Mediation, Arbitration Forms of Dispute Resolution

Fort Myers The News-Press, January 10, 2008

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Q: Can you please explain to me the difference between mediation and arbitration and give an example of when one is preferred over the other? **B.B. (via e-mail)**

A: Mediation and arbitration are two common forms of what the legal community calls "alternative dispute resolution." The purpose of alternative dispute resolution is to keep disputes out of court, when possible, and to be certain that any disputes that do make it to court have been the subject of a good faith effort to resolve the dispute. Filing and prosecuting a lawsuit can be extremely time consuming and expensive, and while not always the case, alternative dispute resolution is often more expedient and less costly.

Mediation is a process in which a trained mediator, best thought of as a facilitator, meets with the parties to the dispute, both individually and collectively, to try to help the parties reach an agreement to resolve the dispute. Many disputes arise and continue due to mere communication failure. A well-trained mediator can assist the parties in overcoming communication problems. A mediator may bring new ideas to a continuing dispute and may be able to propose a satisfactory resolution that the parties did not consider.

A mediator may, in some cases, pull one or both parties aside individually and candidly point out the merits of the opposing party's position. To be clear, a mediator is not a judge and is not charged with evaluating the merit of any party's claim, nor determining the proper legal outcome of any dispute. In the community association law arena, mediation is most common with homeowners associations as the Florida Homeowners' Associations Act requires pre-suit mediation, or at least an attempt at mediation, prior to filing a lawsuit concerning certain disputes between members and the association.

Arbitration is designed to provide the parties with a ruling where one party prevails, and one party loses as determined by the arbitrator. There are both "binding" and "non-binding" arbitration proceedings. For example, parties may enter into a contract that requires binding arbitration in the event a dispute later arises. Moreover, parties may agree to settle their dispute through binding arbitration after the dispute has arisen. A decision to engage in binding arbitration is usually motivated by the parties' mutual belief that court proceedings are too time consuming and expensive.

"Non-binding" arbitration is what is required by the Florida Condominium Act for any "dispute" as defined in that statute. "Dispute" under the Condominium Act means any disagreement between two or more parties involving the

authority of the board, under the statute or according to the association documents, to take action or not to take action involving an owner's unit or appurtenances to the unit, or concerning the alteration or addition to a common element. Also, included in the definition of "dispute" is any claim of a failure of a governing body to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or allow inspection of books and records. The Condominium Act requires mandatory, non-binding arbitration of all "disputes" prior to filing a lawsuit based upon that dispute. Once the arbitrator makes a ruling, the parties may either accept the ruling or one or both of the parties may reject the ruling and file a lawsuit.

Q: I recently moved into a community governed by a homeowners' association and heard through several of my neighbors that the association is in financial trouble. I want to get copies of all of the financial records in order to figure out whether this is true, or just a rumor. Am I entitled to have the association send copies of these records to me? **J.D. (via e-mail)**

A: Homeowners' associations are required to maintain the association's financial records as a part of its official records. The Florida Homeowners' Association Act requires the association's official records to be open to inspection by members or their authorized agents at reasonable times and places within ten business days after the association receives a written request for access to the records.

When a property owner, or his or her authorized agent, inspects the records, the association must provide copies of records that are requested during the inspection. The association may charge up to fifty cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association can have copies made by an outside vendor and may charge the actual cost of copying.

If the homeowner's association fails to provide access to the official records within ten business days after receipt of a written request, a rebuttable presumption is created that the association willfully failed to comply with the requirements of the Homeowners' Association Act. This failure can result in an award of damages against the association for actual damages or minimum damages. Minimum damages are set by statute at fifty dollars per day up to ten days, with the calculation beginning on the eleventh business day after receipt of the written request.

You should be aware that your homeowners' association is required to provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. If you request a copy of the budget, it must be provided to you within the time limits discussed above.

Homeowners' associations can adopt written rules regarding the frequency, time, location, notice, records to be inspected, and manner of inspection of the official records, which is allowed by statute. The Homeowners' Association Act indicates that such rules cannot impose a requirement that an owner demonstrate any proper purpose for the inspection of the records, state any reason for the inspection, or limit an owner's right to inspect the records to less than one eight hour business day per month.

A final note is that there are some records that are not accessible to members in the HOA setting, including: any record protected by the lawyer-client privilege or the work-product privilege; information obtained by the association in connection with the approval of a lease, sale, or other transfer of a parcel; any disciplinary, health, insurance, and personnel records of the association's employees, and; any medical records of parcel owners or community residents. The rules for condominium associations with respect to official records are slightly different.

Q: Can my condominium association's board members say that we are going to be self-managed

without a vote of the owners? Can the board, by itself, choose who is going to be the manager? **P.A. (via e-mail)**

A: Unless otherwise provided in the condominium documents (which would be unusual), the decision to engage the services of a community manager, or to be self-managed, will rest with the board of directors. Likewise, if the association decides to hire a manager, the decision of who to hire is made by the board of directors.

You should note that there is no requirement that your condominium association hire a manager. However, if your association does hire a manager, the manager must be licensed if the condominium consists of more than fifty units or has annual income in excess of $100,000.00. If the board decides to self-manage the condominium association, it can act as the "manager" without the board members being licensed so long as they are not paid.

Additionally, an association can hire administrative support staff, who are not licensed, as long as they do not engage in acts of "community association management." "Community association management" is defined by Florida Statutes as any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill, when done for payment, and when the association or associations served contain more than 50 units or have an annual budget or budgets in excess of $100,000.00: controlling or dispersing 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.

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Revitalizing Covenants Takes a Number of Steps

Fort Myers The News-Press, January 17, 2008

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Q: My husband and I live in an older community with a very antiquated set of covenants. We have a voluntary association with dues of $25 per year. About half of the owners are members of the association. We have read your articles about the Marketable Record Title Act (MRTA) and we think that our covenants have probably expired as they are more than 30 years old. Is there anything we can do to adopt a new set of covenants that are more up to date? **D.M. (via e-mail)**

A: Yes, if your association has the authority to enforce the use restrictions that are contained in the covenants. However, there would be a number of steps involved.

The first step would be to "revitalize" the covenants. During the 2004 Legislative Session, the Florida Legislature adopted a covenant revitalization procedure that would permit a homeowners' association to revitalize a declaration of covenants that had ceased to govern one or more parcels in the community. This procedure is set forth in the statute governing mandatory homeowners' associations, which is the Florida Homeowners' Association Act. Because of its inclusion in the Homeowners' Association Act, the revitalization process was not available to other types of homeowners' associations.

In order to be considered a "homeowners' association" as defined by the Homeowners' Association Act, the association must be made up of parcel owners, membership must be a mandatory condition of parcel ownership, and the association must be authorized to impose assessments that, if unpaid, may become a lien on the parcel. Because of this definition, many associations that did not fall within that definition of "homeowners' association" could not take advantage of the revitalization process contained in the Homeowners' Association Act.

During the 2007 Legislative Session, the Legislature adopted an amendment to the Marketable Record Title Act (MRTA). The new legislation states that a homeowners' association not otherwise subject to the statute governing mandatory homeowners' associations may use the procedures in the Homeowners' Association Act to revive covenants that have lapsed because of MRTA. The MRTA statute defines "homeowners' associations" as those subject to the Homeowners' Association Act as well as any association of parcel owners which is authorized to enforce use restrictions that are imposed on the parcels. Therefore, even if an association is not a mandatory association governed by the Homeowners' Association Act, it may now revitalize expired covenants if it otherwise falls

within the definition of a homeowners' association as set forth in the MRTA statute.

In summary, the new law will permit non-mandatory homeowners' associations that have the authority to enforce use restrictions that are imposed on the parcels to revitalize covenants that have expired because of MRTA. However, when covenants are "revitalized", they cannot be significantly amended. Basically, you can only revitalize the documents that were in effect before they expired. Once revitalized, however, the owners can use the amendment provisions in the revitalized covenants to further amend and update the documents.

Q: I am a board member of a large condominium association. Currently, there is debate between the board members and the association's manager regarding the notice that is required for the board to hold a budget meeting. Our bylaws require that notice of board meetings need to be posted on the condominium property no less than 72 hours prior to a meeting. Our manager, however, insists that the board is required to provide notice, directly to the unit owners, 14 days in advance of the meeting. What is the association legally required to do? **R.H. (via e-mail)**

A: When a conflict exists between the Florida Condominium Act and the association's condominium documents, the Condominium Act will control. The condominium documents, however, may contain more restrictive requirements than the requirements contained in the Condominium Act, and in such a case you must comply with the requirements set forth in the condominium documents.

In your case, the Condominium Act requires that the board provide notice at least 14 days prior to any meeting at which a proposed budget will be considered by the board or by the unit owners. This notice, along with a copy of the proposed budget, must be hand delivered, mailed, or electronically transmitted to each owner. Additionally, the person providing notice of the budget meeting must execute an affidavit evidencing compliance with this notice requirement, and that affidavit is to be filed among the official records of the association. If your association were to comply with the bylaws and only give notice of the budget meeting by posting notice 72 hours before the meeting, the association would not be complying with the notice requirements for budget meetings as set forth in the Condominium Act. Accordingly, the association is required to comply with the statutory 14 day notice requirement.

The 72 hour notice requirement set forth in your association's bylaws is also different from the notice requirement for regular board meetings as contained in the Condominium Act. The Condominium Act provides that the association must post notice of regular board meetings conspicuously on the condominium property at least 48 hours in advance of the meeting, except in an emergency. In the case of a regular board meeting (which is not subject to any 14 day notice requirement), if the association complied with the 72 hour notice requirement contained in the bylaws it would not be in violation of the 48 hour notice requirement contained in the Condominium Act. On the other hand, if the association followed only the statutory requirements by posting notice 48 hours in advance, this would run afoul of the stricter 72 hour notice requirement contained in the bylaws. For regular board meetings, your association should follow the more restrictive 72 hour notice requirement contained in the bylaws.

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Movies in Clubhouse Could Expose Association to Fines

Public performance controlled by copyright

Fort Myers The News-Press, January 24, 2008

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Q: Until recently, our association had "Movie Fridays", where the association members and their guests could enjoy movies that were recently released on DVD. Many of the residents enjoyed these Friday movies. A new board was recently elected, and that board immediately stopped showing movies in our clubhouse, as one of the board members said this was illegal. If the association purchased the DVD, what is the problem? **S.I. (via e-mail)**

A: The owners of a copyright in a movie have the exclusive right to determine whether the movie may be shown publicly. This is known as the right of public performance. The question then arises whether the performance of the movie at the association's clubhouse is a "public performance". The Copyright Act roughly defines "public performance" as a performance where a substantial number of people outside a "normal circle of a family" is gathered. At least one Florida court has determined that the playing of a copyrighted work in an association's clubhouse constituted infringement of the copyright. When a copyright has been infringed, the person or entity responsible for the infringement is exposed to significant fines. In this case, the responsible entity would likely include the association.

Accordingly, unless the movie has entered the public domain (the time when the movie may be publicly performed without violating the Copyright Act), the Association must obtain a license, or the permission of the copyright owner, in order to publicly perform the work at an event such as your "Movie Fridays". Licenses authorizing the public performance of motion pictures may be obtained from one of several licensing agencies, or in some cases, the film's distributor. Many of these agencies also issue "blanket licenses" that permit the association to play any of the movies contained in the agency's catalogue. However, having a blanket license from one licensing agency will not permit you to show movies that are not in that agency's catalogue. Also, the fact that the association purchased the DVD from a retail store does not grant the association the right to publicly show the movie.

Q: I live in a gated community of single-family homes in Naples. We have a couple of tennis courts and a nice, but small, fitness room. We have a great group of neighbors who are outgoing and active. But that is our problem. The community has too many people competing to use the tennis courts and fitness room. You are lucky to ever get to use these areas when you want. Do you have any practical suggestions for dealing with this issue? **T. D. (via e-mail)**

A: There are several suggestions that come to mind. I presume from your description of your community that it is a homeowners' association and not a condominium association. One suggestion is to expand the facilities by adding on to the fitness center or adding more tennis courts. Unlike in a condominium association setting, there is no statute in the Homeowners' Associations Act limiting a board's general authority to make such alterations and improvements. You should, however, carefully review the governing documents of your community to make sure there are no provisions contained in them requiring member approval for such a project. You should also review the documents to be sure the board has the authority to levy a special assessment or to borrow money to complete such a project. Even if member approval is required, it sounds as if your community might support the project. Of course, you will need space to put these new or expanded facilities, and that is not always available.

Another suggestion may be for the board to adopt some usage rules that give everyone a fair chance to use the equipment and facilities. In order to make such rules, the board must have rulemaking authority in the documents. Perhaps a sign-up sheet for one or two hour periods could be required for tennis court use, or other rules for using the tennis courts and fitness room. There are no set or required rules for such circumstances, and such rules are generally tailored to fit the specific needs of a community. If the usage problem can be demonstrated, and better yet documented, I believe these types of rules are reasonable.

One other suggestion may be for the association to enter into a use or membership agreement with a neighboring community or local club that has adequate facilities. If the governing documents of the community include the association's authority to enter into such agreements and to have the cost of the agreement be a proper common expense of the association, then this might be a viable solution to your problem. If the documents do not contain such authority, they might be amended to add it.

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Master Associations Required to Elect Board

Cost, time involved can be quite high

Fort Myers The News-Press, January 31, 2008

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Q: I live in a condominium that is part of a larger complex where there are four other condominiums. Each condominium has its own association and there is a master association as well. Does the master association have to comply with the condominium election laws when we elect the directors of the master association? **E.M. (via e-mail)**

A: The first issue is whether the master association would be considered a "condominium association". If so, its operations must be consistent with the Florida Condominium Act (Chapter 718, Florida Statutes). The Condominium Act defines the term "association" to include any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership. Typically, if a master association is composed only of condominium unit owners, then it will be considered a condominium association and it must comply with the Condominium Act. However, if the master association includes non-condominium unit owners, the association could be a "homeowners association" governed by the provisions of Chapter 720, Florida Statutes. For example, if you live in a large community which includes a neighborhood of single family homes, a townhouse community, and a condominium, the master association would not be considered a "condominium association". In your case, it sounds as if your master association is probably a "condominium association" as defined by the law.

There are many areas where the Condominium Act does not neatly address the operation of a "condominium master association". In fact, there is not even a definition of a "master association" in Chapter 718. There have been numerous attempts over the past decade or so to provide legislative clarification, but those efforts have not been successful for a variety of reasons.

One of the areas that the Condominium Act does not neatly address is master association elections. That is because many master association bylaws provide that the president (or other representative) from the condominium association is automatically appointed to the board of the master association. However, the Condominium Act does not recognize an appointment process and requires all directors to be elected in accordance with the provisions of the Condominium Act. This generally requires a notice to be sent out 60 days before the meeting, and there is a self nomination process wherein a unit owner can stand for election to the Board.

A few years ago, the agency that regulates condominium associations, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes issued a ruling stating that a master condominium association was required to elect the board of directors and that a system whereby certain officers of the condominium associations were automatically appointed to the master board conflicted with the Condominium Act. Therefore, even if the association's bylaws provide for an appointment system, an election of directors would have to be held. As you can imagine, this can be problematic for some master associations. There are some master associations with thousands of owners and the cost and time involved in conducting a condominium-style election (with the two notice system, the secret ballots, the two envelope system, etc.) can be quite high. However, until the legislature amends the Condominium Act to address the unique circumstances of master associations, it is the system that governs.

Q: My husband and I live in a high rise condominium. When we went to a recent meeting to vote on an amendment, we were told that we could not vote individually. They told us that Florida law only allows one vote per unit. Is that correct? **D.M. (via e-mail).**

A: There is no Florida law that limits the number of votes that can be cast to one per unit. The authority to limit votes to "one unit, one vote" is found within the condominium documents of the community. The majority of condominium documents contain the "one unit, one vote" limitation. Most condominium documents will also require that a voting certificate be filed when a unit is owned by more than one person or by some entity such as a corporation. Voting certificates, unlike proxies, have an indefinite term and only expire when the unit is sold or until the owners change the designated person. The voting certificate notifies the association which owner (or corporate officer) is entitled to cast the vote for a specific unit. Sometimes, the condominium documents will not require a voting certificate where a unit is owned by a husband and wife. In those cases, husbands and wives are not authorized to cast separate votes when only one vote is allowed per unit.

Q: My condominium board recently distributed the annual budget for 2008 and, not surprisingly, the assessment has increased, although not as much as two years ago after the hurricane. I asked the treasurer about some of the items in the budget, and she said that some of them were increased or added because the board is concerned these expenses might rise, but they cannot be sure. I asked if we can expect a refund at the end of the year if these expenses do not rise, and she said that was doubtful. Can you explain the legal limitations on a board making a budget? **D.H. (via e-mail)**

A: When a condominium board prepares and adopts an annual budget, it must comply with Section 718.112(2)(f) of the Florida Condominium Act and show amounts budgeted by accounts and expense classification. By law, the budget must provide sufficient funds so that the association does not run a deficit. Obviously, without a crystal ball, estimating the exact expenses is difficult, if not impossible.

