Attorney Is Necessary To Update Condo Association Documents

Fort Myers The News-Press, January 1, 2012

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

Q: Our condominium association president frequently deflects questions about updating our condominium documents by telling owners that it is a difficult process and expensive to have the attorney do the work. Can you explain the process for changing our documents and whether it requires an attorney to complete the task. **C.D. (via e-mail)**

A: There are a number of issues to consider when changing condominium documents (the declaration of condominium, the articles of incorporation, bylaws, and rules and regulations). Parenthetically, these comments also apply to updating cooperative documents and homeowners' association documents, although the terminology used is slightly different. The governing documents for your association are legal documents, and should be prepared by a licensed attorney.

One of the biggest mistakes I see in this process is associations wanting to "save money" by asking their property to manager prepare amendments, which constitutes the unlicensed practice of law, and could get your manager in trouble. Other associations make the mistake of hiring counsel based solely on price, forgetting the old adage that the cheapest lawyer usually ends up costing you the most money. After all, you can find a form for your Last Will and Testament on the internet, but if you want to make sure your heirs get what you intend, isn't it worth investing in a competent attorney who is familiar with your specific situation to accomplish your goals? The same analogy applies to association documents, which serve as the backbone of your real estate investment.

When tackling an amendment project, it must first be determined what percentage vote is needed to amend the various documents. In some cases, the vote is based on the total number of members. In other cases, the required vote to amend is based on the number of members who actually vote at a meeting where a quorum is established.

In some older condominium documents, and in many documents for homeowners' associations, we see a requirement for "mortgagee consent" which makes the process more difficult and expensive. Changes to the Condominium Act adopted in the last few years have simplified the process somewhat. Unfortunately, the laws for cooperative and homeowners' associations do not contain the same stream-lined procedures for mortgagee consent.

If your amendment threshold is very high (for example seventy-five percent of all members), many associations seek to first amend the amendment threshold. This happens most often in cases where there is a desire to base amendment approval on those who vote, rather than all eligible voters. Of course, you have a "chicken and egg", since you must first obtain the higher vote in order to make the documents easier to amend in the future.

The next consideration is the subject of the desired amendments themselves. Sometimes, associations want to amend their documents to accomplish a result that is inconsistent with applicable law. I see this most frequently with associations who want to charge fees to members that are not authorized by statute. Therefore, an attorney should review the subject of the desired amendment, and assuming the desired objective is lawful, would then draft the appropriate amendment.

There are some clauses in governing documents where an association should simply rely on a competent attorney's recommended format, since there is not much room for individual choices. The section on assessments and collections is a good example of a document clause of this ilk. On the other hand, provisions regarding the allocation of maintenance responsibility between the association and the unit owner, rental restrictions, parking rules and pet policies vary widely from association to association. In other words, there is no "one size fits all" way to address these issues.

The projected cost depends on how extensive the amendments are. It can involve anywhere from an hour or so of attorney's time for a simple amendment, to several thousand dollars if you are completely updating your governing documents. If you speak with an attorney who is familiar with your association's documents (and has perhaps identified problem areas in the documents themselves in the past), you can pin-point whether extensive amendments are in order, or perhaps just a couple of touch-ups here or there. And if you rely on trusted counsel, you may be told that it aint broke, and don't fix it.

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CAI Chapter Confers Annual Awards

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

The South Gulf Coast Chapter of Community Associations Institute recently held its Awards Night and honored the following members and associations.

Chapter Association Board Member of the Year Award was presented to Mr. Duane Hunt of Oaks III Condo Association, Port Charlotte, in recognition of outstanding service to his board and community.

The Volunteer of the Year Award was presented to Tammy LoVecchio, of Gulfshore Insurance, Fort Myers, Naples, and Marco Island.

The chapters Partner of the Year Award was presented to Cindy D'Artagnan, Cindy D'Artagnan, CPA.

The On-Site Manager of the Year Award was awarded to William D. White of Professional Community Services of Naples for displaying a consistently high level of professionalism, diplomacy and work ethic as a qualified communicator of management concepts. When asked his key to success, White gave all the credit to his wife, Cynthia Desmond-White, who is his partner in the business.

The Portfolio Manager of the Year Award was presented to Ms. Verna Lutz of Sandcastle Management, Naples. When I asked her the secret to success, Lutz said: "This is a service business, and not always a glamorous one. It is not for those with big egos. It is really a good fit for people who like to serve. We want our clients to not only be satisfied with our management, but thrilled." Sounds like good advice to me.

The Rose Ann Podvin Memorial Scholarship Award for Community Association Managers was given to Sandra Lewis-Foley of Associa Gulf Coast.

Conference

The Law Firm of Becker & Poliakoff, P.A. will hold its 36th Annual Community Association Leadership Conference on Tuesday, January 24, 2012. The conference is free, and the public is welcome. The event will take place at the Barbara B. Mann Center, 8099 College Parkway, Fort Myers.

Check-in begins at 8:30 a.m. The program starts at 9:00 a.m. and runs to 12:30 p.m. This conference has been approved by the Florida Department of Business and Professional Regulation for two continuing education credit hours (Legal Update) for Community Association Managers. A separate pre-seminar breakfast program, open only to Firm clients, will start at 8:00 a.m., with guest speaker

Ken Wilkinson, the Lee County Property Appraiser.

Attendees at the half-day program will learn about statutory changes made during the 2011 Legislative Session in Tallahassee, and how these changes affect communities and their daily operations. Topics will include board meetings and elections, official record-keeping, hurricane protection, attachment of rents, fines and suspensions, management fees, and fire safety. Also featured will be a panel of attorneys discussing "How to Maintain Smooth Operations at Your Community", which will include rule enforcement issues, followed by a Q&A session.

Please register in advance at www.becker-poliakoff.com/events/ca/ or by e-mailing Franklin Scott at fscott@becker-poliakoff.com .

Q&A

Q: Our condominium association sent out a notice that there are two openings on the board. Three people put in their names, and we just received our ballots. However, there is no indication of where you vote for a specific officer, such as the President. Is this correct? **D.O. (via e-mail)**

A: Yes.

In nearly all cases, and absent a contrary provision in the articles of incorporation or bylaws (which I have only seen in a few instances), the members of the association (called unit owners in condominiums, called unit owners in cooperatives, and called parcel owners in homeowners' associations) elect the "board of directors" often simply referred to as "the board."

The board then elects the board's officers. In most cases, the officers of the board are the president, the vice-president, the secretary, the treasurer, and assistant officers if so appointed. Officers serve at the pleasure of the board and may be removed, with or without cause, by the board at any time and replaced with whomever the board so chooses. Conversely, directors can only be removed from office by vote of the unit/parcel owners.

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Riverwoods Plantation Named Association of Year

Fort Myers The News-Press, January 15, 2012

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

As a follow-up to last week's column, a few more local announcements should be shared.

Riverwoods Plantation RV Resort Condominium Association named best of year: The South Gulfcoast Chapter of CAI recently named Riverwoods Plantation RV Resort Condominium, located in Estero, the "Association of the Year." This award is presented to recognize the best local community association, excelling in all facets of their operation. These associations serve as an example to the industry and encourage educational and professional growth.

I reached out to James Gratton, the Association's President and Rachel Barnell, the Manager. The folks at Riverwoods proudly noted that this is their third award in the past decade or so, and that they have been inducted into CAI's Hall of Fame. When asked the secret to success, Barnell said: "Although our Community is almost thirty years old, our seven-member Board, our management team, and our numerous volunteers continuously strive to improve our grounds and common facilities while maintaining our high standards of excellence. We are honored to be recognized."

Seven Lakes Community Honored with Humanitarian Award: Another local association, also always on the short list for awards, is the Seven Lakes Condominium Community located in South Fort Myers. This year, Seven Lakes received CAI's "Humanitarian Award" which is named after Robert A. White, a well-regarded Community Association Manager from the Fort Myers area who passed away several years ago. Fittingly, Bob was also the General Manager at Seven Lakes for many years.

I contacted the Association and asked for comments from Board President, John Gamble and General Manager, Jim Schneider. Seven Lakes' representatives told me that the Seven Lakes owners give their time, talents, and money for several good causes throughout the year. For example, the Association hosts a golf outing where the proceeds are donated to homeless veterans. The list of charitable initiatives from this Community are too numerous to print and indeed impressive. Fundraisers for Haiti earthquake victims, needy families, blood drives, and purchase of school supplies for underprivileged children are but a few.

Schneider said: "It's one of the awards we have received that we are most proud of, because it shows the true character of our owners." In a day and age when condo associations are usually depicted in media as petty or dysfunctional, it is truly heartening to see condo communities set such an admirable example of community service.

Local Manager Remembered: The local community association management industry lost one of its most respected members with the passing of Richard LaPosta on October 31, 2011.
I had known Dick for some 25 years and had the pleasure of representing a number of associations which Dick's firm, Gulf Shores Community Association Management, also managed.

I recently chatted with Dick's life and business partner, his wife, Diane. When I asked what she thought Dick would like best to be remembered for, she did not hesitate in stating it was his personal pride in every association he managed. Dick was also perhaps somewhat unique in management in that he looked at the homeowners as an integral part of the partnership that is necessary to successfully run a community, not an enemy force to be avoided.

Diane tells me that Dick had a special fondness for the Foxmoor Community located in North Fort Myers, which he had managed for some 20 years. In fact, even when Dick knew that his time was short, he insisted on being driven around the community every day to make sure his standards, and the expectations of his client, were being met.

Dick leaves four children, nine grandchildren, and four great grandchildren, along with Diane. Dick was a good guy and left us too early at age 72.

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Your Association is Likely Able to Stop Owner's Renegade Rentals

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

Q: Our condominium documents state that an owner can rent his condominium for a minimum of 90 consecutive days. This restriction was voted on and passed in 2003. However, there is an owner who rents his unit each year, but the renters only stay for 60 days. It is obvious that the owner is skirting the rules. How can this document be enforced? **C.F. (via e-mail)**

A: Your condominium documents are fairly typical in restricting the minimum term of leases. In addition, many condominium associations also restrict the number of leases per year. Obviously, those associations want to avoid a "hotel-like" atmosphere that might not mesh well with the lifestyle of permanent residents. Your association should only approve leases that meet these requirements.

The subject of lease term and frequency of leases has been prominent in Florida condominium law over the past decade. In 2002, the Florida Supreme Court ruled that lease restrictions could be added to condominium documents by amendment even when owners purchased their units with the expectation of unrestricted leasing. In response, the Florida legislature implemented Section 718.110(13), F.S. in 2004, which provided that any new leasing restrictions are only effective against those unit owners who voted in favor of the leasing restrictions and those unit owners who took title after the leasing restrictions were adopted. That statute was recently clarified to confirm that the grandfathering rule only applies to leasing restrictions concerning the term and frequency of leases. Given that your current restrictions were adopted in 2003, before the statute was amended in 2004, your leasing restrictions apply to all owners in the community. Clearly, any owner in your association who submits a proposed lease must submit a lease for at least a 90 day term. However, there is no requirement that the tenants must actually stay in residence for the entire 90 days. Any tenant is free to leave, or not occupy the unit at all. However, it is also clear that, pursuant to your restrictions, the owner is not able to lease the unit again until the expiration of the 90 days, and I would argue, not entitled to use the unit himself or have any person other than the approved renter occupy the unit. You might want to check your rules or documents on that point, and update them if necessary.

Q: I have a signed purchase agreement on a short sale that was signed in April of 2011. The price had already been approved by the bank so I thought it wouldn't be such a problem and things would go smoothly. To my frustration, the bank had not yet approved the sale and I have been

informed that the property is most likely going to go into foreclosure.

Why would a lender not approve another sale at the same price? Why would they drag it out so long since the price was already approved? Can they change the deal and force it into foreclosure? What, if any, legal stance do I have with the signed agreement? What will happen, or should happen if it does go into foreclosure, do I have first opportunity to purchase the property? **C.B. (via e-mail)**

A: Many people experience frustration dealing with lenders.

Your question seems to say that the lender who holds the mortgage approved your short sale price on a contract that you signed this Spring. Now, about nine months later, you "have another sale", presumably under a new contract to buy the house, at the same price, but the lender no longer seems cooperative.

If the lender approved the first contract in writing, and then held up that sale at the last moment, you might have had a cause of action. In order to have a "legal stance", with some rights against the lender, you would have to show a legal commitment by the lender. That commitment would either have to be by written approval, or perhaps by some less formal action when you detrimentally change your position in reasonable reliance on that less formal action.

There may be terms of the new contract that the lender won't approve, or the lender may have revised internal policies regarding accepting short sales. Many lenders have revisited their policies over the past several years. Some have grown more conservative while others have started to show more latitude.

Everyone has an equal opportunity to buy the property at the foreclosure sale. If you want to tie the property up, you, your attorney, or your real estate agent, must find out whether the lender will work with you, or whether the short sale is no longer available.

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Condominiums Aren't Required to Hire Manager

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

Q: I am the president of a condominium association. We have 40 units and a budget exceeding $140,000.00. The president of another condominium association informed me that every condominium association with 10 or more units or a budget over $100,000 must have a licensed property manager. Is this true? **T.N. (via e-mail)**

A: No. I believe the person you were speaking with may have been confusing the issue of whether a condominium association must employ a community association manager with the issue of whether a community association manager must be licensed if the association chooses to employ a manager.

There is no provision of law that requires a condominium association (or a cooperative or homeowners' association for that matter) to hire a community association manager. A condominium association may manage itself, if it so chooses. However, if the association chooses to retain a community association manager (either an employee or independent contractor/management company), the law provides that the manager or management firm must be licensed. There is a so-called "de minimis exception" when the association or associations to be served by a manager collectively contain less than 10 units or have a budget of less than $100,000.

