in the statute, and then only upon approval by the local government having jurisdiction and subject to certain regulations. A "private road or driveway" is defined as "any privately owned way or place used for vehicles by the owner and those having express or implied permission from the owner, but not by other persons". A "public" street or highway is defined as "the entire width between the boundary lines of every way or place of whatever nature when any part thereof is open to the use of the public for purposes of vehicular traffic".

The statute provides that a golf cart may not be operated on public roads or streets by any person under the age of 14. The law further states that a license is not needed to operate a golf cart. If your community has private roads, then the use of golf carts in your community is not subject to the statute and subject only to your community's governing documents.

If there is nothing currently in your governing documents providing guidelines for the operation of golf carts in the community, it is certainly something your board of directors should consider, in consultation with the association's attorney. The association could theoretically be held liable for an accident on the common areas involving a golf cart if the association knew or should have known of a danger, but failed to take steps to prevent injury.

In one Florida appeals court case, the appellate court reversed a trial court decision in which evidence of "near misses" involving golf carts was excluded by the trial court. The appellate court held that the evidence should have been admissible against the association. See *McFall v. Inverrary Country Club, Inc.*, 622 So.2d 41 (Fla. 4th DCA 1993). Therefore, an association is at risk if it ignores known accidents, near misses or dangerous situations.

In order to reduce potential liability, the association might consider enacting a rule to require any resident who wants to operate a golf cart in the community to sign a waiver and indemnification agreement. In addition, the board might consider adopting rules similar to Florida's statutory regulations which are applicable to the operation of golf carts on public roads. These regulations provide, for example, that all golf carts must be equipped with efficient brakes, reliable steering apparatus, safe tires, a rearview mirror,

and red reflector warning devices in both front and rear, and that golf carts operated after sunset must also be equipped with headlights, brake lights, turn signals, and a windshield.

A rule adopted by the board should also address the operation of golf carts by non-residents, particularly minors. The association could also adopt other requirements not necessarily related to safety, such as allowing only electric golf carts, and prohibiting charging of golf carts on common areas.

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Condo Act Straddles Fence on Fiduciary Relationship

Fort Myers The News-Press, December 12, 2010

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Q: A friend and I have been debating over the fiduciary responsibilities of a Community Association Manager (CAM). What, if any, fiduciary duty is owed by a CAM to the board of directors of an association? **P.A. (via e-mail)**

A: This is a very important concept. A person who occupies a fiduciary relationship bears much more legal responsibility than normal, arms-length parties to a contract. In order for there to be a fiduciary duty, there must be a fiduciary relationship between the parties. Florida case law has not addressed the fiduciary relationship between a CAM and a community association. The Florida Condominium Act entices this debate by straddling the fence. The condominium statute states that nothing in the statute “shall be construed as providing for or removing the requirement of a fiduciary relationship between any manager employed by the association and the unit owners”. The Florida Homeowners’ Association Act avoids the issue completely.

A 2009 case from a Tennessee appeals court, called Condominium Management Associates Inc., v. Fairway Village Owner’s Association, addressed whether a manager has a fiduciary responsibility to a homeowners association. In that case, the court explained that a fiduciary relationship is not merely a relationship of mutual trust and confidence. Rather, it is a relationship

where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of the confidence, to influence and exercise dominion and control over the weaker or dominated party. Florida cases outside of the association context have similarly defined a fiduciary relationship as one where there must be some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party.

In the Tennessee case, the court analyzed the question of the existence of a fiduciary relationship by looking at the language of the management agreement itself. The agreement provided, among other things, that the manager was to operate and maintain the association property, prepare specifications for service contracts, obtain bids, negotiate services, maintain daily bookkeeping, receive and deposit all accounts receivables, and prepare an operating budget. The association argued that the manager was essentially the party responsible for the operation of the association. The court disagreed and ruled that no fiduciary relationship existed. Since the manager was acting under the oversight of the board of directors, the relationship was not one of dominion and control but rather an arms-length business transaction by which no fiduciary duty is conferred.

Whether a Florida court would follow the Tennessee view is an open question. It may well depend on the facts of a particular case, and the language used in a particular agreement.

Q: In reading chapter 720 (Homeowners Associations), it says that an assessment may not be levied at a board meeting unless notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. Our board decided, at a closed meeting, that they would add \$50.00 to establish a reserve account in addition to our assessment for the annual operating account. Does this contradict the wording of Chapter 720 regarding assessments? **D.R. (via e-mail)**

A: It is not clear from the information you have supplied whether the board has attempted to levy a special assessment, or amend the budget to increase the regular assessments. With respect to special assessments, written notice must be mailed or hand delivered to each parcel owner and posted

not less than 14 days in advance. If the board attempted to revise the budget, the same requirements for adoption of the initial budget would apply. If the proper notice was not provided for the meeting at which the assessment was levied, it is possible that a court would declare the assessment invalid and uncollectible.

