No Transfer Fee on Seasonal Rental

But terms must remain the same

Fort Myers The News-Press, January 2, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am aware of the law which allows transfer fees in connection with the approval of the sale, mortgage, lease, sublease, or other transfer of a condominium unit. The law also says "if the lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge shall be made." My question is whether this statute means that the lease renewal must commence immediately after the expiration of the initial lease, or does this provision also apply to seasonal rentals when the same renter leases from the same unit owner seasonally each year? **H.C. (via e-mail)**

A: Section 718.112(2)(i) of the Florida Condominium Act permits charging transfer fees for approval of sales or leases provided that the association has the documentary authority to approve the transaction in the first instance, and further provided that the fee is authorized by the declaration or bylaws. The statute provides that a fee may not exceed $100 per applicant, and counts a husband/wife and a parent/dependent child relationship as one applicant. Your question about seasonal leases is a fairly common question here in Southwest Florida, where such arrangements are common (for example, the same tenant may rent the same unit from the same owner in February and March of every year).

In a 2004 non-binding ruling called a "declaratory statement", the Florida Division of Condominiums, Timeshares and Mobile Homes concluded that a lease "renewal" involves a continuation of the landlord-tenant relationship on the terms specified in any option to renew, or the continuation of a landlord-tenant relationship on the same terms as the original lease. The terms of a lease that need to be analyzed including the identities of the parties, the description of the leased property, the term of the lease, and the rental amount.

Therefore, if the "renewal" lease is between the exact same parties concerning the exact same unit, and all other material terms (including price) are the same, then, at least in the eyes of Florida's regulatory agency, the subsequent lease is a "renewal" and cannot be the subject of another transfer charge. If there is a new lease with different terms (including price), that is a new tenancy and a separate transfer fee may be charged.

Q: May a condominium association transfer maintenance responsibility for windows and doors to the respective owners of the apartments when the condominium documents currently provide that the association maintains the windows and doors? **A.D. (via e-mail)**

A: The Florida Condominium Act permits a declaration of condominium to require that unit owners maintain the unit and "limited common elements." If the windows and doors are part of the unit, or are designated in the declaration as limited common elements, changing the maintenance responsibilities can be accomplished through an amendment to the declaration of condominium.

A new statutory provision, effective July 1, 2010 further provides that any portion of the common elements serving only one unit or a group of units may be reclassified as limited common elements by amending the declaration of condominium according to the declaration's amendment provision. Your association's attorney should be able to review your condominium documents and determine how to best proceed.

It should also be noted that even if the unit owners are obligated by the documents to maintain windows and doors, state law requires that they be insured by the association. This is mandatory for all residential condominiums, with limited exceptions for certain types of free-standing units. Further, since the association must insure windows and doors, the association is also obligated by law to pay for any expenses resulting from "casualty" damages to the windows or doors not covered by insurance, including shortfalls occasioned by the deductible. This is known as the so-called "Plaza East Rule".

While the association cannot "opt out" of statutorily-imposed insurance responsibilities, it can opt out of post-casualty cost allocations through a vote, which is commonly referred to as a "Plaza East Opt Out Vote".

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.

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

Tenant Can Be held Liable for Owner's Obligations

Suspension of use rights also permissible

Fort Myers The News-Press, January 9, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: We are a small condominium association (18 units) with 5 units not paying monthly maintenance fees (four units in foreclosure and one unit attempting a short sale). We are stressed financially. Two of the units in foreclosure have renters that are still living in the units, using all the facilities, and not contributing anything. Can we require that they contribute something toward the cost of maintaining the facilities they are using? The association pays for water and sewer. Can the association cut off any services from these units? **R.Y. (via e-mail)**

A: The Florida Condominium Act was amended, effective July 1, 2010, and addressed both issues you have raised.

The law now provides that if a unit is occupied by a tenant, and the unit 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 directly to the association. The association can evict a tenant who does not comply with a proper demand. There is some disagreement as to whether the statute's reference to "future monetary obligations" means that you can only demand future maintenance fee payments from the tenant, or whether you can demand that all rents be paid over until the account is brought current. There may also be an issue as to whether the mortgage company might assert a competing claim if there is an "assignment of rents" clause in the mortgage. These issues should be discussed between the board and the association's legal counsel. A decision to invoke the new statute may well be the best choice. Alternatively, your lawyer might recommend seeking the appointment of a receiver in the pending foreclosure cases.

The new statute now also provides that common element use rights may be suspended when a unit owner is more than ninety days delinquent in the payment of any monetary obligation to the association. The authority to suspend common element use rights does not need to be contained in the condominium governing documents, and no hearing is required. However, the suspension must be approved at a properly noticed board meeting. 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.

The new law does contain several limitations on the ability to suspend use rights. An association may not suspend access to a unit, the use of limited common elements, utility services, the use of parking spaces or the use of elevators.

Accordingly, the association may not shut off water to the unit based on a delinquency.

I would also point out that the law is essentially identical for homeowners' associations governed by Chapter 720, although the 2010 amendment to that statute seemed to require a hearing before use rights can be suspended for nonpayment.

Q: Regarding annual reserves, how should necessary modifications to our spa, which will exceed $10,000.00 and will be incurred in the upcoming fiscal year, be dealt with in the proposed budget? Is it required by law to have a reserve line item in the budget? **E.G. (via e-mail)**

A: 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.

If the deferred maintenance expense or replacement cost for the spa exceeds $10,000.00, then you are required to include a reserve account for this item. Based upon the information you submitted, I am assuming that the association did not previously have a reserve account for the spa. Therefore, if the necessary modifications need to be done in 2011, the 2011 operating budget should provide the required funds to do the work. Thereafter, a reserve account should be set up for the spa, although the remaining useful life calculation should be adjusted based upon the work done in 2011.

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.

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

You Can Owe Assessments and Still Serve on Board

Homeowner association has no such restrictions

Fort Myers The News-Press, January 16, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Our homeowners' association meeting is next month and we will be electing one board member. One of the candidates is more than ninety days delinquent in the payment of assessments to the association. The association is still controlled by the developer, and the developer's management company told me that a delinquent owner has every right to run for the board. Our governing documents do say that a member who is delinquent in the payment of assessments can have their right to vote suspended. Can you clarify for me whether a delinquent member can run for the board? **F.M. (via e-mail)**

A: Since your association is a homeowners' association, there are no statutory restrictions on board membership related to assessment delinquency. You are correct, however, that the Homeowners' Associations Act does provide that an association may suspend the voting rights of a member for the nonpayment of regular annual assessments that are delinquent in excess of ninety days, if the governing documents so provide. But that provision does not affect eligibility to run for the board.

While it is a novel idea that has not been sanctioned by case law, as far as I know, it is possible that the governing documents of your homeowners' association might be amended to provide a mechanism for suspending or terminating a director who is delinquent in the payment of assessments. I have some concern that the provision of the Homeowners' Associations Act that provides that, "all members of the association are eligible to serve on the board of directors" could prohibit the documents from making any member ineligible for election to the board. But perhaps the documents could legally provide that a delinquent director is deemed to have resigned from the board when the delinquency exceeds ninety days. Again, there is no statutory authority for this in a homeowners' association, but if clearly included in the governing documents of the association, it might be enforceable.

You may know that the Condominium Act does include specific statutory provisions concerning directors and delinquency. Specifically, the Condominium Act provides that a director who is more than ninety days delinquent in the payment of any monetary obligation, which would include assessments, fines or any other fee due to the association, is deemed to have abandoned the director's position. This is not a suspension, but an abandonment that creates a vacancy to be filled by the remaining board. In addition, the Condominium Act specifically provides that a member who is more than ninety days delinquent

in the payment of any monetary obligation is not eligible to serve as a director. However, the Division of Florida Condominiums, Timeshares and Mobile Homes has expressed the position that such a delinquent owner can be a candidate, and as long as the delinquency is resolved prior to the election, can then be elected and serve on the board.

Annual Conference

The Law Firm of Becker & Poliakoff, P.A. will be holding its 35th Annual Community Association Leadership Conference on Monday, January 24, 2011. 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.

This year's program will focus on legislative changes impacting Florida's communities. Attendees will learn about the significant changes that were made during the 2010 Legislative Session in Tallahassee. Topics will include everything from enabling associations to collect more in unpaid common expenses that are in arrears from a first mortgage, to how to collect back assessments from renters. Also featured will be Becker & Poliakoff's construction attorneys on a panel to talk about common construction issues facing community associations.

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

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.

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

Association Breaks In, Turns Off Water

Tenant pays price for delinquent owner

Fort Myers The News-Press, January 23, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am a tenant in a condominium unit where the owner is delinquent in the payment of assessments to the association. The association is coming after me to pay assessments but I have refused to pay them. The association entered my residence without my permission and disconnected my water service. I have reconnected the water and changed the lock so that they cannot enter the residence. The association is now telling me that unless I give them a key to the new lock, they will break the lock I installed and install another lock so they can have access to the unit. My questions are: 1) Does the association have the right to access my unit to disconnect water service due to the owner's delinquent assessments? 2) Can the association deny water service to a tenant in order to collect assessments? 3) Does the association have the right to physically break my lock and install a new one? **S.T. (via e-mail)**

A: Your situation raises a number of issues under new statutes that were enacted effective July 1, 2010. First, the law now provides that an association may send a demand letter to the tenant of a delinquent owner to collect rent directly from the tenant. If the tenant fails to pay pursuant to the statute, the association has the right to evict the tenant. However, even if the owner of the unit is delinquent in the payment of assessments, and even if the tenant fails to send rent to the association as demanded, the association has no right to turn off water service. The new statute does permit the suspension of certain common area use rights for owners, or their tenants or guests, who are delinquent in the payment of assessments. For example, the association could properly deny your use of the recreational facilities until your landlord's account is brought current. However, that statute clearly provides that utility services may not be suspended.

The association's entry into your unit does not warrant you changing the lock and not providing a key to the association. So long as the association's governing documents, including rules, provide that owners shall provide a key to the association for proper access, then owners and tenants, are required to comply with that rule. Instead of changing the lock, your recourse is to take up the issue with your landlord who could then address this with the association.

Q: Is an owner in a condominium entitled to get a copy of the condominium association's tax return? **C.F. (via e-mail)**

A: Pursuant to Florida condominium statutes, the official records of the association are open to inspection by any member of the association at reasonable times, subject to reasonable rules which the association may adopt. Further, the right to inspect includes the right to make or obtain copies at the reasonable expense, if any, of the member.

The official records of the association include accounting records for the association. The statute also contains a "catch all" provision which states that "all other records of the association not specifically included in the foregoing which are related to the operation of the association" are official records of the association. Accordingly, tax returns filed by the association are part of the official records of the association open to inspection and copying by a member 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.

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

Condo Association Should Pay Part of Dry-Out Cost

Washer hose bursts; owner stuck with bill

Fort Myers The News-Press, January 30, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I have a question about who is responsible for drying out a condo unit? We had a washer hose that burst and water ran all over our unit. We paid a contractor to clean up the damage and dehumidify the unit. Our insurance adjuster says that the condo association should be responsible for a portion of the cost for the drying, but the condo association says that we are responsible for all of the costs. **W.G. (via e-mail)**

A: One factor that is key in this case is whether the incident causing the damage was a "casualty," or is more properly characterized as a maintenance or wear and tear issue. A casualty is generally defined in the law as something that is sudden, unexpected, and unintentional. For example, continuous water leaks are generally not considered casualties, while a suddenly bursting pipe usually is.

In casualty situations, the association is required to repair or replace the items that the association insures. This includes drywall. On the other hand, the unit owner is responsible to insure and pay for damages to "all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing."

Based on the facts as you describe them, the discharge from the failed washer hose sounds like a casualty. Accordingly, unless the hose's failure was caused by your negligence, or unless your association has "opted out" of the statutory scheme by majority vote, the association would be responsible for the costs attributable to drying out the drywall. However, a "dry-out" contractor usually is not only seeking to prevent and remediate damage to property within the association's jurisdiction (for example, drywall), but also property within the individual unit owner's jurisdiction. For example, drying out your carpeting, furniture, and surface coverings is your financial responsibility. Further, the fact that you called the dry-out contractor (instead of reporting the incident to the association) could be raised as a defense by the association, particularly if your contractor's charges are not reasonable or customary.

In my experience, the adjusters for your insurance carrier and the association's carrier should be able to get together and come to an amicable and reasonable split on the allocation of costs for the services.

Q: I am a new board member for a condominium in Florida. It is my understanding that all official board meetings must be posted and open to all unit owners under Florida law. Does this preclude a board from getting together to informally discuss potential options pertaining to management issues, maintenance, or renovation projects, if no voting or decisions are made, and the issues will be presented and decided later at a formal board meeting? **R.D. (via e-mail)**

A: Yes. The Florida Condominium Act provides (with an exception for certain attorney-client privileged meetings) that all "meetings" of the board at which a quorum of the members is present (either in person or by telephone) must be open to all unit owners. If less than a quorum is present, or if the directors are not discussing association business (such as at a social event), then the gathering is not a "meeting" and the open meeting requirement does not apply. Proper notice generally requires posting notice (and an agenda) conspicuously on the condominium property at least 48 continuous hours in advance of the meeting, 14 days mailed and posted notice is required for certain board meetings.

Although some boards believe that the open meeting requirements should not apply to "executive sessions", "workshops" or other meetings where no votes will be taken, this is simply incorrect under the law. No matter what you call the gathering, so long as a quorum is present and they are discussing association business, and assuming the exception for attorney meetings is not applicable, the open meeting and notice requirements of the law apply. The same rules apply to cooperative associations.

Parenthetically, the same law generally applies to homeowners' associations. However, there is one major difference in that the Florida Homeowners' Association Act permits HOA boards to meet in private (outside of the presence of members) to discuss "personnel matters", even if an attorney is not present. The "personnel exception" does not apply in the condominium or cooperative setting.

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.

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

Landscaper Can't Also Serve On Review Committee

Fort Myers The News-Press, February 6, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a homeowners' association. A prior board awarded me the association's landscape maintenance contract as my bid was the lowest and offered the most services out of a 3 bid process. Now a new board has taken over and they are trying to say that my contract is not valid because I am a member of the Architectural Review Committee. They said I cannot be on the committee and provide services to the association. The previous board told me that only members of the board of directors could not earn money. Also, because the ARC has no control over maintenance contracts, they said there was no conflict of interest. Is there a conflict of interest if I am a member of the ARC and my landscape company has the contract for the grounds maintenance? **L.S. (via e-mail)**

A: Effective July 1, 2010, a new clause was added to the Florida Homeowners' Association Act to address compensation of directors, officers and committee members. The new law specifically provides that a director, officer, or committee member of a homeowners' association may not directly receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member, unless authorized by the governing documents or a vote of the association membership. Additionally, unless specifically authorized by the governing documents or approved by a majority of the members voting in person or by proxy at a duly noticed meeting, no director, officer, or committee member of the association may in any other way "benefit financially from service to the association."

Therefore, a contract with a vendor who also serves on a committee is not proper unless the agreement is authorized in your governing documents, or authorized in advance by a vote of your members (parcel owners, not just the board). In my opinion, under the new statute, it is improper for a committee member to also be a paid vendor since they "may not in any other way benefit financially from service to the association."

In the instance where an association has an existing contract with a vendor who is currently serving on an association committee, there is a question as to whether the new law negates the contract, such that the vendor would either need to resign as the vendor or resign from the committee. In general, Florida's courts have held that the Legislature cannot retroactively apply amendments to Florida's housing statutes so as to impair vested contract rights. I believe the better argument is that existing contracts would be "grandfathered", and the new law would control when the existing contracts expire.

Q: I live in a neighborhood governed by a master association. There are also numerous subassociations. As a resident, I would like to volunteer for a committee. I cannot volunteer for committees within my neighborhood because my subassociation was merged into the master association several years ago. The master association board cannot find volunteers to serve on its committees. I have offered to volunteer but the master association board will not allow me to because my husband is a licensed Community Association Manager (CAM) who manages two subassociations within the community. Can the master association prohibit me from serving on a committee because of my husband's status as a CAM? **E.I. (via e-mail)**

A: The 2010 changes to Section 720.303, Florida Statutes discussed in the previous question, read in the strictest sense, would prohibit you from serving on a committee of the subassociations your husband manages given that it can be argued that you are also financially benefitting from his service to those associations. However, the same cannot be said for your service on a master association committee.

Further, there is nothing in the statue regulating CAM licensure which would prevent either you or your husband from volunteering to serve on a master association committee provided that no financial benefit is involved. Accordingly, your husband's status as a CAM is not a legal bar to you from serving on a master association committee. However, the composition of committees does lie within the complete discretion of the board.

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.

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

Depth of Financial Report Depends on Revenues

Fort Myers The News-Press, February 13, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: We are a condominium association of 129 units with an annual budget of just under a million dollars. We have not done an audit in years. Every year, our residents vote to waive the audit requirement, so we just do a compilation. We have just been told that Chapter 718 now mandates that we must have an audit. Could you please clarify? **P.P. (via e-mail)**

A: 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 the 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. An association with fewer than 75 units, regardless of its revenues, may prepare a report of cash receipts and expenditures in lieu of the audit, review or compilation. Keep in mind that the bylaws may impose stricter financial reporting requirements and deadlines than the statute, and the board always has the authority of obtaining a higher-level report than the minimum required by statute.

With respect to the waiver, the statute does allow an association, by majority vote of the unit owners, to "waive down" to a lower level financial report requirement. As an example, an association with revenues of more than $400,000.00 could vote to waive down to a review, a compilation, or a report of cash receipts and expenditures in lieu of the audit. The statutory provision allowing waiver was amended in 2008, to provide that an association may not "waive down" for more than 3 consecutive years. Accordingly, since your association has revenues in excess of $400,000.00, and operates 75 units or more, it falls into the audit category and is now required to have an audit performed at least once every four years.

Q: We are members of a homeowners' association. Unfortunately, we are facing a foreclosure of our home. We have always timely paid our assessments to the association. The association is asking us to pay an attorney's fee charge incurred when the association filed an answer to the mortgage foreclosure complaint, even though we have never been delinquent in the payment of assessments to the association. Are we responsible to pay these attorney's fees? **S.S. (via e-mail)**

A: Section 720.3085(3)(b) provides that any payment received by an association and accepted shall be applied first to any interest accrued, then

to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection of amounts owed to the association, and then to the delinquent assessment. The statute contemplates the owner's responsibility to pay attorney's fees incurred in the collection process when he or she is delinquent in the payment of assessments, which you are not. Therefore, pursuant to the statutory provisions, it is my opinion that you would not be responsible for the attorney's fees incurred under these circumstances. However, your association's governing documents could provide for a broader scope of responsibility for which you might be liable.

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.