"Community association management" is defined rather broadly in the Florida Statutes to mean any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

Q: In your remarks about "pets" in a recent column, I believe a comment should have been made regarding the American Disabilities/Service Dogs based on the revision effective March 15th of 2011. **C.S. (via e-mail)**

A: It is important to recognize that there are two different federal laws that impact an association's ability to enforce pet restrictions due to a disability of the unit owner. You have asked specifically about the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against individuals with disabilities in any "place of public accommodation." The law defines a "public accommodation" to include an inn, hotel, motel, or "other place of lodging." There is caselaw from federal courts concluding that a residential apartment or condominium is not a

"public accommodation" and that therefore the ADA does not apply to such facilities. However, recent regulations adopted by the Department of Justice (DOJ) have clarified that the ADA would apply to an apartment or condominium if the facility has the characteristics of a hotel, i.e., stays of 30 days or less, accepts reservations from walk-ups or call-ins, provides linen service, etc. Whether the ADA applies to your condominium will depend on the specific facts. As indicated in your e-mail, the service animal regulations were recently revised, such that for purposes of the ADA, a "service animal" only includes a dog (and a miniature horse under certain conditions) that has been individually trained to do work or perform tasks for a person with a disability. Emotional support animals are not service animals under the ADA.

The law that would more likely be applicable to a situation involving a unit owner in a residential condominium is the Fair Housing Amendments Act of 1988 (FHA), which prohibits discrimination against disabled persons in housing. It is a violation of the FHA for a "housing provider", which includes condominium and homeowner's associations, to refuse to make "reasonable accommodations" in its rules, policies, practices or services, when such accommodation may be necessary to afford a handicapped person an equal opportunity to use and enjoy a dwelling or the common areas associated with the dwelling. Therefore, a handicapped person may be entitled to keep an assistance animal as a reasonable accommodation if the person has a handicap and there is a nexus between the handicap and the assistance that the animal provides.

One factor distinguishing the FHA from the ADA is that under the FHA and its regulations, which are adopted by the Department of Housing and Urban Development (HUD), there is no specific definition of "service animal." Accordingly, the FHA is not limited to dogs. Also, the FHA has been applied to emotional support animals, and whether or not training is required under the FHA depends on the facts.

Both DOJ and HUD have confirmed their respective positions that it is not necessary for an assistance animal under the FHA to qualify as a service animal under the ADA, and vice versa. Because violations of the ADA or FHA can result in substantial liability for an association, the manager, and even individual board members, it is important to consult with qualified counsel when dealing with one of these situations.

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Mandatory HOA Needs Unanimous Support

Fort Myers The News-Press, February 5, 2012

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

Q: I live in a subdivision where membership in the homeowners' association is voluntary. Our deed of restrictions have expired, and the association is now trying to get our owners to approve the creation of a mandatory homeowners' association. Can the owners create a mandatory association and require all owners to be members and pay assessments to maintain the common areas? **D.M. (via e-mail)**

A: Yes, but it won't be easy. Based on cases previously decided by the appellate courts of this state, you cannot require property owners to be members of a mandatory homeowners' association unless all owners approve. Approval of mortgage lenders and other lienholders may also be required.

You state that your deed of restrictions have "expired." If the document has expired on its own terms, then it is basically "dead" and the attorney you retain to work on this project should simply draft a modern set of restrictions, that will be agreeable to one hundred percent of your lot owners, including a provision for membership in the association.

If you determine that unanimous consent is not feasible, you should also have your attorney determine whether the documents may not have really "expired", but rather been "extinguished" by Florida's Marketable Record Title Act. Reviving expired covenants is permitted for non- mandatory homeowner's associations, if the association has the right to enforce the deed restrictions.

Your questions really need to be answered by a competent attorney after reviewing all of the facts and the governing documents for your community. However, it is probable that you will not be able to create a mandatory homeowners' association unless you obtain unanimous approval.

Q: Can an individual be the president of a condominium association board for five consecutive years? Don't they have to change positions after a two-year term? **P.A. (via e-mail)**

A: Your question raises several issues, one being permissible terms of board members, the second being term limits, and thirdly, the difference between directors and officers on the application of these rules. As has been discussed in this column previously, the Florida Condominium Act was amended in 2008 to provide that terms of board members expire at the annual meeting unless two-year staggered terms are voted in. Therefore, if your association's bylaws contain a two-year staggered term provision, then board members for your association serve for two-year terms.

While the director's term may be for only two years, there is no limitation in the Condominium Act which prohibits a sitting board member from running for subsequent terms. In other words, the statute does not, in and of itself, impose "term limits", meaning that directors can seek re-election as many times as they want. There has always been some debate as to whether the bylaws of an association can impose term limits. Without belaboring the somewhat conflicting historical interpretations on this issue, I believe the question was laid to rest by the 2011 amendment to the statutes, and that term limits are now clearly valid, if contained in the bylaws. Please note, however, that term limits apply to how many years a person can serve on the board of directors.

Your question deals with director service as a particular office, here president. There is no provision in the statute, nor in any set of bylaws that I have ever seen, which prohibits boards from electing whoever it so chooses to serve as the board's officers, including president. That said, Florida's Not-For-Profit Corporation Act, Chapter 617 of the Florida Statutes, does permit the bylaws to establish the qualifications of officers. I do not think it would be illegal to state one could not serve in a particular office (e.g., office of the President) for more than so many years, but it certainly would not be a common provision.

The issues concerning term limits and staggered terms is a condominium specific issue. Neither the Cooperative Act, Chapter 719, nor the Homeowners' Association Act, Chapter 720, have analogous provisions which limit the use of staggered or multi-year terms. Further, there is no similar provision in either the Cooperative or Homeowners' Association Act that can be relied on to articulate a justification for supporting term limits.

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Delinquent Accounts Can Be Liable For Interest

Fort Myers The News-Press, February 12, 2012

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

Q: What can be done about a delinquent owner who is ignoring late fees and interest that were put on their account? **E.M. (via e-mail)**

A: When an owner is delinquent in the payment of assessments, both the Florida Condominium Act and the Florida Homeowners' Association Act provide that delinquent assessments bear interest from the date due until paid. Interest accrues at the rate set forth in the declaration, and if the declaration fails to specify an interest rate, it accrues at eighteen percent per annum. Further, if permitted by the declaration or bylaws, the association may also charge an administrative late fee in the amount of twenty-five dollars per installment, or five percent of the delinquent assessment installment, whichever is greater.

Additionally, if the association engages an attorney to send statutorily required notice letters as required by both laws, reasonable attorney's fees and certain costs affiliated with that process also become a liability of the owner.

If an owner pays delinquent assessments, but not the interest, late fees, attorney's fees or costs, the statutes provide that any payment received by the association shall be applied first to interest accrued on the account, then to any administrative late fee, then to costs and reasonable attorney's fees, and then to the delinquent assessment.

Because money received after an account is delinquent is first applied to the aforementioned charges, which is commonly referred to as the "application of payment law", the remaining balance will be considered assessments. Therefore, the remaining balance will continue to accrue interest and is the proper subject of a claim of lien and other customary collection procedures.

Q: A person in my condo building had a reverse mortgage. The individual died a few months ago. The bank will not take the person's name off the deed and is not paying the maintenance fee. Our community sends a bill to the bank every month but they do not pay the fee. Isn't there or shouldn't there be a law that this can't happen? **K.H. (via e-mail)**

A: Reverse mortgages are a bit out of my bailiwick, so I asked my partner, Steven Kushner (who primarily handles real estate transactions) to weigh in. Steve tells me that "reverse mortgages" are different from the usual type of mortgages in a number of ways. Most often, there are monthly disbursements made by the lender to the unit owner/borrower. The borrower usually uses those disbursements to pay living expenses. Each disbursement, however, increases the amount

owed, and therefore decreases the owner's equity in the property. It's the reverse of the normal mortgage, where the owner makes payments to the lender, reducing the loan amount, and thus increasing the equity.

When it comes to condominium assessments, however, the position of the lender in reverse mortgages is no different than other first mortgage holders. Title won't pass to the lender unless there is a foreclosure, or a deed in lieu of foreclosure is given.

In this economy, lenders often delay taking title in order to postpone the onset of their responsibility for paying assessments. This is a huge problem throughout Florida, possibly the biggest issue facing community associations. There is a bill presently pending before the Legislature which would, if passed, provide meaningful relief by speeding up foreclosures, and would also permit associations to take a more active role in the process.

Q: I live in a condominium community with seven separate condominium associations and a master association. One of our unit owners intends to run for the master association board. However, this person is presently serving as a director for one of the individual condominium associations. Is it legal for a unit owner to serve on both boards? **S.R. (via e-mail)**

A: Yes. There is nothing illegal about simultaneous service. I suppose that the bylaws for one (or both) of the associations could prohibit simultaneous service, but I do not recall ever having seen such a provision, and there may be issues as to its legal enforceability.

Serving on both the master and neighborhood association boards can present difficulties, especially when there is some type of conflict between the two associations. In such cases, the director may have a duty to abstain from voting and decline the opportunity to be privy to attorney-client privileged material or other confidential information for either association. It is a decidedly bad idea for a director with conflicting loyalties to "pick a side", since he or she owes two sets of fiduciary duty, as a result of service on both boards. A director who acts in "bad faith" can be held personally liable for monetary damages under current Florida law.

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Remote Participation OK

Fort Myers The News-Press, February 19, 2012

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

Q: Our homeowners' association is wondering if video conferencing is official attendance for a quorum at an annual meeting and if people can vote by video participation. Our board has been voting at their monthly meeting issues via video means and this has not seemed to cause any problems, but we need to know if it is binding for annual meeting votes. **M.C. (via e-mail)**

A: I assume that your directors currently participate in board meetings via one of the popular computer/internet services that allow users to communicate with others by voice, video, and instant messaging over the internet.

The Florida Not For Profit Corporation Act allows directors to participate in board meetings through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting, unless the articles of incorporation or bylaws otherwise provide. Accordingly, provided that the association's articles of incorporation or bylaws do not prohibit participation via telephone or video conference, directors may participate in board meetings in this manner. The association must also make certain that telephone or computer speakers are present at the actual location of the board meeting so that the conversation of those directors attending by telephone may be heard by the directors attending in person, as well as by owners present at the meeting.

With respect to participation in membership meetings, the Florida Not For Profit Corporation Act provides that, if authorized by the board, and subject to such guidelines and procedures as the board may adopt, members and proxyholders who are not physically present at a meeting may, by means of remote communication, participate in the meeting. Additionally, members may be deemed present in person and vote at the meeting if the association implements reasonable means to verify that those so participating are in fact a member or a proxyholder and that the association also adopts reasonable measures to ensure that they are given a reasonable opportunity to participate in the meeting and vote on matters submitted for membership consideration. Accordingly, if the board chooses to so permit, and provided that the appropriate guidelines are followed, both members and proxyholders may attend and/or participate via telephone conference, video means or otherwise provided that such participation is not prohibited by the association's governing documents.

This law applies not only to homeowners' associations, but most cooperative and condominium associations as well.

Q: My condominium association has a difficult time getting a slate of five volunteers to serve on the board of directors each year. We were thinking of going to two year terms, so we would only need to find two or three volunteers each year. When the condominium law was changed several years ago, allowing for only one-year terms for board members, I believe the law allowed the membership to vote to opt out of this provision. Our condominium association never took a vote. Is it true that the membership can opt out of this provision? If so, can a vote be taken at any subsequent annual meeting? **B.W. (via e-mail)**

A: The Florida Condominium Act was amended in 2008 to limit the terms of board members to one-year, subject to the "staggered term exception." The "staggered term exception" provides: "if 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's bylaws authorizing the association to operate with two-year staggered board terms. Secondly, 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 or ratify 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.

If your association has not yet voted on and approved the "opt-in," your board members' terms are limited to one-year. Also remember, as stated above, that the "opt-in" vote is only applicable if your bylaws currently authorize two-year staggered board terms. If your bylaws do not currently contain this provision, the bylaws would also need to be amended.

Regarding your final question about taking the vote at the next annual meeting, the members' resolution approving two-year staggered terms needs to be held at a special members' meeting prior to the annual election, unless you want to wait another year to implement it.

Finally, your board should have the association's attorney prepare the required legal documents. If you have two year terms specified in the bylaws, counsel will need to advise how to legally re-institute the staggering for your board seats, since all of your directors are now only serving one-year terms, and you will need to provide for a phase-in of the staggered seats.

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Documents May Impose Limitations on Proxies

Fort Myers The News-Press, February 26, 2012

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

Q: Is there a limit on the number of proxies a board member can control in a condominium association? **B.K. (via e-mail)**

A: There are no limitations in the statute regarding the number of proxies any person can hold, including designees of the board. However, your governing documents may impose such a limitation. It is not uncommon to find a restriction on the number of proxies an individual can hold in some older documents. The idea of imposing proxy limits was to ensure that no one owner or group of owners could bring in a large number of proxies and control the election of directors or other issues which may be presented for vote to the membership. In fact, for a short time in the 1980's, the Florida Condominium Act provided that no person could hold more than five proxies, and many documents written in this era contain such a limitation.

The condominium law changed some twenty years ago, rendering obsolete the general concerns that would justify such a provision. Condominium elections must now be conducted by secret written ballot and proxies cannot be used to elect directors. Additionally, the law requires use of a "limited proxy" which is essentially an "absentee ballot" in order to vote on most other issues where a vote of the members is required.

Therefore, due to changes in the condominium law, there is no longer a fear that one person can effectively control the operation of an association through proxy solicitation. Notwithstanding the foregoing, an association should still comply with provisions limiting the number of proxies an individual can hold if contained in the governing documents. I would also recommend amending out such a clause.

With respect to homeowners' associations, the law does not require the use of secret ballots when electing directors, nor the use of limited proxies in other matters, so theoretically there might be some benefit in imposing proxy limits. I would personally not favor such a provision, nor do I recall ever having seen one in HOA bylaws.

Q: I live in a condominium. My association only posts "blank" agendas for the board meetings. For example, the agenda will just list "communication…new business…old business…" with no specific information as to what will be discussed. Is it legal to discuss items that aren't on the agenda? **V.J. (via e-mail)**

A: In my opinion, no.

The Florida Condominium Act says that the posted notice of board meetings "must specifically identify all agenda items." To comply with the

intent of the law, it is my opinion that the agenda items must be disclosed with enough specificity so that the unit owners will know what is going to be discussed and/or voted on. This will allow the unit owners the opportunity to decide to attend the meeting should they have sufficient interest in the subject matter.

