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Strategies and Legal Tools to Diffuse Difficult People

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A more accurate title to this article could be "How to Deal With Unavoidable, Persistently Difficult People". Of course, the best strategy is to simply avoid difficult people. But that is not always possible when living together in the confines of a community association. And this strategy is rarely available when you have volunteered to serve on a community association board of directors or committee, and an important part of your role is to interact with all members of the association.

Even unavoidable encounters between association volunteers and difficult people are generally tolerable so long as they are brief and isolated. Therefore, your second strategy should be to do what you reasonably can do to satisfy the person from the start. Do not contribute to making a person behave badly, or to sparking combative instincts. In many cases, people just want to be heard, and to have their thoughts and feelings validated by others. So listen, and try to do so with a smile, or at least with a pleasant demeanor. Do not refute, or argue, or even try to repeat the person's points in your own words. Be receptive, and use phrases such as "You might be right", "Those are good points that I will take under serious consideration", or "Give us some time to explore those ideas." Ask them specifically, "What would you like us to do?" Of course, these responses will obligate you to spend some time developing a substantive response later. But often, even if that substantive response is not what the person wants to hear, just knowing that you listened and took the time to go through the process of addressing their concern is enough to resolve the issue.

This second strategy might be called a "no regrets" strategy because if it is used, and the difficult person persists, at least you know you did all you reasonably could have to avoid further problems. It seems that many disputes and ongoing "battles" do not involve inherently difficult people, but are the result of a perceived, or sometimes actual, act of disrespect. These "battles of wills" take on a life of their own where the participants often lose sight of the issue that started the dispute, and no longer even care about the outcome of that issue. Instead, the dispute becomes all about ego and reputation, and winning. To be clear, the recipient of an initial complaint could be equally to blame for fueling a dispute. It is important to hear the person's actual concern and to act on it if warranted. You must disregard the fact that the person may have expressed the concern in an offensive or obnoxious manner, and not take it personally. Admittedly, that is easier said than done. But the value of a quick resolution of the issue can be worth the extra effort.

Regrettably, there are some people who are going to be persistently difficult despite your best efforts to

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Can he ride that thing in here?

Motorized Scooters, Mopeds, Segways, and Golf Cart Use and Control

While the operation of various types of vehicles on public streets and sidewalks is regulated by state statute, those laws would not necessarily apply within a private community, and therefore many associations are interested in adopting and enforcing private restrictions or prohibitions for these vehicles within the boundaries of the community.

If an association is going to attempt to regulate these types of vehicles, it is helpful to have an understanding of what they are and how they are treated under state law. A motorized scooter is a vehicle without a seat, with no more than three wheels, and travels no faster than 30 mph. A motorized scooter is not a "motor vehicle" under state law, and is not legal to operate on public streets. A moped is a vehicle with pedals and a seat, with no more than three wheels, a small motor (no more than 50 cc), automatic transmission, and travels no faster than 30 mph. A moped is not classified as a motor vehicle under state law, but can be operated on public streets subject to certain equipment requirements and regulations regarding driving to the right if traveling at less than the normal speed of traffic. Mopeds under human power may be operated on sidewalks subject to the same restrictions as pedestrians. A Segway Personal Transporter™, referred to as an Electric Personal Assistive Mobility Device (EPAMD) under state law, is a self-balancing, two-nontandem-wheeled device, designed to transport only one person, with an electric propulsion system with average power of 750 watts, with a maximum speed of less than 20 miles per hour. EPAMDs are not classified as vehicles, but may be operated on public streets with a posted speed limit of 25 mph or less, on a marked bicycle path, on any street where bicycles are permitted, and on a sidewalk subject to the requirement to yield to pedestrians and give an audible signal before passing a pedestrian. Operators under 16 must wear a bicycle helmet. Local government may impose additional restrictions or prohibit the use of EPAMDs on streets and sidewalks. Golf carts are motor vehicles, and may only be operated on public streets that are designated by the local government and subject to certain equipment and age requirements, and subject to additional local regulations that may apply.

One potential avenue for addressing these types of vehicles that could be available to homeowners associations, but not condominium associations, is for the board of directors to vote to have state traffic laws enforced by local law enforcement within the community. This arrangement requires a written agreement and approval from the local government, and can sometimes be an effective tool for addressing speeding in homeowners associations.

Another alternative for addressing these vehicles is to adopt private restrictions in the declaration or in the rules and regulations. Generally speaking, Florida Courts have held that restrictions in the declaration, sometimes referred to as "category one" restrictions, are valid and enforceable unless they are clearly ambiguous, wholly arbitrary in their application, in violation of public policy, or abrogate some fundamental constitutional right. On the other hand, restrictions in the rules and regulations, sometimes referred to as "category two" restrictions, must meet a higher standard, and are valid and enforceable only if they do not contravene a provision of the declaration, are reasonable, and advance the legitimate objectives of the association.