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

Certain Documents Must Be Provided Free of Charge

Fort Myers The News-Press, February 20, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I have read your column previously where you discussed the "Frequently Asked Questions and Answers" document that condominium associations must maintain and provide to owners and prospective purchasers. I am a real estate agent, and I find it very difficult to get the question and answer form, transfer application forms, and governing documents from the association. Many associations want up-front payment for the documents. Is it the responsibility of the management company to provide these documents to a prospective purchaser or real estate agent when the seller does not have them? And is it proper for the association to charge for these documents? **B.B. (via e-mail)**

A: The completed, up-to-date "Frequently Asked Questions and Answers" form, and any application forms required in connection with the association's transfer approval authority, must be provided to the seller and prospective purchasers at no charge. As you may know, it is permissible for a condominium association to charge up to $100 in connection with processing transfer applications. Technically, the transfer application is submitted by the current owner of the Unit, although the prospective purchaser will certainly need to assist in filling out the seller form to include relevant, personal information.

As for copies of the declaration of condominium, articles of incorporation, bylaws and rules, the association is required to maintain adequate copies of these documents to provide to unit owners and prospective purchasers. The Condominium Act does permit the association to charge the actual costs for preparing and furnishing these documents. Therefore, I believe it is appropriate for the Association to ask for payment for these governing documents before providing copies.

In addition to the "Frequently Asked Question and Answers" form, the association is also required to maintain year-end financial information to provide to the unit owners and prospective purchasers.

Q: A committee of our homeowners' association has been revising our governing documents. Their meetings have been open to the members. Recently the board decided not to have any more meetings and also voted to disallow any further questions or comments about the proposed, revised governing documents in advance of the annual meeting. Is the board violating the law by not allowing homeowners to propose additional changes? **E.P. (via e-mail)**

A: The process of revising the governing documents can be arduous and time consuming. The heavy duty work is usually handled by the board of directors or a committee working closely

with the association's legal counsel. Legal counsel often prepares an initial draft to bring the current governing documents up-to-date with current law, and also re-incorporate provisions that may be peculiar to, and necessary for the particular association. Once the initial draft is prepared, legal counsel will usually then recommend that the board members or committee review the draft and propose changes or submit questions or concerns. It is usually at this point in the process that the board seeks to solicit owner consensus. There is no set way to do this. Some associations hold "town hall" meetings. Some associations simply post a copy of the proposed changes on a web-site. Other associations simply wait for the formal meeting where questions can be asked and answered, but the risk there is that some may vote against amendments on topics that could have been "negotiated" earlier in the process.

I have found that most associations do make some effort for pre-meeting input on documents although unfortunately, this seems to be a topic which routinely fails to garner much interest from most of the members.

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.

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

Don't Vote Where Conflict of Interest Exists

Fort Myers The News-Press, February 27, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am on the board of directors of our condominium association. My husband works for the management company that we hired to oversee our community. I vote on the contracts and any increase in pay for services they provide. Can I do this under state law? **R.S. (via e-mail)**

A: While the answer may be different in the homeowners' association context, Florida condominium law does not prohibit your service on the board of directors.

However, in my opinion, you have a conflict of interest with respect to issues involving your association's management company. A conflict of interest is not, in and of itself, grounds for disqualification from the board. Rather, you should not participate in board discussions regarding the management company (whether they are doing a good or bad job, whether it might be time to change companies, etc.) and should not vote with respect to issues pertaining to the management company. Instead, at least in my opinion, you should abstain from voting on conflict of interest grounds and have the minutes specifically reflect that abstention.

Q: I am the president of a condominium association. I recently appointed a board member's spouse to our compliance committee. Is this a problem? **J.B. (via e-mail)**

A: Probably. I assume that your "compliance committee" also acts as the "fining committee". As you may know, the Florida Condominium Act provides that a fine may not be levied by a board of directors unless the proposed recipient of a fine is afforded an opportunity for a hearing. The hearing must be held before a committee of unit owners who are not board members, nor persons who reside in a board member's household. If the committee does not agree with the fine, the fine may not be imposed.

Presumably, your board member's spouse resides with the board member. As such, the spouse may not legally serve on a fining committee.

Q: You previously stated that a tenant could be held liable for certain obligations of a unit owner. Can you point me to the law which supports that conclusion? **C.S. (via e-mail)**

A: For condominiums, Section 718.303(1) of the Florida Condominium Act states that each tenant and invitee is governed by and must comply with the provisions of the Condominium Act, the declaration of condominium, the articles of incorporation, and the bylaws, which are deemed expressly incorporated into any lease of a unit. The statute further provides that the association may bring an action for damages or injunctive

relief, or both, for failure to comply with these provisions directly against a tenant.

As to homeowners' association, Section 720.305(1) of the Florida Homeowners' Association Act, while containing subtle yet important differences, contains very similar language.

Q: Our condominium association's board recently adopted a rule that permits fishing in our common element lakes. Can the board make a rule that tenants cannot fish in the lakes? **S.H. (via e-mail)**

A: No.

Section 718.106(4) of the Florida Condominium Act states that when a unit is leased, a tenant has all use rights in common elements readily available for use by other owners. The unit owner gives up those rights unless such rights are waived in writing by the tenant. The association also has the right to adopt rules to prohibit dual usage of common elements by a unit owner and tenant.

Assuming that there is no waiver of any rights between the landlord and tenant (which is uncommon), a tenant would have the same right to fish in the lake as a unit owner.

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.

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

Legal Action May Be Owners' Only Recourse

Developer ignores rules on age, pets

Fort Myers The News-Press, March 6, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a "55 and over" community. The developer still controls the association and because of the bad economy, he is selling units to people under the age of 55. In addition, we have restrictions limiting pets, and the developer has allowed new owners to move in with dogs. Are we protected in any way by law? **G.T. (via e-mail)**

A: The law provides that all unit or parcel owners have standing to bring legal action against the association. Members can also recall the board. If a developer is still in control of the association, the recall solution is not available. Therefore, a legal action may be your only recourse.

For condominiums, there is a provision in the Florida Administrative Code that prohibits a developer from exempting itself, either partially or totally, from restrictions applicable to other unit owners. This includes pet restrictions and age restrictions.

One concern is that the community might lose its "55 and over" status, and might lose its ability to enforce the pet restrictions in the future. The failure of an association to diligently and consistently enforce restrictions may support the defenses of "selective enforcement" and "waiver" in future enforcement cases. However, in Florida, it is fairly well established that the failure of the developer controlled association to enforce restrictions will not support a defense of selective or arbitrary enforcement when the unit owner controlled board later takes control and consistently enforces the restrictions beginning at turnover.

As a practical matter, owners in your situation will not succeed in having pets removed that were properly approved, at least from the pet owners' perspective. But the post-turnover board could succeed in prohibiting future pets if it consistently enforces the restrictions beginning at turnover.

As to the "55 and over" restriction, federal law allows "55 and over" communities a 20% "cushion" of units that do not have an occupant age 55 or over. You need to review your documents carefully as the developer may have reserved the right to sell to persons under age 55 within that 20 percent. Regardless, if your community has less than 80% of its occupied units occupied by at least one person 55 years of age or older, your community will lose its status as a "55 and over" community. Then, you would no longer be able to enforce governing document restrictions prohibiting children from residing in the community.

You and your fellow unit owners may wish to consider bringing legal action now to avoid that result.

Q: Our condominium governing documents state that rental income can be seized to pay fees in arrears if a unit is in foreclosure. If there is not yet a foreclosure action pending, can a condominium association collect the rent? **D.S. (via e-mail)**

A: Both the Florida Condominium Act and the Florida Homeowners' Association Act were amended, effective July 1, 2010, and address the issue you have raised.

The law now provides that if a unit or parcel is occupied by a tenant, and the unit or 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. As such, there is no requirement under this new law that a foreclosure case be pending. Furthermore, the association can evict a tenant who does not comply with a proper demand.

As discussed in prior columns, there is some disagreement as to whether the statute's reference to "future monetary obligations" means that you can only demand future maintenance fee payments from the tenant, or whether you can demand that all rents be paid over until the account is brought current. The board should discuss that issue with legal counsel.

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.

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

Pools a Hot Topic for Community Associations

Fort Myers The News-Press, March 13, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: The board of directors of our condominium association recently informed us that we will have to upgrade/retrofit our swimming pool to meet new standards, and the cost is very expensive. Is there some sort of grandfathering for our pool? Any advice on how to handle this? If the pool gets shut down by the Department of Health, it will devalue our units. **C.K. (via e-mail)**

A: Permitting for community association pools has been a hot topic lately for several reasons. First, the Virginia Graeme Baker Pool and Spa Safety Act, with an effective date of December 19, 2008, established mandatory federal requirements for mitigation of direct suction drainage system entrapment hazards in public swimming pools and spas, and required the installation of drain covers that meet certain performance standards. While many associations have installed the compliant drain covers, many have not addressed the direct suction issue. The federal requirements apply to virtually any pool operated by a community association, and are independent of state permitting regulations.

In Florida, gravity drainage with a collector tank (which is one of six methods for mitigating direct suction under federal law) has been required by state law for new pools since 1977, and state law now specifies that gravity drainage is the only acceptable method for mitigating direct suction in Florida.

In addition to the federal law, the state rules regarding permitting for public swimming pools were amended in May of 2009 to provide that pools that qualify for a state permitting exemption are now required to renew their exemption every two years, starting July, 2010. Historically, the exemptions were issued once, and never had to be renewed. The permitting exemptions that are currently available under state law are only available to condominiums and cooperatives that adequately restrict or prohibit short term rentals. There is currently no such exemption for homeowners associations.

Some condominium and cooperative associations that have previously obtained the exemption are finding that when they attempt to renew, the exemption application is denied because the association no longer adequately restricts rentals. In that event, the association is faced with a dilemma. It can either impose rental restrictions in an effort to qualify for the exemption, or it can pursue the permit. If the association decides to pursue the permit, it is possible that expensive remodeling of the pool might be necessary to meet the extensive construction and configuration requirements.

In summary, community associations should: 1) confirm that they have complied with the federal requirements regarding direct suction mitigation and drain covers, and 2) confirm that they either qualify for and have obtained an exemption from state permitting, or that they qualify for and have obtained a state pool permit.

Otherwise, the association faces the possibility that the pool could be posted as closed by the Department of Health.

Q: Our board, for the first time in history, has not given us a proxy to vote for less than fully funded reserves. Twenty out of thirty-three owners have signed a petition asking the board to allow us to vote on partially funding the reserves. If the board refuses to provide the owners with a proxy allowing us to vote on partially funding reserves, can the owners provide the proxy and present it at the budget meeting? **J.D. (via e-mail)**

A: This is an intriguing issue. The Condominium Act provides no guidance as to how the members of the association address voting on reserves funding when the board does not put the matter up for a membership vote. Reserve funding is one of the few issues that the Condominium Act reserves to a vote of the membership.

However, if the budget is adopted at a board meeting, it is not proper for the owners to show up with proxies, since a members' meeting has not been called. Also, the statute states that unless reserves have been waived or reduced by unit owner vote, fully funded reserves are part of the budget once it is adopted.

However, it would appear to be inconsistent with the intent of the Condominium Act to allow a board of directors to impose fully funded reserves without giving the membership an opportunity to vote on the question of reserve funding if there is in fact two-thirds opposition to the full funding of reserves. In my judgment, the owners could probably petition for a special meeting and ask for the adoption of a budget with a revised reserve schedule. Although fully-funded reserves would probably have to be collected until the reduction became effective, that factor could be taken into account when the members vote on how much to fund the reserves for the rest of the year. Of course, members also have the right to recall their board of directors, with or without cause, by approval of a majority of all voting interests.

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.

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

Owners Caught Between Rock, Hard Place Over Lawn

Fort Myers The News-Press, March 20, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a large manufactured home community. Lawn cutting and recycled water for lawn watering is provided by our maintenance fees. Approximately one tenth of the homes, including mine, have rock lawns. Those of us with rock lawns do not use the lawn cutting and lawn watering, but we are required to pay for it, and we are personally responsible for maintaining our rocks lawns free of weeds. Most families here are seasonal, which means that we have to hire someone to have the weeding done for approximately six months per year when we are not here. We feel we are being discriminated against. Do we have the right to expect our rock lawns to be maintained by the association? **J.K. (via e-mail)**

A: There are several different types of manufactured home communities from the legal perspective. "Resident-owned communities" are typically governed by a set of covenants and restrictions which address the maintenance responsibilities of the owners and the association. In some cases, the association is solely governed by Chapter 617 (the Florida Not-For-Profit Corporation Act). Some communities are "mandatory homeowners' association communities" governed by Chapter 720 (the Florida Homeowners' Association Act). Some are set up as cooperatives and governed by Chapter 719 (the Florida Cooperative Act). Others are actually "mobile home parks", in which case the home owner owns the home itself, and rents the lot from the owner of the mobile home park. In those cases, the mobile home park owner must comply with Chapter 723 (the statute that governs mobile home parks).

I assume that your manufactured home community is a resident-owned community. In any of those cases, the responsibility for maintaining the lots would be addressed in the covenants and restrictions and is not covered by any of the above-listed statutes. I assume that the covenants provide that the association is responsible for lawn cutting and watering. In that case, the association would not be required to spray for weeds in your yard. If the covenants are worded more generally (for example, if the covenants say that the association is responsible for "yard maintenance"), then you may have a valid argument for asking the association to spray for weeds.

If your community is a rental park, then the terms of your lease agreement with the park owner will govern.

Although it seems only fair that the association help pay to maintain the lawns that do not have grass, whether you can force the association to do so depends on the wording of the covenants and is not addressed by state law.

Q: Is there is a statutory requirement for presenting a balanced budget to the membership in a condominium? **M.M. (via e-mail)**

A: Section 718.112(2)(f) of the Florida condominium statute requires the board to prepare a proposed annual budget of estimated revenues and expenses. The proposed budget must be detailed and show the amounts budgeted by accounts and expense classifications. In addition to the annual operating expenses, the proposed budget must include reserve accounts for capital expenditures and deferred maintenance.

The statute also requires that assessments be made against units in an amount which is not less than that required to provide funds in advance for payment of all the anticipated current operating expenses, and for all of the unpaid operating expenses previously incurred. Therefore, the statute contemplates that the association determine all of its anticipated expenses and previously accrued expenses and assess the owners in an amount necessary to cover those expenses.

Depending upon how you would define the term "balanced budget", I would say that the statute does require that a "balanced budget" be utilized. In other words, associations may not engage in "deficit spending" and as to the operational side, I believe should avoid accumulating excessive surpluses (although it is entirely appropriate to include a line item for contingencies in an operating budget).

With respect to reserves, the association budget can provide for less than the full funding of reserves, but only if the members approve less than full funding of reserves.

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.

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

Associations Don't Impose Residency Rules

Fort Myers The News-Press, March 27, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: At a recent homeowners' association meeting, a member stated that directors are not eligible if they are not American citizens, or if they do not reside in the United States for more than half of the year. We reviewed the Not-For-Profit Corporations Act and see that it allows for state residency requirements if contained in the articles of incorporation or bylaws. But we also see the Homeowners' Associations Act that provides that, "all members of the association shall be eligible to serve on the board of directors." Which statute applies? I have a friend who lives in a condominium and his attorney told him that residency requirements for board membership are not permitted in a condominium. Could you sort this out for us? **G.K. (via e-mail)**

A: You are correct that the Not-For-Profit Corporations Act, which also governs most community associations in Florida, expressly provides that the articles of incorporation or bylaws can impose state residency requirements on directors. However, in my experience, most community association documents do not impose such residency requirements.

Your friend in the condominium is fortunate, in some ways, because the answer to this question has been expressly answered in the condominium context. Specifically, the Condominium Act provides that "any unit owner or other eligible person" may be a candidate for the board. The Division of Florida Condominiums, Timeshares and Mobile Homes has issued both declaratory statements and arbitration decisions which clearly conclude that residency requirements for directors are invalid in condominium associations. These declaratory statements and arbitration decisions address permanent residency restrictions generally. Therefore, seasonal residents and investor owners who do not occupy the unit are permitted to serve on the board.

I am not aware of any similar decisions in the homeowners' association context. However, you are correct that the Homeowners' Associations Act contains language similar to the language in the Condominium Act and provides that "all members of the association are eligible to serve on the board of directors." Therefore, it is reasonable to conclude that the same analysis that is applied in the condominium context also applies in the homeowners' association context.

As for the apparent conflict between the statutes, the basic rule of statutory interpretation is that specific statutes control over general statutes. Therefore, it is my opinion that the provisions of the Condominium and Homeowners' Association Acts, as they apply to those associations, take precedence over the Not-For-Profit Corporations

Act in cases where the specific language is clear and unambiguous.

Q: I own a condominium unit in a small association. We have one-story buildings. Recently, it has been determined that we have a rodent problem in the attic. Accordingly, I would like to know whose responsibility it is to rectify this situation. **M.T. (via e-mail)**

A: Generally speaking, and absent negligence or other circumstances, the party responsible for rectifying a pest infestation would be the party responsible for generally maintaining that portion of the condominium property. Here, this determination would be based on what the governing documents for your association provide. Attic space, or the truss cavity, is usually outside of the unit boundaries, and is therefore part of the common elements. Typically, common elements are maintained by the association. If your condominium units are defined in such a manner, then it would be the association's responsibility to remedy the pest problem.

However, if your unit boundaries are configured differently than the usual set-up, and describe the attic as part of the unit, then it would be the individual owner's responsibility to deal with pest control.

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.

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

Short Sale Defined, Association Implications Outlined

Fort Myers The News-Press, April 3, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: What is a short sale and how does such a transaction affect an association's entitlement to unpaid assessments? **R.P. (via e-mail)**

A: A "short sale" is a term used when an individual is selling their property and the amount the property is being sold for is less than the amount owed on the mortgage. In such a transaction, the bank agrees to accept less than it is owed, but will still release the mortgage, so that the new buyer can take clear title.

In most short sale situations where the property involves association assessments, the property owner is also delinquent to their association, not just their mortgage lender. A short sale is, from the association's legal perspective, a voluntary transfer from the current owner to a third party. Accordingly, the association is legally entitled to insist that all amounts owed the association must be paid (including past due principal, interest, late fees and attorney's fees) in order for the association to release its claims against the property and allow the buyer to take a clear title.

However, it is not uncommon for the association to be asked by the parties to the transaction to accept some amount less than the total amount the association is entitled to. In such a situation, the association is confronted with a difficult decision. On the one hand, the association can "play hard ball" and stand firm that all amounts must be paid. This could result in payment in full, or could possibly cause the short sale to fall through. Then the foreclosure and/or delinquency would continue into the future and months (or years) may pass before the association sees a resumption of assessment income from that unit.

Alternatively, the association could agree to some amount less than what it is entitled to. The association receives payment immediately, and has a new owner occupying the property who is likely in a better financial position than the prior owner. This scenario raises concern as to setting precedent for other cases. If the association is going to accept less than full payment in a short sale, I recommend that the association's counsel be involved in the decision-making process.

I have seen associations gamble and win. I have seen them gamble and lose. No doubt, some associations have taken less than they could have gotten had they stood firm. In the final analysis, short sales are typically better for the association than a foreclosure, and each short sale should be evaluated on its own merits. In many cases, the buyer is getting such a great deal on the property that they are willing to pay the association everything it is owed, no questions asked.