I do not believe it is proper for an agenda item to be labeled "new business" only. On the other hand, labeling an agenda item as "communications" would probably be sufficient if the intent would be to read letters the board has received from unit owners.

While I am not aware of any legal rulings interpreting this part of the statute, remember that the law specifically states that the board may not consider items not listed on the posted agenda unless it is an "emergency" item (a fairly high legal standard). Even in such cases, a majority of the board plus one must approve taking up the item on an emergency basis. Further, the emergency action must be ratified at the next duly noticed meeting of the board. The fact that the law requires a board to jump through all of these hoops makes it clear, at least to me, that simply posting "old business" and "new business" on an agenda is an insufficient disclosure of "designated agenda items."

Conversely, in the homeowners' association context, there is no requirement in the law that an agenda be posted for board meetings. Curiously, the law was amended last year to allow parcel owners in homeowners' associations to speak with regard to "designated items" at board meetings, but I do not interpret that to mean that an agenda must now be created similar to condominiums. Rather, I think the new law means that parcel owners must be allowed to speak to whatever items the HOA board takes up at its meeting.

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Liability for Pre-Foreclosure Assessment Discussed

Fort Myers The News-Press, March 4, 2012

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

Q: We recently purchased a property out of a mortgage foreclosure case. The association was a party to the lawsuit. When we researched the property, we did not find a lien recorded by the association. Now that we own the property, the association is demanding that we pay past-due assessments that came due before the foreclosure. Are we liable for these charges? **B.S. (e-mail)**

A: It depends, but probably so.

Generally, the foreclosure of a first mortgage extinguishes all inferior interests in the property. Therefore, the purchaser at the foreclosure sale takes title only subject to any superior interest in the property which could not be foreclosed in the lawsuit, such as property taxes. However, if the property is subject to a homeowners' association governed by Chapter 720, or a condominium association governed by Chapter 718, the purchaser at the foreclosure sale is liable by statute for all assessments that were due at the time that title transferred.

The only exception is that a first mortgagee only has to pay the "safe harbor" amount (generally 12 months of unpaid assessments or one percent of the original mortgage debt, whichever is less) when it takes title through its foreclosure. However, the safe harbor protections in the statute do not extend to bidders at a foreclosure sale.

I would also note that in the homeowners' association context, recent case law suggests that the language of the governing documents, the year the community was created, and perhaps the year the mortgage was recorded would all have relevance and may (or may not) change the answer. These are issues that should be discussed with your counsel.

Q: I live in a condominium unit in a complex that wants to switch the condominium to a "55 and over" complex. How can this be done? **J.V. (via e-mail)**

A: There are two main requirements that a condominium association must follow in order to convert to a "55 and over" community.

First, the association must verify through reliable means, as set forth in the law, that at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or over. Secondly, the community must publish and adhere to policies and procedures demonstrating an intent by the association to provide housing for persons 55 years of age or older.

As a first step, I typically recommend that the association conduct a census to establish that at least 80 percent of the occupied units are occupied

by at least one person 55 years of age or over. Legal counsel should be asked to assist with the preparation of the census and provide advice on how the 80 percent threshold is calculated, especially in terms of what qualifies (or does not qualify) as an "occupied" unit, and what type of age verification procedures are required. If the community meets the legally required 80 percent threshold, then the association would need to adopt an amendment to the declaration of condominium establishing the condominium as a "55 and over" community.

The amendment should also be prepared by your association attorney to make sure that it addresses all appropriate issues, including desired minimum age requirements, (if any) for other residents, rules on the 20 percent of the units that are not legally required to be occupied by a person who is at least 55 years of age or older, and how heirs and surviving spouses should be treated.

After the amendment is properly adopted and recorded in the public records, a number of other steps must be taken, including the adoption of census update procedures, various certifications by the board of directors, and registration of the community.

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Owners Have Right to Speak at Board Meetings

Fort Myers The News-Press, March 11, 2012

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. Does the board have to let owners speak at board meetings? **S.R. (via e-mail)**

A: Yes. Prior to the 2011 Legislative Session, HOA members, unlike their condominium counterparts, were not legally entitled to speak at board meetings, with a limited exception for meetings called under a somewhat complicated member petition process.

In 2011, the statute was changed to provide owners with the general right to speak at all HOA board meetings with reference to all "designated items." As mentioned in a recent column in response to a related question, the Florida Homeowners' Act does not require a detailed agenda for HOA board meetings (as is required in the condominium context). My interpretation of the new law is that it entitles members of homeowners' associations to speak at board meetings with reference to any item that the board takes up at that meeting.

The statute does empower the board to adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements.

Q: When I bought my two condominium units, the documents allowed units to be rented. Thereafter, the condominium declaration was amended to prohibit rentals altogether. I did not vote in favor of the amendment. Subsequent to the effective date of the amendment, I sold one unit, but I have also kept one unit. Can I continue to rent the one unit I have kept? **R.J. (via e-mail)**

A: Yes, assuming that the declaration amendments were adopted after October 1, 2004.

The current version of the Florida Condominium Act provides that there are three types of rental amendments which only apply to those who vote in favor of the amendment, or those who take title to a unit after the effective date of the amendment. These are: (1) amendments that prohibit unit owners from renting their units; (2) amendments that alter the duration of the rental term; and (3) amendments which specify or limit the number of times unit owners are entitled to rent their units during a specified period. Such amendments are subject to what I call the "Rental Amendment Grandfathering Law."

The amendment in your case falls into the first category in that it prevents unit owners from renting their units altogether, so it is subject to the Rental Amendment Grandfathering Law, since you did not vote in favor of it. Therefore, as to the unit you still own, and again assuming the amendment vote took place after October 1, 2004 (and further assuming your association does not want to be the

test case challenging the constitutionality of the statute) you may continue to rent your unit. However, the unit that you sold may not be rented if the transfer took place after the effective date of the amendment.

Q: Our homeowners' association recently conducted its annual meeting and election. However, one of the newly elected board members resigned the day after the election. Can the Board now appoint a replacement director? If so, must the person be someone who was on the election ballot? **C.F. (via e-mail)**

A: When a director resigns, the remaining directors (even if less than a quorum) may appoint a replacement director to serve out the remaining unexpired term, unless otherwise provided in the bylaws. The Board may appoint any person to fill the resigning director's position. The person chosen does not need to be someone who was on the election ballot unless your bylaws require that vacancies must be filled with unsuccessful candidates, a clause I have run across once or twice, but which by no means is common.

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Condo Pool May Be Subject to Accessibility Requirements

Fort Myers The News-Press, April 1, 2012

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

Q: We have heard that our condominium association may have to install a lift that enables disabled people to get into and out of the pool. Is this correct? **M.F. (via e-mail)**

A: Maybe. The Americans with Disabilities Act ("ADA") requires that "public accommodations" provide persons with disabilities equal opportunity to enjoy the premises.

In 2010, the Department of Justice ("DOJ") published revised final regulations implementing the ADA ("2010 Standards").

The 2010 Standards required that by March 15, 2012, all existing facilities of public accommodations, including pools, be maintained in operable, working condition, so that persons with disabilities have access to the pool whenever the pool is open to others. The 2010 Standards establish two categories of pools: large pools with more than 300 linear feet of pool wall; and smaller pools with less than 300 linear feet of wall. Large pools must have two accessible means of entry. Small pools are only required to have one accessible means of entry, provided that it is either a pool lift or a sloped entry.

A facility is subject to ADA if it is a place of "public accommodation." Pools at places of pubic accommodation must be retrofitted when it becomes "readily achievable" to do so. "Readily achievable" is accomplishable and able to be carried out without much difficulty or expense. The 2010 Standards seem to imply that installing a lift or ramp is "readily achievable" for just about any facility, given the relatively low cost of the equipment.

On March 20, 2012, the DOJ issued a ruling extending the date for compliance with pool accessibility requirements by sixty days.

The application of ADA to a particular condominium, cooperative, or homeowner's association, is a matter that should be individually and specifically discussed with the association's legal counsel, and is simply not suitable for determination through a general newspaper column. In general, residential condominiums, cooperatives and subdivisions are not subject to ADA. However, a condominium, cooperative or subdivision which permits short-term stays and/or has the operational characteristics of a hotel, motel, or inn would be subject to the ADA.

A pool at a condominium, cooperative or subdivision could also become subject to the ADA if people other than residents and guests are permitted to use the pool, such as by hosting water aerobic classes, or swim team competitions.

Q: What right do condominium association officers, directors or management company employees have regarding access to my unit? I am specifically concerned about entry when I am in residence. **P.K. (via e-mail)**

A: The Florida Condominium Act provides that the condominium association has the right of access to the units during reasonable hours so that the association may execute its maintenance responsibility. The law specifically states that the association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.

Typically, if the access is necessary for routine maintenance, meaning a non-emergency, the association should take reasonable steps to give all unit owners notice of when and why they will be entering the unit. However, advance notice is not specifically required by the Condominium Act.

Many associations require, either through their declaration of condominium or rules, that owners provide the association with a key to their unit so that the association has a means of access to the unit so that it can exercise its access right discussed above. If an association has a policy requiring owners provide a key to the association, the association should also adopt policies regarding how those keys are secured and how access to the units is effectuated so as to protect the association and the unit owners from the potential of improper access.

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Association Should Consult Attorney About Foreclosure

Fort Myers The News-Press, April 8, 2012

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

Q: About two years ago, an owner in our condominium moved out, handed the keys back to the bank, and stopped paying the mortgages and our association maintenance fees. There is a $417,000 first mortgage and a $55,450 second mortgage on the abandoned unit. It is currently assessed for only $227,000. The bank had filed a foreclosure action, but in April 2011 the court dismissed it "without prejudice." We are told that means that the bank can refile, but we don't know when or if that will happen. Tax payments are current, so we assume that the bank has been paying the taxes. Our association put a lien on the property for unpaid maintenance fees (over $15,000), and understands from reading your column that we could file a foreclosure lawsuit and possibly take title to the unit and rent it out. However, given the unknown timeframe for the bank's foreclosure on the mortgage, this doesn't seem a viable option. What do you think? **R.F. (via e-mail)**

A: Unfortunately for associations, especially in Lee County, this situation is all too common, even some five years after the "crash" of the real estate market. There are no "quick fix" or "magic bullet" options, though a cottage industry of those who promise otherwise has predictably taken hold. The most likely result of a lien foreclosure action is the association will take title to the unit. As the record title holder, the association will have the right to rent out the unit, subject of course to the terms of your condominium documents as to minimum lease term, etc.

However, you correctly note that without knowing when the bank might refile a foreclosure action, the association is left in the predicament of balancing whether taking on the costs of prosecuting the foreclosure action, and possibly making the unit suitable for rental, will in the long run be financially worth while.

If the association takes title the unit, it can also market and attempt to negotiate a short sale with the bank. The association should be aware that this can be a long and cumbersome process. Most banks will still require the prior unit owner to participate in some form in the short sale process. Many banks' bureaucratic nature seemingly does not permit them to make the best or most expeditious business decisions.

Another option for the association if it takes title to the unit, is to tender a deed in lieu of foreclosure to the bank. The bank is not obligated to accept a deed in lieu of foreclosure, and dealing with the bank in this regard is also often fraught with the

same bureaucratic road blocks as a short sale. Nevertheless, this can get the ball rolling toward a direction where the bank refiles a foreclosure, hopefully bringing an end in sight. Tendering a deed in lieu of foreclosure can especially be a viable option if the bank's case was dismissed because it had problems proving it was in fact the entity entitled to foreclose the mortgage.

Many times, local community banks are far more responsive to either a short sale or the tender of a deed in lieu of foreclosure than large national banks.

Finally, after the association has taken title and under certain circumstances, the association may also consider filing a quiet title action (a second lawsuit following the lien foreclosure case) against the bank to remove the mortgage as an encumbrance against the property. This final option, generally treated as a measure of last resort, is only viable in fairly limited circumstances, and may present title insurance complications.

The association should consult with its attorney to understand the options available and attempt to choose the best one.

Q: I am the treasurer of a small condominium association. Our board is considering switching to "pooled" reserves. You wrote an article in 2009 stating that if the funds that are currently held in "straight-line" accounts are going to be put into the "pool", then majority approval of the unit owners is required. We intend to request formal owner approval for switching to pooled reserves, but we are uncertain about Florida law regarding such change. We have been advised by our management company that approval by as many as seventy-five percent of the owners may be required. However, your article from 2009 states otherwise. Is it still your opinion that only majority approval of the unit owners is required? **R.N. (via e-mail)**

A: The law has not changed since my article from 2009. If the association has been fully funding statutory reserves on the straight-line method, in order to switch over to pooled reserves, a unit owner vote is not required. However, in order to move existing straight-line reserve funds into the pool, an owner vote is required. The reason a vote of the owners is required to move existing reserves into the pool is because Florida law requires a vote of the owners whenever reserves are used for "non-scheduled purposes." Moving existing reserves into the pool would allow those reserves to be used for any items in the pool, rather than just the component that the reserve was originally intended to fund.

By statute as routinely interpreted, the vote required is a majority of the owners present, in person or by proxy, and voting at a meeting, not a majority of the total voting interests. Also, you should check your governing documents to make sure that there is no higher threshold required. If a higher vote of the owners is required for using reserves for non-scheduled purposes, then you should follow the higher vote threshold in your documents. There are also certain reserve schedules/disclosures that the owners must be provided prior to the vote. This should be discussed with your legal counsel, not your management company. Too many associations pressure their managers with interpreting the law, which is a bad idea from so many angles (not the least of which is that the Unlicensed Practice of Law in Florida is a felony).

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Driveway Repairs Costly

Fort Myers The News-Press, April 15, 2012

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

Q: Our condominium association is small, just thirteen units. Two of the units are abandoned and extremely delinquent on fees. A third unit is occupied but also delinquent on fees. This particular unit owner has reported a code violation for our driveway to the city. Preliminary estimates are for $22,000 to re-pave the driveway. Many of our personal budgets are tight. Some of us are upset that an owner refusing to pay maintenance fees is causing us an assessment. Can the board make a rule that says if any single or group of owners is directly responsible for an assessment, they need to pay it before the other owners are assessed? **K.J. (via e-mail)**

A: Unit owners are responsible to pay for their respective share of the common expenses, which are funded through assessments. Depending on the language contained in the condominium documents, a condominium association may also have the ability to charge a single unit owner for certain expenses. For example, many condominium documents contain a provision which says that the association can perform certain maintenance or repairs if the owner fails to do so, and require the unit owner to reimburse the association. Pursuant to recent case law, it is reasonably clear that such "individual assessments", even if secured by a right of lien are valid, if properly authorized in the condominium documents.