You also mention that the board meeting was closed. Florida Statutes provide that meetings where a quorum of board members gathers to conduct association business must be open to all members, except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. There is also an exception to the open meeting requirement for meetings of the board held for the purpose of discussing personnel matters. So unless a board meeting is for one of the foregoing purposes, it should be open to the members.

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Condo Associations Can Ban Smoking On Entire Premises

Fort Myers The News-Press, December 19, 2010

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Q: Our condominium association is considering an amendment to restrict smoking in parts of the common elements. We may even go as far as to completely restrict smoking in all parts of the buildings, common elements and the units. Is this possible here in Florida or are we just “blowing smoke?” If the amendment fails, can the Board do this by simply adopting a rule? **D.B. (via e-mail)**

A: There is no appellate case decision in Florida dealing with this issue. However, most attorneys I have polled on the subject agree that a condominium association may amend its declaration of condominium to prohibit smoking on the condominium property and such an amendment would be valid and enforceable. The Florida Clean Indoor Air Act (the “Act”), contained within Chapter 386 of the Florida Statutes, provides a uniform state-wide code to keep public places and public areas reasonably free from tobacco smoke. Section 386.203, Florida Statutes, specifically provides that condominium common elements are included within the meaning of “common areas” defined by the Act. Pursuant to the Act, smoking is prohibited in the common element hallways, corridors, lobbies, aisles, water fountain areas, restrooms, stairwells, entryways, and conference rooms. Further, all other indoor

“common areas” are also “no smoking”, unless the board has specifically designated the area as a smoking area. Smoking may occur outdoors, unless the board adopts a no smoking policy (rule) with respect to outdoor areas. Therefore, the board can generally regulate common element smoking, including a complete ban. A rule regulating smoking in units, while theoretically defensible (if the documents are worded properly), would be risky at best.

Q: I currently serve on the board of our homeowners’ association and would like clarification regarding the term “guest.” My understanding is that a guest stays at the residence, but does not reimburse the homeowner for any expense. However, at what point is this person no longer a guest? We are trying to determine whether we can make long term guests submit to a background check, just like we would for new tenants and owners. **A.A. (via e-mail)**

A: A guest is generally considered to be a person who is not a property owner, family member, or tenant and who is physically present or occupies the home on a temporary basis at the invitation of the owner, without payment or consideration. If your governing documents do not require the residency of “long term” guests to be

approved by the association, you are going to have a very difficult time requiring them to submit to a background check. As long as there is no consideration (i.e., rent or other compensation for the right to stay in the home), then the person would not be considered a tenant. If your

documents require background checks for only tenants or owner-occupants, then most likely you would not be able to obtain a background check for a guest, even if they stayed for a two or three-month period. An amendment to the governing documents would be needed.

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Renters Can't Have Pets Even Though Owners Can

Fort Myers The News-Press, December 26, 2010

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Q: I own a condominium unit where the governing documents allow owners to have pets. I rent my unit out. There has been an ongoing problem with pet owners failing to clean up after their pets and sometimes allowing them to run unleashed.

The perception is that renters, especially seasonal renters, are the worst offenders. To deal with this problem, the board has passed a rule forbidding renters to have pets. I am concerned that the rule excludes many potential renters, which may make it much more difficult for me to rent out my unit.

It seems to me that an owner should be able to delegate all of his rights and privileges to a renter, and that the pet problem should be dealt with by enforcing the rules that we already have, rather than prohibiting renters from having pets. **J.S. (via e-mail)**

A: You are correct that there is a general perception, right or wrong, that renters are less

likely than owners to follow association rules or be as careful with the use of common elements.

According to the somewhat limited legal precedent which exists on the subject, associations are permitted to adopt different rules for tenants and owners, as long as the rules are reasonable and do not conflict with a right in the declaration of condominium. In other words, if the declaration says that tenants are permitted to have pets, then a rule adopted by the board cannot prohibit tenants from having pets.

However, if the declaration is silent or states that owners are permitted to have pets, then a rule prohibiting tenants from having pets would likely be considered valid.

It is important to note that the law forbids treating tenants differently than unit owners with respect to the use of the common elements. For example, in a condominium which permits tenants to have pets, a rule that allows owners, but not tenants, to use a common "dog walk" area would be invalid.

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