It is crucial for the board to spend some time thinking about the types and amount of expenses that will come due in the coming year. Careful thought and planning can avoid the burden and expense of levying a special assessment during the year, which is not always possible in every association without member approval, and sometimes the required member approval is not easily obtainable. Therefore, as both a legal and practical matter, the board is well-advised to budget slightly on the high side of potential expenses. Moreover, it is prudent for a board to establish an operating reserve (which is really just surplus funds in the association's general operating account) to cover the cost of completely unexpected expenses, some of which will inevitably arise during the year. The trick, and the point your question appears to raise, is in

determining how much operating surplus is enough.

Many associations have the benefit of history to estimate future expenses. But a well thought out budget will also consider inflation, contracts that are expiring and will need to be renewed, likely at a higher cost, special projects planned for the upcoming year, and extraordinary circumstances. One timely example of an extraordinary expense is "bad debt", which simply refers to the failure of members to pay their assessments. The recent collection and foreclosure experience of most every association is that more and more owners are delinquent in the payment of their assessments. While the Condominium Act contains some very good remedies for the association to pursue delinquent owners, delinquencies often create cash flow issues which, if not adequately planned for, can cause major problems for the association.

In any event, condominium owners do own their pro rata share of funds held by the association, and the board is constrained to spend funds only on proper common expenses. Therefore, any surplus funds in the association account are held, essentially, in trust by the association for the benefit of the community.

For a great resource on the budgeting issue, I recommend you go to the Division of Florida Land Sales, Condominiums and Mobile Homes web site and review the educational publication "Budgets & Reserve Schedules" which can be found at http://www.myflorida.com/dbpr/lsc/documents/budgets_and_reserves.pdf.

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Condo Board Meetings Must Be Posted in Advance

Especially if the agenda includes possible termination of association's manager

Fort Myers The News-Press, February 7, 2008

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Q: Must a meeting of the condominium board of directors be properly noticed when the intention is to discuss the performance and possible termination of the community association manager? There are no potential litigation issues involved. We would prefer that the existing manager not be aware of the discussion at this time. **C.H. (via e-mail)**

A: The law governing condominium associations states that notice of all board meetings must be conspicuously posted on the condominium property at least 48 hours preceding the meeting, except in an emergency. The notice must specifically incorporate an identification of agenda items. The only exception is when the board meets with the association's attorney with respect to proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice. Based on the facts you have presented, the board would be required to properly notice the board meeting to discuss the performance and possible termination of the manager. However, since notice only has to be posted on the condominium property, there would be no requirement that you send a copy of the notice to the manager, nor that the manager be permitted to attend. The only way that unit owners could be properly excluded from the meeting would be for the board to meet with the association's attorney, and even then the matter must involve "pending or proposed" litigation, which is often an appropriate designation if an employment separation is expected to be adversarial.

Note that the law is different for homeowners' associations. Notice of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of the meeting, except in an emergency, similar to condominiums. However, in a homeowners' association, it is not necessary that the notice incorporate an identification of agenda items. Similar to board meetings in a condominium setting, homeowners' association board meetings are not open to all members when the board meets with the association's attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. In addition, the homeowners' association statute provides that the requirement that board meetings be open is inapplicable to meetings between the board and the association's attorney, with respect to meetings of the board held for the purpose of discussing personnel matters. Therefore, in a homeowners' association the board can meet in private to discuss personnel matters, but only if the meeting is with the association's attorney.

Q: I am a condominium unit owner and about two months ago I had water damage due to a faulty air conditioner. My insurance adjuster informed me that the association is responsible for all of the clean-up costs and that my insurance company will only pay for painting and any moldings that had to be replaced. My association has informed me they believe their liability is only for the outside of the building. Consequently, the clean-up and repair work was not done and mold has grown in the unit. Who is responsible for the cleanup? **D.W. (via e-mail)**

A: Your situation and the questions it raises is a very common scenario, and probably constitutes one of the most complicated discussions of Florida condominium law today. I do not believe the analysis is as simple as your insurance adjuster may have led you to believe. However, it is true that the Condominium Act requires the condominium association to carry casualty insurance to cover the unit, as initially installed by the developer, but with exceptions for certain items including wall coverings, floor coverings, fixtures, built-in cabinets, air conditioning units serving only one unit, and several other items of property specifically excluded in the Condominium Act.

One difficult question, which is the subject of ongoing dispute, is who should pay for damage when no insurance proceeds are available due to the existence of a deductible. I presume your association has denied liability because there are no insurance proceeds to pay for the repair due to the association's insurance deductible. In that case, the correct answer to your question, according to many practitioners, is found in the specific casualty repair provisions of your declaration of condominium. The Division of Florida Land Sales, Condominiums and Mobile Homes (the State agency which enforces the condominium laws) and certain insurance companies, however, maintain that the association must pay to repair any item of property that the association insures, without regard to whether insurance proceeds are actually received to pay for the repair of that item and without regard to what the declaration of condominium provides.

While the debate continues, there can be no doubt that the best course of action in the case of water damage is to clean up the damage as soon as possible. From the association's standpoint, it is almost certain that the common elements of the condominium, which the association is obligated to maintain and repair, have been damaged to some extent whenever any significant water damage has occurred. When mold is introduced into the equation, there is a possibility that other unit owners will be affected by the association's failure to promptly clean up the water damage. By moving swiftly to clean up the water damage and prevent mold, neither the association nor the unit owner prejudices its rights to later seek reimbursement from the legally responsible party. So, while I do not have an iron-clad answer as to who is responsible for the cost of the clean up and repairs in your particular case, I do advise that the clean up be preformed as soon as possible after the water leak has occurred in order to avoid mold and other continuing damage.

Also, it is important to remember in these situations that the analysis of who is responsible to clean up and repair the damage does not focus upon who causes the damage, but rather upon what specific items of property were damaged. There is also a potential opportunity to seek reimbursement from a negligent party who causes damages, regardless of who takes the lead and cleans up the unit. In most cases, especially in water damage cases, the analysis of negligence and ultimate liability should be deferred until after the water is cleaned up and the possibility of continuing damage, including mold, has been eliminated.

Q: I manage a Florida condominium and this situation came up recently. An owner sold his unit but neglected to provide the new owner with a mailbox key. The new owner has asked the association to rekey the mailbox. The covenants do not mention anything regarding rekeying mailboxes. I thought that if a mailbox served one unit only, it was a limited common element and was to be repaired at the owner's expense, not the association's. **C.M (via e-mail)**

A: Portions of the condominium property not included in the "unit" are common elements. Limited common elements are common elements that are reserved for the exclusive use of a certain unit or units to the exclusion of all other units, as specified in the declaration of condominium. Some examples of limited common elements are assigned parking spaces, patios, and balconies.

The Condominium Act states that maintenance of the common elements is the responsibility of the association, and that the declaration may provide that certain limited common elements are to be maintained by those entitled to use them. If the declaration of condominium identifies an item (i.e., a mailbox) as a limited common element, and specifies it is to be maintained by the owner who is entitled to use it then that owner is responsible for its maintenance and repair. If the declaration of condominium does not identify an item as a limited common element and as the maintenance and repair responsibility of an owner, then it is the responsibility of the association.

You should review this association's declaration of condominium to see if the subject mailbox is designated as a limited common element and that owners are responsible for the maintenance and repair of limited common elements serving their units. If so, the new owner will be required to pay the expense of rekeying the mailbox. If not, then the association will be required to pay for rekeying as a common expense of the association.

TRADE SHOW

The South Gulf Coast Chapter of the Community Associations Institute will be holding its 14th Annual Conference & Trade Expo 2008 today at the Seven Lakes Association Auditorium, 1965 Seven Lakes Boulevard.

More than 40 exhibitions will be providing products, services and information to residents of community associations.

The event is also at the North Collier Regional Park Exhibition Hall, 15000 Livingston Road, on Friday. The expo is open to the public from 10 a.m. to 3 p.m. in Fort Myers and 11 a.m. to 3 p.m. in Collier. Also, the public can attend an 8 a.m. "Conflict Resolutions" seminar presented by Joe Adams of Becker & Poliakoff, P.A. The three-hour seminar focuses on the role of the board of directors in creating and enforcing rules as well as how those rules ultimately impact unit owners in community associations. For more information, call 239-466-5757.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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

Electricity For Condos Exempt From Sales Tax

Associations must meet several state requirements, first of which is exclusive use of the power.

Fort Myers The News-Press, February 14, 2008

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Q: Where can I find information on Section 12A-1.053 of the Florida Administrative Code, which provides an exemption for sales tax on electric power or energy used in common areas of condominiums, cooperatives and homeowners associations? **C.G. (via e-mail)**

A: You have correctly identified the Florida Administrative Code provision that permits an electric utility to not collect and remit sales tax on electric power when that power is sold to and used by cooperatives, condominiums, and certain other residential facilities, which would include homeowners associations. In order to apply the exemption, the utility provider must have written documentation on file establishing the customer's entitlement to the exemption. You should contact the customer service department of your electric energy provider to obtain their required forms.

Because electric power used by community associations for common use facilities is, in many ways, a quasi-governmental function, the statutes and regulations exempt those costs from the collection of sales tax. There are several requirements that an association must meet in order to confirm eligibility for this sales tax exemption. First, it is essential that 100% of the energy that is used and exempt from sales tax be exclusively used by the co-owners/members of the association. None of the energy may be used in any activity which sells or rents a commodity or provides a service for a fee. For example, if a homeowners' association operates public or semi-private facilities, then the electric power used in that facility will not be eligible for the exemption. Additionally, each point of service must be separately metered and billed. It is not acceptable to make calculations or allocate the percentage of exempt and non-exempt uses that run through a single meter. A responsible legal entity must also be established as the customer to whom the utility provider can render its bills and receive payment for the electric service. This requirement is easily met by community associations that are formed as Florida not-for-profit corporations. In the case of homeowners' associations, it is required that association membership be mandatory for all owners within the community.

FPL has a packet of information and forms for a community association to obtain exempt status under the regulation, and even a form to recoup previously paid sales tax for electric energy that was rightfully entitled to the exemption. The FPL materials point out that the Florida Department of Revenue has concluded that electrical power used by a residential condominium or homeowners'

association relating to the operation of a water or sewage system do not qualify for the exemption. In addition, the State of Florida has previously ruled that non-energy charges on street lights (including common use facilities), and residential outdoor lights are subject to sales tax. Such non-energy charges include relamping, and pole and light rental.

In summary, if your association meets the several requirements described above, and an appropriate representative of your association executes an exemption form required by the electric utility, then your association can be exempt from paying sales tax on electric power used for the benefit of your members.

Q: If our bylaws state that our yearly financial report must be audited by a certified accountant, can our board disregard this because we are a small development? **G.L. (via e-mail)**

A: This is a question that comes up occasionally in both the condominium and homeowners' association settings. The minimum financial reporting requirements for both condominium and homeowners' associations are set out in the statutes that govern each type of community. In a condominium setting, the Florida Condominium Act provides that an association that has total annual revenues that are less than $100,000.00 shall prepare a report of cash receipts and expenditures, and that any association that operates less than fifty units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures. If an association's total annual revenues are $100,000.00 or more but less than $200,000.00, it shall prepare a compiled financial statement; if its total annual revenues are at least $200,000.00 but less than $400,000.00, it shall prepare a reviewed financial statement; and if its total annual revenues are $400,000.00 or more it shall prepare an audited financial statement.

You may be aware that if approved by a majority of the voting interests present at a properly called meeting of the association, the association can "waive" a higher financial reporting requirement to a lower requirement (for example, vote to prepare a report of cash receipts and expenditures in lieu of an audited financial statement). Such a meeting and approval must occur prior to the end of the fiscal year and is effective only for the fiscal year in which the vote is taken.

The Florida Homeowners' Association Act contains similar provisions. The types of financial reports, and the amount of total annual revenues which trigger the type of report which must be prepared, are the same as those referenced in the Condominium Act. There is a similar provision in the Homeowners' Association Act stating that an association in a community of fewer than fifty parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures. A homeowners' association also has the ability to "waive down" to a lower financial reporting requirement if approved by a majority of the voting interests present at a properly called meeting of the association. Note that the Homeowners' Association Act does not specifically require that the vote to "waive down" to a lower financial reporting requirement be conducted prior to the end of the fiscal year or that the vote is only effective for the fiscal year in which the vote is taken.

Regardless of whether you live in a condominium or homeowners' association, you must look not only at the statutory requirements, but also at any financial reporting requirements that appear in the condominium or governing documents. The financial reporting requirements contained in the statutes set forth the minimum requirements, and the condominium or governing documents can provide for stricter financial reporting requirements than the statutes. If your bylaws specifically require an audit by a certified accountant each year then that is the standard the association should comply with. You should also check your documents to determine whether, like the referenced statutes, there is an ability to vote to "waive down" from the audit requirement to a lesser financial reporting requirement. Conducting an audit each year can be a costly endeavor, and

associations with such requirements in their condominium or governing documents may wish to amend those provisions to be consistent with the statutes which allow greater flexibility, and more options, for associations.

Q: We have a five member condominium association board. We have a manager who reports to the president and/or vice-president. Two board members have concerns about the manager's performance and the president assured us that the whole board would have input into the manager's performance review. But we now learn that the review has already happened without our input. What is the proper way to address our concerns? **L.J. (via e-mail)**

A: The issue of authorizing certain board members or officers to take action on behalf of an association can be handled in several different ways. Some boards grant the president or committees broad authority to hire and fire, or to negotiate and enter into contracts, or to prepare and deliver performance reviews. On the other end of the spectrum, some boards insist that every decision be considered and voted upon by the entire board. Probably the most efficient method of administering the association is probably somewhere in between, with the level of board involvement being determined by the significance, often measured in cost, of the particular action being taken. One thing that is certain is that each and every board member is responsible for actions taken by the association. Therefore, board members should insist that they have a voice in association matters and, at the very least, have the opportunity to record a "no" vote on the record regarding any action taken by the association with which the board member does not agree.

In your case, it appears that one or more directors took action without board input. If a majority of the board agrees with your view, then that majority certainly has the ability to either restrict the president's authority to handle such matters alone in the future, or to remove the president and replace him with someone who will follow the wishes of the majority of the board. My general advice to board members, including those who might take action or enter into agreements on their own, without board involvement or support is to think twice. Why risk taking an action that is later found to be beyond your authority as a director or officer? Involving the whole board in important association matters is one easy way to help insulate against claims of personal liability against a director.

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Condo Documents Govern Fees Charged Renters

Board members may communicate by e-mail, but not if the exchange becomes a de facto board meeting.

Fort Myers The News-Press, February 21, 2008

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Q: Can a condominium association charge a transfer fee and a separate management fee for a renter? I paid $100.00 to the condominium association, and then was asked to send another $50.00 fee made payable to a different payee. I was told this was a "management fee." **G.P. (via e-mail)**

A: The condominium statute states that no charge shall be made by the association in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Therefore, you must first determine whether the association is required to approve the lease and whether the fee for such approval is provided for in one of the enumerated documents.

The statute also provides that any such fee may be preset, but in no event may such fee exceed $100.00 per applicant other than husband/wife or parent/dependent child, which are considered one applicant. The statute also provides that the association may, if the authority to do so appears in the declaration or bylaws, require that a prospective lessee place a security deposit, in an amount not to exceed the equivalent of one month 's rent, into an escrow account maintained by the association. The purpose of the security deposit is to protect against damages to the common elements or association property. The security deposit must be handled in the same fashion as provided in the statute governing landlords and tenants. Therefore, if your declaration or bylaws permit the association to collect a security deposit, it may be that the additional $50.00 is being treated as a security deposit. However, the security deposit is a fee collected from the tenant, not the owner. Further, the tenant would be entitled to a refund of the security deposit if there was no damage to the common elements.

Some associations have provisions in their declaration requiring the units to be rented through the association. In those cases, the condominium documents should include specific provisions regarding the rental program. You should review your condominium documents to see if they provide for a mandatory rental program and management fee. If there is such authority, then in my opinion, the management fee is valid. If no such authority exists, you should ask your association for additional information regarding the management fee and its authority for requiring you to pay it.

Q: I serve on the board of my condominium association. The majority of the other board members do not reside locally for most of the year. Although we are able to meet in person during the "season", this is simply not possible during the summer months. As a result, most of our conversations during the off-season occur via e-mail, as this seems to be the most efficient way for the board members to reach decisions. During an "in-person" board meeting, a unit owner vocally opposed the board's decision-making via e-mail and told us that we were in violation of the law. I am not sure that we, as a board, can accomplish the necessary tasks if we are unable to communicate via e-mail. Is it illegal for Board members to communicate via e-mail, and if so, what are our options? **J. C. (via e-mail)**

A: Board members may communicate by e-mail, however, there are limitations. These limitations come into play when the board's communication by e-mail turns into a de facto "board meeting" or accomplishes tasks that should be decided during a board meeting that is open to the unit owners.