Under the facts you have presented, it would not be legally proper to require the complaining unit owner to pay for the entire repaving expense. The fact that this unit owner reported the code violation to the city has no impact on the association's duty to repave the driveway and pay for any related expense. In fact, one does not typically even need to be a property owner to report a suspected code violation. Further, although not clearly applicable here, Florida condominium law contains a prohibition against "SLAPP Suits", which is an acronym for "Strategic Lawsuits Against Public Participation." If this law applied, your complaining owner could claim treble damages, which would certainly add insult to injury.

Q: I have a question about who can serve on the board of directors of a condominium association. Our association's bylaws specify that directors must be "members" of the association. The bylaws also specify that only owners of units are members. In our association, we have a number of units that are titled in only one spouse's name or in a trust. Therefore, it appears to me that the other spouse in those situations is not eligible to be elected to the board. Assuming my conclusion is right, can we amend the bylaws to allow spouses of owners/members to become directors, or is this a Florida law requirement? Thanks. **B.D. (via e-mail)**

A: The Florida Not-For-Profit Corporation Act simply states that directors of corporations must be natural persons at least eighteen years of age or older. They need not be residents of this state nor members of the corporation. The statute further provides that the articles or bylaws may prescribe additional qualifications for directors.

With respects to units owned in trust, Section 617.0802(2) of the non-profit statute provides that if eligibility to serve as a member of the board of directors of a condominium association is restricted to membership in the association, the "grantor" of a trust, or any "beneficiary" of a trust which owns a unit, shall be deemed a "member" of the association and eligible to serve as a director of the association. However, to be eligible, a beneficiary must occupy the unit. In other words, when a unit is owned in trust, either the grantor or beneficiary of the trust is eligible to run for the board, so long as the beneficiary resides in the unit.

The Florida Condominium Act says that "any unit owner or other eligible person" may be a candidate for the board of directors. The law goes on to say that a person is not eligible for board membership if the person has been suspended or removed from the board by the State, is delinquent in the payment of monetary obligations to the association, or has been convicted of a felony, unless his civil rights have been restored for at least five years as of the date such person seeks election to the board.

Therefore, so long as a person is at least eighteen years old and not disqualified by the three eligibility criteria in the Florida Condominium Act, the person is eligible to run for the board, 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 to run.

You have advised that your bylaws do restrict board eligibility to "members" of the association, and that only unit owners are "members." Therefore, in answer to your question, for units owned in the name of one spouse, but not the other, only the spouse on the deed would be eligible for the board. With respect to a unit owned in trust, the statute mandates that either the grantor or a beneficiary that resides in the unit would be eligible for the board. Essentially, the law provides broader eligibility in trust situations than where title is held by an individual spouse.

Limiting board eligibility to members is not required by law, and therefore the association could amend the bylaws to expand board eligibility to non-members, including spouses of members, if desired. My personal drafting practice, which I have found is acceptable to most associations, is to permit the spouse of a member to serve on the board. Married couples often choose to title the unit in one spouse's name for estate or tax planning reasons, but both consider themselves beneficial "owners" as would be the case in a trust.

Also keep in mind that co-owners of a unit cannot simultaneously serve on the board, with certain exceptions for when a full board cannot otherwise be seated.

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Condo Board Has Control of Meeting Minutes

Fort Myers The News-Press, April 22, 2012

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

Q: Our condominium association board omits details in the meeting minutes that are published to the owners. For example, the board has refused to include the dates, amounts and scope of the contracts they approve. What does Florida law require the board to disclose? What rights do individual owners have to require that this information be published? **R.B. (via e-mail)**

A: The purpose of meeting minutes is to record what was done, not what was said. If detailed findings of fact are appropriate, which is sometimes the case when a board action may be subject to later legal examination, those findings should be recited in a separate resolution of the board. A typical set of board minutes should be two or three pages in length. The minutes should reflect: (1) the date, time, and place at which the meeting was called to order; (2) the name of the presiding officer; (3) the establishment of a quorum, with attendees listed by name; (4) proof of proper notice for the meeting; (5) disposal of unapproved minutes from previous board meetings; (6) a summary of reports given to the board and a statement by whom the reports were given (a one or two sentence summary is typically sufficient); (7) summary of disposition of unfinished business; (8) votes or action taken with respect to new business; and (9) adjournment.

Whenever an item is put to a vote, the person making the motion for approval of the item should be identified in the minutes, and also the name of the person who seconds the motion. The exact wording of the motion should also be included in the minutes, or if there is a resolution, the resolution can be incorporated into the minutes by reference. The points raised in debate are typically not included in the minutes. The vote of every director must be recorded in the minutes.

The condominium law (as well as the law governing homeowners' associations) requires minutes of board minutes to be kept for seven years, as part of the official records of the association. In my opinion, minutes should be kept perpetually (from the beginning of the association) and are one of the few documents that an association should keep in its files for as long as the association is in existence.

With regard to your question about the contract, it is my opinion that the terms of the contract do not have to be included in the meeting minutes. You are able to obtain a copy of the contract if you wish.

In response to your last question, it is my opinion that individual unit owners have no rights to dictate the content of board minutes, this is solely the province of the board of directors. For example, I

have often seen situations where a member sends a letter to the board and demands that it be "included with the minutes." There is no obligation to do so, and it is usually not a good idea to do so.

Q: Notice of our condominium association board meetings is posted 48 hours in advance, along with an agenda. Additionally, all board members receive a "board information packet" 72 hours before each meeting. The packets contain printed backup material regarding all agenda items that are to be considered. Are these "board information packets" available on request of owners, prior to the board meeting, so that everyone may be conversant with agenda items? **E.F. (via e-mail)**

A: The "board information packet" that you describe would be considered an "official record" of the association. As such, it would be available for inspection by any unit owner upon written request. However, the association would have five working days from the date of a request to make the packet available, and would become subject to penalties for noncompliance with the statute after ten working days.

Accordingly, there is no legal obligation on the part of the association to produce the board packet for owners on a day's notice, although it would not violate the law to do so.

Q: I was reviewing one of your past articles ("By Vote of Owners, Audit Rule Can Be Waived Down", August 22, 2010). The article dealt with waiver of condominium association audits. My question is whether the same rules apply to homeowners' associations? **L.J. (via e-mail)**

A: Yes. As in the case of condominiums, members of a Florida homeowners' association can "waive down" to a lower level of year-end financial report where an audit is required (annual receipts in excess of $400,000.00). Lower level financial reports include a review, a compilation, or a cash statement of receipts and expenditures ("cash report"). The owners can vote to "waive down" to the lowest level report (cash report) and there is nothing in the law that says you can only "waive down" one level.

However, the association is obligated to provide some level of year-end financial report. That requirement cannot be waived.

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Owner Responsible for Doors

Fort Myers The News-Press, April 29, 2012

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

Q: I recently attended a condominium education seminar, where an insurance expert stated that if the condominium association insures a part of the condominium property, the association must also maintain, repair, and replace that portion of the property. We have a situation where an owner is claiming that the original hardware (handles, latches, etc.) on interior doors within their unit must be replaced by the association. The latches on the doors have broken due to normal wear and tear. Is the association responsible for the cost of the door hardware? **V.H. (via e-mail)**

A: Probably not.

In almost every declaration of condominium I have reviewed, interior unit doors and their hardware are classified as part of the "unit" and are the maintenance, repair, and replacement responsibility of the unit owner. The confusion may exist because under Florida law, the association must insure certain portions of the unit even though it has no general maintenance, repair, or replacement responsibility with respect to those items. Interior doors and the hardware for those doors is a good example. These must be insured by the association against property damage.

Under the so-called "Plaza East Rule", which was codified by the Florida Legislature in 2008, if there are insufficient insurance proceeds to pay for property damage, the association must assess all unit owners for the repair cost as a common expense, unless the association has affirmatively "opted out" of the Plaza East Rule by membership vote.

As applied to your situation, let us assume that a fire were to have damaged the unit. In this case, the interior doors and their hardware are insured by the association, and the association would be responsible for their cost of replacement, to the extent not covered by insurance.

However, the same result does not apply in situations where the item needs to be replaced simply due to normal wear and tear. This is the unit owner's responsibility, absent some unusual provision in your declaration of condominium to the contrary.

Q: I own a condominium unit. My assessments have always been paid on time. My association is telling me that when I rent out my unit I forfeit my right to use the amenities. I also own a deeded boat slip at the condominium for which I also pay my assessments. I have read one of your articles from 2009 where you stated that the Florida Condominium Act does not permit an association to suspend the use rights of a unit owner or tenant for any reason, and that the common elements,

common areas, and recreational facilities shall be available to all owners, tenants and their invited guests for the intended use. Has this changed? Thank you. **A.K. (via e-mail)**

A: While the law has changed since my 2009 article, it has not changed in a way that affects the answer to your inquiry. The current version of the statute does authorize an association to suspend certain common area use rights for the delinquency of any monetary obligation of more than 90 days.

Because you are current in your monetary obligations to the association, the suspension provision of the statute does not apply to your question. Instead, your question concerns what is commonly referred to as "dual usage", which is the simultaneous use of the common elements by a tenant who is renting a unit and by the owner of the unit at the same time.

Dual usage is addressed in Section 718.106(4) of the Florida Condominium Act, which provides that when there is a tenant in a unit, the tenant has all of the use rights in the association property and the common elements that are otherwise "readily available for use generally" by unit owners, and that the unit owner shall not have such rights except as a guest, unless such rights are waived in writing by the tenant. The statute goes on to say that associations may adopt rules to prohibit dual usage by a unit owner and a tenant of association property and common elements otherwise readily available for use generally by unit owners.

With respect to your boat slip, it is likely that the boat slip is a "limited common element" appurtenant to your unit. As such, it is probably not considered a common element that is "readily available for use generally" by unit owners. There is at least one arbitration decision which concludes that an association's dual usage rules that prohibit the owner from using a limited common element boat slip, even if the tenant has waived the right to use the boat slip, are invalid. However, the association could possibly prohibit you from parking to use your boat slip, depending on the characterization of parking rights in the declaration of condominium.

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Condo Act is Vague About Making Records Available

Fort Myers The News-Press, May 6, 2012

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

Q: In a recent column, you wrote that an "official record" had to be made available within 5 working days from the date of receipt of a request. Doesn't the association have 10 business days to comply with a written request for documents? **V.G. (via e-mail)**

A: This is one of the sections of the Florida Condominium Act that is written rather vaguely. Section 718.111(12)(b) states that the official records of a condominium association shall be made available to a unit owner "within 5 working days after receipt of a written request by the board or its designee."

However, Section 718.111(12)(c) states that the failure of an association to provide the records within 10 working days after receipt of a request "creates a rebuttable presumption that the association willfully failed to comply with" the law.

I have never really understood the reason for the dichotomy. The law clearly requires the records be made available within 5 working days, but it appears to me that there is no penalty for the association so long as it provides the records within 10 working days.

Conversely, Section 720.303(5) of the Florida Homeowners' Association Act currently provides that a homeowners' association has 10 business days in which to make official records available for inspection by a member.

Q: Our condominium association has a five member board. Only five people ran for the board, so they are automatically elected. However, some members of the board are calling owners and asking them not to send in their proxies in hopes that there will be no quorum present for the annual meeting. What effect, if any, would this have on the election? **C.T. (via e-mail)**

A: It sounds like you have a dysfunctional association. If the "old board" did not want the "new board" to be elected, the members of the "old board" should have stood for election. I do not believe that the current board can abuse its fiduciary power by trying to scuttle the annual meeting in the hopes of not seating the new board.

Interestingly, the Florida Condominium Act does say that if there are only as many (or fewer) pre-qualified candidates as there are open board seats, no election is required. The law goes on to state that the new board is seated "immediately upon the adjournment of the annual meeting." I guess that your current board's theory is that if there is no annual meeting, there is nothing to adjourn, and the new board cannot be seated.

While this is certainly an interesting argument, I do not believe it is consistent with the intent of the law. A meeting can be called to order without verifying a quorum. In fact, once a meeting is called to order, the next item of business is verification of the quorum.

According to Robert's Rules of Order (11th ed.), it is the duty of the presiding officer, after calling the meeting to order, to determine whether a quorum is present. If a quorum cannot be obtained, the chair calls the meeting to order, announces the absence of a quorum, and entertains a motion to adjourn or one of the other motions permissible by the rule.

Therefore, under what is routinely considered the most common rule of procedure, it is clear that a meeting can be "adjourned" without the establishment of a quorum. It is my opinion that the current board has the duty to call the annual meeting to order, whether or not a quorum shows up. If there is a quorum, the regular business of the annual members' meeting should proceed. If not, the new board takes office immediately.

Q: Some unit owners in our fifteen unit condominium want to add a heater to our swimming pool, which has never been heated. Our condominium declaration does not address "material alterations or substantial additions." Is a vote required and what is the percentage? **W.M. (via e-mail)**

A: According to a Declaratory Statement issued by the Division of Florida Condominiums, Timeshares and Mobile Homes in January 1997, the addition of a pool heater is a "material alteration or substantial addition" to the common elements. See In Re: Petition For Declaratory Statement, Alfred and Mary Venclick, Unit Owners, Schooner Bay Condominium, Docket Number DS96444.

While Declaratory Statements are not "the law" in the same manner as reported appellate court cases, they are considered to have at least some persuasive impact. I agree with the reasoning of the Declaratory Statement and believe that the pool heater would be considered a "material alteration or substantial addition."

As such, and assuming that your declaration of condominium is silent with respect to material alterations or substantial additions, and assuming that you have verified that the current version of the condominium statute is applicable to your situation, you would need approval of 75% of all voting interests (there is typically one voting interest per unit) to authorize installation of the pool heater.