While the large number of short sales we see is a symptom of the ongoing delinquency crisis, the fact that more short sales are occurring is, in my opinion, a good thing because it means that inventory is moving. The more distressed property that is being transferred into the hands of new owners who are more financially sound, the sooner the market reaches the point where pricing is not dictated by bargain hunters focused on distressed inventory.

Q: I serve on the Board of Directors of a small condominium association. Each of the units is entitled to one vote in the election of directors. We have our annual meeting and election coming up. We expect a tie vote on the one Board seat up for election. Should a tie occur, how should we resolve this issue? **M.B. (via e-mail)**

A: Pursuant to the Florida Administrative Code, if two or more candidates for the same position receive the same number of votes, which would result in one or more candidates not serving or serving for a lesser period of time, the association must, unless otherwise provided in the bylaws, conduct a runoff election. The association must mail or hand deliver a notice of the runoff election to the voters within 7 days of the previous election where the tie vote occurred. The notice must include the date of the runoff election, as well as a ballot conforming to the requirements of the Code and copies of any information sheets previously submitted by the runoff candidates to the association. The runoff election must occur not less than 21 days, not more than 30 days, after the date of the election where the tie vote occurred. The only persons authorized to compete in the runoff election are the runoff candidates who received a tie vote at the previous election.

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.

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

You Can't Restrict Voting Rights When Lot Sits Empty

Fort Myers The News-Press, April 10, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a homeowners association comprised of 250 lots. However, about half of these lots remain vacant with no homes built upon them. Most of these empty lots are owned by investors who never attend any of the board meetings, but still get to vote on membership matters. Most times, the outcome of our membership issues depends upon how these "empty lot investors" vote. It doesn't seem fair that that such a large group get to control the outcome of our voting. Is there anything we can do to change this? **M.M. (via e-mail)**

A: Probably not. Each lot owner has a right to participate in your membership meetings and cast a vote for each lot that the owner may own as provided in your covenants. I assume these owners also pay their share of the costs of operating your community.

You cannot restrict an owner's voting rights except when an owner becomes more than 90 days delinquent in the payment of any regular assessments due the Association and the suspension of voting rights is authorized by your governing documents. Curiously, in the condominium context, an association can suspend voting rights for any unit owner who is more than 90 days delinquent in the payment of "any monetary obligation" to the association (not just "regular assessments"). Further, in the condominium context, the authority to suspend voting rights does not need to be mentioned in the governing documents, while it does in the homeowners' association context.

Q: I live in a condominium association. One of our five-story buildings developed cracks in the outside walls, which caused water to penetrate into some of the units. The Association immediately repaired the cracks but the water damaged some of the walls and floors within the units. In some cases, the damage involved expensive tiling and other floor coverings. Who is responsible to repair the damage within these units? **J.S. (via e-mail)**

A: Unless the association was somehow negligent in this scenario (which based upon the facts above does not seem to be the case) the unit owners are responsible to repair the damages to their unit and the Association is responsible to repair the damages to the common elements.

The Condominium Act describes those items that unit owners are responsible to insure in the event of a casualty. A casualty is some sudden or unexpected event. When there is damage to a unit due to a casualty event, the unit owners are responsible to repair those items that they are obligated to insure. Such items specifically include ceiling, floor and wall coverings within the unit.

Even if the damage was not caused by a casualty (which is unclear here due to the limited facts presented) the unit owners would still have to repair the floor, wall and ceiling coverings and all of their personal furnishings within the unit unless the association was negligent, and such negligence was the actual cause of the damage.

Q: I have a question regarding the homeowners' association where I live. The association's articles of incorporation were filed in 1974 as a voluntary association. I have read that unless one hundred percent of the owners consent, we cannot be a mandatory association. Is this correct? **H.L. (via e-mail)**

A: Yes.

If the original covenants and restrictions include mandatory membership in the association, the right of the association to levy assessments, and the right to record a lien for non-payment of those assessments, then the association is governed by Chapter 720, commonly called the Florida Homeowners' Association Act. If not, the only way to create a mandatory membership homeowners' association is through the unanimous consent of all lot owners, and perhaps record owners of liens (such as mortgage holders). In fact, one Florida appeals court specifically ruled that a voluntary association could not be converted to mandatory membership without unanimous approval. See Holiday Pines Property Owners Association, Inc. v. Wetherington, 596 So.2d 84 (Fla. 4th DCA 1992).

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.

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

Governing Documents Guide Common Area Alterations

Fort Myers The News-Press, April 17, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Is there any provision in the Florida statutes for homeowners' associations regarding voting on a material change to the property, and how non-votes are counted? Are non-votes counted as "no" votes, or with the majority? **P.L. (via e-mail)**

A: Unlike the Florida Condominium Act (Chapter 718 of the Florida Statutes), the Florida Homeowners' Association Act (Chapter 720 of the Florida Statutes) contains no specific regulation of "material alterations of, or substantial additions to" the common areas. In the absence of statutory guidance in Chapter 720, it is my opinion that the issue is controlled solely by the governing documents.

Some governing documents are silent on the issue of material alterations or substantial additions. In that case, a recent decision issued from a Florida appeals court suggests that such alterations or additions may be improper. See Swain v. The Meadows at Martin Downs Homeowners Association, Inc., 2011 WL 1261151 (Fla. 4th DCA April 6, 2011). Some documents allow the Board of Directors to make material alterations or substantial additions. Some documents impose a membership approval requirement.

If the governing documents require approval by the membership, it is important to closely look at the language in the documents themselves as to whether non-votes are counted "no" votes. For example, if the document provides that an alteration or addition must be approved by "two-thirds of the voting interests", then those who do not vote have essentially voted "no." On the other hand, if the documents were to say that approval of alterations or additions could be approved "by two-thirds of the voting interest present, in person or by proxy, and voting at a duly noticed meeting of the association at which a quorum is present", then those who did not vote would simply not be counted.

Under Chapter 720, the approval threshold for decisions that require approval by the members is, unless otherwise provided in the governing documents or by statute, a majority of the voting interests present, in person or by proxy, at a meeting at which a quorum is attained. So, typically, if a member does not attend a meeting, the "non-vote" does not count as a "no" vote. However, if the governing documents (or a provision of the statute) require approval by a percentage of the entire voting interests, in those cases non-votes count as "no" votes.

Q: The board of directors in my homeowners association refuses to follow the requirements in the Homeowners' Association Act. What can the owners do to force the board to follow the statute and what liability does an individual board member have for failing to follow the law? **H.H. (via e-mail)**

A: This is a complaint we hear frequently. Of course, there are usually two sides to a story, and your board may see it entirely differently.

In my opinion, the best solution to this type of problem is political, not legal. A majority of members in a homeowners' association can recall any member of the board (or the whole board) with or without cause, at any time, by vote of a majority of the entire voting interests.

Sometimes a board is perceived as too harsh or vigorous. Sometimes a board is perceived as too lax. There are just some cases where it is clear that the board is not meeting the expectations of those who elected them. The particular type of community involved, and the general philosophy of the membership play a part in the development of the collective expectations for a particular neighborhood. While recalls are not pleasant and are usually divisive, they are much more straightforward and certainly less expensive than pursuing internal neighborhood grievances through litigation.

Having said my peace, and in response to your question, each director has a fiduciary responsibility to enforce and uphold the provisions of your association's governing documents and comply with applicable law. If the board refuses to enforce the provisions of the law and/or your governing documents, any owner may file a lawsuit to compel the board's compliance. If successful, the prevailing parcel owner would obtain a court order (known as an injunction) and would also be entitled to recover the attorney's fees they incur in compelling the board's performance of its duty.

HOA directors are generally not personally liable for the acts or omissions of the association unless the breach of their fiduciary duty also involves violation of a criminal law, an improper personal benefit, recklessness, or certain types of intentional misconduct.

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.

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

Florida Definition of Board Meeting Discussed

Fort Myers The News-Press, April 24, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: After reading one of your recent columns concerning the definition of a board meeting, I wondered if that interpretation included e-mail discussions among board members where a quorum of the board receives the e-mail. I am specifically interested in e-mails where condominium business, strategies, and/or decisions are discussed or made. **D.B. (via e-mail)**

A: As discussed in my prior columns, the Florida Administrative Code defines a board meeting as "any gathering of the members of the board of directors, at which a quorum of the members is present, for the purpose of conducting association business." It is not necessary for the board to take a formal vote on a matter in order for a "meeting" to occur.

However, the basic requirements of a meeting include a "gathering" where the board members are "present." Florida corporation law, which also applies to condominium associations, does count a director as being present when he or she is present through some means of communication in which all directors can simultaneously hear each other during the meeting. Because e-mail lacks this essential feature of simultaneous communication, it is my opinion that e-mail communications between directors, even when sent to multiple directors that constitute a quorum, do not constitute a meeting.

This interpretation is consistent with arbitration decisions from the Division of Florida Condominiums, Timeshares and Mobile Homes. In one such arbitration decision, the arbitrator determined that e-mails from individual directors, sent either to individual directors or to a group, are not property of the association and are not official records. However, at least one other arbitration decision, that analyzed the legality of less than a quorum of directors meeting in person to discuss association matters, concluded that an association board is required to honor the letter and spirit of the law by having deliberations and decisions made at open meetings of the board. Therefore, while it is convenient, and sometimes unavoidable, to have individual discussions and e-mail communications outside of a duly noticed, open board meeting, it is essential that directors openly discuss issues at an open meeting, and articulate the reasons behind their vote.

Importantly, a 2002 legal opinion from the Division of Condominiums, Timeshares and Mobile Homes did conclude that e-mails that are sent to an association owned computer or to the property manager are considered official records of the association, both in their electronic and/or document form. Therefore, even though such e-mails do not constitute a meeting, those records are considered official records of the association. In addition, if an association regularly prints out e-

mails between directors and uses them to conduct association business, those would also constitute official records.

Q: I am a member of the board of a homeowners' association. Recently, a board member resigned, leaving us with four board members. We have been unable to appoint a new board member, as the vote of the remaining board members is tied two to two. Do you have any suggestions? **A. J. (via e-mail)**

A: The statute governing homeowners' associations, Chapter 720, Florida Statutes, provides that unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of the term may be filled by an affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to the requirements of the governing documents. Therefore, my suggestion is that the board try again to fill the vacancy by a board vote, and if the vote is again tied, that the board call for a special members' meeting to fill the vacancy.

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.

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

Association Obligation Is To Make Records Available

Fort Myers The News-Press, May 1, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am having an issue with my homeowners' association. I have asked for copies of our board meeting minutes to be posted on the association website. However, I have been told by the association that the law requires that I send my request for copies to the association by certified letter, return receipt and that I will be charged twenty-five cents a page for all copies. Previously, the association has e-mailed me copies of records without this requirement. What state law requires that minutes of board meetings be posted and e-mailed to a homeowner upon request? Thank you for your help. **J.K. (via e-mail)**

A: As you state your association is a homeowner's association, your issues are governed by Section 720.303(5) of the statute. That law provides that the official records of the association must be made available to an owner following receipt of a written request, and within ten working days of receipt of such request. If the owner's request is submitted by certified mail, the association's failure to make the records available creates a rebuttable presumption that the association willfully failed to comply with the law. However, the law does not excuse associations from complying with records access requests which are not sent by certified mail, but rather shifts the burden of proof should a dispute arise later.

The statute also provides that the board may adopt reasonable written rules governing frequency, time, location, notice, records to be inspected, and manner of inspections to govern the inspection process. The board's policy must at least permit an owner to inspect the records for one eight-hour business day per month. Further, the association is permitted to charge up to fifty cents per page for copies. If the board's written rule requires use of certified mail, it is my opinion that such a rule would be legally enforceable, although some may debate that conclusion.

The association's obligation is to make the records available (where they are kept) for your inspection and copying, if you wish. There is no obligation for an association to send official records to an owner, by e-mail, by regular mail, or otherwise.

As to the association's obligation to post meeting minutes on its website and/or e-mail minutes to a homeowner upon request, there is likewise no such obligation in the law. Some associations post meeting minutes to their websites or otherwise distribute them to their members electronically. It is not unlawful to do so, just not legally required.

Q: I live in a community that has a master association and twelve sub-associations. Ten of the sub-associations are condominium associations, and two are homeowners' associations. Is our

master association a condominium association or is it a homeowners' association? **J.M. (via e-mail)**

A: Chapter 718 of the Florida Statutes, commonly known as the Florida Condominium Act, defines "association" as any entity responsible for the operation of common elements, or any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives, and membership is a required condition of unit ownership. "Unit Owners" means condominium unit owners. Therefore, since your master association is composed, in part, of members who are not "unit owners", then the master association is not governed by the Florida Condominium Act.

Chapter 720 of the Florida Statutes, commonly called the Florida Homeowners' Association Act, defines a "homeowners' association" as any Florida corporation responsible for the operation of a "community" in which the voting membership is made up of parcel owners and in which membership is a mandatory condition of parcel ownership, and which corporation is authorized to impose assessments that, if unpaid, may become a lien on the parcel. The definition of "parcel" under the Act can include a condominium unit. Therefore, assuming that your master association documents provide for mandatory membership, and include assessment and lien authority, the master association is governed by the Florida Homeowners' Association Act.

In general, the trend over the past decade has been to attempt to coordinate both statutes so that procedural matters are handled the same in both settings. However, there are some significant differences between the two laws. Most consider the condominium laws to be stricter in terms of requirements placed on boards in conducting their affairs. Conversely, condominiums are regulated by a state agency (the Division of Condominiums, Timeshares and Mobile Homes) while HOAs are largely unregulated.

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.

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

Board-made Rule Must Meet Several Legal Criteria

Fort Myers The News-Press, May 8, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Our condominium documents state that reasonable regulations concerning the use of the condominium property may be made and amended from time to time by the board of directors. Since 1989, various boards have adopted 13 rules in board meetings. The new board decided to consolidate all the rules into one document to be distributed to the unit owners. Should we also record the consolidated rules in our county public records? **V.B. (via e-mail)**

A: Florida Law specifically recognizes a board's authority to make rules and regulations. In order for a board -made rule to be legally upheld, several criteria must be met.

First, the recorded condominium documents must grant rule-making authority to the board. It is important to ensure that the board is granted rule-making authority as to both the "common elements" and the "units". Some documents only grant rule-making authority for common elements.

Secondly, any Board-made rule cannot be inconsistent with the superior documents (typically the recorded declaration of condominium, articles of incorporation, or bylaws), nor any right which is "inferable" from those superior documents.

Third, board-made rules must be "reasonable", which is often at the heart of legal challenges regarding board-made rules.

Fourth, a board-made rule must be adopted and promulgated in a procedurally correct fashion. Rules regarding common elements are subject to 48 hour pre-meeting posting requirements. Rules regarding unit use are subject to heightened notice requirements; 14 day advance mailed and posted notice must be provided. Additionally, the condominium documents need to be consulted as to additional procedures. For example, some documents require that new rules be mailed out to unit owners 30 day before they become effective.

Unless required by the superior recorded documents, rules (and rule amendments) do not need to be recorded in the public records in order to be valid. If the current rules are recorded, however, it is recommended that the association record subsequent amendments. Some of my association clients prefer to record their rules and regulations so that their members are able to confirm which version is most current. That being said, there are recording costs imposed by the county. If your association has extensive rules (i.e. many pages) and the rules are routinely amended, you may find that recording the rules (and any amendments thereto) can be burdensome and expensive.

Q: Our governing documents provide that our board shall consist of three directors. Our association has been operating with two directors following the resignation of the third director. Does the association have an obligation to inform the State? If so, is it the board or the management company that must do so? **C.B. (via e-mail)**

A: As you may know, most community associations are formed as not-for-profit corporations. A not-for-profit corporation is required to file an annual report electronically no later than May 1 of each year to update the directors, officers, and other required information. The association may electronically file an amended annual report to reflect a change in the composition of the board, but I am not aware of any requirement to do so. Instead, the changes can simply be reflected in the next annual report filing.

As for your specific question, it provides a good opportunity to reiterate that, as between the board and the management company, there is no distinction to be made as to who is responsible to take action. The board may delegate authority to a management company, but may never delegate its responsibilities. Therefore, if there was an obligation to amend the annual report, the board is absolutely responsible to make sure that happens. Any acts or omissions by the management company are the ultimate responsibility of the board.

Finally, the board should make diligent effort to fill the vacancy. In many cases, the articles of incorporation or bylaws provide that the remaining directors "shall" fill vacancies. Obviously, if no other member will take a board seat, you cannot be expected to comply with this requirement. But while a two-member board can legally administer an association when the designated number of directors in the bylaws is three, as a practical matter, associations should avoid operating with a two-member board whenever possible.

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.

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

Association Can Collect Rent Directly From Tenants

Fort Myers The News-Press, May 15, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am on the board of a condominium association and we have an issue with delinquent unit owners who rent their units. Is it legal to apply the rent paid to the unit owners to their delinquent maintenance owed to the association? **J.B. (via e-mail)**

A: An association may send a demand letter to the tenants occupying a unit when the unit owner has become delinquent to the association in the payment of any monetary obligation. The ability to collect rental income directly from tenants is a new right granted associations which went into effect July 1, 2010. The advantage to this new right is that an association may now make a demand for rental income based simply on delinquency where previously the statutes only permitted such demands to be made in conjunction with a foreclosure lawsuit. Interestingly, I have also learned that the owner of several condominium units in a Fort Myers condominium has filed a federal court lawsuit challenging the constitutionality of the new statute, as a deprivation of due process rights.

I would also point out that some of the ambiguities in the existing law have been removed by Senate Bill 530/House Bill 1195 which was approved in the 2011 Session of the Florida Legislature. That Bill must now be presented to the Governor for action (approval or veto). I will update column readers on the status of that law in the near future.

Q: My townhome development is at fifty percent foreclosure. Of the remaining owners, only 2 to 3 are current on their assessments. Our property manager is resigning due to the uncooperative situation with the owners. She states she will turn over the property to a receiver. What will it mean to me as an owner (current with my maintenance) if the property goes into receivership? **T.B. (via e-mail)**

A: Section 720.3053 of the Florida Homeowners' Association Act permits an owner to petition the circuit court for the appointment of a receiver when there are not enough persons willing to serve on the board so as to constitute a quorum. Your manager has no right to appoint a receiver, seek the appointment of a receiver, nor "turn over the property" to a receiver.

Receivers are professional conservators, most often public accountants. They run your association for an hourly fee, under the supervision of a court. Receiverships are expensive, and are intended for only the most distressed situations. While your situation certainly sounds "distressed", I would strongly urge your community to muster up enough volunteers to compose a board. Property values

are certainly negatively impacted, to a substantial degree, when a property must be run by a receiver.

Q: Our condominium association bylaws say that once a director serves two consecutive terms, he is ineligible to stand for re-election until the lapse of one year. Are the term limits in our bylaws enforceable? **G.D. (via e-mail)**

A: The state agency which regulates condominiums (known as the Division of Florida Condominiums, Timeshares, and Mobile Homes) has gone back and forth over the years as to whether term limits for condominiums are enforceable. In 1994 a Division arbitrator ruled that term limits were valid. In 2007, the Division reversed its position and issued two declaratory statements concluding that term limits are not valid. The Division's rationale for the 2007 decisions invalidating term limits was that the statute provides that "any unit owner" may place their name into nomination and it would thus stand to reason that they would be eligible for election.