In the days of "snail mail", it would be hard to classify written communications between directors as a "meeting." However, e-mail is dramatically different in that a quorum of the board could be sitting in various locations around the world at the same time and communicate "in writing" almost instantaneously with one another. For this reason, instant messaging and/or "chat room" discussions could very well qualify as a "board meeting" if a quorum of the board was simultaneously present and discussing association business. However, this issue has not been addressed by the courts.

Remember that board meetings must be properly noticed and are open to owners, and when a board member is not physically present at the meeting he or she can attend by telephone conference where a telephone speaker is used so that the conversation of the board members attending by phone may be heard by those board members attending in person as well as by any unit owners present at the meeting. The Florida Condominium Act does not presently contemplate the ability to attend board meetings utilizing newer technology such as instant messaging, chat rooms, etc.

Ultimately, there are situations where e-mail communication could be deemed to constitute a board meeting, and there are situations where communicating by e-mail will not. In either event, e-mail should never serve as the sole method of communication between the board members, and should not serve as a substitute for board meetings at which the association membership is invited to attend and issues at which are open discussion and voted on.

Q: I live in a condominium that was built eight years ago. Recently, several of the units have been experiencing problems with the roofs which are causing a variety of problems, including some leakage and some damage to ceiling drywall. The roofs may be buckling. Because the buildings in our complex are over eight years old, and the association was turned over to the members about eight years ago, is there any chance that the association could still go back against the developer to get these roof problems addressed? **C.K. (via e-mail)**

A: Your question raises two important legal issues. The first issue concerns warranties and the second concerns the statute of limitations.

You may know that the Florida Condominium Act provides a statutory warranty of fitness of purpose and merchantability from the developer in favor of the association on the roofs and structural, mechanical, electrical and plumbing elements. The statutory warranty commences upon the issuance of a certificate of occupancy for the particular building, and continues either for three years or one year after the date of turn over of control of the association to the non-developer members, whichever comes last. But in no event does the warranty extend more than five years from the date of issuance of the certificate of occupancy. Therefore, any construction defect or deficiency covered by the warranty that exists during the warranty period, gives rise to a warranty claim

against the developer for those defects or deficiencies.

The warranty period should not be confused with the statute of limitations. The statute of limitations for known defects in condominium common elements does not begin to run until transition of control of the association to the non-developer members, and generally expires four years from the date of transition. That basic statute of limitations concerns "known" or "patent" defects. Conversely, for "latent" defects, which are defects that are not known and could not have been reasonably discovered with the exercise of reasonable diligence during the initial four-year period, a lawsuit can be brought up to ten years after the issuance of the Certificate of Occupancy (C.O.) for each improvement, so long as any lawsuit is commenced within four years from the time the defects were actually discovered. Therefore, if a defect or deficiency existed during the warranty period, but no claim was brought during the initial four-year statute of limitations period due to the fact that no person could have reasonably discovered the defect, then a breach of warranty claim may be brought within ten years of the date of issuance of the C.O. for the improvement. It would have to be shown that the defect existed prior to the expiration of the warranty period, but manifested itself outside the warranty period, and was thus a latent defect.

Given the dates that you provided in your question, it would appear that there is a possibility that the association may still have a valid claim against the developer. The first step to determining your best course of action would be to have an engineer or engineering consultant inspect the roofs and provide an opinion as to the cause of the common roofing problem.

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New Mediation Rules in Effect For Associations

Highlights of this new law include that the aggrieved party no longer has to file a petition for mediation

Fort Myers The News-Press, February 28, 2008

By Joe Adams
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Q: We are residents in a homeowners' association and read your recent article referencing mediation to resolve homeowners' association disputes. Would you please briefly provide us with the steps for mediation. What are the costs and who pays those costs? Is the mediation conducted by the State in Tallahassee? Where can I obtain a copy of the statute? **W.M. (via e-mail)**

A: New presuit mediation requirements for homeowners associations were adopted effective July 1, 2007. The new law amends the petition for mediation provisions contained within §720.311, Florida Statutes, which requires mandatory mediation for certain disputes (e.g. covenant enforcement, use or changes to common areas, etc.) between a homeowners' association and a member before the dispute can be filed in court.

The highlights of this new law include that the aggrieved party no longer has to file a petition for mediation with the Division of Land Sales, Condominiums and Mobile Homes in Tallahassee. Instead, an aggrieved party must now serve upon the responding party a written offer to participate in presuit mediation. The form of the written offer is contained in the statute and should be strictly adhered to. The written offer, which must be sent via certified and regular first class mail, informs the responding party of the dispute and offers presuit mediation as an avenue to resolve the dispute. The aggrieved party suggests the use of one of five certified mediators to mediate the dispute. The responding party is given the option of selecting one or more of the five certified mediators. If the responding party agrees to attend mediation with one or more of the five suggested mediators, the mediation must be scheduled within 90 days, unless extended by mutual written agreement.

Both parties are required to prepay one-half of the mediator's estimated fees. The aggrieved party is authorized to immediately proceed with the filing of a lawsuit against the responding party if the responding party: (1) fails to respond to the written offer to mediate via certified and regular first class mail within 20 days of the date of the mailing; (2) fails to agree to one or more of the five suggested certified mediators; or (3) fails to prepay one-half of the mediator's estimated fees. The new law also states that persons who refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute. Importantly, the new law allows the prevailing party in any subsequent arbitration or litigation proceeding to recover costs and attorney's fees incurred in the

presuit mediation process. Those costs can range from several hundred to several thousand dollars, depending upon the issue at hand and depending upon how vigorously the opposing party defends the allegations.

You can access all statutes including Chapter 720, F. S., as well as proposed statutes for the 2008 legislative session at the website www.flsenate.gov.

Q: Our homeowners' association covenants contain the following restrictions: units may not park more than two vehicles on a permanent basis; all vehicles of guests exceeding two vehicles shall be parked in designated guest areas; and owners and tenants and their families shall not park in areas designated for guests, as these are reserved for temporary use. Can my homeowners' association limit the number of vehicles that I can park in my garage or driveway, stop me from parking my vehicles in guest parking, and tell me that my guests cannot park in the street? **R.C. (via e-mail)**

A: Parking is one of the most difficult issues to deal with in community associations. As lots, driveways, and garages get smaller, there is less space for parking. If there is not enough space to park in the driveways and garages, many people will park in the street, which is not only a safety hazard but can distract from the aesthetics of the community. Too many cars parked in the driveway can also detract from the aesthetics. Therefore, many modern association governing documents include provisions restricting the number of cars that can be permanently parked and prohibiting or limiting street parking. Covenants contained in a recorded set of deed restrictions are presumed to be valid. Therefore, the restrictions that you mention in your covenants most likely can be enforced.

One difficult aspect of this issue is the method of enforcement. Many associations attempt to tow vehicles that are illegally parked. Towing is considered a "self help" remedy and is not favored in the law. I am of the opinion that in order to tow vehicles as an enforcement remedy, the governing documents must allow the Board to tow vehicles. There is also a law dealing with towing, commonly referred to as the "Florida Towing Statute" which must be strictly complied with or else the association can open itself up to potential liability.

Q: I live in a community which is made up of four condominium associations. Recently, each of the four condominiums voted to merge. A few weeks ago, the condominium building in which I reside suffered damage as a result of a leaking pipe. The condominium manager sent out notice of a board meeting that states only the residents living in my condominium building are responsible to pay for the damage as a common expense and that the board will be meeting to levy a special assessment against the owners in my building. Why aren't they levying a special assessment against all of the owners in all of the buildings now that we have merged? **D.A. (via e-mail)**

A: There are two types of mergers that typically occur with condominium associations. The first type of merger, generally referred to as a "property merger", is where not only the individual corporations merge, but also where the common elements, common expenses, reserves, and association property of each condominium are all merged into one condominium association. This type of merger is extremely difficult to accomplish as it typically requires the unanimous approval of all of the unit owners and lienholders.

A more common form of merger, generally called a "corporate merger" is where condominium associations merge the separate corporations which manage and operate those condominiums into one corporation which manages all of the condominiums. In this type of merger, the actual condominiums maintain their separate declarations of condominium and the common elements, common expenses and reserve accounts are still individually maintained for each condominium. "Corporate mergers" are considerably more common as the percentage of unit owners necessary to authorize a corporate merger are

typically quite lower than the percentage of approval necessary for a "property merger".

It appears that your association went through a "corporate merger" rather than a "property merger." As such, the common elements for each condominium are not combined, and in such a case the expense of repairing the common elements would typically only fall on those owners in the condominium which suffered the damage and would not be spread amongst all of the owners in all of the other condominiums.

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Condo Considers Eliminating Management Firm

While not legally necessary for any association to hire a managing firm, considerable work can fall to board.

Fort Myers The News-Press, March 6, 2008

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Q: I serve on the board of my condominium association. For years we have had a management company. Now, due to a number of factors including several of our members are in arrears in the payment of their assessments and banks are foreclosing on units, some members of our association want to eliminate the management company to save money. It is my understanding that we must have a management company due to the fact that our condominium has more than fifty units. Is there any way around this requirement? **D.S. (via e-mail)**

A: Your question includes a common misunderstanding about the requirements for hiring a management company or manager. First, it is not legally necessary for any association to hire a manager or management company, unless required by the community's governing documents. The association may be "self-managed" if it so chooses. However, if an association elects to hire a management company or manager, it must hire a licensed community association manager if the association contains more than fifty units or has an annual budget in excess of $100,000.00.

One problem with being self-managed is that a considerable amount of work can fall to the volunteer board members. Moreover, an experienced community association manager cannot only do the work to administer the association, but most likely can do it more cost-efficiently than the inexperienced, self-managed board. Your collections issue is a good example. A good manager can be instrumental in keeping members current in their payment obligations.

I am aware of some associations that are self-managed to save money, but the board hires an "administrative assistant" to take up some of the work load. When an unlicensed administrative assistant is employed, it is important to understand that a community association manager, as defined in Chapter 468, Florida Statutes, includes a person who controls or disburses funds of the association, prepares budgets or other financial documents, assists in the noticing of conduct of community association meetings, and coordinates maintenance for the residential development or other day-to-day services involved with the operation of the association. Therefore, an unlicensed administrative assistant's role and ability to perform important tasks is limited. Both the unlicensed administrative assistant and the association could face potential legal liability for failing to comply with the license requirements in the statute.

Q: We have one unit owner in our condominium demanding to see our check stubs. Since we turn these over to a CPA for compilation reports given at our annual meeting, must we meet his requests? **M.E. (via e-mail)**

A: The Condominium Act provides a very detailed list of what records constitute the "official records" of the association. Accounting records are official records of the association and must be maintained for a period not less than seven years. The Florida Condominium Act provides that detailed records of all receipts and expenditures constitute accounting records and must be maintained by the association. The Condominium Act also includes within its definition of "accounting records" a statement of account for each unit regarding the payment of their assessments, all accounting statements and financial reports and all contracts for work to be performed, including bids for that work. It should be noted that the association is required to maintain bids for work for a period of only one year.

It is likely that both the check stubs and the financial reports compiled by the CPA are "accounting records" and therefore "official records" of the association. It is also important to note that the Condominium Act provides that "all other records" of the association that are related to the operation of the association are also official records. Once again, this would include check stubs. Even if the association is sending check stubs to the CPA for their compilation of reports, they, or copies of them, would have to be made available for an owner's inspection.

As you may be aware, official records of the association are open to inspection by association members. The right to inspect the official records includes the right to make copies for which the association can charge a reasonable expense. The association is also authorized to create reasonable rules regarding the frequency and manner of record inspections. The Condominium Act provides that records must be made available within five working days after receipt of the written request. If the association fails to provide the records within ten working days after receipt of the written request, a rebuttable presumption is created that the association willfully failed to comply with the statutory requirements, and an owner who is denied access to official records is entitled to the actual damages or minimal damages for the association's willful failure to so comply. Minimum damages are set by statute as $50.00 per calendar day, up to ten days, with the calculation beginning on the eleventh working day after receipt of the written request.

Q: The architectural review committee (ARC) in my homeowners' association has a design guidelines booklet that has been published, but not recorded in the public records. The ARC wants to amend some of the rules in the booklet, and the recorded declaration of covenants, conditions and restrictions does provide authority for the ARC to make changes and revisions. However, a director contends that only rules within the declaration can be enforced and that the ARC is not able to change rules without an amendment to the declaration, which requires a two-thirds (2/3) vote of the entire membership. Is the director correct? **M.F. (via e-mail)**

A: The framework you described for architectural control is quite common in homeowners' associations. Most often, there is a provision in the declaration which authorizes the association to enforce architectural review standards, and most often, the board of directors of the association is either obligated to, or has the option to, appoint an ARC to carry out the architectural control function. Typical provisions do call for the adoption of specific design guidelines, and often provide the ARC or the board with the authority to amend those guidelines without member approval. Of course, any such amendment cannot conflict with any provision contained in the declaration, which is a superior document to all other governing documents of the association, including design guidelines. Therefore, the answer to your question depends upon the specific wording in your declaration. In my experience, it is possible, and even typical, that the board or the ARC can amend design guidelines without member approval.

You may know from prior columns that the Florida legislature enacted a new statute on this point effective July 1, 2007. Specifically, Section 720.3035 of the Homeowner's Association Act now requires that any approval or disapproval of members' improvements to their property, and any enforcement standards for the external appearance of parcels, shall be permitted only to the extent the authority is specifically stated or reasonably inferred as to location, size, type or appearance in the declaration or other published guidelines and standards that are authorized by the declaration. The new statute appears to be designed to remove broad discretion of the ARC or the board in each specific case, and instead requires that ARCs and boards make decisions based upon well-defined, written criteria. The statute has yet to be tested in court to determine its exact requirements, but the clear mandate is that ARCs and boards establish detailed design guidelines just as the ARC in your community appears to be interested in doing. Since the declaration provides the ARC with the authority to revise those guidelines, I would expect that authority is valid and consistent with the statute.

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Rule About 14-Day Meeting Notice Clarified

Condo owner more than five years behind on paying monthly fees and special assessments

Fort Myers The News-Press, March 13, 2008

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Q: I am confused about the 14 day notice for adopting rules in a condominium. We have been told that rules involving unit use may only be approved by the board after the notice of the board meeting is mailed to the owners 14 days before the board meeting. What information must be included with the 14 day notice? Some rules are very important and it seems as if the board should come to an agreement on the actual final wording and then the proposed rule should be mailed with a 14 day notice for a final board meeting. Is this procedure correct or do we need to send a 14 day notice every time the board discusses changing a rule involving unit use? **E.B. (via e-mail)**

A: First, I will presume that your condominium documents permit the board of directors to adopt and amend the rules and regulations regarding both units (apartments) and common elements. In some condominiums, rules and regulations must be approved by the owners, and in such a case, approval would need to occur at a properly noticed membership meeting. If the board has the authority to adopt and amend rules and regulations, the Florida Condominium Act provides that written notice of any board meeting at which an amendment to rules regarding unit use "will be considered" shall be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property not less than 14 days prior to the meeting. Evidence of compliance with the 14 day notice requirement must be made by affidavit executed by the person providing the notice, and the affidavit is to be filed among the official records of the association.

What makes the statute unclear is the use of the word "considered." That could be interpreted to mean that anytime a change to a rule involving unit use is brought up for discussion, it requires 14 days notice by mail, delivery, or electronic transmission, as well as posting. However, I do not interpret the law that way. Rather, I think that the intent of the law is that the 14 day notice is only required when the board is going to adopt a rule involving unit use. In my opinion, the board can meet and discuss proposed changes to the rules regarding unit use at a meeting subject to the regular 48 hours posted notice requirement, but once the board is going to vote on the rule change, the board must mail and post the notice of the board meeting.

Please also note that the 14 day notice requirement only applies to rules regarding "unit use." In other words, absent any restrictions to the contrary in the condominium documents, amendments to rules and regulations regarding common elements can be

adopted by the board at a meeting that is simply posted 48 hours in advance, with no mail-out requirement.

If the board is going to adopt or amend a rule regarding unit use, although not required by law, I believe the proposed new rule or amendment to the existing rule should be mailed along with the notice. If the proposed action involves a change to an existing rule, the proposed rule would typically be sent in "black-lined" format (with new language underlined and deleted language struck through). At the board meeting, the board can change the wording based on comments from those in attendance, decide not to adopt a rule, or adopt it as originally proposed. In other words, there is still some leeway for the board at the actual meeting where the rule change or new rule is adopted.