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Fidelity Bond Covers Theft of Association Funds

Fort Myers The News-Press, May 13, 2012

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

Q: I am a real estate agent. One of the question that seems to come up all of the time these days, especially from the mortgage lenders, is whether the association has adequate "fidelity bond" coverage. Can you explain what this means and what the legal requirements are? **A.T. (via e-mail)**

A: Fidelity bonding is basically an insurance policy that provides protection against theft of association funds. It is sometimes also referred to as employee dishonesty coverage or crime coverage.

As far as the legal requirements, Section 718.111(11)(h) of the Florida Condominium Act requires fidelity bonding covering the officers of the association, and any other person who has the authority to control or disburse the funds of the association. The minimum amount of required bond is the maximum amount of funds that could ever be stolen from the association.

Therefore, the association must take fluctuations in its cash position into account when purchasing coverage. Also, provision must be made for large spikes in the association's account balances, such as when a special assessment has been levied, or an insurance settlement received.

Curiously, the Florida Homeowners' Association Act does not impose fidelity bonding requirements, and in fact generally avoids insurance issues altogether. In my opinion, and setting aside any obligations placed on the association through its bylaws, it is the fiduciary duty of the HOA board to ensure that fidelity bonding is in place. The standards set forth in the condominium statute in terms of required coverage provide a good yardstick for homeowners' associations as well.

Although I have no hard statistics to point to, it is my observation that there seems to be an uptick in theft against associations, perhaps due to the economy. I know from personal experience that these incidents are often devastating to an association. Not only is there the legal wrangling that always follows, the sense of betrayal when a trusted person violates that trust does not spare associations.

There are several important risk management considerations for boards that should be discussed with the association's insurance and legal advisors. The potential problem areas where you might face potential denial of coverage after a theft loss are many. Some can be protected against easily, some not so easily.

Amongst the most troublesome issues is when the source of theft is an employee of a management

company who is not generally authorized to control or disburse funds of an association, but figures out how to steal their money anyway. In cases like this, I have seen the association's insurer resists coverage on the basis that the person who stole the money is not covered by the association's bond. The management company's bonding company may also claim that they only insure the funds of the management company, not third parties.

Examples of other areas where coverage problems are sometimes encountered include when a third party is the guilty party (for example, a contractor runs off with your deposit), claims of misrepresentation in the bond application process, and computer theft or fraud.

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New Florida Law Was Not Necessary

Fort Myers The News-Press, May 20, 2012

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

As you may have already heard, one of the bills passed by the Florida Legislature during the 2012 Legislative Session will impact community associations by eliminating implied warranties in common areas such as roadways, underground pipes, and utilities. Common law implied warranties mean that the common areas are fit for their intended purpose.

Despite strong lobbying efforts against the bill, House Bill 1013 passed by fairly large margins in both the House and the Senate. The legislation was signed by Governor Scott earlier this month. When Governor Scott signed HB 1013 into law, he stated that homeowners' associations will continue to have legal remedies because they will be able to sue for violations of the building code, negligence, and breach of contract. However, the fact is that those causes of action do not have the same chances of success as does an implied warranty cause of action. The Governor also stated that the law was necessary to prevent an increase in the price of new homes. There is no evidence of this and it simply ignores the fact that condominiums in Florida have had statutory warranties for thirty-five years and there is no evidence that such warranties have deterred or even slowed down real estate development.

So where do we go from here? First, the law itself may be considered to be unconstitutional, as it applies retroactively to all past, pending, and future cases. However, setting aside the constitutional issues, there is expected to be an effort to have statutory warranties added to the Florida HOA Act to cover the common areas. Interestingly, this issue was actually debated about ten years ago when I was a member of the HOA Task Force which was formed at the direction of Governor Jeb Bush. The Task Force, which included a number of "pro-developer" members, recommended statutory common area warranties and approved specific common area warranties language to be added to the HOA Act. It may now be time to resurrect that language and get it adopted by the Legislature and Governor. This is an issue that not only impacts community associations but it also will have a direct impact on cities and counties that take over responsibility for the infrastructure of new communities.

The passage of HB 1013 further shows how important it is for members of common interest communities to be involved in the legislative process and to share their concerns with the members of their legislative delegation.

Q: In a recent column you mentioned that under Florida law, the association must insure certain portions of the unit even though it has no general maintenance, repair, or replacement responsibility with respect to those items. You

mentioned interior doors and hardware doors as a good example of items that the association must insure. What other portions of the "unit" must the association insure for property damage? Can you give me a statute to reference? **J.L. (via e-mail)**

A: The relevant statute is Section 718.111(11)(f), Florida Statutes. Basically, the association must insure all portions of the condominium property as originally installed or replacement of like kind and quality, and certain approved alterations or additions. The statute specifically excludes certain property such as floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, kitchen cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit. Therefore, if an item is part of the unit, but it is not specifically mentioned as an item excluded from the association's insurance responsibility, then it must be included in the association's insurance policy. For example, interior unit drywall is not listed as an excluded item, and therefore, it is the association's insurance responsibility. However, paint and wallpaper on the drywall are not the association's responsibility as those items are specifically mentioned as being excluded.

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Director May Leave HOA By Giving Written Notice

Fort Myers The News-Press, May 27, 2012

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

Q: What are the legal requirements for a resignation from the board of directors of a homeowners' association? **J.B. (via e-mail)**

A: The issue of board member resignations is not specifically addressed in the Florida Homeowners' Association (HOA) Act. However, most homeowners' associations are not for profit corporations, and are also governed by Chapter 617, the Florida Not-For-Profit Corporation Act. Chapter 617 provides that a director may resign at any time by delivering written notice to the corporation or the board of directors or its chair. A resignation is effective when the notice is delivered unless the notice specifies a later effective date. If the resignation is made effective at a later date, the board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date. Given that Chapter 617 requires that the notice be in writing, there are sometimes disputes over whether a verbal resignation is sufficient. In an arbitration case decided by the Division of Florida Condominiums, Timeshares and Mobile Homes, an arbitrator determined that an oral resignation, on the record at a duly noticed meeting, was a valid resignation under Chapter 617. Keep in mind that most HOA disputes are not heard by the Division's arbitration section. However, the arbitration decisions sometimes provide a good explanation of the legal issues and an indication of how similar matters may be resolved by courts in the future.

Q: Can a condominium board member who was appointed by the board of directors be removed by the board of directors? **A.B. (via e-mail)**

A: No. A board member may only be removed by a vote of the owners pursuant to the recall provisions of the Florida Condominium Act. The Florida Condominium Act provides that any member of the board may be recalled or removed from office with or without cause by a vote or agreement in writing by a majority of the voting interests. The Division of Florida Condominiums, Timeshares and Mobile Homes has adopted a number of procedural rules that must be followed in order to effectively recall a board member.

If the recall is by written agreement, a copy of the written agreement must be served on the association by certified mail or by personal service. The board must then duly notice and hold a meeting of the board within five full business days after receipt of the agreement. A board member may also be recalled at a special meeting. In that case, a special meeting may be called by ten percent of the voting interests. If the recall is done at a special meeting, the board must duly notice and hold a board meeting within five full business

days of the adjournment of the unit owner meeting. At the board meeting, the board must either certify the recall or file a petition for recall arbitration with the Division.

Regardless of whether a director is recalled by a vote or written agreement, if the board determines to certify the recall, the recall is effective immediately. The recalled director has five days from the date of certification to turn over any and all records and property of the association in his or her possession to the board.

The board of directors does have the authority to remove a director from an officer position. The board of directors generally has the power to appoint officers, and therefore can also remove the board member from the office which he or she serves. After removal from office, the board member will continue to serve on the board, but simply as a "director." For example, if the board member was appointed to serve as treasurer, a majority of the board can vote to remove the director from the office of treasurer and appoint another person to fill the position. The old treasurer would still be a director and continue to serve the remainder of his or her term on the board, but would no longer hold the office of treasurer.

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Use of Common Elements Can Be Denied

Fort Myers The News-Press, June 3, 2012

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

Q: Recently, our condominium board of directors claimed we were late on paying our quarterly fees, and stated that the association's records did not show receiving payment. Although we pay on time or early each and every quarter, we are constantly told that the association did not receive our payment. In order to resolve the issue, we resubmitted a new check which cleared within days. Several months later, the board held a meeting and suspended our use rights in the common elements based on our "historical delinquency." Under what circumstances could this be considered legal or reasonable? **P.S. (via e-mail)**

A: The Florida Condominium Act specifically states that if a unit owner is more than ninety days delinquent in paying a monetary obligation due to the association, the association can suspend the right of the unit owner or the unit owner's occupant, licensee, or invitee to use the common elements, common facilities, or any other association property until the monetary obligation is paid in full. The suspension may not be applied 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.

Therefore, if you are paid in full, the board does not have the right to suspend your right to use the common elements. Note that the Condominium Act uses the phrase "monetary obligation due to the association." Therefore, if the association imposed late fees or interest, and those remain unpaid, then the suspension can remain until those obligations are paid in full. However, once an owner is paid in full, including any outstanding late fees and interest, the board would not have the authority to retroactively suspend or suspend based on historical delinquency.

Q: The board of directors in my condominium has approved and collected a special assessment for repairs on my building based on a contractor's proposal. The proposal includes an additional ten percent of the total amount for potential unforeseen repairs. Three days after commencing work on the building, the contractor has stated that the amount of the repairs will increase substantially, presumably above the ten percent allocated for potential unforeseen repairs. Can the board of directors impose these additional expenses on the owners since it was not part of the original proposal? Does the board need to obtain a vote of the owners to approve the additional expenses? **R.P. (via e-mail)**

A: A well drafted construction contract will specifically describe the scope of the work and the price and will require any changes to be agreed to in writing by the parties. It is important that the

contract be prepared or, at the very least, reviewed by the association's attorney to ensure that the association is protected. Specifically, the contract should provide that any changes to the scope of work and the costs associated with those changes must be approved by the association and its design consultant, usually an architect or engineer. Assuming that the board of directors, in conjunction with its design consultant, determines that the unforeseen repairs are necessary, the board can approve the additional repairs and the additional expenses without a vote of the owners. It is not necessary for the owners to vote on the additional special assessment, unless the condominium documents require a vote of the owners for special assessments. Assuming the board of directors has the authority to levy special assessments without membership approval, the board can increase the amount of the assessments, but it will need to hold another board meeting to approve the additional special assessment. The board meeting notice must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least fourteen days before the meeting. The notice of the board meeting must specifically state that assessments will be considered and the nature, estimated cost, and description of the purposes for such assessments.

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Relative Moves Into Condominium Due to Illness

Fort Myers The News-Press, June 10, 2012

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

Q: I own a three-bedroom condominium unit and have two designated parking spaces noted on the declaration of condominium. I recently had a relative move in with me because of illness. Can the board deny me an additional parking decal for my relative's car because she did not go through the condominium interview to live in the unit? **S.N. (via e-mail)**

A: Your question raises two issues. The first is whether an association can require a new resident to be interviewed and approved by the board prior to moving into a unit. Typically, the condominium documents will address the authority of the board to approve tenants and new owners. Many condominium documents however do not specifically address whether the association has the right to approve a new occupant, such as a family member, who is not a tenant. There are arbitration decisions from the Division of Florida Condominiums, Timeshares and Mobile Homes, that have distinguished a family member from a tenant. If the person moving into the unit will be considered a part of the owner's "family," whether the board has the authority to approve and interview a proposed new resident will depend on the language of the condominium documents. Some condominium documents will require association approval for any new resident, regardless of whether the person is considered part of the owner's family or a tenant. Therefore, whether or not the association has a right to approve your relative who has moved in due to illness depends on the specific language of your condominium documents.

The second issue is whether the association can give you only one decal for parking even though you have two designated parking spaces. I assume that the parking spaces are considered limited common elements and the condominium documents entitle you to park a vehicle in each space. Regardless of whether you have one car or two cars or whether your relative has been approved or not, my opinion is that you would be entitled to a second decal unless the condominium documents limit the use of the parking space to vehicles of approved residents.

Q: My condominium association has amended the declaration to state that owners may rent their units only if the rental is for a minimum of twelve months, and that if the tenants leave before the end of the twelve months, the owners of the unit may not rent the unit until end of the original twelve months. Is this legal and/or enforceable? **R.D. (via e-mail)**

A: The issue of whether an association can change the minimal rental term has been debated for many years. There was a case from about ten years ago that decided that the right to lease was a substantial

property right and that an association could not change the right to lease through an amendment to the declaration. However, the Florida Supreme Court reversed that decision and determined that because a declaration of condominium can be amended, and because owners bought into the condominium knowing that the declaration could be amended, a declaration amendment changing the minimum rental term was valid. After the Florida Supreme Court decision, there was a change to the condominium statute which now states that an amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during the specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

Therefore, if the new restriction was passed as an amendment to the declaration, then the new restriction is valid except that it can only be applied to new owners or owners that voted in favor of the amendment. Therefore, if you are a current owner and did not vote in favor of the amendment, the amendment is not effective as to you. Otherwise, it would be.

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ADA Pool Rules May Apply to Short-Term Stays

Fort Myers The News-Press, June 17, 2012

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

Q: I heard that the new federal rule on swimming pool lifts was suspended. Can you comment please? **J.A. (via e-mail)**

A: The Americans with Disabilities Act of 1990, as amended ("ADA") is a federal civil rights law that prohibits discrimination against individuals with disabilities in employment, public services, public accommodations, and telecommunications. "Public accommodations" that are subject to the ADA are places such as hotels, movie theaters, restaurants, shopping malls, and other facilities that provide goods and services to the general public. The ADA is not generally applicable to condominiums, homeowners associations, or mobile home parks that are strictly residential and only open to residents and their guests. However, the ADA can apply to those facilities if they are open to the public (such as for a bingo game or water aerobics class that is open to the public). The law can also apply to communities that allow short term stays (generally 30 days or less) and operate with the characteristics of a hotel. Some condominiums and parks will clearly fall into this category.