In the context of motorcycles, Florida Courts and the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") have upheld outright bans on motorcycles in residential communities. There are similar decisions

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satisfy them. It seems that some people are stimulated by conflict, or by the feeling they get when they negatively affect others. Or in some cases, difficult people have had success getting their way in the past because others would rather give in to unreasonable and threatening demands than deal with unpleasantness. But giving in without good reason can set an undesirable precedent that may encourage aggressive conduct in the future. Therefore, in the worst cases of bad behavior, the best strategy available is to set limits on how and when the difficult person will be permitted to interact with you. Fortunately, both the Florida Condominium Act and the Homeowners' Associations Act provide some assistance to association boards and committees.

On the most basic level, association volunteers can decline to be spoken to in an offensive manner, or at any time outside of official meetings. There is no legal requirement that association directors or committee members speak directly to any association members. With the exception of member comments during meetings at which members have a right to be present and speak, you can require that all communications be in writing. Even at meetings, the statutes specifically permit the board to adopt reasonable rules governing the frequency, duration, and manner of owner statements, which can be helpful to set detailed limits and maintain order. And at those official meetings, there is no legal obligation for directors to engage in discussion, or to provide a substantive response. You can just respond with a simple, "Thank you for your comments."

Participants often lose sight of the issue that started the dispute and engage in a battle of wills. The goal is to diffuse any dispute before it gets out of hand.

Sometimes difficult members pester the manager, office staff, or association contractors by frequently asking questions, demanding documents, or giving orders. But the law is clear that association members have no authority to act for the association. Employees and contractors work for the association and take their instructions from the board. In extreme cases, legal action might be warranted if the association suffers damages due to unreasonable interference with the association's operations or employment relationships. And here again, it is permissible to require that all communications be in writing. While the statutes do allow members to inspect official records, and to obtain copies at their own expense, a written request is required. As with the right to speak at meetings, the board is permitted to adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying.

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in the context of pickup trucks, and the reasoning of those cases would appear to apply to these other types of vehicles. However, there is at least one arbitration decision from the Division that was issued in 2008 determining that a condominium association's action to prohibit EPAMDs throughout the community was invalid for several reasons, including the fact that the prohibition was not in the declaration or the rules and regulations, and did not apply to golf carts or bicycles. The decision even suggests that a properly adopted prohibition against EPAMDs in hallways and elevators of the building would not be valid, since the association allowed shopping carts and electrical wheelchairs in those areas.

One reason that many associations are interested in regulating or prohibiting these types of vehicles is potential liability. The association may always be subject to a claim by anyone for anything, whether or not the association would ultimately be found liable. Therefore, being proactive in determining potential hazardous conditions, and taking steps to mitigate the association's liability, is always beneficial in reducing the likelihood of an unfavorable lawsuit. Associations that own or control property can be held liable for accidents on the property if they knew or should have known of the danger and failed to take reasonable steps to prevent it. Therefore, if a community is aware of an area where there have been "near misses" with any types of vehicles, those should not be ignored.

Editor's Note: Don't forget that the association may be faced with authorizing use of these and other types of vehicles in connection with a reasonable accommodation.

Why Should The Condominium Association Require Bonds From The Renovation Contractor

We often encounter Condominium Associations who have difficulty understanding why they should bond their exterior renovation contract. Many Associations consider it money wasted on another layer of liability protection when they would rather spend the money on actual scope - sticks, bricks, and finishes. They do not expect the surety to pay the claims even if they are made against the Contractor's Performance and Payment Bonds.

Association Boards often ask, "Isn't the risk already covered by all the insurance required from the Contractor?" The short answer is, "No", and here's why.

A **performance bond**, unlike insurance, assures the Association that the Contractor, or its Surety, will complete the project even if the contractor goes bankrupt or cannot competently perform to complete the contract. In addition, sometimes a Surety can be required to pay Association claims for work not properly performed even after occupancy. *See, Federal Ins. Co. v. The Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119 (Fla. 1998).

A **payment bond**, on the other hand, assures the Association that the Contractor will pay the subcontractors and suppliers under the contract terms agreed between the Association and the Contractor. The payment bond protects the Association from having construction liens recorded on its project, provided the Association properly records the Bond with the Notice of Commencement. Most Associations understand that they do not want unpaid subcontractors and suppliers recording liens on their property, but they are loathe to get into the technical and complex quagmire that is the lien law. Thus, the Surety provides assurance to the Association for both the Contractor's performance and payment to third parties.

Performance and Payment Bonds are issued together to the Association and to the Contractor once he can demonstrate his creditworthiness. The Surety issues the bonds only after its audit of the Contractor's contract balances, payment history, and contract performance. In turn, the Surety protects itself by obtaining a General Indemnity Agreement from the Contractor and any spouse, personally, to reimburse the Surety if it is required to pay out Contractor claims on the project.

"But," you say, "we already know this contractor and we have already determined that he is qualified." We say, "But wait… There's more."