There may be other requirements to meet before the new, or amended, rule can be enforced. For example, some condominium documents will require all new or amended rules to be sent to all owners before they can be enforced. It is always a good idea to review the condominium documents before taking on the task of adopting new rules or amending existing rules.

Q: Our condominium association has an owner who has not paid monthly fees nor special assessments for over five years. This individual continues to enjoy normal living conditions here, despite owing a large sum of money in assessments to our association. What are our options? Can we tack on interest, late fees and attorney's fees? **L.G. (via e-mail)**

A: Although it is beyond debate that delinquencies in community associations are at an all time high, few associations allow the problem to persist for five years.

The Florida Condominium Act provides that a unit owner, regardless of how his or her title has been acquired, is liable for all assessments which come due while he or she is the unit owner. The association has a lien on each condominium parcel to secure the payment of assessments. Assessments and installments on them which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. This rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest shall accrue at the rate of eighteen percent per year.

Also, if the declaration or bylaws so provide, the association may charge an administrative late fee in addition to such interest, in an amount not to exceed the greater of $25.00 or five percent of each installment of the assessment for each delinquent installment that the payment is late. Payment received by an association shall be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in the collection, and then to delinquent assessments.

Further, the association may bring an action in its name to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed and may also bring an action to recover a money judgment for the unpaid assessments without waiving any claim of lien. The association is entitled to recover its reasonable attorney's fees incurred in either a lien foreclosure action or an action to recover a money judgment from late assessments.

The condominium laws do not, in general, permit more extreme remedies in the nature of "self-help", such as the ability to ban use of recreational facilities or suspend voting rights.

In my opinion, the board of directors has a fiduciary duty to take reasonable steps to ensure that all accounts of the association are paid in a timely fashion. Your association can presumably record a claim of lien against the subject property. Florida law requires that the delinquent unit owner be notified that a claim of lien is being recorded against his property, and that the unit owner has thirty days in which to pay his account in full. If, after thirty days, the owner has not paid in full, then the association is authorized to foreclose the claim of lien, and possibly acquire title to the

subject property or have a third party acquire title, who then becomes jointly and severally liable for past due assessments unless that third party is the first mortgagee.

First mortgagees who acquire title through foreclosure of their lien are required to pay one percent of the original mortgage debt or the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the six months immediately proceeding the acquisition of title.

Your association should consult its attorney prior to initiating proceedings against this owner, as the lack of action for five years could pose additional problems, including limiting the ability to collect some of the past-due amounts due to the statute of limitations.

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Q&A: Speech at Homeowner Meetings Restricted

Members have right to speak on any matter placed on the agenda by petition of the voting interests.

Fort Myers The News-Press, March 20, 2008

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Q: Our homeowners' association board says that Florida law, specifically Section 720.303(2)(b) of the Florida Statutes, does not allow association members to speak during a board meeting unless they have successfully petitioned the board. Then and only then can they speak on the petitioned agenda item. Conversely, some association members argue that this is incorrect and that the law allows members to speak at a board meeting regardless of whether the item has been petitioned or not. What is the correct interpretation of this law? **B.G. (via e-mail)**

A: Section 720 of the Florida Statutes, which is commonly referred to as the Florida Homeowners' Association Act (the Act), provides that members of a homeowners' association (HOA) have the right to attend meetings of the board, and to speak on any matter placed on the agenda by petition of the voting interests, for at least three minutes. As you can see, in the HOA setting, the right to speak is limited by statute to those items placed on the agenda by membership petition. Conversely, the law for condominium associations is quite different. Specifically, members of condominium associations have the right to speak with regard to all designated agenda items at board meetings, although in the condominium setting, there is no procedure for items to be added to board agendas through membership petition.

The HOA may adopt written reasonable rules governing the frequency, duration, and other manner of member statements, subject to certain limits set forth in the law. The Act further provides that if twenty percent of the total voting interests petition the board to address an item of business, the board must, at its next regular board meeting or at a special meeting of the board, but not later than sixty days after receipt of the petition, take the petitioned item up on the board's agenda. The board must give all members notice of the meeting at which the petitioned agenda item will be addressed, fourteen days in advance. Other than addressing the petitioned item at the meeting, the board is not required to take any other action with respect to the subject of the petition, unless the governing documents require board action as the result of a petition item.

Beyond these statutory requirements, some homeowners' associations dedicate a portion of their agenda to allowing individual members to speak at board meetings, notwithstanding the petition requirement in the law. Further, if the HOA's bylaws permit members to speak at board meetings in general, it is my opinion that such a

provision would be enforceable, not withstanding the more restrictive nature of the Homeowner's Association Act.

Q: I am on the board of directors at my condominium association and the buildings are in need of new replacement windows. The board proposes to adopt a new replacement window that is energy efficient and more modern in its appearance. However, the windows are part of the unit owners' property and the association cannot make the unit owners change the windows now, but if the unit owners do decide to change windows, they would be required to update to the new, board-approved window. One unit owner claims that the board must obtain a two-thirds vote of all owners to update the window policy. The owner has made the same point about a two-thirds vote being needed to change front doors and remove old carpeting in the hallways. Any light you could shed on this would be appreciated. **D.M. (via e-mail)**

A: Your question deals primarily with the concept of "material alterations" of the condominium property, which is a very common issue with condominiums. As you may know, the Florida Condominium Act provides that no material alterations or substantial additions to the common elements may be made, except in the manner provided in the declaration. In the event the declaration does not address this issue, the statute requires that seventy-five percent of all members approve any material alteration to the common elements.

You indicate that the windows are the "unit owners' property." Therefore, I assume that the windows are either defined as part of the "unit" or as "limited common elements." Limited common elements are merely common elements that are reserved for the exclusive use of a particular unit. An interesting provision found in some condominium documents is that material alterations may be made by unit owners to their limited common elements with board approval alone. I find this interesting because in many of the same associations, the declaration says that the association cannot make material alterations to other common elements without membership approval.

In summary, the answer to your question about the window replacement policy and the window replacement authority can only be answered by referring to your declaration of condominium and determining the voting requirements therein. There may also be a certain amount of leeway for the board, depending on the facts of your situation, to have broader authority when a new style of windows being selected is related to safety upgrades, such as hurricane protection.

FREE COURSE TO COVER REGULATION.

A free course on the regulation of residential condominium and cooperative associations in Florida will be held on Wednesday, March 26, 2008 from 9:00 am to 1:00 p.m. at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Ft. Myers, FL (across from Bell Tower Shops). The course will be taught by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes.

The course focuses on how federal and state statutes and regulations impact associations. Participants will review guiding documents such as Florida statutes and legislation including the Condominium Act and Cooperative Act, the Fire Safety Act, and the Florida Administrative Code. The course will also touch on federal laws such as the Fair housing Amendments Act of 1988, the Housing for Older Persons Act of 1995, the Telecommunications Act of 1996, and the Fair Debt Collection Practices Act. Please note that this course does not count for manager CEUs for community association managers.

Registration is not required, but space is limited.
To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail fleducation@caionline.org.

Course seating may be limited to one owner occupant per condominium unit based on space availability. To see a complete list of classes in your area, visit www.caionline.org/florida.

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Budget Must Show Fully Funded Reserve Accounts

Members then may vote to reduce those reserves

Fort Myers The News-Press, April 3, 2008

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Q: I understand that many condominium associations take a vote to reduce reserves for the upcoming year at an annual meeting held in January, February or March. My association has always done it this way. It has recently come to my attention that this is not the proper way to vote on reducing the reserves. Chapter 718 of the Florida Statutes is very vague on this and the administrative code has one sentence that would make it seem the vote cannot be taken until the proposed budget is mailed to the owners showing full funding. This would make it very difficult to adopt a budget in December, while the vote to waive or reduce reserve funding is not taken until January, February or March. Can you explain how and when the vote to reduce reserve funding should be conducted? **D.S. (via e-mail)**

A: The Florida Condominium Act is clear in its mandate that the board prepare an annual budget which includes fully funded reserve accounts. This initial requirement is reiterated in the Division of Florida Land Sales, Condominiums and Mobile Home manual entitled "Budgets and Reserve Schedules: A Self-Study Training Manual for Beginners", which is available on the Division's website. However, the Condominium Act also permits the board to seek the approval of a majority of the members present, in person or by proxy, at a duly called meeting at which a quorum is obtained, to waive reserve funding each year, either partially or completely. A separate vote must be taken for each year in which reserve funds are not fully funded.

While I am aware of some associations that obtain the vote of the members at a January, February or March (first quarter) annual meeting, in my experience, it is more common for a board of directors that has elected to propose a reduction in the funding of reserve accounts to call a special meeting in conjunction with the board budget meeting, which typically takes place in November or December of each year. In this manner, the board may provide the members with a budget reflecting fully funded reserves, as required by statute, as well as a budget reflecting the proposed reduced reserve funding. By conducting a special members' meeting in November or December, the concerns set forth in your question are completely addressed. A year-end "financial meeting" is also helpful for associations that plan to vote on the waiver of financial reporting requirements, such as an audit. Assuming that the association's fiscal year is the same as the calendar year, a vote before the calendar year's end is helpful because the law requires that any financial reporting waiver vote take place before the end of the fiscal year for which the waiver is approved.

If the association board elects to propose a waiver or reduction of reserve funding, I do not believe it is "illegal" for that vote to take place in the first quarter without regard to the fact that the fiscal year begins January 1 of each year. The statute and regulations only require that an annual vote be taken, and do not prescribe when that vote must be taken. However, theoretically, the Association would need to collect fully funded reserves for the first couple of months of the year (until the vote to waive the funding of reserves is approved).

You should also note that the Division has previously issued a declaratory statement concerning partial reserve funding which interprets the statute and the administrative code to require that any proposal to partially fund reserve funds must include a detailed, proposed budget which shows precisely how the reserve funding will be reduced and which reserve accounts will be partially funded.

For these reasons, it is certainly preferable to either have your financial votes before the end of the year, or change the fiscal year so that your fiscal year begins after your first-quarter meetings. Changing of the fiscal year may require an amendment to your bylaws, depending on how they are written.

Q: Our condominium is overrun with owners who are not paying their assessments. We have been placing liens on their units for the assessments. My question is, how long do those liens last? **H.S. (via-email)**

A: It is incumbent upon the Board to take such action as is necessary to ensure there is adequate funds for the operation of the condominium. The Condominium Act provides that assessments shall be made against unit owners not less frequently than quarterly in an amount no less than required to provide funds in advance for payment of all of the anticipated current operating expenses and for all of the unpaid operating expenses previously incurred. In addition, no unit owner may be excused from the payment of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment.

The Condominium Act provides that assessments and installments on them not paid when due bear interest at the rate provided in the declaration from the due date until paid. The rate of interest may not exceed the rate allowed by law, and if no rate is provided in the declaration, interest will accrue at the rate of eighteen percent per year. Also, if the declaration or bylaws provide, the association may charge an administrative late fee in addition to the interest, in an amount not to exceed the greater of $25.00 or five percent of each installment of the assessment for each delinquent installment that the payment is late. The association has a lien on each condominium parcel for any unpaid assessments, together with any applicable interest and late fees, as well as reasonable attorneys' fees incurred by the association incident to the collection of the assessments or enforcement of the lien. If a unit owner fails to timely pay his assessments, the association should take the necessary steps to file a claim of lien against the unit. If the owner continues to be delinquent, a lawsuit to foreclose the claim of lien should be initiated.

The association's claim of lien is only effective for one year after the claim of lien is recorded unless, within that time, an action to enforce the lien is commenced. The one year time period will automatically extend for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the owner or any other person claiming an interest in the parcel. Therefore, it is very important that the association keep track of the one year anniversary of the lien and file a foreclosure action prior the expiration of the one year period.

You should also note that an owner can file a "notice of contest of lien", and after that notice has been recorded the clerk of the circuit court mails a copy of the recorded notice to the association by certified mail, return receipt requested. After this service, which is complete upon mailing, the association only has ninety days in which to file an

action to enforce the lien, and if not done so the lien is void. The ninety day period is also extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

Q: I live in a community operated by a homeowners' association that is still under the developer's control. Can the developer direct a homeowner not to put a satellite dish in certain locations, such as the roof? **P.T. (via e-mail)**

A: Parcel owners in a homeowners' association typically own both the structure of the home and the lot upon which it is constructed. The rule adopted by the FCC, the "Over The Air Reception Devices Rule" (commonly referred to as the "OTARD Rule"), applies to viewers who place video antennas, including satellite dishes that are less than one meter (39 inches) in diameter, on property that is within their exclusive use or control, where they have a direct or indirect ownership interest in the property. Homeowners typically have exclusive use or control over their lots and the structures located on them (i.e., their homes) and are permitted to install satellite dishes in accordance with the OTARD Rule. A satellite dish can either be installed on the home or on the land owned by the homeowner.

The association is entitled to specify permissible locations in its rules. Such rules may not, however, impair the installation, maintenance, or use of satellite dishes. In particular, the rule cannot unreasonably delay or prevent installation, maintenance or use; unreasonably increase the cost of installation, maintenance or use; or preclude reception of an acceptable quality signal.

In your case, so long as the association has appropriate rule-making authority, and the developer-controlled board has adopted a valid rule in a procedurally correct fashion, the developer-controlled board would have the right to establish locations for the installation of satellite dishes, provided that the specified location permits the property owner to receive an acceptable signal and does not unreasonably increase costs.

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PROPERTY TAXES SUPERIOR TO ASSOCIATION'S CLAIM

Unpaid assessments may be extinguished at deed sale

Fort Myers The News-Press, April 10, 2008

By Joe Adams
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Q: Please explain how property taxes impact an association's ability to collect unpaid assessments. We live in a condominium and our building has a unit owner who has failed to pay property taxes for a year. C.M. (via e-mail)

A: The short answer is that property taxes are superior to the association's claim of lien, which means that the association's claim of lien for unpaid assessments may be extinguished at a tax deed sale.

When an individual fails to pay their property taxes, the Clerk of Courts will sell a tax certificate in the amount of taxes owed for any given year. The purchaser of the tax certificate holds the certificate for two years, during which time the amount on the certificate accrues interest, usually at a high rate. After two years, the purchaser of the tax certificate has the right to apply to the Clerk of Courts to set a date for a tax deed sale. A tax deed sale functions similarly to a foreclosure sale in that the tax deed is sold to the highest bidder, who then takes title to the property. The recipient of the tax deed takes title free of all encumbrances including all mortgages and the association's claim of lien. The association's claim of lien is extinguished in the process, thereby preventing the association from foreclosing the claim of lien.

Pursuant to Florida Statutes, a person may redeem a tax certificate at any time after the certificate is issued and before a tax deed sale is held. Obviously, if an owner redeems the tax certificate encumbering his unit then the association can move forward with the normal process of foreclosing the claim of lien. Even if an association's claim of lien is extinguished at a tax deed sale, the association can still seek to file a lawsuit against the delinquent owner for money damages for the delinquent assessments.

If a tax deed sale occurs (which extinguishes the association's claim of lien) and there is equity in the property at the time of the sale, the association may be able to recover some or all of its money from the excess proceeds, depending on how much equity is left in the property, and who "stands in line" ahead of the association, if anyone at all.

It is also worth noting that the Florida Condominium Act provides that all provisions of a declaration relating to a condominium parcel which has been sold for taxes survive and are enforceable after the issuance of a tax deed to the

same extent that they would be enforceable against a voluntary grantee of the title immediately prior to the delivery of the tax deed. There are similar provisions in the Florida Homeowners' Association Act.

Q. In a previous column you stated that in HOA elections general proxies can be used, unless prohibited by the governing documents. Can limited proxies be used unless prohibited by the governing documents? If limited proxies are used, how would the proxy holder be able to vote for nominees from the floor? L.V. (via e-mail)

A. The Florida Homeowners' Association Act provides that elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association, and that the members have the right, unless otherwise provided by statute or in the governing documents, to vote in person or by proxy. If a homeowners' association's governing documents do not prohibit members to vote in elections by proxy, limited proxies would be allowed.

Absent a prohibition in the governing documents, general proxies in a homeowners' association setting can be used, and would allow the holder of the proxy to use his or her discretion while voting on agenda items, such as elections. A limited proxy can be used where the member designates on the proxy form the way he or she wishes to vote and the proxy holder is simply the person designated to cast that member's vote in the manner predetermined by that member.

For a proxy to be valid it must be dated, must state the date, time, and place of the meeting, and must be signed by the authorized person who executed the proxy. The proxy should also indicate who the proxy holder is. A proxy is only good for the meeting for which it was originally given, or legal adjournment thereof, and automatically expires 90 days after the date of the meeting for which it was originally given. Furthermore, a proxy is revocable at any time at the pleasure of the person who executes it.