In its most recent pronouncement on the issue, the Division issued a 2010 declaratory statement concluding that term limits are enforceable. The rationale for the 2010 decision is based on the 2008 amendments to the condominium election procedures. Further, an amendment to the condominium statute adopted in 2011 (awaiting action from the Governor) would further clarify that term limits contained in a condominium association's bylaws are valid.

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.

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

It's Not Legal to Discuss Items That Aren't on Agenda

Fort Myers The News-Press, May 22, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: It appears that our condominium board is not acting pursuant to the law regarding open board meetings. Is it proper for the board to discuss items not included on the agenda on the meeting notice? Is it proper to identify an agenda item as "discussion" with no specific topic identified? **R.M. (via e-mail)**

A: It is not legally proper for a board to discuss items not included on the posted agenda, except in an emergency. A board is well-advised to check with legal counsel before exercising the "emergency" exception.

In response to your second question, I do not believe it is proper for an agenda item to be labeled "discussion" only. To comply with the intent of the law, the agenda items must be disclosed with enough specificity that the unit owners will know which items are going to be discussed. This will allow the owners the opportunity to prepare should they decide to attend the meeting. Remember, all unit owners have the right to attend and speak at open board meetings with reference to all designated agenda items. Simply labeling the agenda item as "discussion" without specifying what will be discussed would be legally insufficient, in my opinion. Conversely, designation of an agenda item such as "discussion of whether to paint buildings" would be perfectly proper. The intent of the law is to let owners know that the board plans to discuss an issue (regardless of whether the board plans to vote on it), which permits unit owners interested in a topic to attend the board meeting and provide their input.

Q: Our condominium association board requires a face-to-face interview with an applicant prior to the purchase of a unit. Is it legal to require an on-site interview prior to board approval of a potential buyer? **D.M. (via e-mail)**

A: If the requirement for a face-to-face interview with a proposed purchaser is specifically required by the declaration of condominium, and is exercised uniformly and without discriminatory intent or affect, it is my opinion that the association can require the interview. Some would argue that such a requirement is archaic, serves no useful purpose, and is a disadvantage because many sales involve out-of-town buyers who may have been in the area to look at a number of properties, and decided on this one.

Keep in mind that many condominium documents include a provision requiring the association to provide an alternate purchaser if the owner's proposed purchaser is disapproved by the association. Therefore, if the association disapproves a proposed purchaser because he or she did not submit to a face-to-face interview, and

the association does not provide an alternate purchaser, under many of the "boilerplate" condominium documents I see used in this area, the association may find itself being sued by the owner for the lost sale.

Q: My neighbors visit their home in Southwest Florida every two months or so. They rent a car when they are here. They do not fasten (stick) the gate entry transponder on the windshield of their rented vehicle. Instead, they hold the transponder out the car window and wave it at the electronic reader. The board has deactivated their transponder stating that it must be affixed to the windshield of a resident-owned vehicle. Is the association permitted to do this? **D.G. (via e-mail)**

A: I assume that entrants to your community may access the community by talking to a live gate attendant, or by some other means in addition to using the transponder. One important legal right of every property owner that is strongly protected in the law is the right of ingress and egress.

The requirement that transponders be affixed to a particular vehicle, may be a proper rule by the board. As you may know, board-made rules must be "reasonable." Generally, a board-made rule will be considered reasonable if it is necessary to achieve a clear and proper purpose of the association. In this case, if the transponders are not affixed to a particular vehicle, they can be stolen, passed around to non-residents, or otherwise used to access the community by people who are not authorized to enter the community. Therefore, while the question of reasonableness of board-made rules is certainly a subjective determination, and would be a jury question if the matter were litigated in the courts, I think the rule would likely pass muster.

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.

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

Amendment to Declaration Alters Property Rights

Fort Myers The News-Press, May 29, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I am interested in learning about the limits on association document changes that affect a homeowner's property rights. When you buy property in a homeowners' association, you agree to abide by the governing documents. But what about changes to the governing documents that affect private property rights? What changes are outside the association's authority? Does an association have the right to tell residents that they must use a certain phone company, internet company, cable company or satellite company? I would think that such things need to be voluntary. **R.E. (via e-mail)**

A: In 2002, the Florida Supreme Court issued an opinion which concluded that, with limited exceptions, every unit owner purchases a condominium unit with notice that his or her property rights can be altered through an amendment to the declaration of condominium. The case of Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) is considered by some to be the most significant condominium governance decision issued by the Florida Supreme Court in the near half-century during which Florida has had a condominium statute (the first Florida Condominium Act was adopted in 1963).

At issue in Woodside was an amendment to a declaration of condominium which severely limited (nearly banned) a unit owner's right to lease. The court ruled that the right to lease was conferred by the declaration of condominium, that the declaration of condominium is itself an amendable contract, and thus the rights conferred by the declaration are likewise amendable through amendment of the declaration.

The application of the Woodside ruling to homeowners' associations is perhaps a subject that could be debated. The Woodside Court held that condominiums are strictly a "creature of statute" and seemed to place some emphasis on that point in its decision. Homeowners' associations are not necessarily a "creature of statute", but are increasingly becoming subject to a statutory regime very similar to that which is applicable to condominiums. In my view, the courts would be likely to apply the Woodside doctrine to HOAs. The basic underlying theory is that your rights are subject to an amendable contract; the declaration of condominium in the condominium context, the declaration of covenants in the HOA context.

However, the laws themselves set forth certain rights which cannot be changed without every owner's approval. For example, the Homeowners' Association Act provides that no amendment may materially and adversely alter the proportionate voting interests of a parcel, or increase the proportion or percentage by which a parcel shares

in the common expenses of the association unless unanimously approved by all owners and lienholders, such as mortgagees.

In addition, somewhat unique to the homeowners' association context, there is a line of cases (mostly from trial courts, whose pronouncements are not technically binding as "the law") that hold that declaration amendments cannot change the "general scheme of development" without unanimous approval of all of the owners. The most common application of this doctrine involves attempts to impose mandatory golf club membership upon homeowners who originally bought their homes in communities where golf club membership was voluntary. In response to the mandatory golf club membership cases, the Homeowners' Association Act was amended last year to provide the ability to create mandatory club membership on less than unanimous approval, if authorized by the declaration.

A wholly separate, equally interesting and somewhat even more complicated legal discussion, involves the extent to which statutory amendments can be retroactively applied to affect vested property rights. This issue has also been the subject of a recent Florida Supreme Court case. In Cohn v. The Grande Condominium Association, Inc., published March 31, 2011, the high court held that 2007 changes to the condominium statute which adjusted proportionate voting rights between residential and commercial units in mixed-use developments could not be retroactively applied, based on constitutional grounds.

With respect to your question about telephone, internet, and television service, the generally held view of most community association lawyers is that such services can be purchased in bulk by the association if provided for in the declaration of covenants as originally recorded, or as amended. However, such agreements do not mandate that all owners use that bulk service exclusively. In fact, FCC regulations have invalidated the "exclusivity" provisions of bulk cable television service agreements. Of course, any owner who lives in a community with bulk service who elects to utilize a different service provider will effectively be paying twice, as it is not possible to avoid the payment of a proper common expense to the association.

I would also point out that House Bill 1195 (currently awaiting action from the Governor) specifically provides that "communication services" (which includes telephone and video programming services) and internet services may be purchased in bulk by the association and the cost "shall be deemed an operating expense", even if there is no provision for same in the declaration of covenants.

If HB 1195 becomes law (July 1, 2011), then both the condominium and homeowners' association statutes will clearly establish the authority of a board of directors to enter into such agreements with, I suppose, some room to argue about the constitutionality of the new law.

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.

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

Association May Have Right to Enforce Parking Rule

Fort Myers The News-Press, June 5, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I have a limited common element parking space assigned my condominium unit. The condominium documents state that the association may regulate use of the parking space by rules and regulations. We have a parking decal rule with which I completely agree. However, there is also a rule that we must park facing the building and risk being towed if we do not follow this regulation. Is parking facing the building something that can be required of the unit owners, and can our vehicles be towed even if we have a decal and our vehicle is properly registered with the association? **M.R. (via e-mail)**

A: Board-made rules are valid so long as the board has authority to make such rules, the rules do not conflict with any statutory provision or superior condominium document provisions, and the rules are "reasonable." It appears that the crux of your issue involves the question of whether the "head in parking only" regulation is reasonable.

There might be several different reasons why the association wants owners to park facing the building. For example, it may be that decals can be more easily verified from a certain perspective. Perhaps there is sod or landscaping behind the parking bumpers and the board is concerned about damage from vehicle exhaust or the vehicle itself. Or, perhaps the proximity of the sidewalks to the parking area would result in a tripping hazard for vehicles backed into the spaces.

Reasonableness is a fairly subjective determination to be made on a case-by-case basis. Reasonableness is considered a "question of fact" (jury decision) in the law. The board does not need to show that its rule is the only way to address the underlying concern, or even the least restrictive way to address the underlying concern. However, the board would have to demonstrate that there is in fact some underlying reason for the rule.

The remedy of towing would, in my opinion, seem to be a rather extreme penalty, especially for a first time violation. Generally speaking, towing is a remedy that I recommend be used sparingly. Since towing is a "self-help" remedy, a judge will often examine the association's towing process very carefully if the association is sued for wrongful towing. Since towing is not a remedy for the enforcement of condominium rules mentioned in the statute, the condominium documents would need to confer such authority on the association. Further, the association needs to be aware that Florida has a detailed statute governing the towing of vehicles, which is found at Section 715.07 of the Florida Statutes.

Q: All of the buildings in my condominium except mine have an outside water faucet available.

I pay the same amount for water as every other unit in our community but do not have equal access to outside water. If I cannot have access to outside water, I believe it is fair and appropriate that I receive a credit for a portion of my water bill. Can you provide guidance on this issue? **J.T. (via e-mail)**

A: I am aware of no rule of law that mandates that a condominium unit owner have easy access to outside water, or even access to outside water in the same manner as other unit owners in the same condominium. If the absence of an outside water faucet for your building is a builder's mistake, you may have a claim against the developer of the condominium. I would assume that if the outdoor faucets are common elements, they are available for use by unit owners for their personal purposes (most typically, washing cars). Accordingly, you presumably have the right to use a faucet on another building.

The allocation of common expenses as set forth in the declaration, cannot be amended or altered without the unanimous approval of all of the unit owners, together with all of the lienholders of record for all of the units in the condominium, unless provided otherwise in the original declaration of condominium. Your declaration may provide for a lower voting requirement, but that too is unusual in my experience. Accordingly, I do not believe there is any authority for the association to provide you a credit against water usage.

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.

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

Sunshine Law Applies to Government Agencies

Fort Myers The News-Press, June 12, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I was under the impression that Florida's sunshine laws did not apply to homeowners' association meetings unless the board was performing some governmental function. Can a board president have a meeting with one or two board members and exclude other members by simply not notifying them? Can homeowners' association members attend committee meetings? **L.V. (via e-mail)**

A: The Florida "sunshine law" applies only to certain governmental entities and agencies. It is found in Chapter 286 of the Florida Statutes, and with few exceptions, generally prohibits any two members of a covered board or commission from meeting outside of a noticed and public meeting.

On the other hand, the notice and open meeting requirements that apply to community associations are found in specific statutory provisions of the Florida Homeowners' Association Act, the Florida Condominium Act, and the Florida Cooperative Act. Many attorneys, managers, and board members use the term "sunshine laws" when referring to these provisions, but really in a more colloquial or "industry slang" manner of speaking.

Section 720.303(2) of the Florida Homeowners' Association Act contains all of the "sunshine" provisions regulating notice and meetings for homeowners' associations. You must also check the governing documents of your homeowners' association because they may contain additional requirements that must be met as well.

Unlike the Florida "sunshine law" that applies to governmental entities, association board members who constitute less than a quorum may meet at any time and discuss association business. Obviously, without a quorum, formal decisions cannot be made.

The Florida Homeowners' Association Act provides that members can attend meetings of HOA committees that can approve architectural requests or authorize the expenditure of association funds. Other homeowners' association committee meetings can be closed and are not subject to notice provisions, unless the governing documents provide otherwise. The condominium statute is slightly different regarding committee meetings.

Q: Our condominium association is in the process of imposing a special assessment to pay for new roofs. Can we assess each unit equally or must we assess the units on the weighted basis (based on square footage) that we use for our normal monthly assessments? **B.B. (via e-mail)**

A: I am assuming that your roofs are common elements (which is usually the case) and that their maintenance, repair and replacement is the

responsibility of the association (which is also usually the case). Unless there is language in the declaration of condominium which permits the association to levy a special assessment on an equal basis, rather than the weighted basis upon which regular assessments are paid (and I have never seen such a provision), the special assessment must also be levied on a weighted basis.

A logical question which might follow is whether the declaration of condominium can be amended to permit equal assessments. In most cases, such an amendment would require unanimous approval of all unit owners and lien-holders, such as mortgage holders.

Q: My homeowners' association board adopted a motion to table the creation of a committee, and then later decided, by e-mail, to appoint that committee. Accordingly, no notice or member participation was permitted in the decision. Is this legal? **P.M. (via e-mail)**

A: Homeowners' association boards are required to post notice of their meetings and hold those meetings open to all members. There are two exceptions. One for meetings with the attorney to discuss proposed or pending litigation, and one for meetings of the board to discuss personnel matters. HOA boards cannot vote by e-mail.

Your general assumption that a board can only take official action at a duly noticed board meeting is correct. However, if at the initial meeting at which the committee appointment was tabled, the board specifically authorized one or more directors to later formalize the appointment of the committee, then the action of those directors, even though made by less than a quorum, would be appropriate.

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.

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

Condolt May Be Best To 'Grandfather' Baby Into Condo

Fort Myers The News-Press, June 19, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a "55 and over" condominium. Presently, we have a couple who is expecting a baby. This couple was grandfathered when we became a "55 and over" community. What is the law governing this situation? **R.A. (via e-mail)**

A: It is generally unlawful to discriminate in any activities relating to the sale or rental of a dwelling because of race, color, religion, sex, handicap, familial status or national origin. 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. Therefore, a housing provider (which includes condominium and homeowners associations) cannot prohibit the sale, rental or occupancy of a unit simply because one or more of the occupants may be children, nor otherwise discriminate in the terms and conditions of housing against families with children.

There are exceptions to the law. The most common exception is found in the federal Housing for Older Persons Act commonly called "HOPA". HOPA allows common ownership associations to designate themselves as "55 or over" communities if they meet certain criteria. To qualify for this exemption, at least 80% of the occupied units must be occupied by at least one resident 55 or older. The community must also 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. The association must also engage in appropriate age verification procedures designed to ensure that occupancy percentages comply with the "55 and over" requirement.

In your case, the association has already grandfathered these residents as part of the 20% "cushion" for non-qualified residents, which is permissible under the law. Having a child occupy the unit would not change its status as an exempt unit. Depending upon how your "grandfathering" language was written, the addition of the child may or may not violate the documents that were created as part of becoming a "55 and over" community. This should be reviewed with the association's attorney.

As a general matter, I think the board would be well advised to "grandfather" the baby, and should not face concerns regarding "selective enforcement" in other situations. As to whether the association could force the family to move, I would not be in a position to comment without seeing how the documentation was written. I do not believe there are any appellate court cases on this issue which could be consulted for guidance. Perhaps stating the obvious, the "eviction of a

baby" seems like a problematic case from many perspectives. This may be one case where the association should not bite off more than it is willing to chew.

Q: My association recently held its annual meeting and election of directors. There were 3 candidates running for 2 open spots on our 5 member Board. One of the three candidates did not place their name into nomination before the annual meeting. Rather, this person nominated himself from the floor and his nomination was "seconded." Although this process was questioned, our manager said it was appropriate. This person was ultimately elected to serve on the board. However, the very next day, this person resigned. Many of our owners feel that a candidate cannot nominate himself from the floor during the annual meeting and that this process may have negated the results of the election. Did we have a proper election? **D.L. (via e-mail)**

A: Your inquiry does not specify whether your association is a condominium or a homeowners' association. If it's a condominium with at least 11 units, your association must follow the election process described in the Florida Condominium Act, which prohibits nominations from the floor during the election. In this scenario, the self-nomination was a nullity and the two pre-qualified candidates would be automatically elected to the board.

However, if your association is a homeowners' association, the Florida Homeowners' Association Act specifically states that any member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held. Assuming all other election procedures were properly followed, the floor nominee was properly elected. If he resigned after the annual meeting, the vacancy on the board would be filled for the unexpired term by the remainder of the board, unless otherwise provided in the bylaws. Further, unless otherwise provided in the bylaws, the board would not be obligated to appoint the unsuccessful candidate to fill the vacancy, but could appoint any person the board desired.

Board elections are one of the areas where the substantial differences between condominiums and homeowners' associations really make no sense, and cause great confusion in the operation of associations. I have long advocated for amending the homeowners' association statute to comply with the procedures followed by condominiums.

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.

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

Condo-Fee Deadbeats Get a Legal Break

Fort Myers The News-Press, June 26, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Could you explain the reasoning behind the law that allows a person to live in a condo but the association is not allowed to shut their water off even when the association's maintenance fees include water and sewer and the person is delinquent for a matter of years. If a person living in a home served by a public water supplier becomes two months late in paying their bill, their water is shut off. **M.K. (via e-mail)**

A: Prior to 2010, the prevailing view was that lien and foreclosure was the only remedy available to a condominium association for non-payment of assessments. Effective July 1, 2010, the law was amended to provide that a condominium association may deny a unit owner who is delinquent for more than 90 days the right to use the common elements, common facilities or other association property, until the monetary obligation is paid.

Under the new law, suspension of use rights cannot be applied to limited common elements intended to be used only by that unit. Further, the association cannot deny a unit owner access to the unit, nor the right to use parking spaces or elevators. Relevant to your question, the new law also provides that an association cannot suspend "utility services", which would clearly include water and sewer. Although a municipal provider of utilities can and will shut off a customer's service for non-payment, the Legislature has apparently determined that a condominium association should be its "Brother's Keeper."

Q: We are a condominium association that currently has a policy of prohibiting renters from having pets. We have been advised by some property rental agencies that our position is illegal as we discriminate between owners and renters. Could you comment on this? **S.H. (via e-mail)**

A: The law does not guarantee that tenants will be given the same rights as owners. In fact, owners have many rights unavailable to tenants, such as the right to attend and speak at board meetings and the right to vote for the board. While Section 718.106(4) of the Florida Condominium Act does state that a tenant shall have full rights in association property and common elements generally available to unit owners, that provision of the law has never been interpreted to grant the tenant all the same rights and privileges as owners in all of the affairs of the association.

Assuming the restrictions on tenant ownership of pets is contained in the declaration, those restrictions are clothed with a strong presumption of validity under Florida case law. Additionally, the prohibition on pets violates no constitutional rights or public policy. Past arbitration decisions by the Division of Florida Land Sales,

Condominiums, and Mobile Homes have specifically allowed associations to prohibit tenants from having pets while still allowing owners to have pets.