When the ADA does apply, it requires that new facilities built for first occupancy after January 26, 1992, must be accessible unless "structurally impracticable." Existing facilities that are being "altered" must be made accessible to the "maximum extent feasible." For existing facilities that are not being altered, they are subject to a continuing requirement to remove architectural barriers when it is "readily achievable" to do so. What the "readily achievable" requirement means is that an existing facility, even if it is not undergoing any other upgrades or changes, is under a continuing obligation to remove barriers to accessibility unless it would involve significant difficulty or expense, based on factors such as the nature and cost of the needed action, the resources available to the facility, and the impact on the operation of the site.

The technical specifications for ADA compliance are promulgated by the U.S. Department of Justice ("DOJ"). The first set of ADA standards was adopted in 1991, with requirements for particular features and elements of facilities, such as the height of light switches, width of doors, slope of access ramps, and the number, size, and location of handicapped parking spaces, etc. In 2010, DOJ published updated ADA regulations (the "2010 Standards") which, for the first time, contain specific accessibility requirements for a number of types of recreational facilities, including swimming pools and spas.

The effective date of the 2010 Standards is generally March 15, 2012. However, in response to public comments and concerns, DOJ first extended

the pool and spa compliance deadline to May 21, 2012. Then on May 18, 2012, DOJ announced that the pool and spa compliance deadline for existing facilities was being further extended to January 31, 2013. The compliance deadline for new or altered pools and spas has not been changed. DOJ has also issued guidance to the effect that pool lifts must be fixed unless a fixed lift is not readily achievable, in which case a portable lift can be deployed until the fixed lift becomes readily achievable.

So, in summary, if an association has a pool or spa and is subject to the ADA, either because it is open to the public or because the association allows short term stays and operates with the characteristics of a place of public accommodation, the pool and spa must be made accessible pursuant to the ADA and the 2010 Standards on or before the deadline of January 31, 2013 to the extent that it is "readily achievable" to do so. If accessibility is not readily achievable by the deadline, the association should develop a plan to provide access for the pool and spa when it becomes readily achievable in the future. More information on the pool accessibility requirements can be found on the ADA website at www.ada.gov/pools_2010.htm.

Q: How far back can an association go in collecting maintenance assessments against a delinquent unit owner? Is there a statute of limitations? We have unit owners that have been delinquent since 2006. **K.F. (via e-mail)**

A: There are various statutes of limitations in Florida which apply to different types of claims. Generally speaking, lawsuits filed under the statutory obligations carry a four-year statute of limitations, while lawsuits filed pursuant to written contracts carry a five-year statute of limitations.

Although the payment of assessments could be deemed both a statutory obligation and an obligation under written contract (the declaration of condominium), it is my sense that the five-year statute of limitations would apply. I am not aware of any appellate court cases directly on point.

I can say that regardless of the statute of limitations, letting assessments go unpaid without legal challenge for five years is not good business, and substantially lessens an association's chances at recovery.

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Board Often Can Sue Without Shareholder Vote

Fort Myers The News-Press, June 24, 2012

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

Q: I live in a mobile home park cooperative. Can the board of directors enter into a lawsuit without the approval of the shareholders? **D.R. (via e-mail)**

A: Probably. Except where otherwise limited by the governing statutes, community associations are conferred all of the general powers of Corporations Not For Profit pursuant to Chapter 617. This includes the power to sue or be sued.

With regard to condominium and cooperative associations, there are no limitations in Chapter 718 or Chapter 719, respectively, which limit the ability of an association to bring a lawsuit with regard to any matter. Largely without exception, condominium documents and cooperative documents grant this power to the board. However, you should note that it is possible for the governing documents of an association to require that a unit owner vote be held prior to the association entering into certain types of litigation. Such clauses have appeared with increasing frequency in documents written over the past decade or so, and are primarily geared at protecting the developer against post-turnover claims by the association. The validity of such provisions have not been decided by the appellate courts in Florida.

However, with regard to homeowners' associations, Section 720.303(1) of the Florida Homeowners' Association Act, provides before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000, the association must obtain the affirmative approval of a majority of the voting interests at a meeting of the membership at which a quorum has been attained. Accordingly, for a homeowners' association, a membership vote is arguably required before a lawsuit involving $100,000 or more is brought by the association, although the statute conflicts with a Rule of Civil Procedure on point.

Q: I live in a gated community governed by a homeowners' association. We have an owner who lives out of the country who rents his house for weekly and even daily periods of time, in violation of our covenants which require rental periods of ninety days minimum. Despite being notified by the management company we employ, and our board president, he persists in violating our restrictions. What action can we take to resolve this problem? **D.B. (via e-mail)**

A: A homeowners' association has a number of enforcement tools at its disposal when confronted with a violation of this nature. The association may fine any owner or an owner's tenant for the failure of the owner or the tenant to comply with any provision of the declaration, bylaws or rules of the association. For continuing violations, the association may impose a fine of $100 per day for

the duration of the violation. However, the total aggregate fine may not exceed $1,000, unless a greater amount is allowed by the association's documents.

An association may suspend, for a reasonable period of time, the owner's or the owner's tenants right to use the common areas and facilities of the association for the failure to comply with any provision of the declaration, bylaws or rules of the association.

In order to levy a fine or suspension, as discussed above, the association must give the party to be fined or suspended, at least fourteen days' notice of a hearing before an impartial committee, composed of individuals who are not board members, family members of board members or employees of the association. If the committee authorizes the imposition of the fine or suspension, the board may impose same.

Practically speaking, if the association does not have significant amenities, such as a pool, tennis court, fitness room and/or a clubhouse, such suspension may not be a determination. Further, depending on the amount of rental income being generated by the owner's violative behavior, it may continue to be profitable for the owner to rent his property in violation of the governing documents, even if he is subject to fines by the association.

The association also has the ability to sue the owner for an injunction in order to enforce the documents. The prevailing party in this type of litigation is typically entitled to recover his or her attorney's fees, which can be significant if the matter proceeds to a trial or an appeal. Prior to bringing legal action, the association must make a demand that the owner participate in pre-suit mediation.

The law for homeowners' associations requires that disputes between the association and an owner are subject to pre-suit mediation. The statute, as applied to your situation, requires that the association send a demand for pre-suit mediation to the subject owner and provide a list of mediators the association is willing to mediate this dispute before. The owner then has twenty days to accept the demand for mediation and choose a mediator and the mediation must be held within ninety days of the date of the demand. The failure to comply with the pre-suit mediation requirements of the statute, prevent the non-complying party from being able to recover their attorney's fees from any subsequently filed legal action where they are the prevailing party.

The association should consult with its legal counsel on how to proceed when faced with such a situation.

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Clean Indoor Air Act Can Apply to Condos

Fort Myers The News-Press, July 1, 2012

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

Q: Our board is considering adopting a rule to prohibit smoking in the hallways of our condominium buildings, which are more than fifty percent enclosed. However, some of the directors believe that smoking in portions of the condominium property identified as common elements, so long as they are at least fifty percent enclosed, is already prohibited by the Florida Clean Indoor Air Act. Is this true? **C.B. (via e-mail)**

A: The Florida Clean Indoor Air Act, found at Section 386.201 of the Florida Statutes, specifically prohibits smoking in an "enclosed indoor workplace." There are certain exceptions to this hard and fast rule. Namely, smoking may be permitted in (1) a private residence, provided it is not being used commercially to provide child care, adult care, health care, or any combination thereof, (2) a retail tobacco shop, (3) a designated smoking guest room at a public lodging establishment, (4) a stand-alone bar, (5) a smoking cessation program, and (6) a smoking room in an airport in-transit lounge.

The term "enclosed indoor workplace" is defined to include a place predominantly or totally bounded on all sides by physical barriers where one or more persons engage in work. A place is deemed "predominantly" bounded by physical barriers if it is more than fifty percent covered from above by a physical barrier that excludes rain, and more than fifty percent of the combined surface area of its sides is covered by closed physical barriers. As such, it is possible that a portion of the common elements that is partially exposed to the elements is still considered to be an "enclosed indoor workplace" regardless of the fact that it is not completely enclosed.

Before making a determination as to whether smoking is prohibited in the area in question, it is important to determine whether "work" is actually being performed there, as the statute is fairly specific on this point. The term work does not include noncommercial activities performed by members of a membership association. However, the term does apply to work performed by managers, officers and directors, regardless of whether the individuals receive compensation for their service. Therefore, as applied in the condominium context, it is my view that the Florida Clean Indoor Air Act serves to prohibit smoking in all indoor meetings of the board and committee meetings because "work" is being performed. Furthermore, cleaning or maintenance of an enclosed common element is sufficient "work" to impose a ban on smoking within these areas as well. Presumably, your hallways are periodically cleaned, so "work" is performed there.

As I have noted in earlier columns, the Florida Clean Indoor Air Act does not apply to outdoor common elements, such as a parking lot or open swimming pool area. However, it is my view that if the board of directors is granted rule-making authority over the common elements, which is usually the case in condominiums, the board could adopt a rule banning smoking in outdoor common elements as well.

Q: I reviewed your recent column/blog entitled "Owners Not Subject To New Leasing Amendment If They Did Not Vote In Favor For It". The column applied to condominiums. My question is whether the same rule applies to homeowners' associations. **S.C. (via e-mail)**

A: No.

The "rental amendment grandfathering" law is found at Section 718.110(13) of the Florida Condominium Act. There is no parallel provision in Chapter 720 of the Florida Statutes, the Florida Homeowners' Association Act.

The Condominium law was enacted in reaction to a decision of the 2002 Florida Supreme Court called Woodside Village Condominium Association, Inc. v. Jahren, where the high court held that since a declaration of condominium is amendable, unit owners take title with knowledge that their rights can be fundamentally changed through amendment of the declaration of condominium.

Presumably, if presented with the same set of facts in the homeowners' association context, a court would rule that rental rights can be amended (or even eliminated) through a proper amendment to the HOA declaration of covenants. As there is no counter-part in the Homeowners' Association Act to the condominium law's "grandfathering" rule, that exception would not apply.

However, it should be noted that there are no appellate case decisions on point. There are some potential legal distinctions between condominiums and homeowners' associations which a court might take into account. A homeowners' association considering rental amendments should consult with an attorney who is experienced in Florida community association law.

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Association Can't Hide From Landscaper's Water Violations

Fort Myers The News-Press, July 8, 2012

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

Q: Our homeowners' association recently hired a new landscaping company. The company has changed our irrigation so that it is now contrary to the watering restrictions applicable in our locale. The company has agreed to assume responsibility if the applicable governmental agency takes action. What are your thoughts? **R.G. (via e-mail)**

A: Landscape watering restrictions are published by the water management district that has control over the particular jurisdiction in which the property at issue is located. Additionally, local governments may adopt alternative irrigation ordinances based on local water demands, system limitations, or resource availability.

For example, Lee County is subject to the regulations of the South Florida Water Management District (SFWMD). Separate watering restrictions have been adopted by Lee County Utilities as to property located within unincorporated Lee County. Likewise, the City of Cape Coral has adopted separate restrictions as to property located within the city limits of Cape Coral.

As to all other Lee County municipalities, the general restrictions implemented by SFWMD will control. In the event that SFWMD adopts temporary restrictions to address a specific water shortage that are more restrictive than those applicable to unincorporated Lee County or the City of Cape Coral, the restrictions of SFWMD will control.

The current Lee County Utilities restrictions (for unincorporated Lee County) allow homeowners to water their lawns and landscaping a maximum of two days per week. The days on which a homeowner can water is determined by looking to the last digit in the house number. If that number is an odd number, the owner may water on Wednesdays and Saturdays. If that number is an even number (of if there is no address), the owner may water on Thursdays and Sundays. Watering may only take place between midnight and 9:00 AM and/or 5:00 PM and midnight on the approved day. No watering is allowed between 9:00 AM and 5:00 PM or on Mondays, Tuesdays or Fridays.

In the City of Cape Coral, the schedule is a bit more complicated, though it generally only provides homeowners with the ability to water their lawns and landscaping two days per week. Those whose address ends in a "0" can water on Monday and Friday between midnight and 4:00 AM, while those whose address ends in a "1" can water on Monday and Friday between 4:00 AM and 8:00 AM. Those whose address ends in a "3" or "5" can water on Wednesday and Saturday between midnight and 4:00 AM, while those whose address ends in a "7" or "9" can water on Wednesday and Saturday between 4:00 AM and 8:00 AM. Finally, those whose address ends in a "2"

or “4” can water on Thursday and Sunday between midnight and 4:00 AM, while those whose address ends in “6” or “8” can water on Thursday and Sunday between 4:00 AM and 8:00 AM. No watering is allowed between 8:00 AM and midnight.

For all other municipalities in Lee County, SFWMD allows homeowners to water their lawns and landscaping three days per week. Those whose address ends in an odd number can water on Monday, Wednesday and Saturday before 10:00 AM and after 4:00 PM. Those whose address ends in an even number (or have no street address) can water on Tuesday, Thursday and Sunday before 10:00 AM and after 4:00 PM. No watering is allowed between 10:00 AM and 4:00 PM.

The foregoing restrictions do not apply if you are watering with reclaimed water, a rain harvesting system or a low volume method (such as micro-irrigation) container watering, or hand-watering with a hose with an automatic shut-off nozzle. Additionally, there is an exception in all jurisdictions within Lee County to allow for watering of newly installed lawns and landscaping.

It is the owner of the property who is ultimately responsible for compliance with the law, which can be enforced by the applicable police department, sheriff’s office, or other law enforcement officer. A third violation of watering rules can carry up to 60 days of jail time, plus fines.

In a homeowners’ association, it is likely that the individual members own the lots (except to the extent you are dealing with common area irrigation) and would be cited for violations. If your governing documents make the homeowners’ association responsible for irrigation, or if it is the homeowners’ association which holds the well use permit, then either the homeowner would have a right to make a third party claim against the association, or the association would be cited directly.

I do not believe that an association which has knowledge of legal violations can hide behind a contractor’s verbal agreement to “take care of it.” Further, knowing violations of certain laws, especially laws that are criminal or quasi-criminal in nature, can present complications in terms of insurance coverage, as well as a director’s right to claim indemnity from the association and may constitute a breach of fiduciary duty. If your association has professional management, their license might also be subject to a complaint.