Since a limited proxy prevents the proxy holder from utilizing their discretion when voting the proxy, the proxy holder would not be able to change the vote to a candidate nominated from the floor. That vote would be for whomever the member cast his or her vote for on the limited proxy. If the member who submitted the proxy is able to attend the meeting, the member could revoke their previous proxy and vote at the meeting for any of the candidates, including any who nominated themselves from the floor. A definite answer would require reviewing the language within the proxy and the governing documents.

Q: My homeowners' association owns a community clubhouse with a pool and tennis courts. The facilities are getting run down and the new board has announced its main goal is to rehabilitate the facilities. At a recent meeting, the board committed to seek input from the members and proceed only with a widely accepted plan. During the discussion, a board member stated that legally the board has unlimited authority to repair, or even tear down and rebuild, the clubhouse and to assess the members whatever is needed to accomplish this. I find that very hard to believe as I understood that members must approve all capital improvements. Can you clarify the law on this point? R.W. (via e-mail)

A: Your misunderstanding may come from your familiarity with the Condominium Act, which requires that capital improvements that are "material alterations", as that term has been defined in the law, must be approved as required in the declaration or, if not addressed in the declaration, then by 75 percent of the members. However, no such provision exists in the Homeowners' Associations Act. To determine the limitations on a homeowners' association board's authority both as to improvements and to spending and assessment authority, you need to read the governing documents and locate any such limitations. In the absence of express limitations, the board's authority in this regard is essentially unlimited. In my experience, homeowners'

association documents often do not contain "material alteration" limitations, but do limit assessment authority so that the members' control of the funds can effectively limit the boards' authority.

One legal limitation that always exists is that the board has a fiduciary duty to act in the best interest of the association. Therefore, a plan to build facilities that are clearly not appropriate for a given community, or to spend money on a project that is not needed, may violate that duty. Establishing a breach of fiduciary duty is often difficult as there is usually a range of reasonable choices and the board has some discretion within that range. Those are the types of decisions a board is elected to make. Of course, a practical limitation on the boards' authority is the ever-present ability of the members of the association to recall the board.

Finally, the Homeowners' Associations Act does require a board to obtain competitive bids for an improvement project that exceeds 10% of the annual budget, and I expect the cost of your association's project will exceed that amount. While this provision is not in any way a limitation (the board may accept the higher bid), it does allow the members to monitor the board's project and decision-making process.

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It's Not Always Easy to Collect Assessments

Many condominium units have a fair market value that is less than the amount owed to the bank

Fort Myers The News-Press, April 17, 2008

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Q: My condominium association has developed a real problem with owners who are not paying their assessments. This situation is starting to affect our bank account and cash flow. Another problem is that several of the units are being foreclosed upon by their mortgage lender and I understand that a mortgage foreclosure will wipe out the association's claim, except for the past six months of assessments. Therefore, we have been advised by our property manager to move very quickly and beat the mortgage lender to court. We have been told that this is the only sure-fire way to collect all of the funds owing to the association. However, our condominium board continues to allow owners to be thirty days in arrears before sending a letter demanding payment, and even that letter gives an additional thirty days to pay. Shouldn't we be rushing into court to make certain we collect all that is owing to our association? **D.F. (via e-mail)**

A: The current real estate market and economy in general is creating new challenges for many condominium associations such as yours. While I do agree that taking prompt, diligent action to collect assessments is most often in the best interest of the association, there are situations now in which racing to obtain a foreclosure judgment before the mortgage lender will not result in any benefit to the association. In other words, in many situations, there is no absolute, certain method to making sure the association collects all that is due to it.

The main issue is that a first mortgage is a legally superior interest to an association's claim of lien for unpaid assessments. The new, complicating factor is that many condominium units have a fair market value that is less than the amount owed to the bank. Therefore, there is no equity in the unit which in better days was the security that the bank, the association, and the unit owner could rely upon to resolve this situation to the satisfaction of all parties. But where there is no equity in the unit, and the association obtains title through a foreclosure of its lien for unpaid assessments, the association takes title to the unit subject to any first mortgage. If this occurred in the past when units usually had equity, the association would contact the bank, advise the bank of the association's foreclosure, and the bank would quickly and eagerly commence foreclosure proceedings or take a deed in lieu of foreclosure from the association. By taking title to the unit, the first mortgagee then becomes liable for assessments going forward, and possibly up to six months of assessments that have accrued on the unit. However, many banks today are not eager to take title as they too have no viable

method of selling the unit and recovering their funds. Mortgage lenders do not want to take title to units because, in the current environment, that would result in them "throwing good money after bad."

If an association holds title to a unit that is subject to a mortgage debt that exceeds the value of a unit and the mortgage lender will not take action, there is very little the association can do to resolve the issue. The association might be permitted to rent the unit out and collect rent, but any lease would need to clearly provide that the mortgage company may come in at any moment and take title and possession of the unit.

Still, it is advisable in most instances for a condominium association to take prompt action if it can determine that the unit owner is likely to be able to save the property from the association's foreclosure action. In addition, not every bank will refuse to take title to the unit after the association commences a foreclosure action, and if the bank does take title at least the association has a paying owner going forward. That result is certainly better than doing nothing and allowing the unit owner to enjoy the services provided by the association, but not pay assessments indefinitely. The association's alternative of doing nothing could result in no action and no collected assessments for years to come, depending upon the action, or inaction, of a first mortgagee. As you can see, there is certainly no guarantee that winning the race to foreclosure judgment will guarantee a full recovery for the association.

Q: Our condominium association established a committee to review our condominium documents and to recommend changes to the board. In doing so, the committee failed to provide notice and to keep minutes of such meetings. Is this a violation of the "sunshine laws"? **L.T. (via e-mail)**

A: The Florida Condominium Act defines "committee" as a group of board members, unit owners, or a combination thereof, appointed by the board or a member of the board to make recommendations to the board regarding the proposed annual budget or to take action on behalf of the board. The board may establish other committees by authority granted through the association's condominium documents or board resolution. A committee's scope of authority to act depends on the task at hand, and how much authority is granted by the board.

Association committees are generally categorized as either "statutory committees" or "non-statutory committees". In a condominium association setting, statutory committees are those committees that can take final action on behalf of the board, or make recommendations to the board regarding the association's budget. The statutory committees in a condominium association are always subject to the so-called "sunshine laws". The non-statutory committees are also subject to the sunshine laws unless they are specifically exempted from those requirements by the association's bylaws.

For those readers who are interested in homeowners' association law, there are some differences. In a homeowners' association setting, the statutory committees are committees which make final decisions regarding the expenditure of association funds, or committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. The sunshine laws always apply to statutory committees in a homeowners' association. A homeowners' association's non-statutory committees, however, are not subject to the sunshine laws (although the governing documents should be reviewed to make sure there is no requirement in them to the contrary).

In your case, it does not appear that the committee was empowered to take final action on behalf of the board, nor is that committee's purpose to make recommendations to the board regarding the association budget, and therefore it is a non-statutory committee. However, unless your association's bylaws exempt non-statutory committees from the requirements of the sunshine laws, those requirements should have been followed.

As an added twist, there is another type of committee for condominium associations. At election meetings, the Florida Administrative Code requires a committee to verify the signature and unit identification on the outer ballot envelopes, and to handle the ballots and envelopes as further set forth in that Code. Although all of the actions to be performed by this committee can occur at the election meeting, the Florida Administrative Code allows the committee to verify the outer envelope information in advance of the election meeting. If this option is chosen, the committee meeting where this occurs must be noticed in the same manner required for noticing board meetings, and the meeting must be open to all unit owners and must also be held on the date of the election.

Free Courses Offered on Regulating Condos, Coop Associations

There are two free courses on Condominium and Cooperative Associations being held at the Seven Lakes Condominium Association located at 1965 Seven Lakes Boulevard, in Fort Myers. The first course will be held on Thursday, April 17, 2008 from 9:00 a.m. through 1:00 p.m., and deals with the regulation of residential condominium and cooperative associations in Florida. The second course will be held on Thursday, April 24, 2008 from 9:00 a.m. through 12:00 p.m. regarding condominium association operations.

Registration is required because space is limited. To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail: fleducation@caionline.org/florida.

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No Law Says Condos Must Have Hurricane Windows

Some insurance companies may require them

Fort Myers The News-Press, April 27, 2008

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Q: Are you aware of any impending law or rule by insurance companies requiring that condominiums must have hurricane resistant windows in order to be insured? **B.F. (via e-mail)**

A: I have, in the past, heard third person accounts of insurance companies or agents stating to associations that either windows must be upgraded or shutters installed in order to obtain insurance through certain private insurers. I have also heard several insurance agents recently opine that the market has now "softened" (meaning that rates have come down and insurance is more available, both relatively speaking), so I am not sure if that is still a commonly encountered requirement from private insurers. In any event, there is no "law" which would impose this requirement on condominium associations.

Many condominium insurance policies are now written through Citizens Property Insurance Corporation. There was a law passed during last year's Legislative Session dealing with Citizens Property Insurance Corporation and the requirement for "openings protection" (such as hurricane shutters or hurricane resistant windows.) However, the new law has generally been interpreted to apply only to single family homes with an insured value of $750,000 or more in a wind-borne debris region and insured by Citizens, but not to condominium buildings.

For single family homes, the law provides that effective January 1, 2009, a personal lines residential structure (i.e., a single family home) located in a wind-borne debris region having an insured value on the structure of $750,000 or more is not eligible for coverage by Citizens unless the structure has "openings protection." A residential structure will comply with the requirements of the law if it has shutters or opening protections on all openings and if such opening protections complied with the Florida Building Code at the time they were installed.

I do not believe that the legislation applies to a condominium association master policy because the insurance policy that a condominium association obtains is a commercial lines residential coverage policy, not a personal lines residential coverage policy.

Nevertheless, history has definitely proven that it is a good idea for condominium associations to protect their buildings from hurricane damage, through impact glass, shutters, or a combination thereof. The board should consult with an engineer regarding the preferred methods to protect the building and also with its legal counsel to

determine the proper procedures for addressing installations recommended by the engineer. Depending upon how your condominium documents are written, there are usually a couple of different options for the Board to consider.

Q: I live in a condominium and we seem to be having more and more problems with unauthorized tenants. Our condominium documents require that any lease be at least thirty days in length, and also require that owners provide applications for new leases before the tenants move in. However, it is clear from activity in the parking lot and at the pool that people are renting units for one and two weeks at a time. Moreover, they are not providing applications. Can we evict these tenants? What can we do to get the owners and tenants to follow the rules? **B.L. (via e-mail)**

A: It will probably not surprise you to learn that this is a common problem for condominium associations in Southwest Florida. Especially with the real estate market downturn and other economic conditions, some condominium unit owners are taking liberties with rental policies and requirements in order to collect whatever rental income they can.

From a legal standpoint, your best option to enforce rental restrictions is to have comprehensive provisions in your declaration of condominium to govern not only rental restrictions and application and approval requirements, but also guest restrictions. In my experience, the most frustrating aspect of short-term rental violations is the difficulty in collecting accurate facts to prove the association's case. Unless you have limited access through a manned guardhouse or front desk, or some other entry system that does not allow unauthorized persons to pass through, your only opportunity to identify these renters is to essentially "stake out" the unit. That is neither fun, easy, nor what directors are elected to do. Even when detailed facts supporting the association's case have been gathered, the unit owner often argues that the suspected tenants were only "guests", and in many cases the suspected tenants are long gone by the time the information is gathered and the owner is confronted with the facts. By also having comprehensive guest limitations and application requirements the association can at least blunt the "guest defense" that we often encounter.

In the end, it is my opinion that the association must focus its efforts against the unit owner. Associations sometimes focus upon the tenant and engage in protracted discussions with the tenant over the issue. However, the association's authority and leverage ultimately lies with the unit owner. The association documents may permit the association to levy a fine against a violating owner. The ultimate authority of the association is the ability to enforce the covenants and restrictions through legal action, which must be preceded by arbitration with the Division of Florida Land Sales, Condominiums and Mobile Homes for this type of dispute. Such legal action is essentially seeking an Order requiring the owner to comply with the leasing provisions. It is proper to bring an action for repeated violations of the leasing restrictions, even if there is no current, ongoing violation at the time the arbitration is commenced or at the time an arbitrator or judge hears the case, provided the association can show that it has given the offender at least one written warning, in the legally required format. Assuming the association has gathered adequate facts to prove its case, and the association ultimately prevails, the association may recover reasonable costs and attorney's fees against the unit owner, and may obtain an order from the arbitrator, and ultimately from a judge, if necessary requiring compliance with the rental restrictions.

Additionally, some condominium governing documents provide the association with authority to evict the tenant. The problem with eviction in short-term rental situations is that by the time the required eviction procedures are followed and an eviction lawsuit is filed, the short-term renters are often long gone. You should note that actions for eviction are not subject to the mandatory nonbinding arbitration provisions in the Condominium Act, and can be filed directly in a Court of competent jurisdiction.

In summary, the best you can do is make certain that you have all of the tools available to you through comprehensive provisions in your governing documents. Then, you must proceed diligently and do your best to enforce those provisions. Generally, if unit owners are aware of the association's diligence, they will comply with the documents to avoid the inevitable action by the association.

Q: I live in a condominium that is still under the control of the developer. Our condominium documents restrict owners parking a truck with commercial lettering in the parking area. I have written to the developer asking him to enforce this restriction, yet nothing happens. What can I do to force the developer to enforce its own restrictions? When the unit owners take over, will we be able to enforce the restrictions since the developer failed to? **S.S. (via e-mail)**

A: You problem is not uncommon. Unfortunately, there is no "easy" answer.

In my experience, some developer-controlled associations (although certainly not all of them) are unwilling to enforce the restrictions contained in the documents which they themselves drafted. There are many reasons, the most common is that the developer's appointees to the board are more focused on their "other job" (selling units) than operating the association. However, it should be noted that there are many responsible developers who take promises to their buyers seriously, including enforcement of provisions of the governing documents. Usually, the developer-controlled board will rely heavily on the management company for this function.

Non-enforcement of documents is not limited to developer-controlled boards, there are also some unit owner-controlled associations that do not make rule enforcement a priority. While no one signs up to serve on an association board to play policeman, the directors do have a fiduciary duty to enforce the covenants and restrictions applicable to the condominium. If the restrictions are not in keeping with modern times, then they should be changed.

I would note that Florida law confers standing on an individual unit owner to enforce the provisions of the documents. This means that, in most cases, a unit owner who is unhappy with the non-enforcement of the documents could take the offender directly to court. Of course, few unit owners are willing to invest the time and money necessary to address the problem in this way.

Although I have never personally handled such a case, I am aware of cases where unit owners have filed lawsuits against their associations (both under control of the developer and the unit owners), seeking a court order to compel the board of directors to enforce the restrictions. If such a lawsuit were upheld, the association would also be responsible to pay the attorneys fees of the person who had to take the association to court to force the board to enforce the restrictions.

In sum, this is one of those paradoxes of association living, where theoretical rights are not always easy, or at least practical, to enforce. I would recommend that you write a certified letter to your board of directors demanding that they enforce the vehicle restrictions, or asking for an explanation as to why they are not doing so. If it is important enough to you, you could also obtain personal legal counsel to assist you in remedies that you may have.

You might be also interested in knowing that the State of Florida has ruled, through its arbitration program (which is not binding as "law"), that a developer-controlled association's non-enforcement of rules and regulations will not create "selective enforcement" problems for the association, after the unit owners take control of the board of directors.

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Condo Associations Must Make Records Available

Board can set up rules on inspections

Fort Myers The News-Press, May 4, 2008

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Q: I am on the board of directors of my condominium association and we recently had an owner contacting us almost daily requesting information and documents from the association. I believe this owner is planning to run for the board shortly and is trying to get up to speed on all of the issues involving the condominium association. Unfortunately, the owner's actions are adversely affecting our property manager who is being asked to make copies and locate information and is not able to perform his other duties because of these requests. I understand that the association must make records available to all owners, but are there any limits on that requirement that will allow our manager to get his job done? **B.L. (via e-mail)**

A: As you may know, the Florida Condominium Act is in many respects consumer protection legislation for the benefit of unit owners. One important section of the Condominium Act establishes the requirement that the association maintain official records, and make those records available for member review. The Condominium Act lists a variety of specific records that are required to be kept, but then adds a general requirement that "all other records of the association not specifically included in the foregoing which are related to the operation of the Association" must also be maintained. In other words, every scrap of paper concerning the association's operation is arguably required to be kept as an "official record".

The official records of the association are open to inspection by any association member, or their designated representative, upon written request. Once a written request is made, the association must make the records available for inspection within 5 working days. Failure to provide an opportunity to inspect the records within 10 working days after receipt of a written request creates a rebuttable presumption that the Association willfully failed to comply with the statute. In such cases, even if actual damages cannot be shown, the unit owner may make a claim for statutory damages of $50.00 per day, for a maximum of 10 days ($500.00).