A bonded Contractor is not only accountable for its performance to the Association. The Contractor is also accountable to the Surety, with whom it enjoys a necessary relationship for continued business with public and private owners. Before the surety ever issues the bonds, its underwriters examine the Contractor's books, records, and practices to evaluate the kinds of contracts completed, the status and payment history under contracts underway, when and why a contractor was sued, if ever, and generally a contractor's operational practices, *i.e.*, - does the contractor pay its subcontractors, suppliers, and other third parties properly and timely? A bondable contractor tends to be the qualified contractor both because of quality performance in the past and because of responsible business practices. If you want more information about construction bonds, their benefits, and whether your construction contract warrants surety protection, please contact us.

Substituting mailings with electronic notice

Can you use email?

In this high-tech world many associations would like to avoid the expense, timing and labor involved with mailings. In a large community, making photocopies of notices and other documents necessary to furnish members, can take hours. Duplication and mailing costs can eat into an already tight budget. Since it seems that "everyone" uses email, many community leaders often ask whether notices of meetings, proposed budgets and other documents can be distributed to the members electronically.

Section 617.0141(2) of the Florida Not-For-Profit Act states that notice of corporate actions may be transmitted by "electronic transmission", which would include what is commonly referred to as "e-mail." Further, according to the corporate law, electronic notice is effective if posted on an electronic network that the member has consented to consult.

In the condominium context, Section 718.112(2)(d)6 of the statute states that notice of meetings of the board, unit owner meetings (except recall meetings) and committee meetings may be given by electronic transmission "if authorized by the bylaws." Thus, electronic notice is not an option unless the bylaws specifically address this issue. The Florida Homeowners Association Act, being Chapter 720, Florida Statutes contains a similar provision. Section 720.303(2)(c),1. provides in relevant part:

> . . . The bylaws or amended bylaws may provide for giving notice by electronic transmission in a manner authorized by law for meetings of board of directors, committee meetings requiring notice under this section, and annual and special meetings of the members; however, a member must consent in writing to receive notice by electronic transmission.

Since the law requires each member who consents to receive electronic notice to sign a written consent form, an association cannot simply use electronic notice even if the issue is addressed in the bylaws.

Using electronic notice may not be a panacea. Someone has to collect and keep track of member consent forms. Someone has to monitor and keep track of email address updates. Since members can revoke consent at any time, association rosters must be monitored constantly to ensure the association complies with the law. Also, consent to electronic notice turns what may be a 'private' email address into a record subject to inspection by other members. The e-mail address of any unit owner who has consented to receive notices by electronic transmission must be made available to any unit owner who requests it, which may discourage members from electing to receive association mailings electronically.

Since 1980, The Community Update newsletter has been providing law related educational articles for community leaders and professionals. This information is provided for informational purposes only and should not be construed as or relied upon as legal advice. Readers should not act or refrain from acting based upon the information provided without first contacting an attorney admitted to the Florida Bar. Please contact the editor with any questions, suggestions or comments cu_editor@becker-poliakoff.com.

CONDO CANNOT COLLECT PAST DUE AMOUNTS FROM INVESTOR AFTER FORECLOSURE

Association becomes liable for past due assessments upon acquisition of title

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According to Bankrate.com. in 2012 it took an average of 382 days for a lender to complete a mortgage foreclosure in the United States. However, that statistic includes states with the non-judicial foreclosure procedures and states that have very few foreclosures. Florida is not one of those states. In Florida it reportedly takes an average of **858 days** for a lender to complete a foreclosure. That's right - more than two years from start to finish, sometimes even longer.

When a property owner stops paying his or her mortgage, they typically don't pay association assessments either. In fact it is more likely that an owner will neglect the association, believing that they are protected from forced sale as a result of homestead. We have addressed association collection efforts and tactics many times on the Firm's Blog and I invite you to visit the site to refresh your recollection of the larger issues. We specifically answered the question of what happens to the outstanding delinquency if the association becomes the property owner as a result of foreclosure of its lien in 2010. That question was answered again by the Third District Court of Appeal in an Opinion filed on January 23, 2013.

The ruling in ***Aventura Management, LLC v. Spiaggia Ocean Condominium Association*** reflects the unfortunate reality faced by many community associations in Florida. Here's what happened:

- An owner stopped paying maintenance assessments so the condo association filed a Claim of Lien.
- It filed suit to foreclose its lien in 2008 and obtained a final judgment of foreclosure in September, 2009.
- The sale was held in December of that year and the association received a Certificate of Title.
- The association rented the unit in an attempt to recoup the lost assessment payments.
- In the meantime, the mortgagee filed its mortgage foreclosure lawsuit, obtained a final judgment and the court set the sale on September, 2010.
- An investor bought the property at the mortgage foreclosure sale.

The new owner objected to the association's bill for the past due assessments on the account. It wouldn't pay so the case went to court. Ultimately the Third District ruled that the new owner ***did not*** have to pay. Even if it did have to pay, it could turn around and sue the association for reimbursement, since the association was the previous owner. The bottom line here is that each collection/foreclosure action requires a strategy based upon the relevant facts. By foreclosing, the Spiaggia board was able to collect rent until the bank obtained title.