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Restrictions a Matter of Preference

Fort Myers The News-Press, July 15, 2012

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

Q: Our board of directors is working on a new set of rules and regulations. Should the restrictions contained in our declaration of condominium also be included in the rules? Also, what percentage of members (homeowners) is required to approve the rules and regulations? **P.B. (via e-mail)**

A: In order for an association board to adopt valid rules and regulations, four basic tests must be met. First, the superior governing documents (the declaration, the articles of incorporation, or the bylaws) must grant the board the authority to adopt and amend rules and regulations. It is important to ensure that the board's rule-making authority extends to both common property (known as common areas in homeowners' associations and as common elements in condominiums) as well as the individual homes (known as parcels in homeowners' associations and units in condominiums).

Secondly, a board-made rule cannot conflict with any right contained in the superior documents nor any right which is "inferable" from those documents. Thirdly, the rule must be "reasonable." Finally, the rule must be adopted in a procedurally correct fashion, and in accordance with both the applicable statute and additional procedural requirements contained in your governing documents themselves.

Whether to republish restrictions already found in a superior governing document in the rules and regulations is a matter of preference, and may have some relationship with how voluminous the restrictions contained in the superior governing documents are. Many associations do wish to reiterate the more important document restrictions in the rules (such as pet restrictions). Some rules simply refer the reader to the applicable governing document. It is important to make sure that any provision that is addressed in both the higher level documents and the rules does not contain conflicting or contradictory language.

Whether a membership vote is required to change rules, or whether it is a board prerogative is driven solely by the applicable provisions of your governing documents, and not state statute. I would say that a majority of documents I have seen confer some level of rule-making authority on the board, although there is a distinct minority of documents which require membership approval for changes to rules and regulations. Your association's attorney should be able to advise on this point.

Q: I live in a cooperative. Is it mandatory under Florida statute that either the president or vice president of the co-op board be in the community at all times? We have been told that either the president or vice president must be in the community if the other is absent. **J.S. (via e-mail)**

A: No. There is no law that requires cooperative board members to be residents in the cooperative. In fact, the Florida Cooperative Act provides that "any unit owner" may submit their name into nomination for election to the board. In my opinion, it would violate the statute to prohibit non-residents from serving on the cooperative board, since "any unit owner" is entitled to run.

The Florida Cooperative Act does not contain any guidance regarding the qualifications of officers. I suppose the bylaws could lawfully impose a residency requirement to serve as president or vice president of the association. However, I have never seen such a clause. As a practical matter, many cooperative communities are nearly deserted during the summer months, because the preponderance of residents are seasonal. Requiring full-time residency for association officers would seem to me to be counterproductive and certainly not customary.

Q: Our association suspended a unit owner's right to use the swimming pool because they were delinquent in payment of assessments for more than ninety days. However, they keep using the pool, and will not give up their key. We are in the process of converting to a card access system, but it will be several months before we install that system. Can we call the police? **T.V. (via e-mail)**

A: Law enforcement officials will not (and should not) get involved in what is essentially a civil dispute.

One of the weaknesses in the 2010 amendment to the statute which allows suspension of common area use rights for nonpayment is the lack of an effective enforcement mechanism in the law. If you have access control capabilities (such as programmable cards), I believe you can de-activate the suspended person's entrance code for the swimming pool.

However, if the suspended owner has a key and refuses to return it, and keeps using the pool notwithstanding the suspension, your remedy is to apply to the court for an injunction. While enforcing condominium policies in court should be a last resort, and is rarely pleasant, the association does have a fiduciary duty to apply its policies evenly to all people.

Accordingly, if the association wishes to pursue suspension as a remedy for nonpayment, the board needs to be prepared to bring it to conclusion when someone chooses to defy the association's authority. If the association has followed all proper steps to impose the suspension, it should be entitled to recover the attorney's fees it incurs in a court proceeding to enforce the suspension.

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Conflict of Interest Can Be Overcome by Abstention

Fort Myers The News-Press, July 22, 2012

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

Q: I live in a community operated by a homeowners' association. The board president went to work for our management company. He then became the vice president of the board, and continues to work for the management company. I think this is a conflict of interest, what do you think? **J.C. (via e-mail)**

A: I agree that this presents the potential for conflict of interest. However, that does not necessarily make the situation unlawful nor indicative of bad intent. In cases where a board member has a conflict of interest, the conflict can often be overcome by full disclosure and abstention from voting on matters regarding which the conflict exists. Of course, the underlying transaction must also be fair and reasonable.

Further, there is a special rule applicable to homeowners' associations under the Florida Homeowners' Association Act. That law provides that a director, officer, or committee member of the association may not directly receive any salary or compensation from the association for the performance of duties as a director, officer, or committee member, and may not "in any other way benefit financially from service to the association."

While it is not clear how that law might apply in your situation (it would probably depend upon your vice president's role in direct service to your association on behalf of the management company, and other similar factors), it is important to note that the statute permits such arrangements if the compensation is authorized by the governing documents, or authorized in advance by a vote of the homeowners representing a majority of the voting interests voting in person or by proxy at a meeting of the members.

Q: The vice president of our board owns a construction company, which contracts with the HOA. Also, our board holds a monthly meeting where homeowners can attend and ask questions. However, after everyone leaves, the board conducts its actual business meeting. Doesn't this violate the Sunshine Law? How do I file a complaint? **W.D. (via e-mail)**

A: With respect to a board member owning a construction company that does business with the association, see my response to the previous question. The same law would apply. The board may find some benefit in contracting with a company which is owned by one of its residents, since the resident has a vested interest in seeing that a good job is done in their own community. Certainly, however, the potential for conflict of interest exists. As with the board member working for a management company, there are requirements for a fair contract, disclosure, abstention from voting, and authority for the relationships in either

the governing documents or through vote of the homeowners.

The "Government-in-the-Sunshine" law, Chapter 286, does not apply to homeowners' associations. However, all of Florida's housing statutes (the Florida Condominium Act, the Florida Cooperative Act, and the Florida Homeowners' Association Act) contain open meeting requirements, which are often referred to as "sunshine" laws, although somewhat in the nature of industry slang.

Meetings of HOA boards must be open to members, with limited exceptions. The practice you describe violates the law if homeowners are precluded from attendance.

Generally speaking, disputes in homeowners' associations are adjudicated first through a mandatory mediation process, and then through the courts. If a dispute does not settle in mediation, and the matter has to go to court, the winner usually is entitled to recover their attorney's fees from the loser.

Q: Can a homeowners' association post notice for board meetings in a locked area, such as an indoor clubhouse bulletin board? We have deactivated clubhouse entry rights for homeowners who are more than 90 days delinquent, so they would not be able to see the posted notices. **K.G. (via e-mail)**

A: That is a very interesting question. I suppose either side of the case could be argued.

In my opinion, an HOA cannot preclude a member from attending board meetings, even if they are delinquent and their common area use rights have been suspended pursuant to the applicable law (discussed in last week's column).

Section 720.303(2)(c) of the Florida Homeowners' Association Act simply says that notices of all board meetings "must be posted in a conspicuous place in the community" (there is an alternative method of giving notice through mail or personal delivery seven days in advance). I would think an area such as an indoor clubhouse bulletin board would qualify as a "conspicuous place". Accordingly, I would argue that if a homeowner's right to use the clubhouse has been properly suspended pursuant to applicable law, they will not be able to check for posted notice.

The opposing point of view is that because you cannot suspend a member's right to attend board meetings, even if they are delinquent in payment of assessments, you therefore cannot impinge upon their right to receive "conspicuous" notice of when and where board meetings are going to be held.

If the courts ever rule on this, or if the statute is changed to clarify it, I would certainly note it in the column.

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Should Association Foreclose, or Take Offer to Settle?

Fort Myers The News-Press, July 29, 2012

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

Q: Our condominium association is owed $13,000.00 in back maintenance fees (including interest, late fees, and attorneys' fees). There is a "short sale" pending, and the parties have offered to pay the association $10,000.00 if the association will issue a clear title. Some say we should foreclose and rent the unit, others say take the money and run. What do you say? **J.C. (via e-mail)**

A: That is a question confronted by associations with regrettable frequency these days.

It is important to note that, generally speaking, in a "short sale", the buyer will be liable to the association for all unpaid assessments and interest.

Accordingly, the first question your board must ask and have answered is what scenarios may play out if the short sale does not go through and the mortgage holder has to foreclose. In some cases, the mortgagee will be liable for a certain amount of unpaid assessments (usually twelve months of unpaid assessments or one percent of the original mortgage debt, whichever is less) and in others, particularly in the homeowners' association context, there may be no liability.

It is probably safe to say that if the mortgage holder forecloses, the association will get less than the $10,000.00 which is on the table. This would weigh in favor of taking the money to settle. It may also be that if the current offer is $10,000.00, the buyer, seller, and bank are not going to let the deal sour over $3,000.00, which would weigh in favor of the association holding fast in demanding full payment.

However, if the deal does not close and there is a foreclosure, the association could end up with substantially less, or even nothing. Additionally, the association will not have a paying unit owner in title if the short sale does not go through. Therefore, the association should also factor in the assessments it would lose during the pendency of the foreclosure process, which can often go on for a year or more.

Because the Florida Condominium Act states that no unit owner can be excused from their payment of common expenses unless all other unit owners are likewise excused, I have heard credible attorneys argue that an association cannot even compromise its past-due assessments in a short sale situation, although it could compromise interest, late fees, or attorneys' fees. I do not ascribe to this point of view, because the statute also empowers the association to settle lawsuits, and most lawsuit settlements result in taking less than you are claiming, or may be legally entitled to. However, the courts have not addressed this point of law and the board should, for its own protection, get an attorney's opinion on the propriety of

compromising past-due assessments.

In terms of trying to beat the bank to foreclosure and renting the unit while the mortgage foreclosure is pending, some associations do that. Unless you are dealing with a highly desirable rental location (such as a beachfront condominium) and taking into account that the association will have to furnish the unit, and the fact that many abandoned units are in deplorable condition (we even see all of the appliances stripped out), this strategy could easily backfire.

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Courts Frown on Splits Based on Date of Ownership

Fort Myers The News-Press, August 5, 2012

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

Q: If an owner voted in favor of new lease restrictions in a declaration of condominium amendment, can that owner exempt himself from them like those who voted against the new provision? **E.G. (via e-mail)**

A: It depends. Section 718.110(13) of the Florida Condominium Act provides that an amendment prohibiting unit owners from renting their units, an amendment altering the duration of the rental term, or an amendment specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

Therefore, unless the rental amendment itself "grandfathered" all existing unit owners, only those unit owners who did not consent to the amendment (those who voted against it or did not vote at all) would be grandfathered.

Some associations overcome this potential objection by grandfathering all existing owners. Historically, Florida courts have frowned upon the creation of two classes based on date of ownership. In Barnett and Klein Corp. v. President of Palm Beach--A Condominium, Inc., a 1983 Florida appeals court case was presented with a board-made rule which provided that unit owners who held title prior to March 12, 1979 could lease their apartments once a year, whereas unit owners who took title after that date were limited to one rental every two years. The Court looked to the provision of the bylaws which granted the board authority to adopt rules and noted that this provision further required that the rules adopted be equally applicable to all members and uniform in their application and effect. As such, the Court held that a rule which creates two classes was outside the scope of the authority granted and the Court invalidated the rule.

I would argue that the Barnett case can be distinguished because it involved a board-made rule (as opposed to a declaration amendment) and because the statute now recognizes that an amendment may create two classes of owners, at least when dealing with rental amendments.

Q: In one of your recent columns, you wrote that the condominium association was liable for repair costs to drywall that was damaged after water flooding from a unit above. You had also mentioned air conditioners being the association's responsibility. This does not make sense to me, since our condominium documents specifically state that the maintenance, repair, and replacement of both interior drywall and air conditioning equipment is the responsibility of the owner, not the association. **W.M. (via e-mail)**

A: Clearly, this is one of the most confusing areas in condominium operations, which has been made more complicated by various amendments to the statutes in the past decade.

Generally speaking, the association maintains the "common elements" and the unit owner maintains the "unit." The condominium documents may require the association to maintain portions of the unit, and the declaration may further require that unit owners maintain certain common elements, if they are designated as "limited common elements."

Therefore, determining maintenance and repair responsibilities is typically a function of interpretation of the condominium documents, which are hopefully written in a clear and concise fashion on the point.

The situation gets much murkier, however, when you are dealing with damage to the condominium property, as opposed to normal wear and tear. The association is obligated by law to insure certain portions of the condominium property, regardless of whether that portion of the property is designated as part of the common elements or part of the unit. Drywall and air conditioner compressors are two examples.

If property insured by the association is damaged, it is generally the association that must pay to repair it, including situations where there is no insurance money available because the damage is below the deductible. This result is mandated by statute, and is said by statute to apply regardless of any contrary provisions in the condominium documents.

There is one exception, that being for associations which have "opted out" of the statute. Simply stated, by vote of a majority of the entire voting interests (not just those who vote at a meeting where a quorum is assembled), the association can "opt out" of the statutorily-mandated post-casualty repair cost allocation, and allocate the costs in some other fashion.

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There's No Rule That Officers, Directors Must Be Full-Time Residents

Fort Myers The News-Press, August 12, 2012

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

Q: Our homeowners' association conducts monthly meetings. The newly elected president is a part-time resident and has yet to attend a meeting, either in person or by phone. How many meetings can an elected member of the board miss? Also, when I attend the board meetings, I ask to address issues that I have with the association, such as landscaping requests. The manager has said that the board can entertain general questions from the floor, but that it is up to the board whether to do so or not. Don't homeowners have the right to speak to the board regarding issues we want to bring to the board's attention? **J.M. (via e-mail)**

A: The members of the board of directors are elected by the homeowners. The board of directors appoints its officers. There is no requirement in the law that either officers or directors be full-time residents in the community, nor does the law address absences from board meetings.

I have seen some HOA bylaws which provide that missing a set number of meetings constitutes automatic resignation from the board. In light of recent changes to the Florida Homeowners' Association Act, I doubt that such a provision would be found valid today.

With respect to who the board chooses to elect as president, that is an issue solely within the prerogative of the board (not the homeowners). Presumably, your board is aware of whatever reasons have precluded your president's attendance at previous meetings, and is content to permit the vice-president to chair board meetings in the president's absence.