There are some limitations built into the statute, and the board has the authority to adopt rules which can manage issues such as the manager being overwhelmed by repeated records requests from one member. Importantly, the statute only requires the association to make the records available for inspection by an owner or an owner's authorized representative. Often, owners will call the manager or make a written request and insist that records be copied and mailed or copied and made available for pick up. There is no requirement that the board or manager go through the files, make requested copies and send them out

or make them available for pick-up. The owner only has a right to come and review the files himself or herself.

In some cases, it may be to the mutual benefit of the association and the member to make a copy, particularly where the request is for a very specific document. However, if a member submits a request to review "all documents concerning" a certain matter, then there is an inherent danger to the manager or the board providing those copies, because if they fail to include a document that the owner later claims he or she asked for, that failure may be viewed as a willful failure to comply with the statute.

For those open-ended document requests, it is advisable that the documents simply be made available, and that the manager and board do not attempt to select the appropriate documents in accordance with the request. Even then, the manager or a board member should supervise the records inspection.

The Condominium Act permits the association to adopt reasonable rules regarding the frequency, time, location, notice, and manner of records inspections and copying. While the Condominium Act does not contain specific reference to what rules are reasonable, the Florida Homeowners' Associations Act does provide that the rules can limit inspection to one 8 hour business day per month. It is generally believed that it is reasonable to limit record inspections to one time per month per member in a condominium as well, especially if the member is given a full 8 hour day during which to conduct the inspection.

The requirement to keep official records and to make them available on relatively short notice highlights the need for associations to make record retention and inspection procedures a priority in the day-to-day operation of the association. One critical aspect of the record retention and inspection procedures is the need to segregate confidential documents from public documents. The Condominium Act does permit the association to withhold from member review any lawyer-client privileged document, and also any record protected by the work-product privilege, which typically arises in conjunction with litigation. In addition, any information collected by the association in connection with the approval of the lease, sale, or other transfer of the unit as well as any medical records of unit owners are confidential and should not be opened for member review. The Homeowners' Association Act also includes personnel records of association employees, as an additional confidential category of records in the HOA context.

Q: My condominium association's bylaws indicate that only private automobiles and passenger type vans with no signage on the vehicle are permitted in the community. No inoperable vehicles, vehicles without a license plate or trucks are permitted in the association unless they are stored within an enclosed garage. My question regards the prohibition on trucks. Is a small pick-up or a half ton pick-up classified as a truck? What is considered a truck? **D.S. (via e-mail)**

A: This is a question which has been posed on many occasions, particularly as the automotive industry has successfully marketed, and the public has accepted, pickup trucks, SUV's, and "cross-over" vehicles as common means of personal transportation. Some owners in "no truck communities" argue that their "illegal" vehicles are in better condition and cost more than many automobiles which are permitted in the community, with little to no restriction.

There are some statutes that may help identify what qualifies as a "truck". The Florida Uniform Traffic Control Law set forth in the Florida Statutes defines a truck as "any motor vehicle designed, used, or maintained primarily for the transportation of property". Another section of the Florida Statutes deals with motor vehicle licenses and further defines "truck" to mean "any motor vehicle with a net vehicle weight of 5,000 pounds or less and which is designed or used principally for the carriage of goods and includes a motor vehicle to which has been added a cabinet box, a platform, a rack, or other equipment for the purpose of carrying goods other than the personal effects of the passengers."

Given the language contained in the Florida Statutes, small pick-ups and half ton pick-ups would likely be classified as "trucks". Conversely, an "SUV", although often built on a pickup truck chassis, would not seem to qualify as a "truck".

To address the issue based on modern life, and to avoid uncertainty, I think associations should clarify their vehicle restrictions to provide clear definitions of what is, and is not, prohibited in the community.

Q: Please explain how the law allows board members to receive payment for their duties. Our condominium association documents provide that if the board votes for a fellow member to be paid, no other action is needed. I was under the impression that board members were required to serve as volunteers and in order to be paid they needed to hold a community association manager license. **J.C. (via e-mail)**

A: The Florida Condominium Act provides that the board shall serve without compensation unless otherwise provided in the association's bylaws. So long as your association's bylaws provide that board members can be paid, it is allowed. You say the condominium documents require a board vote to do so, and that procedure must be followed. If the owners do not want to allow board members to be paid, the bylaws would have to be amended.

Another issue, however, is whether a board member who is being paid is involved in "community association management", and therefore, required to be licensed by the State. A person is deemed to be performing "community association management" when they perform certain functions for an association or associations containing more than 50 units (pending legislation, recently approved by the Florida Legislature and waiting to be signed into law by the Governor, will reduce this to 10 units) or the associations have an annual budget or budgets in excess of $100,000.

"Community association management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for payment: 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. A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the above-referenced management services is not required to be a licensed community association manager.

The requirement for licensure will depend upon exactly what the paid board member is doing, and whether it falls within those services for which licensure is required by the statute.

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Community Life: Impartial Committee Can Verify Voters

Fort Myers The News-Press, May 18, 2008

By Joe Adams
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Q: Our condominium association held its annual meeting last month. Because we have so many unit owners, it took over 2 hours just to verify the information on the envelopes and count the election ballots. Can we count the ballots ahead of time and then add the votes that were submitted at the annual meeting and then announce the results? **F.C. (via e-mail)**

A: The Division of Florida Land Sales, Condominiums, and Mobile Homes has adopted a rule allowing an association to verify outer envelope information in advance of the annual meeting. The rule allows the board of directors to appoint an "impartial committee." The appointment of the impartial committee should be at a properly noticed meeting of the board.

The impartial committee can meet prior to the annual meeting, but only on the same date as the annual meeting. The meeting of the impartial committee to verify outer envelope information must be noticed 48 hours in advance and must be open to all unit owners. The term "impartial" means a committee whose members do not include any current board members, officers, candidates for the board, or the spouses of any of these individuals.

At the committee meeting, the signature and unit identification on the outer envelope must be checked against the list of qualified voters. The voters must be checked off on the list as having voted. The inner envelope which contains the ballots, however, cannot be opened and counted until the annual meeting. However, the outer envelopes cannot be opened, and the ballots therefore cannot be counted, until the actual annual meeting.

Q: I know you have answered questions before concerning official records requirements for associations. Can you also discuss the length of time that an association should keep various records, such as tax returns, insurance policies, contracts, minutes, and especially ballots and voting records. **T.M.(via e-mail)**

A: Both the Florida Condominium Act and the Florida Homeowners' Association Act provide specific guidance for record retention requirements as to certain records. For other records, the statutes offer no guidance and the concept of reasonableness comes into play.

Clearly, property records including plans, specifications, permits, and warranties related to improvements provided by the developer should be kept indefinitely. Similarly, the governing documents, including the declaration, articles of incorporation, bylaws, and rules and regulations,

and any amendments thereto, should be maintained at all times.

In both condominium associations and homeowners' associations, all pending contracts for work to be performed must be maintained, and bids for work to be performed shall be maintained for a period of one year after the bid was received. For condominium associations, ballots, sign-in sheets, voting proxies and other voting records must also be kept for a period of one year from the date of election, vote or meeting.

Several items are required by statute to be retained for seven years, and those include minutes of meetings of the association board of directors and unit owners, accounting and financial records and, for condominiums, as a result of the Florida Administrative Code, proposed and adopted budgets must be kept with the minutes for a period of seven years. I recommend that minutes be retained permanently. Interestingly for homeowners' associations, all of the association's insurance policies are required to be retained for at least seven years, while the condominium act only requires that all current insurance policies be retained.

Related to the general issue of record retention is a frequent question concerning the need to retain any audio or video recordings made by the board. The Florida Administrative Code addresses this issue and provides that if the board or committee elects to audio or video tape their meetings for the purpose of creating accurate written minutes, the recording may be discarded after the minutes are created. However, if the board or committee elects to retain the recording even after the minutes are created, those recordings shall be part of the official records.

Q: I live in a fairly new gated community of single family homes with a master association and several homeowners' associations, and the board of directors is doing little to enforce the covenants and restrictions. For example, the board is ignoring overnight parking on the streets, outdoor storage of trash and garbage, the presence of commercial vehicles, the six-month or more deployment of storm shutters, etc. All of these issues are clearly prohibited in the governing documents. What is a person to do to get the board to do its job and correct these violations? **R.S. (via e-mail)**

A: Encouraging (and in some cases, compelling) the board to act may be as simple as notifying the board of your concerns. One approach is to draft a letter to the board, advising it of your concerns. You could also have an attorney write the letter for you. At a minimum, the letter should cite specific examples of violations, as well as provisions from your governing documents which prohibit such activity. Because the law changes often and the provisions of your governing documents may not be easy to interpret, the assistance of an attorney could be very helpful.

There may also be factors you are not aware of, such as what your documents provide about enforcement authority. For example, you indicate there is a master association and several sub-associations. Each association will have its own set of governing documents. You would have to look at the restrictions and enforcement authority in the master association's governing documents and the governing documents of the sub-association where the violation is occurring to determine which entity (or both) is responsible for correcting that violation.

If communicating your concerns with the board proves futile, and the matter results in a dispute between you and the association, you will be required to submit your dispute to the Department of Business and Professional Regulation for mandatory mediation. Under the Florida Homeowners' Association Act, disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes are subject to mandatory mediation before the dispute is filed in court. Mediation proceedings are conducted pursuant to the Florida Rules of Civil Procedure. If mediation is unsuccessful, the parties can file the unresolved dispute in court or elect to enter into binding or non-binding arbitration. If all parties to the dispute do not agree to arbitration, any party can file the dispute in court.

As you can see, there are various ways to address your concerns. Obviously, filing legal action should be the option of last resort. You should first try to communicate your concerns with the board and attempt to resolve the problem through such communication before resorting to legal action.

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Neighbor's Smoking, Cooking, TV Annoy Resident

Fort Myers The News-Press, May 25, 2008

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Q: I live in a condominium that was converted in 2005 from an apartment building. I had lived in the apartment for a year before the conversion took place and I decided to buy my unit. Each building has six condominium units, with three units on the top and three units on the bottom. Everything was fine until about eight months ago when a new neighbor moved in, who is a tenant, and began creating disturbances for me. I don't believe he is doing this on purpose, but his daily living style affects my unit. For example, he often cooks meals that create a very strong odor. In addition, he smokes on his balcony nightly and when my balcony door is open, the smoke comes into my unit. Also, he has his television up against the wall that separates our units and often has the television on a loud volume setting late at night. I don't want to be unreasonable because he is not doing anything crazy like having loud parties or purposely disturbing me but I need to address these situations. Do I have any legal rights, and if necessary, can the association help me with these problems? **N.N. (via e-mail)**

A: Your questions and the issues you are facing are very typical of condominium living, which is much more akin to an urban lifestyle where people must interact on a daily basis as opposed to living in a detached home community where people can most often enjoy their property in isolation from other owners.

As a practical matter, and before resorting to any legal rights or association action, you may be in a position to address these issues yourself. As you describe your neighbor's actions, it is likely that the neighbor does not realize his activities are disturbing you. Therefore, you may be well served by having a neighborly discussion about these issues. Perhaps he would be willing to move his television or go smoke elsewhere than the balcony. The cooking odor issue is not as compelling, in my mind, as it is reasonable for people to cook and it is a natural and unavoidable consequence that cooking odors will travel. Therefore, in order to not be perceived as unreasonable, you may want to pick one or two of the more pressing issues that you are having and make a further attempt to live with some of the smaller disturbances that are typical and unavoidable in most condominium buildings.

In the event your neighbor is not able or willing to address these issues to your satisfaction, you may (or may not) have a legal claim for nuisance. Nuisance is generally defined as an act or omission which either annoys, injures or endangers the comfort, health, or safety of persons or which unlawfully interferes or tends to obstruct other persons' lives and the use of their property. Whether or not your neighbor's conduct rises to the level of an actionable nuisance is determined by the standard of a reasonable, objective person. For example, if it is determined that a reasonable, objective person would be disturbed by the

television, the smoking or the cooking odors, then you will have established an important element of a nuisance claim. However, a recurring issue in many nuisance claims is whether the complainant is ultra-sensitive. For example, if you have a very bad allergy condition that makes exposure to even the slightest amount of cigarette smoke disturbing to you, the law will likely not recognize a nuisance claim because such a small amount of smoke may not be bothersome to the average, reasonable person. The same analysis would apply to the noise created by the television and the cooking odors. If you believe the conduct of your neighbor rises to the level of a legal nuisance, then you have personal, legal standing and a legal right to bring such a claim.

You may also know that most well-written condominium declarations include a provision prohibiting owners and their tenants and guests from creating a nuisance on the condominium property. In many situations such as yours, a unit owner will contact the association and demand that the association take action against the neighbor. In those cases, the association board must investigate the situation and make a determination whether a nuisance exists and whether action under the condominium documents is appropriate. Except in very clear cut cases, association boards usually are reluctant to pursue a claim on nuisance grounds due to the uncertainty of the merits of the case.

One way that an association can address specific instances of nuisance is through amendments to the governing documents. For example, a number of associations throughout the country, and some in Florida, have adopted amendments to the declaration of condominium prohibiting smoking upon common elements, and some have even prohibited smoking within units as well. The theory is that prohibiting smoking, including within units, is no different than prohibiting loud, disturbing music or commercial business activity in a unit, and therefore there is a legal basis to adopt such amendments. Initial court cases throughout the country which address total smoking prohibitions in condominiums have generally favored the enforceability of the declaration amendment, although there are no test cases from the Florida appellate courts.

Q: Please explain which types of disputes between a condominium unit owner and an association are subject to the State's arbitration program. **L.J. (via e-mail)**

A: The State's mandatory nonbinding arbitration program is run by the Division of Florida Land Sales, Condominiums and Mobile Homes, which employs full-time attorneys to act as arbitrators to conduct arbitration proceedings. The program was established in 1992.

A "dispute" within the jurisdiction of the Division's arbitration program includes any disagreement between two or more parties that involves the authority of the board of directors to require any owner to take any action, or not to take any action, involving that owner's unit or the unit's appurtenances thereto, as well as the board's authority to alter or add to a common area or element. A "dispute" also includes any disagreement between two or more parties that involves the failure of a governing body, when required by statute or the association's documents to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or to allow inspection of the books and records.

A "dispute" does not include any disagreement that primarily involves title to any unit or common element, the interpretation or enforcement of any warranty, the levy of a fee or assessment or the collection of an assessment levied against the parties, the eviction or other removal of a tenant from a unit, alleged breaches of fiduciary duty by one or more directors, or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements for condominium property.

The arbitration program requires a party to a dispute to petition the Division for arbitration before instituting litigation in a court of law. Filing a petition requires stating the specific nature of the dispute, demand for relief, notice of an intention to file the petition or other legal action in the absence of resolution of the dispute, and a $50 filing fee. Upon receipt of the petition, the

Division will determine the existence of a dispute and serve a copy of the petition to all respondents. Either party may request that the dispute be referred to mediation, either before or after the filing of the respondent's answer to the petition. The arbitrator can also require mediation as he or she sees fit.

Arbitration decisions are final in those disputes where parties have agreed to be bound and also where a complaint for a trial de novo is not timely filed in a court of competent jurisdiction in which the condominium is located. The prevailing party in an arbitration proceeding is entitled to an award of costs and reasonable attorney's fees in an amount determined by the arbitrator.

Q: I am on the board of my homeowners' association. We have numerous violations of our rules occurring and would like to levy fines against the violating owners. The board voted to fine the owners for the violations, but the owners have not paid the fine. What can we do now and can we file a lien on the property for the amount of the fine that is due? **J.S. (via e-mail)**

A: Under the current law, the association is not permitted to file a lien for unpaid fines. However, during the recent 2008 legislative session, a bill was passed that would permit homeowners' associations to file a lien for a fine, but only if the amount of the fine exceeds $1,000, and the right to lien for such fines would presumably need to be set forth in the governing documents for your homeowner's association. The bill has not yet been signed by the Governor, so it is not yet law. However, if the Governor signs the bill into law, the effective date will be July 1, 2008.

In order to understand this proposed change, let me first explain the current law. The Florida Homeowners' Act provides that if the governing documents provide, an association may levy reasonable fines, not to exceed $100 per violation, against any member or any tenant, guest, or invitee. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, except that no such fine shall exceed $1,000 in the aggregate unless otherwise provided in the governing documents. The current law further provides that a fine shall not become a lien against a parcel. Therefore, under the current law, the only way to collect a fine is to collect it from the person that owes the fine. This is typically handled as a small claims action against the individual who owes the fine, which is different than the lien and foreclosure process for unpaid assessments.

Under the new law, a fine can become a lien, but only if the fine exceeds $1,000. In most situations, the fine will not exceed $1,000 because of the cap in the statute. However, the statute permits fines in excess of $1,000 for a continuing violation, but only if permitted by the governing documents. Therefore, the new law will have limited application, as it will apply only if the governing documents permit fines to exceed $1,000, and in my view, would need to also specifically authorize the lien.