Q: My neighborhood, which is under the homeowner's association law, consists of several hundred lots. Approximately a quarter of the lots have been improved (homes built) and sold to end users. The remaining lots were sold to successive groups of investors, each with a written assignment of developer rights. The most recent investor/developer has stated that it will not provide any funding as the original developer and previous investors did. My question is whether the new investor is allowed by Florida law to not fund all or any portion of the deficit? **M.G. (via e-mail)**

A: Section 720.301(6) defines a "developer" as a person or entity that creates a community (by filing a declaration of covenants) or succeeds to the rights and liabilities of the original developer, provided that these successor developer rights are evidenced in writing. Therefore, each of the successive groups of investors that acquired the undeveloped lots in your community and received a written assignment of developer rights would be considered a "developer" for purposes of the statute.

Deficit funding is addressed in Section 720.308(1)(b) of the Florida Homeowners' Association Act, which provides that while the developer is in control of the association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. In other words, a developer can only be excused from paying assessments on its lots, as provided in the covenants if it finds deficits.

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.

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

Legislation Addresses Owner Privacy Rights

Fort Myers The News-Press, July 3, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

For the next couple of weeks, we will suspend the normal question and answer format for the column and report on some new legislation affecting community associations.

The most significant piece of legislation is Chapter 2011-196, Laws of Florida, commonly known as House Bill 1195, or simply HB 1195. HB 1195 became effective July 1, 2011, and primarily impacts operational and procedural issues for condominium associations and homeowners' associations. Unfortunately, cooperative associations were once again largely ignored in the statutory update process.

Here's a look at some of the changes brought about by the new law:

- **Owner Privacy Rights:** The 2010 amendments to the statutes provided that owners' telephone numbers, e-mail addresses and other "personal identifying information" could not be made accessible to other owners. This caused consternation for many associations which publish owner directories, telephone books, e-mail group lists, and the like. The previous statute did not say whether or not personal identifying information could be published if the owner whose information was being published signed a waiver form. The new statute permits owners to authorize the disclosure of such information, provided that their consent is evidenced in writing.

- **Employee Salary Information:** The 2010 amendments to the condominium statute provided that "personnel records" for condominium association employees are exempt from owner inspection, mirroring a provision already found in the homeowners' association statute. HB 1195 provides that while "personnel records" are still protected from owner inspection, salary information regarding any particular employee, as well as any employee's written employment agreement, are part of the "official records." Accordingly, employee salary information is available for inspection by owners in both condominiums and homeowners' associations.

- **Closed Board Meetings:** HB 1195 amends the condominium statute to mirror the Homeowners' Association Act. Now, under both laws, a board can hold closed meetings (prevent owner attendance and observation) regarding "personnel matters." The law still permits association boards and committees to also meet in closed session with association legal counsel regarding pending or proposed litigation.

- **Board Term Limits:** HB 1195 makes it clear that term limits for condominium association directors, if contained in the bylaws, are valid. There remains doubt as to whether term limits are effective in the HOA context.

- **Right to Speak at HOA Board Meetings:** The Homeowners' Association Act has been amended to state that owners have the right to speak at meetings of the board with reference to "all designated items." Under previous law, HOA members could only speak at board meetings as a matter of right if so provided in the bylaws, or if the owners called for a special board meeting by a complicated petition process. The condominium statute has, for decades, allowed unit owners to "participate" at board meetings with respect to all designated agenda items. Curiously, the new provisions in the Homeowners' Association Act, while providing that members now have the right to speak with reference to "designated items", does not require the HOA board to publish an agenda with its posted notice, as is the case in condominiums.

- **Board Eligibility:** The condominium statute has been amended to clarify that a candidate must be eligible to serve on the board at the time of the deadline for submitting a notice of intent (forty days before the election) in order for his or her name to be listed on the ballot. For example, if a unit owner is more than ninety days delinquent in the payment of assessments to the association at the time of deadline for submitting a self-nomination, they would not be eligible to run for the board. Interpretations of the previous statute were that such a person would need to be placed on the ballot, on the theory that they could cure their ineligibility (for example, bringing their account current) prior to taking their seat on the board.

Next week, we will take a look at some tweaks to the old laws, and a couple of significant new provisions regarding fining, suspension of common area use rights, the suspension of voting rights, and assessment collection remedies.

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.

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

HB 1195 Tightens Laws Regarding Associations

Condo, homeowner groups affected by new provisions

Fort Myers The News-Press, July 10, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Today's column continues our review of HB 1195, which became effective on July 1, 2011:

- **Condominium Association Director Certification:** HB 1195 clarifies that where a newly elected condominium association board member chooses to complete an education curriculum (in lieu of providing a written certification of intention to uphold the condominium documents), he or she must complete the curriculum within one year before, or ninety days after, the date of election or appointment. Proof must be submitted within ninety days after election or appointment. The new statute also clarifies that a written certification or educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption.

- **HOA Director Qualifications:** HB 1195 amends the statute applicable to homeowners' associations, now making it consistent with the condominium statute, providing that a person who is more than ninety days delinquent in the payment of fees to the association is not eligible to serve on the board. Curiously, the statute does not contain the language found in the condominium law which states that once a director becomes ninety days delinquent, he or she is deemed to have "abandoned" his or her office. The HOA statute now, similar to the condominium law, prohibits convicted felons from serving on the board.

- **Master Association Lien Priority:** The new statute somewhat alleviates an existing glitch in the law when an association forecloses a claim of lien for unpaid assessments, the association can be jointly and severally liable with the foreclosed owner for assessments owed to another association, such as a "master association." HB 1195 provides that a foreclosing association is not liable for past due assessments owed to an association which holds a superior interest in the unit. This rule applies to both condominiums and homeowners' associations.

- **Attachment of Rents:** HB 1195 cleans up some glitches from the 2010 law which permitted an association to require that rents owed by a tenant to a delinquent owner be paid directly from the tenant to the association. HB 1195 clarifies that when a unit owner is delinquent to the association in the payment of any monetary obligation, the association may require that

all future rents be paid to the association, as they become due until the owner's debt is satisfied. The statute also contains a standard form demand letter that associations must send to tenants. This provision of the statute applies to condominiums, cooperatives, and homeowners' associations.

- **Suspension of Use Rights:** I would consider the most significant change in the law to be a new provision which allows condominiums, cooperatives and homeowners' associations to suspend common area use rights for behavior-oriented issues which constitute a violation of the communities' governing documents. Under prior law, use rights could only be suspended for financial delinquencies. Under the new statute, the suspension must be limited to a "reasonable time." Further suspensions for document violations cannot be imposed unless the owner is given an opportunity for a hearing before an independent committee.

- **"Bundling" in Condominiums:** The Homeowners' Association Act was amended in 2010 to allow homeowners' associations to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities upon approval by seventy five percent of the total voting interests if not so authorized by the declaration. HB 1195 adds a similar provision to the Condominium Act, though such a transaction need only be approved by a majority of the total voting interests of the association where the declaration is silent.

Next week, we will wrap up our overview of the new statutes.

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.

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

Law Clarifies Exemptions on Manual Fire Alarms

Fort Myers The News-Press, July 17, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Today's column completes our review of HB 1195, which became effective July 1, 2011. We will also take a brief look at a couple of other new statutes affecting community associations:

- **Fire Safety:** HB 1195 fixes a discrepancy created by 2010 amendments to the statutes. The 2011 law clarifies that buildings with less than four stories and a corridor providing an exterior means of egress are exempt from the requirement to install a manual fire alarm system.

- **Hurricane Protection:** The new statute expands the concepts found in the previous versions of the condominium statute which were applicable to "hurricane shutters" and "hurricane protection" to now include "impact glass or other code compliant windows."

- **Bulk Buyers.** HB 1195 tweaks various provisions of the so-called "Distressed Condominium Relief Act" which was enacted in 2010. Most of the changes are technical in nature, for example, clarify the timing of transition of control ("turnover") when a bulk assignee acquires title to developer-owned units.

- **Adding Management Company Collection Fees to Association's Claim of Lien.** In 2010, Chapter 719 of the Florida Statutes, the Florida Cooperative Act, was amended to permit a cooperative association to add a management company's administrative processing charges onto a claim of lien for delinquent assessments. The law was not similarly amended in 2010 for condominiums or homeowners' associations. HB 1195 repealed the 2010 amendment as to cooperatives. Accordingly, the current statutes do not authorize any type of association (condominium, cooperative, or homeowners' association) to add on administrative processing fees or other charges from a management company as part of delinquent assessments. The laws do permit an administrative late fees of up to $25.00 per late installment, or five percent of the delinquent installment (whichever is greater) if authorized in the governing documents.

- **Bulk Services.** HB 1195 adds a new clause in the Florida Homeowners' Association Act which basically mirrors the condominium statute pertaining to bulk purchase of television and related services.

Under the new statute, the HOA board is empowered to enter into bulk service contracts for "communication" services, "information" services, and "Internet" services. As in the condominium setting, owners have the right to cancel any contract made by the board at the first membership meeting following the execution of the contract. As mentioned in my May 29, 2011 column entitled "Amendment to Declaration Alters Property Rights", some might question the constitutionality of this change.

- **Service of Process in Gated Communities.** HB 59, also effective July 1, 2011, provides that a gated residential community, including a condominium or a cooperative, must grant unannounced entry into the community, including the common areas and common elements, to a person attempting to serve process on a defendant or witness who resides within or is known to be within the community. Although the statute does not specifically mention homeowners' associations, its obvious intent is to apply to HOAs as well.

- **Public Lodging Establishments.** HB 883, effective June 2, 2011, provides that a local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals solely based upon their classification, use, or occupancy unless such ordinance was adopted on or before June 1, 2011. This would appear to cut off the capability of local governing bodies in resort communities to regulate the length of permissible rentals.

- **Property and Casualty Insurance.** SB 408 became effective May 17, 2011 and brought about several significant changes to the state's insurance codes. Included in the new law is a reduction of the window for filing hurricane or windstorm claims from five years to three years. Premium increases for re-insurance costs previously capped at ten percent, may now be charged up to fifteen percent per year.

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

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.

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

Unit Owner Has Right To Records On Assessments

Fort Myers The News-Press, July 24, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: When negotiating a short sale, the lender often requests a copy of a ledger showing the breakdown of association fees that are past due in order to approve the payment of those fees in the short sale.

As a real estate agent, I frequently find that associations refuse to provide that information to either the owner or the person handling the short sale. I would think that the association would be glad to supply the information so that the short sale could be approved and the past due fees paid.

According to law, it seems to say that the owner has the right to inspect the official records of the association or have his representative inspect them. Wouldn't that include charges, payments and amounts due on all units?

In some cases, we are being told that the account has been turned over to an attorney and the attorney has instructed them not to provide any information on the fees to anyone.

I would appreciate any information that can be provided on this topic. **L.V. (via e-mail)**

A: Because a "short sale" involves a transfer of title to a third party and is not a foreclosure by the holder of the first mortgage, the third party purchaser becomes jointly and severally liable for all past due assessments upon taking title. Therefore, as you say, the association should be motivated to cooperate in providing pay-off figures, because the association stands to collect all the delinquent assessments it is due rather than just the statutory cap amount it gets when the bank forecloses the first mortgage.

If the account has been turned over to the association's attorney, then it is likely that the association has instructed the association to refer all pay-off requests to the attorney, as he or she will have the most up-to-date figures. The association's attorney should provide these payoff figures upon request.

You are correct that a unit owner has a right to inspect the official records of the association at all reasonable times. This would include access to ledgers, invoices or other documents indicating payment history and amount of assessments owed to the association.

Q: I understand directors cannot be nominated from the floor. I have been unable to find that law. Can you help? **M.P. (via e-mail)**

A: The answer is different depending on whether you live in a condominium or a homeowners' association. The Florida Condominium Act mandates the election procedure

for all condominium associations, with the exception of associations of ten units or fewer that have opted out of the statutory election process. The condominium election procedures requires all nominations to be submitted at least forty days before the scheduled election. Therefore, in the case of a condominium, there is no opportunity to nominate from the floor at the election meeting, and such a nomination would be legally improper.

In a homeowners' association, the statute leaves the election procedures up to the governing documents. In order to ensure every member's ability to be a candidate for the board, the Florida Homeowners' Association Act provides that any member may nominate him or herself from the floor at the election meeting. This provision, along with all other statutory provisions for HOA elections, is found at Section 720.306(9) of the Florida Homeowners' Association Act.

Q: Can the transition of control from the developer to the membership in a homeowners' association be considered complete if the developer has failed to turn over the deeds to the common areas identified in the association documents? **C.M. (via e-mail)**

A: Transition of control, or "turnover", in the strict legal sense, refers solely to the point in time when members of the association other than the developer elect the majority of seats on the association's board of directors. It is true, however, that transition of control triggers several developer obligations pursuant to the Florida Homeowners' Association Act, and usually pursuant to the governing documents of the association.

Section 720.307 of the Florida Homeowners' Association Act sets forth the required timing of turnover, and provides a list of documents that the developer must surrender within ninety days of turnover. While that statutory section requires the developer to turn over all deeds to common property owned by the association, it does not set forth what property is required to be deeded to the association. To determine what property is required to be deeded to the association and when, you must review the governing documents.

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.

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

Owners Must OK Staggered Terms for Condo Board

Fort Myers The News-Press, August 7, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: If a 1985 amendment to our condominium bylaws provides for staggered terms, but our association did not hold a vote to affirm staggered terms in 2008 or any subsequent year, is our association in violation of the law if we still use staggered terms? **L.R. (via e-mail)**

A: Yes.

Section 718.112(2)(d)1 of the Florida Condominium Act was amended in 2008 to provide that "in the event the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms."

Accordingly, the statute requires a two-step process to operate on two-year staggered board terms. First, there must be language in the association bylaws authorizing the association to operate on two-year staggered board terms. And second, the association members, by a majority of the total voting interests (not just those who vote at a meeting called for the purpose), must "opt-in" to the provision in the bylaws authorizing two-year staggered board terms. Since the law was effective October 1, 2008, any opt-in vote would need to have taken place subsequent to that date.

Q: When a board of directors of a homeowners' association or an architectural review board (ARB) has denied a request to alter a lot or home in the past, can a new board or ARB reverse that decision? **G.L. (via e-mail)**

A: Section 720.3035 of the Florida Homeowners' Associations Act requires architectural review decisions to be based upon specifically stated or reasonably inferred guidelines or standards. These guidelines must either be in the declaration of covenants or be authorized by the declaration of covenants. Often, the declaration of covenants will authorize the board or a committee to adopt design guidelines. Obviously, future boards or committees are free to change the guidelines. If a particular, proposed alteration is denied pursuant to one set of guidelines, and a future board or committee revises the guidelines to permit the alteration, then the alteration would be permitted under the revised guidelines. The point is that the guidelines that are in place at the time of the application and the decision should govern.

Assuming we are dealing with reconsideration of the same request under the same guidelines, there is a provision under most parliamentary rules of procedure in which a board or committee member can make a motion for reconsideration of a prior decision. The person making the motion must be one of the persons who voted with the majority in making the original decision. If a motion for

reconsideration is approved, then the original issue can be revisited, and possibly a different decision could be made.

Q: If a homeowners association has quarterly assessments, can a homeowner be given the full ninety (90) days to pay the entire assessment payment before the next quarterly assessment is due without being turned over to the association's attorney for collections? Some owners in our community pay a part of their quarterly assessment when due and the balance at some point during the quarter before the next assessment comes due. Can the association establish a minimum dollar amount before the account gets turned over to the attorney for collections or some other criteria for these "short payments"?

A: The Florida Homeowners' Association Act, found at Chapter 720 of the Florida Statutes, does not address how an association should deal with partial payments or when the association must commence collection action against a delinquent homeowner. Rather, the statute merely states that delinquent assessments bear interest from the date due until paid; and that a late fee, if authorized by the documents, in the amount not to exceed the greater of $25.00 or 5% of the delinquent installment amount may be charged. Further, while the statute goes on to outline the proper notice that must be given before an association records a claim of lien or files a lawsuit to foreclose, the statute does not specify when an association may, or must, commence collection actions.

In my experience, the most appropriate way for the association to deal with these types of issues is to adopt a uniform collection policy. This policy, adopted as a resolution of the board of directors, would detail how and when an association will begin the collection actions against the delinquent homeowner. The policy could set benchmarks for when certain action would be taken, and give some leeway to the board. One benefit of a uniform policy is that the association has a clear set of guideline to follow, and can avoid claims of "selective enforcement" by treating every owner equally.

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.

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

Posting of Deadbeat Lists Is Dangerous Practice

Fort Myers The News-Press, August 14, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: We recently saw a notice posted in our community regarding a "fining committee" meeting. Under the agenda item "new business" we saw a number of community house addresses listed. When I spoke to one of my neighbors (her house was one of the ones listed), she told me that it was because she was late with her dues. Does the association have the right to publish the owners' addresses in the notice? **R.L. (via e-mail)**

A: It seems like your association is a bit confused.

Section 720.305(2) of the Florida Homeowners' Association Act allows the board to suspend certain rights when a parcel owner is more than 90 days delinquent in the payment of monetary obligations to the association, including assessments. The board has the right to suspend certain common area use rights (such as recreational amenities) and voting rights until the account is current.

Conversely, fines are levied for violations of governing documents, and usually include issues such as unauthorized alterations, parking violations, noise and pet violations, and the like, which I typically refer to as "behavioral violations". A homeowners' association may also suspend common area use rights for "behavioral violations".

There is no requirement for a hearing to suspend use rights or voting rights for non-payment, and no need for this issue to be taken up by a "fining committee". Conversely, if an association intends to fine or suspend use rights for behavioral violations, the law does require that a hearing be held before an independent committee before the fine or suspension may be imposed.

Posting identifying information regarding those who are allegedly delinquent to the association in the payment of assessments is a potentially dangerous practice. Among other things, the Florida Consumer Protection Practices Act, found at Section 559.55 of the Florida Statutes, generally prohibits the collection of debts through means designed to embarrass a debtor, including the posting of "deadbeat lists" and the disclosure of debts to third persons when there is no legitimate business need for the information. Owners in your community are entitled to delinquency information about other owners through inspection of official records. I would strongly recommend against postings of this nature.

Q: The condominium association where I rent, has a bylaw which says that motorcycles are not allowed. Unfortunately, two of my adult children have motorcycles. They are not allowed to come visit me if they ride their motorcycle into the condominium. I think that's absurd. These are

small motorcycles and neither has a loud exhaust. Is this legal? **F.K. (via e-mail)**

A: The validity of the restriction in question depends very much on where the prohibition on motorcycles appears in the governing documents and upon the exact language used. The governing documents of the association are the declaration of condominium, the articles of incorporation (sometimes called certificate of incorporation or charter), the bylaws, and the rules and regulations (sometimes called house rules, association policies, and various other names). The hierarchy (order of importance) of the documents is the declaration, then the articles, then the bylaws, then the rules.

You state that the prohibition upon motorcycles is located in the bylaws. That prohibition is valid unless it contradicts a provision of the declaration or a right which is inferable from the declaration. For example, if the declaration contains a provision either allowing motorcycles or prohibiting certain types of vehicles but not prohibiting motorcycles, then it is possible that the prohibition on motorcycles in the bylaws is not enforceable.