With respect to your question about the right to speak at board meetings, homeowners have no legal right to introduce "new business" at board meetings, nor is the board obligated to take up individual resident requests such as landscaping issues, maintenance requests and the like. While some associations (particularly smaller associations) choose to do so, most requests of this nature are usually dealt with through some type of maintenance request form or procedure with the management company.

Q: I am on a condominium association board. Recently, we had an owner (who is also a board member) request access to any written correspondence between the association and its attorney during the past several years. The association has not been involved in any actual or threatened litigation during this period of time. Are these communications protected by the

attorney-client privilege or is the correspondence available to any owner upon request? **G.V. (via e-mail)**

A: Good question. The law is not totally clear on the points you have raised. The appellate courts have not addressed these issues, and the statutes lack some specificity. There has been adjudication of privilege issues through the State's arbitration program, although these decisions are not binding legal precedent.

The prevailing view is that the "attorney-client" privilege is broader than the "work product" privilege. Therefore, pending or threatened litigation is not required to invoke the attorney-client privilege, as is the case when relying on the work product privilege.

The general test used in determining whether a communication between a lawyer and his or her client is privileged is whether the intent of the communication was that it be privileged. Most written attorney opinion letters have "attorney-client privileged" stamped on them, and most attorneys would consider the content of legal opinions they give to be privileged. Associations can (and often) waive the attorney-client privilege, sometimes inadvertently.

In summary, if the association has not waived its attorney-client privilege, past opinion letters are not available for unit owner inspection.

The fact that the requesting unit owner is also a board member presents a slightly different issue. Clearly, board members have the right to rely upon the opinion of legal counsel when they are being asked to make a decision with legal implications, and counsel has rendered an opinion on that topic. However, the right to review legal opinions to assist in making decisions does not necessarily translate to a right to make a copy of those opinions.

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Law Trumps Homeowners' Association Rules – Most of the Time

Fort Myers The News-Press, August 19, 2012

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

Q: My wife owns a condominium unit. She and I stay there occasionally for vacation visits. My mother would like to stay in the condo later this year. The association states that she cannot stay as a guest unless we are there. The association bylaws allow guests, in the absence of the owner, if the guests are the unit owner's "parents, children, grandchildren, or siblings." Can my mother stay in the unit? **M.H. (via e-mail)**

A: Probably not. Some associations limit occupancy by guests in the absence of the owner, some don't.

The language you have cited would need to be reviewed in the context of the governing documents as a whole, but based upon what you have quoted, your parents are not your wife's parents. Since your wife is the owner and you are not, it would seem illogical to argue that your mother is also your wife's mother.

Rather, it would appear that your mother would need to occupy the unit as a tenant, or unrelated guest, to the extent the governing documents permit occupancy by unrelated guests in the absence of the owner, or to the extent rental uses are permitted.

Q: Our homeowners' association was formed in 1988. There are some items in our governing documents that are contrary to the provisions of Chapter 720. Is there a general law that allows older documents to be contrary to Chapter 720? **R.Y. (via e-mail)**

A: It depends.

The first question you have to look at is whether the conflict between your documents and the statute involves a "substantive" or "procedural" issue. If procedural, the current statute controls. For example, Chapter 720 of the Florida Statutes, commonly referred to as the "Florida Homeowners' Association Act", was amended some time ago to provide that the HOA must accept nominations from the floor when electing directors. Any contrary or conflicting provision in an association's bylaws, even if pre-existing, would be unenforceable.

On the other hand, if "substantive rights" are involved, the statute itself states that it is not intended to impair vested contract rights which pre-date the statute. Further, even if the statute did not say this, the Florida Constitution prohibits the retroactive application of legislation which has the effect of impairing vested contract rights. An

example might be in the area of assessments. Say your declaration provides that assessments for all lots (even though all the lots are the same size) are different depending upon whether there is a two-bedroom home or a three-bedroom home on the lot. Further assume that Chapter 720 is amended to provide that assessments must be equal for all lots of the same size. The amendment to the statute would not apply because it would impair a vested contract right, that being the agreement in the current declaration as to how common expenses are shared.

Another twist occurs if the governing documents contain "amended from time to time" language. In such cases, the courts have held that even substantive changes to the statute can be applied retroactively, but even that rule is not absolute.

Q: Our condominium association board has several vacancies. I am a member in good standing and requested to be appointed to the board. The board refused to appoint me. Is this legal? **D.P. (via e-mail)**

A: Yes.

Vacancies on a board are filled by a vote of the remaining directors. The directors have the right to determine who they wish to appoint. While your willingness to serve is laudable, and your board's snub is perhaps hurtful or otherwise inappropriate, it does not violate any law.

Q: Are the information packets given to members of a homeowners' association board, prior to the board's meeting, also available to association members?

A: Yes.

The Florida Homeowners' Association Act contains a very broad definition of "official records", and generally includes all documents which pertain to the operation of the association. The documents typically contained in a monthly board packet would fall into this category. As such, while a homeowner could not demand an extra copy be made available for them at the board meeting, the member does have the right to obtain the documents through inspection of the official records of the association.

The only exception to this general rule would apply in situations where certain confidential information, which is not available for inspection by owners under law, is involved. Examples would include attorney-client privilege information, medical information pertaining to parcel owners, and documents containing personal identifying information of unit owners (for example, social security numbers).

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Term Lengths For Association Boards Are Set By State Law

Fort Myers The News-Press, August 26, 2012

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

Q: I currently serve on the board of my condominium association. We have three-year terms, according to our bylaws. Our management company informed us that we all have to go off the board at our next annual meeting. I suspect the management company's motive involves the fact that they have a hard time working with the current board, and would like to see us ousted. My question is whether we are required to resign at this year's annual meeting or whether we can allow our current board members to serve out the time as stated in our bylaws? **S.W. (via e-mail)**

A: The Florida Condominium Act was amended effective October 1, 2008 to outlaw multi-year board terms, including three-year terms. The only exemption contained in the statute was for associations who wanted to establish staggered terms. In order to establish staggered terms under the 2008 law, several conditions had to be met. First, the terms could not exceed two years. Secondly, the authority for two-year staggered terms would need to be contained in the association's bylaws. Finally, the operation with two-year staggered terms needed to be ratified.

In your case, it sounds as though none of these things ever occurred. Even if someone properly elected in 2008 was "grandfathered" for a three year term, their term would have expired in 2011. Accordingly, all of your directors are probably serving improperly, and I agree with your manager that it should be cleaned up at the earliest possible time, which is apparently your upcoming annual meeting. The current members on the board can run for re-election if they wish, provided that your bylaws do not contain term limits.

Q: I am on the board of a timeshare association which has seven members. This past April, we had a vote to implement staggered terms. The president decided whoever got the top four votes would serve for two years and the remaining three members would serve only one year. Is it legal for the president to make this decision without a vote of the board? **C.O. (via e-mail)**

A: It is difficult to determine the correct answer to your question without seeing the voting documents that were used. I would say that a well-drafted voting package would presumably include an amendment to your association's bylaws that would delineate who would get the two-year seats and who would get the one-year seats.

In the absence of guidance on this question in the document your members were asked to vote on, common sense would seem to indicate that those who got more votes should receive the lengthier terms. I do think that this is a decision that should

not be reached without review by legal counsel, and I suspect counsel would advise to have the board (as opposed to the president solely) approve the manner of determining election terms.

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Shenanigans Are Unlikely with this Board

Fort Myers The News-Press, September 2, 2012

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

Q: Our condominium association sends the owners monthly budget reports, including year-to-date expenditures and comparisons with previous years' expenditures. Some of our owners are leery about what we see. Can we demand an independent audit? If so, what is the procedure? **D.B. (via e-mail)**

A: First, I would say that a condominium association routinely providing that level of financial detail to its members is well "above and beyond" the industry norm. While monthly budget reports, year-to-date expenditure comparisons and similar information is part of the "official records" of the association, and therefore open for inspection by a unit owner upon written request, it is not usually sent out to the owners. It seems somewhat counter-intuitive that if your board was trying to hide some shenanigans, they would provide so much information. Of course, stranger things do happen.

In response to your question, the association is obligated by law to have an annual audit performed if the association's annual revenues exceed $400,000. The members, by a majority vote, can vote to have a less thorough report prepared (a review, a compilation or a cash statement of receipts and expenditures). However, an audit would be required at least once every four years under current law. If your association is below the $400,000 threshold, the type of report which is mandated by law varies by different levels of receipts.

If you are below the audit threshold, or are in a year where the members have voted to waive the audit, the Florida Condominium Act contains no procedure for the members to demand an audit. Interestingly, the Florida Homeowner's Association Act does permit members to petition for a vote on an audit.

In the condominium setting, there are still ways that you could have the books "audited". First, all of the financial records are open to inspection and an owner or group of owners could pay to have a certified public accountant "audit" the records for them. However, you would not receive an actual corporate audit under applicable guidelines, because the association is not a party to the engagement. Alternatively, you could petition to have the bylaws amended to require the association to have an annual audit, regardless of the association's income, and with no ability to opt out in a given year. The required vote to initiate such a petition would depend upon your bylaws. Such a provision would certainly be unusual due to the expense that a mandatory annual audit would impose.

Q: Does the Florida Clean Indoor Air Act apply to radon found in a condominium unit? Is the condominium association responsible to mitigate a radon problem? **B.M. (via e-mail)**

A: No. The Florida Clean Indoor Air Act, found at Section 386.201 of the Florida Statutes, only applies to smoking tobacco products. This statute was recently explored in my column dated July 1, 2012 entitled "Clean Indoor Air Act Can Apply to Condos". You can review past editions of my weekly column at Becker & Poliakoff's Condo and HOA Law Blog, www.floridacondohoalawblog.com. My columns are also posted on my Firm's Twitter page at http://twitter.com/flcondohoalaw. Feel free to follow the column of the Firm's Twitter page, or my personal Twitter page at http://twitter.com/jadams_joe.

Radon is a radioactive gas which is derived from the natural decay of uranium that is found in nearly all soils. According to the EPA, radon gas is the second leading cause of lung cancer in the United States.

Florida law requires that purchase and sale agreements contain a radon disclosure. The existence of this disclosure often leads to the conduct of radon testing in connection with the sale of a unit. Any reading above 4.0 picoCuries per liter (pCi/l) exceeds federal guidelines.

There is no case law in Florida dealing with an association's responsibilities regarding radon. The topic is not addressed in any statute.

When excessive radon readings are discovered in a condominium unit, I normally recommend that the association become involved to determine the potential sources of the radon infiltration, and the appropriate methodology for remediation.

For example, patching cracks in walls and sealing utility entries would typically be undertaken by the association. Conversely, many owners desire to install radon mitigation systems that provide additional venting for the unit. These systems are usually installed inside the unit (and would therefore typically be considered a unit owner expense), although they vent out into the common elements. Particular attention needs to be paid to the condominium documents to determine whether unit owners have the right to alter the common elements, whether they should be asked to undertake a written agreement to maintain the installation in the future, and the like.

When a radon situation exists, I would be so bold as to say that a board would be foolhardy to attempt to navigate toward the solution without the guidance of qualified legal counsel. Counsel can review the condominium documents and Florida law to ensure that the board acts consistent with its fiduciary responsibility and consistent with the mandates of the association's governing documents, in an area that is fraught with potential liability exposure.

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Condo's Declaration Requires Board Approval of Lease

Fort Myers The News-Press, September 16, 2012

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

Q: Our declaration of condominium, which was written thirty years ago, states that the lease of units requires approval of the board of directors. The declaration goes on to state that approval is "subject to the board's sole and absolute discretion". Can a board deny a lease application without supplying a reason? **J.C. (via e-mail)**

A: That is a very good question, which is not addressed in the statutes. Further, as far as I know, it has never been addressed in the courts or through the state's arbitration program.

First of all, I do not think that the board can deny an application to lease for no reason. That would be arbitrary and capricious, and would be very unlikely to stand up in court. That said, I can certainly see instances where a board might have a good reason for the denial, but would be well advised not to give out details. This is especially true if there is concern that the rejected applicant might file a defamation suit. I have seen a few situations where such suits have been threatened.

The unit owner is losing an opportunity to generate rental income, and could reasonably be expected to ask why his or her right to lease was being denied. Therefore, I normally recommend that a short, plain statement outlining the reason for disapproval be issued by the board.

A board should not be overly concerned about defamation claims when the statements made are true. For example, if the board disapproves a lease renewal application because the tenant keeps breaking the rules, I see no reason not to tell the unit owner. Other situations (for example, where a sex offender wishes to lease in the community) may be more sensitive and should be discussed with legal counsel.

I think common sense is the order of the day in determining the appropriate tactic in any similar case.

Q: I read your blog dated August 21, 2012, entitled Attorney-Client Privilege Exists Beyond Litigation, and think something is wrong. The members of the association pay the lawyer's fee. So how is it conceivable that the attorney paid for by all homeowners only represents the board? **H.C. (via e-mail)**

A: This is a common source of discontent in associations. American law recognizes the fiction of the corporation as a legal person. Therefore, a corporation is granted by the law most of the legal powers of individuals, at least with respect to commercial matters. Such powers include the power to enter into contracts, the power to sue and be sued, and the power to hold title to property.

When an attorney represents a corporation, it is the corporation to which that attorney owes his or her duty of loyalty. The attorney does not represent "the board", nor any member on the board. Obviously, a corporation cannot act except through natural persons, which are the agents of the corporation empowered by law to undertake the affairs of the corporation. These agents typically include directors and officers of the association, and others, such as executive employees or managers.

There is some analogy to owning stock in a publicly traded company. While the stock you purchase may help pay for the legal needs of that corporation, you would typically not be privy to the advice that the corporate counsel provides to the appropriate corporate representatives.

Q: What do you think about a management company that tries to influence the association's election by stating that if a certain person is elected, the management company will cancel its contract? **B.F. (via e-mail)**

A: As a general matter, I think it is inappropriate for community association managers (whether on-site employees or representatives of a management company) to seek to influence association elections. However, there is no law against it.

Obviously, there is some "history" between this board candidate and this manager. There are some people who simply will never be able to get along. If the manager feels that the election of one individual will prevent him or her from doing his or her job properly, then they probably should resign. Of course, they need to follow the procedures in their contract.

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