Regardless of whether the association tries to collect a fine through a lien process (if the bill is signed into law by the Governor) or through a small claims action, a court will closely scrutinize the association's actions, as fines are penal in nature. If the board has not closely followed the proper notice and hearing procedures in the statute, the court may determine that the association did not properly levy the fine, or that the provision the association is seeking to enforce was not violated. Further, even if the association is successful collecting a fine, it does not guarantee that the violation will be corrected. For example, if the association properly levies a fine against an owner who is violating the parking restrictions, the small claims action could collect the fine, but will not be sufficient to obtain an injunction to require the owner to abide by the parking restrictions. Therefore, if the association is seeking to correct the violation (in addition to collecting the fine), the association will need to file a petition for mediation, or other legal action, in order to obtain compliance.

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It's Not Uncommon to Turn Over Presiding Officer Duties

Fort Myers The News-Press, June 1, 2008

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Q: Our condominium association generally runs smoothly, but over the past two years we have had a few contentious issues. At a couple of the meetings the president of the association decided to turn over the presiding officer duties, to another board member on one occasion, and to the association's attorney on another occasion. Several members complained that the president did not have the authority to do this. In those instances, the complaining members stated that the president/presiding officer does not get to vote if he is the presiding officer but could vote if he appointed another presiding officer. Obviously, the complaining members knew how the president would vote on these contentious issues and did not want him to have the ability to vote. My question is whether or not the president has the authority to appoint a different presiding officer so that the president can then vote on issues coming before the board? **T.C. (via e-mail)**

A: Your question raises an important point about effective association meetings and administration, but also raises a common misconception about the president's right to vote. First, in my experience, a strong but fair presiding officer is often a key element to a well-run association. The presiding officer must run an efficient meeting and keep the assembly on point, but is well-advised to allow members of the board and members of the association to voice their opinions and concerns. Often, members do not insist that their position or view be adopted, but at least want the opportunity to be heard.

I have been involved in situations like you described in your question, in which the president does not wish to be seen as controlling the direction of the meeting. In many cases, the president's conduct to that point has already been criticized and he or she has already been accused of having some bias in the issue at hand. You may know that most well-written bylaws of an association specifically state that the president shall be the presiding officer at all meetings of the association members or directors, and that in the absence of the president the vice president or some other officer shall serve as presiding officer at a meeting. However, in my opinion, the president can attend a meeting and decide not to act as the presiding officer. In those cases where the presiding officer is designated by a provision in the bylaws, it is reasonable to presume if the president decides not to serve as the presiding officer for a given meeting, the next officer as set forth in the bylaw provision would assume the duties of presiding officer. However, many times the president will appoint a presiding officer who has been prearranged to serve in that capacity, and often times that presiding officer is the association's attorney. In my experience this appointment of a presiding officer by the president is done without objection. If any member of the assembly takes issue with the president's appointment of the presiding officer, a motion may

be made by any member of the board or membership (depending on whether it is a board or membership meeting) to appoint a presiding officer for that particular meeting, and a majority of a quorum of the assembly may adopt the motion to appoint a particular presiding officer.

In any event, if the president's reason for not wanting to serve as the presiding officer is his or her belief that he or she is not entitled to vote as a director while serving as the presiding officer of a director's meeting, then that understanding is incorrect. It is not true that the president can vote only to break a tie. If a president is a member of the assembly (for instance, where the president is also a board member) he or she has exactly the same rights and privileges that all other members have, including the right to speak and debate and the right to vote.

Q: At our annual meeting I proposed that we have a bingo night at our clubhouse. Many residents had expressed an interest in having a bingo night but some members of the board are hesitant to vote for it because they say it might be illegal. I know other communities have bingo nights, so what is the law on holding bingo nights at a country club? **R. S. (via e-mail)**

A: Community associations such as condominiums, homeowners' associations, cooperatives, and mobile home parks are the types of organizations permitted to conduct bingo games under Florida law. However, there are some rules and limitations that must be followed in order to keep the game legal. For instance, after subtracting the actual expenses for conducting the bingo game, all net proceeds must be returned to the players in the form of prizes. If there are remaining proceeds after the bingo games are completed, the remaining proceeds must either be donated to a charity or must be used on the next day of play by providing bingo games free of charge until the remaining proceeds are used.

Florida law also limits how many days of play, total number of jackpots, and winnings are permissible. The maximum number of days a community association is allowed to hold bingo games in a week is two. The maximum jackpot is limited to two hundred and fifty dollars or its equivalent. A community is also limited to three jackpots on any one day of play.

The person or persons who are conducting the bingo game must be residents of the community and members of the organization sponsoring the game. The individuals responsible for organizing the bingo games cannot be compensated. The games must be played on common areas or property owned by the association which is located within the community. All players and organizers of bingo games must be at least eighteen years of age.

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Committee Meetings Subject to Requirements

Fort Myers The News-Press, June 8, 2008

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Q: My question concerns committee meetings and the requirements to provide notice of those meetings to the members and to have those meetings open to the members. Also, is it necessary to keep minutes of committee meetings? **T.L. (via e-mail)**

A: Committees can be very useful to associations, both to take some of the workload off of the board, and to involve more members in the operations of the association. However, you are right to note that committee meetings are also subject to certain advertising and open meeting requirements. Depending upon the type of committee, there are differences between the notice and open meeting requirements in condominium and homeowners associations. For homeowners associations, a committee that has the authority to make a final decision concerning an expenditure of association funds, or a committee which is vested with the power to approve or disapprove architectural review issues, must notice meetings according to provisions in the governing documents, and if the governing documents do not address the notice requirement, forty-eight hours posted notice is required. In addition, those meetings must be open to the members and the members have the opportunity to videotape or audiotape the meetings.

In a condominium setting, committee meetings of committees which are empowered to take any final action on behalf of the board or which make recommendations to the board regarding the association budget, must be preceded by notice and be open to the members.

For homeowners' associations, however, any committee that is not approving architectural decisions or making a final decision concerning the expenditure of association funds is not required to comply with the notice and open meeting requirements unless the homeowners' association governing documents require it. The Condominium Act is different in that any committee which is not empowered to take final action on behalf of the board or make recommendations to the board regarding the association budget may be exempt from the notice and open meeting requirements only if the bylaws for the association so provide. In the absence of an express bylaw provision exempting those condominium committees from the notice and open meeting requirements, the committees must comply with those requirements.

In every case, it is my opinion that it is best for a committee to keep recorded minutes of its meetings. These minutes can be helpful not only to the current committee and board, but to future committees who are attempting to make similar decisions or understand the history of important matters in the association. While the provisions of Condominium Act and Homeowners' Association Act that identify the official records of the association that must be kept do not specifically

include committee minutes as a required official record, both the Condominium Act and Homeowners' Association Act include a "catch-all" provision that includes any records related to the operation of the association. Clearly, committee minutes would be considered part of the official records of the association.

Q: The president of our homeowners' association board owns several units, as an investment. He also manages several rental units in the development. The owners of the units the president manages often give the president a proxy for voting at association meetings. Is this a conflict of interest? **R.C. (via e-mail)**

A: In my opinion, owning several units in a community is not, in and of itself, a conflict of interest. In fact, some might argue that an owner of multiple units has a greater interest in ensuring that property values are maintained, since they have a larger investment than owners of single units. Be that as it may, the fact that a board member owns more than one unit, or owns a unit which is held out for rental, does not disqualify that person from serving on the board on conflict of interest grounds.

That is not to say that issues may not arise where a conflict of interest exists. For example, if the board is dealing with a tenant problem, and the tenant resides in a unit which your president manages, it would be appropriate in that situation for your president to refrain from voting or participation in that issue, on conflict of interest grounds.

With respect to proxy voting, as long as the president is not soliciting proxies in the name of the association, and then voting them contrary to board directives, this is not a conflict of interest either. A director or officer has the same rights as any other owner to hold a neighbor's proxy. This is not much of an issue in the condominium setting, since general proxies are prohibited for voting on most items, and the holder of the proxy is given little discretion in any event. In homeowners' associations, there is a bit more leeway for using general proxies, depending on how the bylaws are written.

Q: I own a condominium unit in a small complex, which is entirely investor owned (there are no resident-owners). Since the directors live all over the country, board meetings are held by telephone conference. I have requested that the board e-mail notice of its meetings and agendas to owners. The board does post notice of its meetings and an agenda on the condominium property, 48 hours in advance. Also, minutes are not readily distributed and are only made available if you request them. Do the Florida Statutes address these issues in non-resident communities? **D.M. (via e-mail)**

A: The same law applies regardless of whether the unit owners reside at the condominium or not. Your board appears to be in compliance with the law by posting the notice on the condominium property 48 hours in advance. While there is nothing in the law that would prohibit the board from providing courtesy e-mail notification to the owners of upcoming board meetings, it is not required in the law.

As to the minutes, there is likewise no requirement that they be mailed out to you. If the board makes minutes available upon written request, it is complying with the law.

While your requests may not be unreasonable given the somewhat unique situation of an entirely investor-owned community, this is not an issue you could force legally. Rather, your remedies are "political", including getting yourself elected to the board and attempting to change policies internally.

Q: My question concerns the use of reserve accounts in a multi-condominium association, and the use of reserves for non-scheduled purposes. Can reserve monies be used to cover operating expenses if there is a vote by the owners to allow this to take place at the annual meeting? Do funds have to be replaced before the end of the year? Does the vote take place on a condominium-by-condominium basis, or for the whole association? **B.M. (via e-mail)**

A: In a multi-condominium association, reserves must be separately accounted for, on a

condominium-by-condominium basis, unless the association has properly consolidated financial operations, which is a procedure available for pre-1977 condominiums.

Whether dealing with a single condominium, or a multi-condominium association, it is proper to use reserve funds for operating purposes if that has been approved by a majority vote of the unit owners. In a multi-condominium association, the vote should be taken on a condominium-by-condominium basis. The funds do not need to be "replaced" by the end of the year, unless that is what the owners voted on. However, if reserve funds have been depleted, the reserve account balances would need to be adjusted in calculating the following year's reserve funding requirements.

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Q & A: Who's responsible for leak damage?

Fort Myers The News-Press, June 15, 2008

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Q: For the second time in the past year, my upstairs neighbor has had a leak that ran down through the wall and damaged my ceiling and drywall. The first time it was a toilet leak and this last time his refrigerator water supply line leaked. In both cases, he refused to pay for the repair to my ceiling and drywall and the condominium association had to complete the repairs. I was told that I was responsible for repairing the drywall damage, but the condominium association decided to take care of it since the damage to the drywall was very minimal. I simply don't understand how I can be liable for this and the upstairs owner is not responsible to pay for this damage. **(B.C. via email)**

A: Your question involves what is arguably the most complicated and uncertain issue facing condominium associations today. The general concept concerning repair of casualty damage in a condominium is that you initially look at what item of property is damaged as opposed to whose conduct caused that damage. The primary reason for this approach is to allow associations and unit owners to know what they are responsible to insure, as insurance is the first line of defense against this type of damage.

The issue is complicated by the construction of most condominium buildings. As you may know, it is necessary to define unit boundaries, general common elements, and limited common elements, which are general common elements owned by all owners in pro rata shares, but reserved for the exclusive use of certain owners. Then, provisions in the condominium declaration assign various general, day-to-day maintenance responsibilities for these various items and areas of property to the unit owner and to the association. However, because casualty damage is different than day-to-day maintenance, both because of the nature and cost of repairs for casualty damage and because casualty damage is insurable, most declarations have separate, often different, repair and replacement responsibilities from the general day-to-day maintenance responsibilities assigned to unit owners and the association respectively in the event of a casualty event. To further complicate matters, the Florida Condominium Act dictates the casualty insurance that must be maintained by the association, which includes insurance of the unit as initially constructed, excluding certain items of property such as wall coverings, floor coverings, built-in cabinets, and others. As a result, the association's insurance covers initially constructed wallboard and ceiling drywall even though those items of property are inside the unit.

Historically, the actual repair responsibility for interior drywall rested, in most cases, with the unit owner, even though the association insured that property. However, to add further to the complication and confusion, the Division of Florida Land Sales, Condominiums, and Mobile Homes issued a Declaratory Statement in January 2006, generally referred to as the "Plaza East"

Declaratory Statement, in which the Division took the position that the association is responsible to repair and replace any item of property which the association is obligated to insure. This decision caused some difficulties because many declaration of condominium casualty repair provisions did not follow the concept that the association must repair and replace everything that the association insures. The Plaza East reasoning was recently overturned by a State Hearing Examiner in another case, and that matter is pending appeal. Condominium communities have lived with this uncertainty for the last two years.

Currently, House Bill 601 is awaiting the Governor's signature, or veto, to address the confusion and uncertainty caused by the Plaza East Declaratory Statement. House Bill 601, if it becomes law, will codify the Plaza East ruling, unless the association affirmatively votes to be bound by the same other casualty repair protocol.

In any event, any liability of your upstairs neighbor will not be based upon any statutory obligation contained within the Condominium Act, but would be based upon a theory of negligence. Unfortunately, negligence is more difficult to establish than one might think. It is not enough to show that some damage occurred, but you must show that the conduct, or failure to act, of your upstairs neighbor was unreasonable or careless. If the upstairs neighbor had no notice whatsoever that the toilet nor the refrigerator supply line would leak, it is unlikely you will establish that he was negligent.

Moreover, if the upstairs neighbor was aware of potential leaks by these items, most of that information would be held by, and known only to, the upstairs neighbor. It can be very difficult for you to establish these important facts. However, it is true that any person damaged by the upstairs neighbor's leaks, including the insurance company that pays to repair such damage, can investigate and explore a possible negligence action against the upstairs neighbor and, if appropriate, recover the cost of the damage from that responsible party.

Q: Can husband and wife simultaneously serve on the Board? (**M.R. via email)**

A: Simple question, complicated answer.

First, it is necessary to understand that, in the absence of restrictions in the condominium documents (declaration of condominium, articles of incorporation, or bylaws) any natural person age 18 years or older may serve on the board of directors, which is the law generally applicable to Florida corporations.

Most condominium documents do contain some restriction on board eligibility. Many documents limit board eligibility to record title holders (persons named on the deed). The Florida Condominium Act has also been consistently interpreted to permit any person named on the deed to stand for election to the board.

Accordingly, as the law stands today, if a husband and wife are both record owners of a unit, they are both legally entitled to run for, and be elected to the board, even though they may only own one unit. In other words, if both are elected, they would get two votes on the board, even though they only share one vote for the unit.

The law has been recently amended on this topic, effective October 1, 2008. The change in the law states that "co-owners" of a unit may not simultaneously serve on the board. Clearly, this would prohibit a husband and wife, who own only one unit, from simultaneously serving on the board.

There are many grey areas created by this law. For example, if a husband and wife owned five units, would they still be limited to one board seat? What about those situations where a husband and wife have been properly elected, can the Florida Legislature remove a board member from their seat? How is the law to be phased in? Can husband and wife both run? If so, and both win, which spouse do you disqualify?

More to come on this topic when this column begins its annual review of condominium and homeowners' legislation.

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Committees Help, But Power is Limited

Fort Myers The News-Press, June 22, 2008

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Q: I live in a condominium where our documents state that the board of directors has the authority to approve or disapprove leases. Given the amount of time the board was spending collecting information and interviewing possible tenants, the board decided that it would be best to create a "screening committee". The board decided to give the committee the full authority to approve or disapprove the leases. My question is, since the recorded documents state that the board of directors has the authority to approve or disapprove leases, do the bylaws need to be amended in order to allow the "screening committee" to have that authority? **R.E. (via e-mail)**

A: Committees can be created in one of two ways. First, the governing documents of the association can create a committee and provide that committee with specific duties and functions. A committee may also be created by a resolution adopted by a majority of the full board of directors. A committee created by a board resolution may exercise portions of the board's duties and responsibilities. However, the authority granted to the committee should be specifically contained within the resolution creating the committee.

Therefore, it is my view that a board may create a committee to carry out the functions of the board as provided in the bylaws. However, there are legal limitations on a committee's authority. For instance, a committee can never authorize an action which is required to be voted on by the members. For example, a committee could not authorize a material alteration of common elements which requires a unit owner vote pursuant to the declaration. Furthermore, a committee cannot fill vacancies on the board of directors or adopt, amend, or repeal the bylaws.

It is important to note that committee meetings, whether advisory or where the committee exercises the authority of the board, must be normally open to the association membership, although the bylaws can provide otherwise in limited circumstances. Stated otherwise, committees that cannot take final action on behalf of the association can be exempt from state "sunshine" regulations, if so provided in the bylaws. When a committee is empowered to act on behalf of the board, the committee meeting must conform to the notice requirements established for meetings for the board of directors, and these requirements cannot be disclaimed in the bylaws. This includes posting notice of the meeting 48 hours in advance, posting an agenda, and permitting unit owner attendance. The same rules apply to a budget committee.