If not, however, then you must look at the specific language of the bylaw provision prohibiting motorcycles. If the bylaws simply state that motorcycles are not permitted and there is no exception made for visitors, then the provision is likely enforceable. Failure to abide by the bylaws may subject you to a fine or other enforcement action by the Board.

While you may feel that the motorcycle rule is "absurd", this is the essence of condominium living. Someone else may think that a rule against owning five dogs is "absurd" but you may have chosen to live there because it is a "no pet" condominium. That is why the governing documents of a condominium association are typically recorded in the public records, and the rules and regulations should be readily available even if they are not recorded.

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.

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

You May Have To Take Legal Action To Stop Music

Fort Myers The News-Press, August 21, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: My next door neighbor at our condominium is a seasonal resident. While she is gone she has someone check her home on the weekends. One Sunday when the individual went to check on the unit, he turned on the radio and did not turn it off before leaving. The music, which could be heard from the front walkway, played day and night until the individual came back and turned it off the following Saturday. This same pattern has repeated itself every Sunday – the radio goes on and plays until the following Saturday. The management company has contacted the owner, but she has refused to instruct her home watcher to return to turn off the radio and she will not provide the Association with a key. What can I do the next time this happens? **R.S. (via e-mail)**

A: Even though your management company has not been successful, perhaps a friendly call or e-mail from you to your next door neighbor would solve the problem. Assuming that does not work, most condominium documents prohibit owners and their guests from causing a "nuisance." Under the law, a nuisance is conduct or behavior that unreasonably interferes with one's peaceful use or possession of his or her property. Playing music at levels which may be heard from outside of the unit 24 hours a day is likely a nuisance. Sometimes association boards are hesitant to get into "nuisance" claims that involve only two neighbors, as opposed to situations where complaints are more wide-spread. While you probably have some basis to insist that your board take action, the board would likewise have some leeway in determining that your complaints are not of sufficient common interest to justify the association's involvement.

You have a right of action against your neighbor to seek the abatement (cessation) of a nuisance, although this would require you to file legal action. Obviously, this should be avoided, but you may end up with no choice. You may also want to ask the local municipality to determine if there are noise ordinances in place and perhaps they would send out a code enforcement officer to monitor the level of decibels being emitted from the neighboring unit and perhaps provide a solution through governmental intervention.

Q: Our homeowners association has a committee that is working on rewriting some of our governing documents. We have a huge problem with resident/voter apathy. To make sure that the changes pass, the committee is contemplating including a statement in the materials mailed to the residents that provides that not sending back your ballot will be construed as a "YES" vote. Is that legal? **R.L. (via e-mail)**

A: No. The specific amendment requirements applicable to your community are contained within your association's respective governing

documents. To properly amend a governing document, the association must obtain enough votes to meet the respective voting threshold requirement. Voting requires an affirmative act by an owner, by properly executing a ballot or a proxy. Votes that are not properly cast or not cast at all count as "no" votes or "non votes", depending on how your amendment clause is written.

For example, assume that you live in a one hundred parcel community and that your quorum requirement is thirty units (technically referred to as "voting interests"). Let us further assume that your declaration states that it may be amended by "75 percent of the voting interests." If you have a meeting and 70 units vote yes, 10 vote no, and 20 do not vote, the amendment does not pass. You cannot count the 20 non-voters as "yes" votes.

Conversely, if your declaration can be amended by "75 percent of the voting interests present, in person or by proxy, at a duly noticed meeting at which a quorum is present", then using the numbers hypothesized above, the amendment would pass.

In the first scenario, those who do not vote essentially cast "no" votes. In the second scenario, those who do not vote are simply not computed once a quorum is established and therefore are simply "non-votes."

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.

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

Be Aware Of Risks In Selective Enforcement Case

Fort Myers The News-Press, August 27, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I live in a community with a homeowners' association. The restrictions prohibit pets, specifically cats and dogs. For awhile, there were none. Over the past several years, a substantial number of homeowners have acquired "indoor" cats, one or even two. At least one of the directors has two. They are not "kept under wraps" by any means, frequently seen in windows. I am wondering if I were to adopt a "pocket pooch" weighing less than 3 pounds and kept it as a non-barking house dog, what could I expect from the board of directors? **J.J. (via e-mail)**

A: While I was taught that two wrongs never make something right, at least one Florida appeals court would disagree as applied to your situation.

Under Florida law, an association may not selectively enforce an otherwise valid restriction. Selective enforcement is established if the facts show that the association is enforcing a restriction against one owner, while allowing other owners to violate the same restriction. In the 2003 appeals court case of Prisco v. Forest Villas Condominium Apartments, Inc., the appellate court reversed a Broward County judge's judgment in favor of the association in an action seeking removal of a dog. The association allowed cats, but not dogs, despite a prohibition in the condominium declaration against any "pets" other than fish or birds. The appellate court found that the association had selectively enforced its declaration. The court said: "The fact that cats are different from dogs makes no difference. What does matter is that neither a cat nor a dog is a fish or a bird, so both should be prohibited." The resident was allowed to keep his dog.

An association might be able to "reinvigorate" an unenforced restriction and prospectively enforce if the board properly notifies owners of its intent to enforce the restriction in the future. If a violation is too widespread, however, this reinvigoration process may fail. Legal counsel should be consulted if the board desires to consider this approach.

In your community, if there is no longer a sentiment to keep the "no pet" rule, it should be amended, rather than ignored. If you choose to violate the restriction and raise a "selective enforcement" defense, you should retain legal counsel conversant in association law. While you might ultimately win on your defense, there are certainly no guarantees in the legal process, and you could be facing a hefty legal bill in trying to prove your point. Your association could also attempt to fine you. You should be aware, and discuss with your counsel in assessing risks, that the prevailing party in this type of case is usually entitled to the recovery of his or her attorneys' fees from the non-prevailing party.

Q: If a homeowners association has quarterly assessments, can a homeowner be given the full ninety days to pay the entire assessment payment before the next quarterly assessment is due without being turned over to the Association's attorney for collections? Some owners in our community pay a part of their quarterly assessment when due and the balance at some point during the quarter before the next assessment comes due. Can the Association establish a minimum dollar amount before the account gets turned over to the attorney for collections or some other criteria for these "short payments"? **F.L. (via e-mail)**

A: Chapter 720, the Florida Homeowners' Association Act, does not specify when the association can or may commence collection action against a delinquent homeowner. Rather, the statute states that "delinquent" assessments bear interest from the date due until paid. Further, a late fee, if authorized by the documents, in an amount not to exceed the greater of $25.00 or five percent of the delinquent installment amount, may be charged. The point at which an assessment payment is considered "delinquent" is determined in the governing documents. When I draft or amend documents, I recommend a "grace period" of 10 days before interest or late fees can be assessed, but I have seen documents with many different standards.

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.

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

Material Alterations Subject to Condo Declaration

Fort Myers The News-Press, September 4, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Our declaration of condominium states that the association may make alterations and improvements that are approved by the board. The board interprets this as authority to make material alterations, such as eliminating security personnel and changing the building color, without a vote of the members. Is there a distinction between "material alterations" as used in the law and "alterations and improvements" as used in our declaration? **J.P. (via e-mail).**

A: The term "material alteration" has been interpreted by Florida's courts to mean physical changes to the common elements or association-owned property which "palpably or perceptively vary or change the form, shape, elements or specifications of property, including buildings and other structures or equipment, from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance." Material alterations may only be undertaken in the manner provided in the declaration, and if the declaration does not address the issue, then by the approval of 75% of the entire membership.

I am not aware of any case that has decided whether the board's express authority to make an "alteration" includes the authority to make a "material alteration." In the absence of such a case, and assuming that your condominium documents contain the common proviso that all of the powers and duties of the association are vested in the board, unless otherwise stated, I believe the better interpretation would be to read "alteration" objectively to include all alterations, thus granting your board such authority. The elimination of security personnel is not a decision that falls into the "material alteration" category. The clause you cite has no bearing on that issue, one way or the other.

Q: We have a rule in our community that people must pick up after their dogs. Most people do, but of course there are violators. This is not only unsightly, but also is unhealthy. When the board is asked to enforce the rule, they state they have no power to levy fines or enforce the rule. My question is whether a Florida homeowners' association can make and enforce rules that state that residents must pick up after their dogs or face a fine? **B.S. (via e-mail)**

A: Your board is wrong. Assuming your board is granted customary rulemaking authority through your governing documents, I do not believe there is any question that a board-made rule requiring members to pick up after their dogs would be considered reasonable and enforceable.

Under current law, a homeowners' association may levy a fine for a violation of covenants or board-

made rules regardless of whether a fining clause is contained in the governing documents. In order to levy a fine, an impartial committee must first approve the proposed fine. The board may levy fines of one hundred dollars per day, up to an aggregate of one thousand dollars for recurring violations. The one thousand dollar cap can be increased if provided for in the governing documents (the rule is different in condominiums, the one thousand dollar cap is absolute).

Q: I live in a community operated by a homeowners' association with a three-member board of directors. Two of the directors also serve on the Architectural Review Committee. Can three members of the Architectural Review Committee, two of which are directors, meet without providing notice of the meeting to the association members? **T.K. (via e-mail)**

A: No. Your question involves the "sunshine" provisions of the Florida Homeowners' Act which regulates notice requirements. Committees that make final decisions regarding the expenditure of association funds, or committees vested with the power to approve or disapprove architectural decisions with respect to parcels in the community, are required to operate in the "sunshine". This means that notice of their meetings need to be posted and owners have the right to attend and (as of July 1, 2011) speak. Therefore, even if they were not directors on the Architectural Review Committee, notice of the meeting would have to be posted for the benefit of the members.

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.

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

Rental Caps Beneficial, But Difficult To Enforce

Fort Myers The News-Press, September 11, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Our condominium documents are silent on rental rights. We have recently been considering placing a cap on the number of units that can be rented at any one time. Can we institute this cap without amending the documents? Will the cap apply to current owners? **B.S. (via e-mail)**

A: I am not a big fan of "rental caps", for a variety of reasons, but primarily because they are difficult to enforce. That said, there is certainly benefit to certain communities in limiting rentals. For example, the Federal Housing Administration (FHA) is reportedly underwriting some thirty percent of the nation's mortgages since the real estate meltdown. For existing condominium projects, FHA-backed mortgages are not available unless at least fifty percent of the units are owner-occupied.

A rental cap, if that is the path taken, should be incorporated into the declaration of condominium, through amendment. Section 718.110(13) of the Florida Condominium Act specifically provides that declaration amendments which: (a) prohibit unit owners from renting their units, or, (b) alter the duration of the rental term or, (c) specify or limit the number of times unit owners are entitled to rent their units apply only to those unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

An amendment imposing a rental cap would have the effect of limiting the number of times a unit owner is entitled to rent his or her unit, or prohibiting a unit owner from renting his or her unit altogether if the maximum number of units are already being rented at the time the unit owner wants to rent his or her unit.

Accordingly, the amendment cannot be enforced against those current owners who do not vote in favor of it. This would make it difficult to monitor and enforce any percentage-based cap, since certain unit owners would be entitled to rent without regard to the cap. Other approaches may accomplish the same objective.

Q: I live in a community that was developed in numerous phases. Each phase has its own governing restrictions. There is a golf course which is owned separately, by a private entity. A bylaw amendment was proposed whereby each lot owner would pay a certain amount to the golf course owner, and would receive a "gift certificate" or credit for future purchases in the exact same amount. Each of the separate phases had to approve the amendment. The bylaws for each phase can be amended by a two-thirds vote. When the amendment was presented, all of the phases got at least a two-thirds vote, but several did not get a seventy-five percent vote, which we are told is also an applicable standard. We are in

disagreement about whether the amendments passed. **J.G. (via e-mail)**

A: Only a Florida-licensed attorney who actually reviews your community's governing documents, the voting materials that were sent out, the minutes of the various meetings, and applicable Florida law can answer that question for you. Your question, at least tangentially, addresses the authority of a homeowner's association to impose mandatory membership or acquire memberships or other use interests in golf clubs or other recreational facilities. Until recently, a number of trial courts across Florida held that a change from voluntary club membership to mandatory club membership, in the HOA context, was a change in the "general scheme of development" and required unanimous approval from the lot owners. However, at least to my knowledge, the question was never definitively decided by an appeals court.

Effective July 1, 2010. Section 720.31(6), of the Florida Homeowners' Association Act was amended to provide that a homeowners' association may enter agreements to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities, such as country clubs, golf courses, marinas, and other recreational facilities. The new law provides that if the interests are existing or created at the time the declaration is recorded, they must be stated and fully described in the declaration.

Subsequent to recording the declaration, agreements to acquire such interests not entered into within 12 months after recording the declaration may be undertaken only if authorized by the declaration as "a material alteration or substantial addition to the common areas or association property", a term borrowed entirely from the condominium statute, but with no counterpart in Chapter 720. If the declaration is silent, any such transaction requires the approval of seventy-five percent of the total voting interests of the association.

Assuming the new law can be applied to your situation, also a question for association counsel, and further assuming that the declarations are silent on the matter, an amendment to the bylaws would be of no value. If such is the case, you would have needed a seventy-five percent vote.

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.

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

What Rights Remain For HOA Member In Arrears?

Fort Myers The News-Press, September 25, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Do owners who are over 90 days delinquent have the right to speak at board meetings. I realize they have the right to attend. I also realize the board has the ability to restrict their rights to facilities until they are current with their assessments. Would you be able to direct me to information that might clarify this issue? **C.H. (via e-mail)**

A: Both the Florida Condominium Act and the Florida Homeowners' Association Act provide that an association may suspend certain common element or common area use rights of a member who is more than 90 days delinquent in the payment of any monetary obligation due to the association. In addition, both condominium and homeowners' associations may suspend the voting rights of members who are more than 90 days delinquent. However, the rights of owners to attend and participate in board meetings are contained in other provisions of these statutes, and those rights are not affected by the suspension of voting rights. I suppose one could argue that if board meetings are held on common property for which use rights have been suspended (such as a clubhouse), the suspension of the right to use the clubhouse would preclude the member's right to attend a board meeting there. I doubt a court would look at it this way.

In homeowners' associations, members have the right to attend all meetings of the board (except meetings with counsel regarding litigation and board meetings regarding personnel matters) and to speak with reference to all "designated items." This part of the law is somewhat ambiguous as there is no statutory obligation for a homeowners' association board meeting to post a written agenda. Presumably, if a written agenda is prepared, those agenda items are the "designated items" referred to in the law. Further, the presumed intent of the statute is that any item of business discussed at the HOA board meeting is subject to member comment.

Similarly, the Florida Condominium Act establishes members' rights to attend board meetings (with the same exceptions applicable to homeowners' associations), and to speak with reference to all "designated agenda items." In contrast with the law for homeowners' associations, the condominium statute does require that the posted notice for board meetings contain an agenda. Generally speaking, the board is only entitled to address items contained on the posted agenda.

Q: I am on the board of a homeowners' association. From time to time our association is served with foreclosure lawsuits which state that the association has twenty days to respond. Is it

necessary for the homeowners' association to file a response? **B.S. (via e-mail)**

A: In order to foreclose its mortgage, a bank typically names all parties who have an interest in the property which is inferior to the mortgage. For example, the holder of the first mortgage would name the holder of a second mortgage or an equity line of credit on the property, because those interests are inferior to the first mortgage and will be eliminated as all liens on the property by the foreclosure of the superior mortgage. Similarly, the foreclosing bank will name the association in order to trump the association's lien for unpaid assessments.

Further, both the Florida Homeowners' Association Act and the Florida Condominium Act require that a party (usually a bank) foreclosing a first mortgage must name the association as a party to the lawsuit in order to receive the benefit of the statutory limitation for unpaid assessments, which is usually referred to as the "safe harbor" protection for the lender. Both laws currently provide that the holder of a first mortgage who forecloses is only liable to the association for twelve months of unpaid assessments or one percent of the original mortgage amount, whichever is less. Therefore, the bank names the association as a party in its foreclosure lawsuit to both wipe out the association's lien against the property and to limit the bank's liability for unpaid assessments to the safe harbor amount.

Whether the association should file an answer in a foreclosure lawsuit is a business decision that must be made by the board. The failure to file a response to a lawsuit will result in a default. What an association loses in failing to file a response to the foreclosure action is the ability to file procedural motions in the court. The foreclosure of bad loans in Florida has experienced many delays, for many reasons. When an association files an answer in a mortgage foreclosure action, it becomes a "party of record" with standing to bring motions, which can in some circumstances be directed at moving the bank's foreclosure forward.

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.

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

Membership Elects Board, Which Then Picks Officers

Fort Myers The News-Press, October 2, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: When there is an election for the board of directors, does the association list each officer position on the ballot or do the association members simply elect the members of the board and the members of the board of directors, once elected, determine amongst themselves who is the president, vice president, secretary, treasurer, etc.? **S.M. (via e-mail)**

A: Generally, the membership of the association elects the members of the board of directors. Following the board's election, the members of the board of directors will determine who will serve as the officers. Chapter 617 of the Florida Statutes, the Florida Corporation Not-For-Profit Act, states that "a corporation shall have the officers described in its articles of incorporation or its bylaws who shall be elected or appointed at such time and for such terms as is provided in the articles of incorporation or the bylaws. In the absence of such provisions, all officers shall be elected or appointed by the board of directors annually."

The Florida Corporation Not-For Profit Act applies to most condominium, cooperative and homeowners' associations. Therefore, in the absence of any specific provision in the articles of incorporation or bylaws, the board of directors determine each year who will serve as the various officers for the association.

Q: Our condominium association sent a first notice of annual meeting stating that if you wanted to be a candidate for election to the board, we had to complete an enclosed "notice of intent" and send it to our property manager's office. Nowhere in this letter was there a deadline stated as to when the notice of intent needed to be returned to the manager. I sent mine in, and was surprised when the second notice of the meeting stated that there would be no election because there were only five owners who had returned their notice of intent. I was not one of the five owners listed. In this second letter, it stated that the notice of intent had to be returned forty days prior to the election "per the laws." Shouldn't the first notice have said something about this "rule"? **P.L. (via e-mail)**

A: Preferably yes, but legally, no. The Florida Condominium Act provides that a person desiring to be a candidate for the board must give written notice of his or her intent at least forty days prior to the date of the election. There is nothing in the law that requires that the first notice tell the owners when the forty-day deadline is to return the notice of intent. The better practice, and the one that I always recommend that my association clients follow, is to include the deadline for returning self-nominations in the first notice form. However, this is not a legal requirement.

Q: Can you please clarify the proper use of proxies in an election of directors. Our association uses a proxy that is worded to allow the proxyholder to use their discretion in voting on the election of directors. Also, does having a quorum in any way affect the election of directors? **S.E.**

A: Since the condominium law is clear that the use of proxies (either general or limited proxies) cannot be used in the election of directors, except in very limited circumstances (timeshares and condominiums of less than ten or fewer units), I am assuming you are a member of a homeowners' association.

Unless the association's bylaws require the use of a secret ballot for the election of directors, the election of directors in a homeowners' association can include the use of proxies. If there is no prohibition on the use of general proxies in the bylaws, then a general proxy can be used. A good proxy gives the proxyholder the discretion to vote on the election of directors how she or he sees fit.

For homeowners' association elections, I prefer to use a proxy that is basically a combination of a general and limited proxy. It allows the property owner to decide whether to give general powers to his or her proxyholder, and vote on the election of directors however the proxyholder wishes. Alternatively, the property owner can instead give his or her proxyholder limited powers to vote on the election of directors specifically in the manner the owner has directed.

Using this format, the "limited proxy" section of the proxy would list the known candidates and the owner would check which candidates he or she wants the proxyholder to vote for. However, if the owner does not know any of the candidates, or otherwise prefers to trust his or her proxyholder to decide which candidates to vote for, the owner can give the proxyholder general powers.

With respect to a quorum, there must be a quorum at the meeting at which the directors will be elected. The Florida Homeowners' Association Act provides that a quorum is thirty percent, unless a lower number is provided in the bylaws.

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.

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

Disabled Parking Spot Delay May Be Discriminatory

Fort Myers The News-Press, October 9, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: We have a child with autism. Due to his disability, he often darts out into the street or gets very distracted and is not aware of his surroundings. Furthermore, he has an extreme aversion/fear of enclosures. As the garage door is opening, he wants to run out. Therefore, it is almost impossible to get him to get into one of our vehicles while it is parked inside our townhouse garage. We asked our HOA to assign a handicap parking space located on our street in common area parking. We submitted this request over a year ago and they have not provided a response. So, is the HOA violating law by not responding to me in a reasonable timeframe? And do I have justification for the HOA to provide this reasonable accommodation? **J.R. (via e-mail)**

A: The federal Fair Housing Act (FHA) and similar state and local laws make it unlawful for housing providers to discriminate in the sale, rental or terms of housing because of a handicap of a buyer or renter, anyone residing or intending to reside in the housing, or any person associated with a handicapped buyer or renter. Discrimination on the basis of handicap includes a refusal to make reasonable accommodations to rules, policies, practices or services when such accommodations may be necessary to afford such person an equal opportunity to use and enjoy a dwelling.

A person is considered handicapped pursuant to federal law if he or she has a physical or mental impairment which substantially limits one or more of the person's major life activities such as seeing, hearing, walking, speaking, learning, breathing, eating, performing manual tasks, etc., a record of having such impairment, or is regarded as having such impairment. Condominium and homeowner's associations are considered to be housing providers and therefore are subject to the FHA, and are obligated to make the accommodation or allow the modification unless the request imposes an undue financial or administrative burden upon it or requires a fundamental alteration in the nature of the housing.

The Department of Housing and Urban Development and the judges who review these types of cases have been increasingly lenient in their interpretation of what is "reasonable". However, each request is evaluated on a case-by-case basis. Based on the facts as you have described them, you seem to make a reasonable argument for an accommodation. While the FHA does not impose any particular timeframe for an association to respond to a request for a reasonable accommodation, a year is quite a long time.

I would recommend making a final request for a reasonable accommodation to the association in writing, with documentation regarding your son's disability and the nexus between the disability and

the accommodation requested. If that is not successful, I would recommend that you contact your local or state housing authority, or an attorney, for assistance in evaluating your concerns.

Q: When the declaration of condominium requires the approval of seventy-five percent of the entire membership to amend, and the membership consists of three units (each unit with one vote) would two votes be sufficient to amend? **M.M. (via e-mail)**

A: No. In this situation the declaration essentially requires one hundred percent approval, to approve an amendment. Section 718.110(1)(a) states that if the declaration fails to provide a method of amending, it may be amended by an affirmative vote of two-thirds of the members, except for those matters, such as unit configuration, which require one hundred percent approval.

Here, the declaration provides a method of amendment, the approval of seventy-five percent of the unit owners. Obviously, the attorney who drafted your documents did not pay close attention to the somewhat unique nature of your community, due to its small size. The only way to achieve seventy-five percent approval is to achieve an affirmative vote of all three members.

Q: My association operates three separate condominiums. I own one unit in one of the condominiums. I know that I am entitled to look at the records related to my condominium, but am I entitled to review the records for the other condominiums, even if I do not own a unit in the other condominiums? **H.L. (via e-mail)**

A: Yes. The Florida Condominium Act refers to the official records of the "association". Although your association operates three separate condominiums, each condominium is operated by one association, and therefore, all of the records of the association, even if applicable only to one of the condominiums, would be open to any of the owners in any of the three condominiums.

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.

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

Association Can Suspend Rights If Any Cash Due

Fort Myers The News-Press, October 16, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I own two condominium units under the same association. One unit is my primary residence and the other I have used as a rental property. I have always kept my assessments current on the unit I where I reside. However, because I haven't been able to find a tenant, I have not been able to pay my assessments since the beginning of this year on my other unit. Can the association suspend my common area use rights even though I am current on the payment of assessments for the unit I live in? **S.W. (via e-mail)**

A: Yes.

The right to suspend use rights is set forth in Section 718.303(4) of the Florida Condominium Act which states "if a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the monetary obligation is paid in full." The right to suspend does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators. No hearing is required to suspend for non-payment, though suspension must be imposed at a duly noticed board meeting, and the owner of the suspended unit notified of suspension in writing.

Although you may be current on the payment of assessments for the unit which is your primary residence, you are still a member of the association and are more than 90 days delinquent in paying a "monetary obligation due to the association" for your other unit. Therefore, it is my opinion that the association has the right to suspend your rights to use the common elements, common facilities or other association property, until all of your accounts are brought current.

Q: Is it true that the Condominium Act, Chapter 718, Florida Statutes, does not require a vote of the membership to approve and adopt rules and regulations? Does the Condominium Act authorize the board to take this action?

A: The authority of a condominium association board to adopt rules and regulations depends on several factors. It should be noted that the Florida Condominium Act does not mandate that the rules and regulations must be approved by the membership, but an association's specific governing documents can impose such a requirement. In order for a board-made rule to be legally upheld (assuming the association's governing documents grant the board rule-making authority), several criteria must be met.

First, as referenced above, the condominium documents must grant rule-making authority to the board. It is important to ensure that the board is granted both rule-making authority as to the "common elements" (common property) and the "units" (apartments). Some documents only grant rule-making authority for common elements.

Secondly, any board-made rule cannot be inconsistent with the superior documents (typically the recorded declaration of condominium, articles of incorporation, or bylaws), nor any right which is "inferable" from those superior documents.

Third, board-made rules must be "reasonable", which is often at the heart of legal challenges regarding board-made rules.

Fourth, a board-made rule must be adopted and promulgated in a procedurally correct fashion. Rules regarding common elements are subject to 48 hour pre-meeting posting requirements. Rules regarding unit use are subject to heightened notice requirements, 14 day mailed and posted notice. Additionally, the condominium documents need to be consulted as to additional procedures. For example, some documents require that new rules be mailed out to unit owners 30 days before they become effective. If that requirement is in the documents, it should be followed.

If the association's governing documents require membership approval, the board cannot adopt rules and regulations without first obtaining the requisite membership approval.

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.

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

Condo Resident Has Right to Make Own Directory

Fort Myers The News-Press, October 23, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: When I first purchased my unit, the association presented me with a directory that listed all of the unit owners' names, telephone numbers, out-of-state addresses and e-mail addresses. Upon asking for an updated directory, I was told that it is now illegal for associations to publish and hand directories out to the residents. The association did, however, tell me that I could collect the unit owners' information and, with the unit owners' permission, could then publish the information in my own directory, which could be copied and distributed at my own expense. I prepared such a directory and included the address of the condominium and a picture of the sign showing the name of the condominium on the front cover. I also made certain to note, on the back cover, that I had created the directory. Now the board is saying that it is illegal for me to include the name and address of the condominium on the cover. The board has also said that it is illegal to state the word "association" anywhere. Do they have the right to tell me what I can include in my own personal directory? **J.P. (via e-mail)**

A: It is true that the Florida Condominium Act was amended during the 2010 Legislative Session to prohibit an association from releasing "personal identifying information" of unit owners. E-mail addresses, telephone numbers and addresses of a unit owner other than as provided to fulfill the association's notice requirements are among the items classified as "personal identifying information." The statute does not protect a unit owner's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements from disclosure.

Additionally, the law was again amended during the 2011 Legislative Session to provide that a unit owner may consent in writing to the disclosure of protected "personal identifying information." Accordingly, an association may now publish a directory that includes "personal identifying information" disclosing certain protected information pertaining to those unit owners who consented to such publication. Remember, the owner's consent must be in writing.

Regarding the directory you personally prepared, I am aware of no restriction on the information that may be published therein, though I would recommend publishing only the information about those unit owners who have expressly consented. I suspect that the board is concerned that unit owners will think that it was the association that published the directory and is probably justified in asking that its name be removed.

Q: I am the owner of a unit in a condominium and serve on the association's board. When I

recently purchased a unit in another condominium, which I plan to make my permanent residence, other board members called for my ouster claiming that I had to be a resident to continue on the board. Is this true? **R.G. (via email)**

A: It has been repeatedly held by the Division of Florida Condominiums, Timeshares, and Mobile Homes, both in Declaratory Statements and arbitration decisions, that unit owners cannot be denied the right to be a candidate for the board of a condominium association due to their residency. This conclusion is based upon language in the Condominium Act which plainly states that "any unit owner" who desires to be a candidate for the board may submit his or her notice of intent to run.

This issue comes up from time to time. Obviously, some believe that more than mere legal ownership is necessary in order to effectively serve on the board. While that view is really not accurate for every director, there are some obvious and good reasons why members may want a director to be regularly present in the community. But clearly, this is a political issue, as there is no question legally that a non-resident, absentee unit owner is still eligible to serve on the board.

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.

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

Law Covers Money-Handling Rules

Fort Myers The News-Press, October 30, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: The board of directors in my condominium has not secured a fidelity bond or insurance policy to cover those individuals who handle our money. Is this legal? **T.N. (via e-mail)**

A: No. Fidelity insurance or fidelity bonding is required by the Florida Condominium Act for all associations. The law requires associations to insure or bond all persons who control or disburse the condominium funds (including the president, secretary, treasurer and all persons authorized to sign checks) in an amount equal to the maximum funds that will be in the custody of the association or its management company at any one time.

Therefore, your board must obtain this coverage. Not doing so presents several substantial risks. For one, if money is stolen, there is no insurance to pay the claim. This could then lead to a breach of fiduciary duty claim against the members of the board who were negligent in not procuring insurance. While most claims of this nature are covered by insurance, a common exclusion in many policies is that claims predicated on the failure to obtain proper insurance are thus excluded. Thus even an "innocent" director (one who did not steal the money) could be faced with a claim against them personally which might not be insured. While such a director might be entitled to indemnification from the association, suffice it to say that a legal quagmire of this nature would be unpleasant at best. The board needs to review the association's financial history and current banking records to determine the maximum amount of money that is in all the association's account, wherever located and for whatever purpose, and that is the amount of fidelity bonding to have as a minimum.

Q: Our association has filed a notice of preservation of covenants as required under MRTA (the Marketable Record Title Act). The notice cites the official book and page number of the original covenants that were recorded in 1982. The notice also states that the declaration was amended in 1991 and further amended in 2000, and the official records book and page number of the 1991 and 2000 amendments are provided in the notice. However, these two amendments are no longer valid but there are other major amendments which are valid but are not listed in the notice. My question is this: Are the original covenants recorded in 1982 with the two referenced amendments the only covenants that have been renewed? If so, can the amendments not mentioned in the notice still be enforced? If not, can this error be easily corrected? **P.K. (via e-mail)**

A: The Marketable Record Title Act (MRTA), set forth in Chapter 712, Florida Statutes, provides that interests in real property are extinguished after

thirty (30) years, with limited exceptions, unless preserved through compliance with MRTA. The MRTA statute allows for the preservation of covenants and restrictions by a homeowners' association. One of the requirements is that the board of directors must mail to all the members, and approve and record, a "Statement of Marketable Title Action." The form that must be used is set forth in the MRTA statute. The form Statement of Marketable Title Action states, in part, that the association is taking action to ensure that the covenants and restrictions recorded in the "official records book ____, page ____, of the public records of _____, Florida, as amended from time to time" retains its status as a source of marketable title with regard to the transfer of a member's residence. (There are other requirements in the law and an association should not attempt to preserve covenants and restrictions without the assistance of legal counsel.)

I assume that the notice of preservation of covenants includes the Statement of Marketable Title Action as required by the MRTA statute, and if so, the covenants, as amended from time to time would be preserved. That would mean that the original covenants, as amended, even if not specifically referenced in the notice of preservation of covenants, would be preserved. Therefore, to answer your question, it would appear to me that the "major amendments" that you describe in your question are valid and can be enforced. However, I would urge you to have this reviewed by a licensed attorney who has experience with filing MRTA preservations for homeowners' associations. In order to give you a complete opinion, the attorney would need to review all of the recorded documents.

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.

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

Statute Protects Personal Information

Fort Myers The News-Press, November 6, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I recently requested salary, health insurance costs, and bonus information for several employees of my homeowners' association. I was denied these records because the board believes that I am not entitled to these records under the statute. Do the revisions to Florida Statute 720 require a homeowners' association to release the salaries of individual employees when requested by a member? **C.P. (via e-mail)**

A: As you apparently know, the official records of the association are generally available to members for inspection upon written request. However, there are several records that are not available to the membership, including "personnel records" of the association's employees, including, but not limited to, disciplinary, payroll, health, and insurance records. The law was amended effective July 1, 2011 to provide clarification that "personnel records" do not include written employment agreements with an association employee or budgetary or financial records that indicate the compensation paid to an association employee.

Obviously, the purpose of the statute is to protect the reasonable expectations of employees that their personal information will be protected. There is certainly no reason for the membership to know of specific payroll tax deductions, other payroll deductions, or about health insurance claims. However, the statute, as recently amended, also clearly grants the right to obtain appropriate records that will reveal the compensation paid to a particular employee.

Q: Do board members need to be unit owners? I live in a condominium conversion community. The board consists of five directors. The directors are all employees of the management firm, are not unit owners, and several of them are also the executive officers. **J.R. (via e-mail)**

A: The Florida Not for Profit Corporation Act requires that directors must be natural persons at least 18 years of age or older, but need not be Florida residents or members of the corporation, unless the articles of incorporation or bylaws so require. Further, the law provides that the articles or bylaws may prescribe additional qualifications for directors.

The Florida Condominium Act provides that "any unit owner or other eligible person" may be a candidate for the board of directors, except that a person is not eligible for board membership if the person has been suspended or removed by the agency that regulates condominiums, or is delinquent in the payment of any fee, fine, or special or regular assessment, or has been convicted of a felony, unless his civil rights have been restored for at least 5 years as of the date such

person seeks election to the board.

Therefore, so long as a person is at least 18 and not disqualified for non-compliance with the eligibility criteria in the Condominium Act, the person is eligible unless disqualified by the articles or bylaws. If the articles and bylaws are silent regarding board eligibility, then a non-unit owner would be eligible.

I would say that a board composed solely of management company employees is a new one on me. It would seem that there are numerous challenges that would be faced, including potentially insoluble conflicts of interest, disclosure obligations, director compensation issues, and contract void ability.

Q: What are the requirements for holding an annual meeting for a homeowners association? Our homeowners association tried to hold an annual meeting earlier in March 2011, but did not have a quorum to open this meeting. Shouldn't another attempt have been made? **P.B. via e-mail**

A: Section 720.306(2) of the Florida Homeowners' Association Act states: "The association shall hold a meeting of its members annually for the transaction of any and all proper business at a time, date, and place stated in, or fixed in accordance with, the bylaws. The election of directors, if one is required to be held, must be held at, or in conjunction with, the annual meeting or as provided in the governing documents."

If proper notice was given for the attempted annual meeting, but the necessary percentage for a quorum was not obtained, then it is hard to fault your board for just re-seating themselves for another year. A 2009 arbitration decision from the Division of Condominiums, Timeshares and Mobile Homes confirms this conclusion.

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.

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

Directors Responsible for Enforcement

Fort Myers The News-Press, November 13, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: What are our options if the president of the board of directors of our association is not willing to enforce the rules of the association fairly and consistently? **M.M. (via e-mail)**

A: I note from your question that you state the president is failing to consistently enforce the rules of the association. However, it is the board of directors, as elected by the membership, which is responsible for the governance of the association, including enforcement of any restrictions contained in the recorded documents for the association as well as any rules properly adopted by the association. The president alone is not responsible. Failure of the board as a whole to consistently enforce the regulations could be construed as selective enforcement, which could prevent future enforcement of the association's governing documents.

Generally, the officers, including the president, are selected by the members of the board. In the event that a majority of the board is dissatisfied with any particular officer's performance, the board is entitled to remove such individual from his or her role as an officer. However, such action would not remove that individual from the board in his or her capacity as a director.

If the membership is dissatisfied with the actions of the members of the board, the owners' recourse is to participate in the election process and put forth candidates that they support and have faith in. Further, both the Condominium Act and the Homeowners' Association Act provide a mechanism for the membership to recall members of the board. However, the standards are relatively high in that a majority of the membership must vote to recall any particular board member.

Q: We have a person living in our condominium who has not paid any assessments for over three years. Other than putting a lien on the property (which we have already done), is there anything else we can do to force payment from this person? I should mention that they are seriously underwater on the mortgage on the unit and cannot possibly sell it at this time (and may never be able to sell it for what they owe). We actually have been hoping that the bank would repossess the unit, but I guess that the mortgage payments are paid on time. **C.B. (via e-mail)**

A: The scenario you present in your question is unfortunately very common in Florida today. That said, there are proactive steps that your association can take to address this problem.

Since a lien has already been recorded, the association has the option of filing a foreclosure lawsuit against the delinquent owner to force the delinquent owner to pay the unpaid assessments,

along with attorneys' fees and costs, in full or risk the court ordering a foreclosure sale. There are certain steps that must be taken before such a lawsuit can be filed, so you should consult with your association's attorney to ensure that the proper procedure is followed.

If a foreclosure sale occurs, either the association or a third-party purchaser will take title to the unit. In the current economic environment, it is a realistic possibility that it will be the association that takes title to the unit if the unit is encumbered by a mortgage. Under this scenario, the association will take title to the unit, but the first mortgagee's interests will not be wiped out. However, the association may, depending on the restrictions contained in the governing documents, have the option of renting out the unit as a means of generating income.

Another option would be to suspend the delinquent owner's common element use rights pursuant to Section 718.303(3), Florida Statutes, which allows the association to suspend such rights of owners who are more than 90 days delinquent in the payment of any "monetary obligation" to the association. The statute requires that the board impose the suspension at a properly noticed board meeting and thereafter notify the owner in writing of the suspension. Be aware, however, that the statute prohibits the association from suspending use rights associated with limited common elements, access to the unit, utility services, parking spaces and elevators.

In addition to the foregoing, I recommend you check the court records to determine if the bank that holds the first mortgage on the unit has filed its own foreclosure lawsuit. If you discover a pending bank foreclosure lawsuit, I recommend you notify your association's attorney so that he or she can fully evaluate the matter and make a determination as to how the association should proceed.

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.

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

Members May Tape Association Meetings

Fort Myers The News-Press, November 20, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Is it legal for a homeowner/association member to videotape a homeowners' association board meeting? **J.E. (via e-mail)**

A: Yes. The Florida Homeowners' Association Act, Chapter 720 of the Florida Statutes, permits members to audio record or video record both membership meetings and board meetings. Further, the statute provides that the association may adopt reasonable rules governing the recording and videotaping of meetings. Such rules must be in writing and should be adopted prior to attempting to restrict an owner's efforts to record a meeting.

Typically such rules will require prior notice to the association that the owner intends to record the meeting. Further, the rules may specify where recording equipment must be placed, and provide that none of the equipment used for the taping may interfere with, or obstruct the meeting, or create a safety hazard.

The same law also applies in both the condominium and cooperative settings.

Q: I own a number of unit weeks in a timeshare property. Is it correct that a timeshare property can have a reserve study done that uses the pooling/cash flow method? **L.C. (via e-mail)**

A: Yes. Based on your question, I assume that your particular timeshare property is a timeshare condominium that is governed by both Chapter 718 (the Florida Condominium Act) and Chapter 721 (the Florida Timeshare Act).

In a "whole ownership" condominium, the association may not use reserve funds allocated for one particular reserve item for another reserve item, unless the non-scheduled use of the reserves is approved by a vote of the unit owners in advance, or unless the association has properly established "pooled reserves."

However, the Florida Timeshare Act specifically provides that a timeshare condominium association may from time to time reallocate reserves for deferred maintenance and capital expenditures in the board's discretion, and without need for the consent of the purchasers of the timeshare plan. In other words, the Florida Timeshare Act allows reserve funds to be used for any reserve item without a vote of the owners. This allows the timeshare condominium association to essentially "pool" its reserves.

However, just as in whole ownership condominium associations, a timeshare condominium association cannot use reserve funds for operating purposes, or transfer reserve funds to an operating account, without a prior vote of the unit week owners.

Q: Are condominium associations required to follow the Florida Sunshine Laws? We have been doing so in order to be safe rather than sorry, but I was recently told that these laws may not be required for condominium association boards. **M.G. (via e-mail)**

A: Florida's "Government-in-the-Sunshine" law was enacted in 1967. Today, the Sunshine Law regarding open government can be found at Chapter 286 of the Florida Statutes according to the website of Florida's Attorney General. Further, the website states that the sunshine laws "establish a basic right of access to most meetings of boards, and other governing bodies of state and local governmental agencies or authorities."

These laws do not apply to community associations (condominium associations, cooperative associations, or homeowners' associations) because they are not state or local government agencies. However, each of Florida's housing statutes (Chapter 718 for condominiums; Chapter 719 for cooperatives; and Chapter 720 for homeowners' associations) contains its own provisions regarding open meetings, member participation rights, record keeping requirements, and the like. Though perhaps somewhat of a slang or shorthand term, these laws are often referenced as association "sunshine laws", but they are not officially referred to as such in any of the statutes.

I previously authored a pamphlet entitled "Community Association Sunshine Law, Course 101", which is published on the website of the Law Firm with which I practice. The pamphlet has been recently revised to address recent statutory changes. The updated version will be posted on the website soon. You can download a copy by going to www.becker-poliakoff.com.

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.

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

Third-Party Buyer Is Best Foreclosure Hope

Association more likely to benefit

Fort Myers The News-Press, November 27, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: We have an empty unit in our building which is in the process of foreclosure. What is owed to the mortgage company is $10,000 to $12,000 less than the fair market value of the unit. If the mortgage company sells the unit for market value, what will we get in past due fees? We had a lien on the unit. It doesn't seem fair that the mortgage company can profit on this sale while leaving us holding the bag for thousands. We have been doing everything we can legally do during the foreclosure process, including responding to the papers which were served on us. We understand the mortgage company is first in line to collect whatever is owed to them, but we are second in line if there is money from the sale in excess for the amount owed to the first mortgage company. **M.M. (via e-mail)**

A: The amount the association will be able to recover will largely depend on who is the successful purchaser at the foreclosure sale. In today's market, more often than not, the mortgage holder is the successful and only bidder at foreclosure sales because most properties have mortgages exceeding the fair market value. If the mortgage holder takes title to the unit as result of its foreclosure action, the mortgage holder's liability for assessments accruing prior to taking title will likely be limited to the lesser of the last 12 months of assessments or 1% of the original mortgage balance. The association's remedy to recover the remaining balance of the delinquent assessments is limited to pursuing the prior owner personally.

However, the circumstances you have described suggest that there may be some equity in the unit. If a third party purchases the unit, the statutory safe harbor afforded to first mortgage holders does not apply and the third party is jointly and severally liable with the prior owner for all delinquent assessments. Further, if the successful bid is greater than the mortgage holder's final judgment, the association can make a claim for the difference from the sale proceeds.

As you can see, an association can benefit greatly if a unit is sold to a third party rather than the first mortgage holder. Therefore, it is vital for an association to have legal counsel review the pleadings filed in a mortgage foreclosure action and determine the liability of a purchaser at a mortgage foreclosure sale.

Q: I manage an association where there are two attorneys on the board. Both are semi-retired and are not licensed in Florida. They have interpreted certain maintenance provisions of the condominium documents differently than previous boards did for many years. I have suggested that

since money needs to be spent, the association should get a legal opinion on this. The rest of the board seems to think this is not necessary as we have two successful attorneys who agree. Are we protected? **B.G. (via e-mail)**

A: No. Under the Florida Condominium Act, a director is immune from liability if he or she acts in a manner he or she reasonably believes to be in the best interests of the association and in a manner a reasonable person would do under like circumstances.

Under Florida's "business judgment rule" codified at Section 617.0830 of the Florida Statutes, a director is entitled to rely on the opinion of an attorney on matters the director reasonably believes are within the attorney's professional or expert competence.

It is not reasonable to rely on the advice of an attorney not licensed to practice law in Florida as to the interpretation of Florida condominium documents. Such interpretation requires not only knowledge of the document itself, but also related statutory law, case decisions, and the impact of other considerations including master association documents, fair housing laws, and advising on how the work is to be paid for (from reserves, common expense assessment, individual assessment, insurance claim, etc.).

Frankly, the board member who is offering this "advice" is exposing himself or herself to potential liability. The rendition of legal opinions by an unlicensed person is considered the unlicensed practice of law by the Florida Bar. Further, I would be surprised if that attorney's out-of-state malpractice carrier, assuming the attorney carries coverage, would cover a claim for bad advice given under such circumstances.

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.

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

'Material Alterations' Have Broad Interpretation Under the Law

Fort Myers The News-Press, December 4, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Our condominium has twenty, two story buildings. The lower breezeways of the first five buildings are constructed of a combination of concrete and dirt. The breezeways in the remaining fifteen buildings are constructed with all concrete. The partially finished breezeways pose a continuing maintenance issue. Can you provide your opinion whether completing the first five breezeways with concrete to match the other fifteen breezeways constitutes a material alteration? **S.W. (via e-mail)**

A: As you apparently know, a condominium association board is limited in the alterations it may make to the common elements. The Florida Condominium Act requires the approval of 75 percent of all unit owners in order for the board to make a material alteration to the common elements, unless the declaration of condominium provides otherwise.

The concept of "material alterations" has long been broadly interpreted in the law. Seemingly insignificant alterations have been determined in the law to be "material alterations."

There is an exception to the rule known as the "necessary maintenance" exception. Even if an alteration perceptively changes the use, appearance, or function of a common element, unit owner approval is not required if the alteration is necessary to perform a maintenance function of the association. Unfortunately, most of the legal guidance in this area comes from prior arbitration decisions of the Division of Florida Condominiums, Timeshares, and Mobile Homes, and many of those arbitration decisions are not easily reconciled. There is also some case law on point, but some of the cases are not easily reconciled across different appellate districts.

In one arbitration case, a board was permitted to replace "Chattahoochee" (river rock) pool deck material with brick pavers, based upon future maintenance considerations, and also the language of that association's documents. However, in another case, an association was not permitted to replace concrete pool decking with brick pavers. Similarly, one appeals court case has held that replacing a cedar shingle roof with terra cotta roof material, due to future maintenance concerns, was a material alteration that required member approval. But in another court case, the addition of rip-rap to shore up an eroding shoreline was permitted without member approval given the necessity to preserve the condominium property.

As you can see, the cases are all over the spectrum, and the ultimate issue is a question of fact to be determined in each case. Given this uncertainty, it is usually the most conservative advice to obtain a vote of the members unless you have an unequivocal written opinion from the association's legal counsel that a membership vote is not required.

Q: I live in a condominium association that, up until recently, allowed owners to have pets. The Board, however, apparently decided that pets (mainly dogs) cause too much trouble in our complex and that we should be a "pet free" condominium. The Board called a special membership meeting to approve an amendment to our Declaration which states that no owners may have pets. The amendment contains language stating that the restriction applies to all owners. The amendment was approved by our unit owners and now the Board is demanding all owners to get rid of their pets. Can the Board do this? Aren't the previously existing pets "grandfathered-in?" I have had my dog for over 8 years and this doesn't seem fair. **R.R. (via e-mail)**

A: I agree that this is not fair. Luckily, however, the law will protect you here. There are several arbitration and district court opinions which provide that when an association adopts a more restrictive rule, policy or amendment that prohibits pets, the association is required to allow those owners who already had a pet on the date the restriction becomes effective (and thus do not comply with the newly adopted pet restriction) to retain the pet until the pet expires or is otherwise permanently removed from the condominium property.

With the exception of the "grandfather" issue, the restriction is enforceable against all owners, if properly adopted. Therefore, an owner, who did not own a pet prior to the effective date of the amendment, would not be permitted to thereafter violate the rule and claim a "grandfathering exemption."

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.

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

Board Not Required To Run Background Checks On Candidates

Fort Myers The News-Press, December 11, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Is there a requirement that the board perform background checks on candidates to make sure that they are qualified to run for the board? **M.M. (via e-mail)**

A: No. Both the Florida Condominium Act and the Florida Homeowners' Association Act provide that if a person has been convicted of a felony in Florida, or convicted of an offense in another jurisdiction that would be considered a felony in Florida, that person is not qualified to run for the board unless his or her civil rights have been restored for at least five years as of the date of the election. In addition, if a candidate has been charged by information or indictment with a felony theft or embezzlement offense involving an association's funds or property and such criminal charges are pending, the candidate is also disqualified from running for the board. A conviction is not necessary (guilty until proven innocent, believe it or not).

However, there is no requirement that the board perform background checks to determine whether a candidate is disqualified because of a felony conviction or embezzlement charge. If a candidate's name is put on the ballot and it is later determined that the person was not qualified to run or serve, then the individual must be removed from the board, or if the disqualification is discovered before the election, any votes cast for that candidate would be disallowed.

Q: I live in a community operated by a homeowners' association. Our current contract with our management company is about to expire. Does state law require that the association receive bids from other management companies before the board signs a new management contract? **L.B. (via e-mail)**

A: No. The Florida Homeowners' Association Act generally requires that the association receive bids before the association enters into certain contracts. The association must obtain competitive bids for contracts which exceed ten percent of the total annual budget for the association, including reserves. However, contracts for certain services are exempted from the competitive bidding requirement. Specifically, the law provides that contracts for "attorney, accountant, architect, community association manager, engineering, and landscape architect services are not subject" to the competitive bidding requirements of the statute.

The Florida Condominium Act has similar exemptions. However, competitive bidding requirements in the condominium context are triggered at five percent of the budget.

Q: Our homeowners' association is voting at a special members' meeting to amend the declaration of covenants. My question is whether the limited proxies that are executed by an owner can stand as the voting instrument, or whether the designated proxy holder must come to the meeting and fill out a separate ballot in order to cast the vote? **E.R. (via e-mail)**

A: A proxy is a legal instrument that allows one person to attend a meeting on behalf of another person and to take action on behalf of that person as authorized by the proxy form. A "general" proxy is the term used to describe a proxy form that allows the designated proxy holder to attend the meeting and vote in his or her own discretion, as if he or she stands in the shoes of the member. A "limited" proxy limits the proxy holder to vote as specifically directed by the member.

While general proxies are generally impermissible in the condominium context, the Florida Homeowners' Association Act does not require limited proxies for voting on amendments to the declaration of covenants. Accordingly, a general proxy would be valid unless prohibited by the bylaws.

However, most homeowners' associations do use limited proxies for voting on amendments to governing documents. In my opinion, if limited proxies are being utilized, the proxy itself essentially serves as an "absentee ballot", and it is not necessary for the limited proxy holder to fill out a separate ballot. It is, however, essential that the physical presence of the limited proxy holder be confirmed and adequately documented at the meeting.

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.

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

Member Absorbs Cost of Calling In To Meeting

Fort Myers The News-Press, December 18, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Many of our owners are not in Florida when some of our board meetings are held. Can absentee owners call in on a conference call (as those board members who are not present do) and speak? If so, who pays the charges involved in adding them to the conference call? **M.G. (via e-mail)**

A: There is no legal right provided by Florida statutes for members of a community association to call in to either board meetings or members' meetings. It is possible that the governing documents of an association could contain such a right, though I have never seen such a provision. If a board is inclined to allow owners to call in, or an association added such a right in its bylaws, presumably the method of charging the cost would be spelled out in the board's resolution or bylaw provision. I represent a number of associations where the board does allow members to call in to meetings. Usually, the member has to pay for the cost of the call.

You are correct that directors have long been permitted by law to attend board meetings by any means of communication whereby all directors participating in the meeting, and audience participants at the site of the meeting, may simultaneously hear each other during the meeting. A "speaker phone" is the most common method used. But even director telephonic participation is optional, meaning the board may decide whether to allow it or not. Most boards do allow directors to call in to meetings, for obvious reasons.

Interestingly, the Florida Not for Profit Corporation Act, which governs most community associations in Florida, was amended in 2009 to permit the board, in its discretion, to allow members (owners) to attend, participate, and actually vote in members' meetings by means of remote communication, such as telephone call in. But again, whether to allow owner telephonic participation in members' meetings is at the board's discretion. Further, where such participation is permitted by the board, the statute requires some reasonable means to verify that each person attending by remote communication is actually a member or a proxy holder. Presumably, advance notice to the association that a member intends to call in, and careful control of the conference call in pass code, would suffice.

Q: If an attorney is asked to attend a closed board meeting, and some of the topics do not involve proposed or pending litigation, shouldn't that portion of the meeting be open to the owners? Do notices of these meetings have to be posted? **S.C. (via e-mail)**

A: Yes. The statutes applicable to condominiums, cooperatives and homeowners'

associations all provide that meetings of the board shall be open to all unit owners.

Of course, every rule has its exceptions. Specifically, the laws for condominiums, cooperatives and homeowners' associations all provide an exception to the open meeting requisite for meetings with the association's attorney with respect to "proposed or pending litigation," if the meeting is held for the purpose of "seeking or rendering legal advice."

As to the posting of notice, the law does not specifically say that notice of closed meetings must be posted, however, there is no exemption from posting either. The Florida Division of Condominiums, Timeshares and Mobile Homes has previously ruled that notice of closed meetings must be posted, even though the members are not entitled to attend.

The need to have protection of the attorney-client privilege regarding pending litigation is obvious. The concept of "proposed" litigation is obviously a bit more amorphous. I do agree that the content of those meetings must be limited to matters contemplated by the statutory privilege.

I would also point out that the condominium and homeowners' association laws permit closed board meetings regarding "personnel matters", without need for counsel to be present. The cooperative law does not contain such an exemption, although I understand there is a move afoot to change that law as well.

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.

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

Compensating Members on An Association Board Is Rare

Fort Myers The News-Press, December 25, 2011

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: Under what circumstances, if any, may members of an association board be compensated? **G.B. (via e-mail)**

A: The applicable statutes generally prohibit compensation to individuals for their service as officers or directors to the association. The condominium and cooperative statutes provide that "unless otherwise provided in the bylaws, members of the board shall serve without compensation." Provisions for paid directors in condominiums and cooperatives are, in my experience, rare. There may be instances where it is appropriate for officers or directors to be reimbursed for out-of-pocket expenses incurred incident to their service to the association, and that is not considered compensation. In the event the association wishes to reimburse an officer or director for out-of-pocket expenses, I recommend that the board adopt a written policy concerning such reimbursement, and that all reimbursement decisions be made at a properly noticed, open meeting of the board of directors.

With regard to homeowners' associations, the Florida Homeowners' Association Act was amended in 2010 to expressly prohibit the compensation of officers, directors or committee members for their service to the association. The statute does, however, provide a number of exceptions, including reimbursement for out-of-pocket expenses, provided that such reimbursement is approved in accordance with procedures established by the governing documents or the board. Further, this law provides that directors and officers and members of committees may be compensated for their service if such compensation is authorized by the governing documents or approved by a majority of the voting interests of the association.

Q: What is the requirement for holding an annual meeting? Our association attempted to hold an annual meeting, but did not have a quorum to open the meeting. Is the board required to attempt to get a quorum to hold an annual meeting? **P.B. (via e-mail)**

A: The Florida Condominium Act, the Florida Cooperative Act, and the Florida Homeowners' Association Act all require that the association hold an annual meeting of the members. The HOA statute provides that a homeowner's association shall hold a meeting of its members annually for the transaction of any and all proper business at the time, day and place stated in, or in accordance with, the bylaws. Further, if there is to be an election of directors, such election must be held in

conjunction with the annual meeting, or as otherwise provided by the governing documents. This statute also provides that, unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is thirty percent of the total voting interests. If such percentage is not achieved, the meeting cannot be opened and business cannot conducted.

Condominium and cooperative associations must also hold an annual meeting of the unit owners. However, a quorum is a majority of the voting interests unless a lesser percentage is provided in the bylaws. Further, in condominium and cooperative associations, there is no quorum requirement for the purposes of holding an election. However the statutes do require that at least twenty percent of eligible voters cast a ballot in order to have a valid election.

Accordingly, condominium, cooperative and homeowners' associations must attempt to hold an annual meeting every year. It is somewhat of a judgment call as to whether the association should continue trying when a quorum cannot be established. In my experience, this decision is usually tied to whether or not the failure to obtain the necessary quorum (for homeowners' associations) or represented voting interests (the twenty percent requirement in condominiums and cooperatives) does or does not complicate the proper seating of a board of directors. If so, then I recommend that the original meeting be adjourned to a date, time, and place specific and that additional member participation be solicited through proxy submittals or in-person attendance.

Q: When a director resigns from our condominium board is there an obligation for the owners to be informed of the vacancy in a timely manner so they can put their name in if they want? **E.F. (via e-mail)**

A: No. The Florida Condominium Act provides that, unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. The statute also provides that in the alternative, a board may hold an election to fill the vacancy, in which case the normal election procedures must be followed. Unless otherwise provided in the bylaws, the board member is appointed to fill the vacancy for the unexpired term of the seat being filled. There is no requirement that the board solicit candidates or otherwise notify the members of the vacancy.

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.

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