Ultimately, the board will be responsible for the actions of the committee, since the board cannot delegate its fiduciary duty. However, as long as the bylaws do not limit the board's authority to create committees, nor limit the ability to delegate corporate authority to the committees, I believe the board of directors can create a "screening

committee" and delegate the authority to approve or disapprove leases to the committee without the need to amend the bylaws.

I would also note that some commentators do not favor the use of the term "screening", as it connotes (at least to some) a discriminatory theme. A term like "lease review committee" is more neutral, and may be a better term to use. I also recommend that if the association intends to disapprove a lease, that there be a process in place for review and ultimate decision-making by the board of directors, since these situations often result in litigation.

Q: I serve on the board of my condominium association and we continue to be divided on the question of what are appropriate rules to be included in the board-made rules and regulations as opposed to being included in the declaration of condominium. The bylaws of the association clearly give the board the authority to make rules and regulations and it would seem to me that the board could add pet restrictions to the rules and regulations. However, some board members think that only the members can add pet restrictions by amending the declaration. What do you think? **D.H. (via e-mail)**

A: A key Florida appeals court case, decided many years ago, established that a board-made rule will be valid if it can pass three tests. First, the board must be granted rule-making authority in the condominium documents. Second, any rule adopted by the board cannot be in conflict with any right that is contained in the superior condominium documents (declaration, articles or by-laws), including any right which is "inferable" from those documents. Finally, any board-made rule must be reasonable and not discriminatory.

You stated in your question that the documents of your condominium do, in fact, give the board rulemaking authority, so the first test is presumably satisfied. However, it is important to verify that the Board's rule-making authority extends to both common elements and units (apartments). Many condominium documents, particularly older ones, only grant the board rule-making authority with respect to common elements. In such cases, the Board would not have rule-making authority regarding use of the units, and restrictions upon unit use could then only be established through an amendment to the condominium documents, typically the declaration.

Next, you must determine whether the rule conflicts with any provision in the condominium documents. In the case of pets, if the condominium documents are completely silent on pets, it is likely that a board-made rule regulating pets will be valid. In my opinion, it does not seem "inferable" from silence that a particular right is established by the condominium documents. However, you must read your condominium documents carefully as I have seen declarations of condominium that make some passing reference to pets which contemplates that pets will be present in the community. If your declaration contains such a provision, then it is reasonable to say that the right to have pets, at least, is inferable from the condominium documents.

The third test is whether or not the rule is reasonable. The problem with this standard is that it is very subjective and difficult to pin down for an exact meaning. For a condominium development that has multiple units within one building and is configured like a traditional apartment building, it may be perfectly reasonable for the association to limit the size of dogs, as larger dogs might not adapt well to tight quarters. I do not believe anyone would question that it is reasonable for a board to make rules including leash requirements, or designating permitted pet walking areas within the condominium.

Because board-made rules are subject to much stricter scrutiny by the courts, I normally recommend that "significant" pet restrictions (such as an outright ban) be included within the declaration of condominium, which is subject to the democratic voting process, involving all unit owners. However, each situation has to be analyzed on a case-by-case basis, because what is "reasonable" for one community may not be so for another.

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New Law Affects Board Make Up

Enacted this year, it is in effect Oct. 1

Fort Myers The News-Press, June 29, 2008

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Today's column begins our annual review of new laws passed by the Florida Legislature affecting community associations. 2008 was an especially busy year, and numerous new laws have been passed. Some are significant, some not. We begin our review with a look at House Bill 995, which primarily impacts condominium associations.

Effective October 1, 2008, Section 718.112(2)(d)1 of the Florida Condominium Act has been amended to provide as follows:

> The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that 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. If no person is interested in or demonstrates an intention to run for the position of a board member whose term has expired according to the provisions of this subparagraph, such board member whose term has expired shall be automatically reappointed to the board of administration and need not stand for reelection.

The apparent intent of this law is to limit board terms to one year, apparently notwithstanding any contrary provisions in the association's bylaws. Many condominium associations (perhaps most) operate under a multi-year board seating system, with two years and three years being the most common terms for their board members.

Most associations with multi-year board terms operate under a "staggered" election system, where a set number of board members do not need to stand for election at each year's annual meeting (they would still have one or two years left on their terms). Many associations feel this approach is necessary to ensure that there is some continuity of experience on the board. For example, a common "staggering" system found in a typical bylaw provision might provide for a seven-member board, with four directors being elected for 2 year terms in one year, three directors elected the following year for a 2 year term, four the next year, and so on.

Under the new law, effective October 1, 2008, these bylaw provisions are apparently no longer valid.

There is an ability to "opt in" to two year staggered terms, by a vote of a majority of the entire voting

interests of the association. There is usually one voting interest per unit in a condominium, and the new law requires approval by a majority of all units (not simply a majority of those who vote) to opt in to two year staggered terms.

Accordingly, for associations that have two year staggered terms in their current bylaws, they will need to call a special meeting, presumably in advance of their next upcoming annual meeting, to "opt in" to the statute. More simply stated, a vote has to be taken to continue to have the right to operate under the existing bylaws. Otherwise, one year terms for board members will be the rule.

For associations with three year terms, it appears that some change will have to be made, I believe most associations will probably want to amend their bylaws to take advantage of the statutorily-permitted option for two year staggered terms. Associations with three year terms for their directors should also address this issue before their next annual meeting.

The new law certainly leaves several important questions unanswered. For example, are directors who have only partially served a multi-year term removed at the next annual meeting? Under the Florida Condominium Act, removal of a director from office is a power given to the unit owners in the condominium, not the Florida Legislature. Is it the intent of the law to be "phased in"; and "grandfather" those with time left on their terms, or is it supposed to take effect in October?

The law can also be construed to permit three year (or even longer) terms for board members, so long as they are not "staggered." I doubt that was the "intent" of the law, but it could certainly be interpreted that way, given how the language in the statute is written (the "otherwise permitted" phrase seems to suggest that other terms would be permissible, but if a staggered term, then only two year terms are permitted).

Associations which have one year director terms, and do not wish to change, need not worry about the new law as to this topic.

A second significant change brought about by HB 995 concerns the age-old debate about spouses (or other co-owners of a condominium unit) simultaneously serving on the board. Under previous law, if both spouses were listed on the title to the unit (named on the deed), they both had the right to run for, and be elected to, the board of directors.

Section 718.112(2)(d)1 of the Condominium Act will provide, as of October 1, 2008, that "coowners of a unit may not serve as members of board of directors at the same time". The law contains an exemption for condominiums containing 10 or fewer units.

This change addresses a common situation where spouses (or other co-owners) own a single unit, but both wish to serve on the board. Under the new law, that will no longer be permissible. However, this new law also leaves many unanswered questions.

As with the multi-year term issue, is it the intention to remove current directors (such as two spouses) from office, when they have been duly elected? Or, does the new law phase in only after they serve out their term? If one spouse is to be kicked off the board by the new law, who decides which one it will be?

The new law also states that co-owners cannot simultaneously serve on the board, but the law does not prohibit co-owners from simultaneously running for the board. What if two co-owners run for the board and both are elected, how does the association decide which one is elected?

What if John Doe and Jane Doe own five units in a condominium? Does the new law mean that both of them cannot serve on the board, each representing the interest of different units? The law prohibits "co-owners of a unit" from serving on the board "at the same time."

In next week's column, we will continue with a review of some additional changes found in HB 995.

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Gov. Crist Vetoes Bill Dealing with HOA Operations

Fort Myers The News-Press, July 6, 2008

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Today's column continues our review of 2008 Legislation applicable to condominium associations and homeowners' associations.

By way of late breaking news, one of the major pieces of legislation adopted during the 2008 Session of the Florida Legislature was recently vetoed by the Governor. House Bill 679 primarily dealt with homeowners' association operations, including areas such as HOA election procedures and reserves. According to the Governor's veto message, he killed the law because he did not support a provision which would have de-regulated swimming pool water quality monitoring requirements for smaller HOAs.

Continuing with our review of House Bill 995, which impacts condominium associations, today we will review some changes to the law applicable to boards of directors.

- Abstentions: Under existing law, a condo board member cannot abstain from voting unless they have a conflict of interest. If they do not vote, they are deemed to have assented to the majority position on the matter. Under the new law, a director can apparently abstain from voting even in the absence of a conflict of interest and, in such cases, is "presumed to have taken no position with regard to the action."

- Director Standards of Care: HB 995 statutorily codifies what is often referred to as the "Business Judgment Rule." This rule provides that a director is not subject to personal liability if he or she acts in a manner that a reasonably prudent person would consider to be in the best interests of the association. Personal liability may be asserted against a director where he or she acts in bad faith, with malicious purpose or in a manner "exhibiting wanton and willful disregard of human rights, safety or property." Further, personal liability can attach where a director acts for improper self-gain or in violation of criminal laws.

- Director Assessment Delinquencies: Section 718.112(2)(n) is a new section of the Florida Condominium Act which provides that any board member who is more than 90 days delinquent in the payment of regular assessments "shall be deemed to have abandoned the office."

- Embezzlement Allegations: A director who is "charged with a felony theft or embezzlement offense" is removed from office until the charges are resolved. If the director is found innocent of the charges, their office is restored. Guilty until proven innocent, I guess.

- Unit Owner Right to Call For Board Vote: Similar to the law for homeowners' associations, the condominium law will contain a procedure for unit owners to require that their board consider an issue. A petition must be signed by at least 20 percent of the voting interests to require the board to take up an item of business within 60 days of receipt of the petition, at either a regular or special meeting.

Next week, we will continue with our review of HB 995, which has an effective date of October 1, 2008.

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HB 995 Removes Most Association 'Opt-Out' Rights

Fort Myers The News-Press, July 13, 2008

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Today's column is the third installment of our annual review of new laws affecting community associations. Today, we will continue reviewing House Bill 995, which primarily impacts condominium associations, and which has an effective date of October 1, 2008.

The Florida Condominium Act spells out many procedures which need to be followed, some of which are rather complex, and not required of any other type of corporation under state law. But, the law has often allowed owners to vote to "opt out" of these procedures and come up with something they felt worked for their community.

HB 995 has eliminated most opt out rights, save a few exceptions for condominiums of less than 10 units. Condominium associations no longer have the right to opt out of the election procedures set forth in the law, nor the provisions that require all absentee voting at association meetings to take place through the use of a limited proxy form promulgated by the state, which in many cases, has to be prepared by an attorney. Associations are likewise no longer permitted to opt out of the competitive bidding requirements of the statute.

More significantly, associations have been restricted in their right to vote on what type of financial report they will have prepared at each year's end. As most are aware, the condominium law requires associations with annual receipts between $100,000 and $200,000 to have a compilation prepared annually. For associations with receipts of $200,000 to $400,000, an annual review is required. For associations with receipts in excess of $400,000, an annual audit is required. However, under current law, an association can vote each year, by majority vote of the unit owners to have a lower level year end financial report. For example, an association required to have an annual audit could take a vote every year and have a review or compilation prepared instead, with the obvious intent of saving on the costs of a full blown audit.

Under HB 995, associations will only be entitled to vote for a lower level report 2 out of every 3 years. Stated otherwise, for an association with annual receipts of more than $400,000, an audit will be required no less than once every three years, even if one hundred percent of the owners in the condominium are opposed to it.

HB 995 also addresses other topics that affect the financial operations of the association.

There are new notice procedures that an association will need to follow in the levy of special assessments. Under the new law, the notice that must be sent to the owners and posted 14 days in advance will need to include the "estimated cost" of the special assessment, which is not a requirement under current law (which only requires disclosure of the purpose of the proposed assessment).

There will also be an important change on voting to waive or reduce reserves, or use of reserves for a non-scheduled purpose. The new law requires a bold face disclaimer on the proxy question, using statutorily prescribed language.

Finally, similar to the law for homeowners' associations, condominium associations will be prohibited from filing liens against units which are delinquent in the payment of their assessments until a 30 day notice of the association's intent to lien is sent to the owner by certified mail.

Next week, we will continue our review of HB 995 with an emphasis on its effect on the physical aspects of operating the condominium property, including mandatory building inspections, new requirements for developers when turning over new properties, and a new right to affix religious symbols to common property of the condominium.

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Community Life: Condo Act to Affect Turnover, Religious Symbols, Alterations

Fort Myers The News-Press, July 20, 2008

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Today's column is the fourth installment of our annual review of new laws affecting community associations. Today we will continue reviewing House Bill 995, which primarily impacts condominium associations, and which has an effective date of October 1, 2008.

Today's column emphasizes the sections of HB 995 which address physical issues related to the operation, management, and maintenance of condominium property:

- **Developer Turnover** Inspection Reports: The section of the Condominium Act regarding transition of control from the developer to unit owners other than the developer (commonly referred to as "turnover"), has been substantially amended. The new law will require the developer to provide, at the turnover meeting, a report sealed by an architect or engineer authorized to practice in Florida. The report must attest to required maintenance, useful life, and replacement costs of various common element components. Included within the list of required items are roofs, structures, fireproofing, elevators, heating/cooling systems, and plumbing. Further, the law will require similar attestations for the buildings' electrical systems, swimming pool or spa equipment, seawalls, pavement and parking areas, drainage systems, painting, and irrigation systems.

- **Material Alterations of Common Elements**: A potential "glitch" in the section of the Florida Condominium Act dealing with "material alterations or substantial additions" of common elements or association property has been addressed. A number of years ago, a Florida court held that the law which existed when a particular condominium was created governed the issue of "material alterations or substantial additions", and that later laws on material alterations or substantial additions, which are more liberal, did not apply. The Legislature essentially overturned that ruling a few years ago for multicondominium associations, but apparently forgot to include similar language for associations which operate a single condominium. That oversight has been addressed, and the law is now clear that the current material alteration clause in the statute applies to existing associations.

- **Religious Symbols**: Apparently as a result of a somewhat well publicized dispute that arose last year, the Florida Condominium Act will now provide that an association

may not refuse the request of a unit owner to attach a religious object on the mantle or frame of the door of the unit. The law requires that such objects cannot exceed three inches wide, six inches high, and 1.5 inches deep.

- **Building Inspections**: A significant new provision has been added to the Condominium Act regarding mandatory building inspections. The new law provides that for condominiums greater than three stories in height, at least every five years, the board shall have the building inspected by an architect or engineer licensed to practice in Florida. The inspection report must attest to the required maintenance, useful life, and replacement costs of the common elements. However, the law does permit associations to "opt out" of the inspection requirement, if approved by a majority of the voting interests present at a properly called meeting of the association. The meeting and approval must occur prior to the end of the five-year period and is effective only for that five-year period.

- **Hurricane Protection**: The Florida Condominium Act was amended a number of years ago to allow associations, after receiving approval of a majority of all unit owners, to install hurricane shutters on the condominium buildings, and issue credit to those who had previously installed shutters. The new law expands this concept, perhaps substantially, by adding the term "other hurricane protection" to the law. The new law is presumably aimed at hurricane glass. The law provides that a unit owner vote to install hurricane glass is not required if the maintenance, repair, and replacement of the glass is the responsibility of the association, pursuant to the declaration. The law further provides that while a vote is required for the installation of hurricane shutters or other hurricane protection (such as glass) which is the responsibility of the unit owner, after such approval and installation, the responsibility of maintenance, repair, and replacement of such items shall remain the responsibility of the unit owner.

Next week, we will continue our review of HB 995 with a review of a new law granting "emergency powers" to condominium association boards of directors following catastrophic events, such as hurricanes.

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Emergency Powers Granted Boards

Fort Myers The News-Press, July 27, 2008

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Today's column is the fifth installment of our annual review of new laws affecting community associations. Today we will continue reviewing House Bill 995, which primarily impacts condominium associations, and which has an effective date of October 1, 2008.

Today's column emphasizes the sections of HB 995 which address "emergency powers" of condominium association boards of directors, in the aftermath of catastrophes such as hurricanes.

As a result of Florida's hurricane experiences in 2004 and 2005, the Florida Advisory Council on Condominiums recommended that the Legislature consider granting extraordinary powers to boards of directors in the aftermath of hurricanes. As a result of those recommendations, the Legislature drafted a new section of the Florida Condominium Act, Section 718.1265, which is entitled "Association Emergency Powers".

The new law permits a condominium association board of directors, unless prohibited by the condominium documents, to take the following actions in response to damage caused by an event for which a state of emergency has been declared by the Governor:

- Meeting Notices: The new law permits the conduct of board and membership meetings without following the customary notice requirements of the Condominium Act. Notice may be given "as is practicable." Public service announcements and radio broadcasts are mentioned among the types of notices that may be used.

- Cancelling Meetings: The association can cancel and reschedule any association meeting that had previously been scheduled, and which may not be practicable to hold due to the emergency.

- Special Assistant Officers: The association may name assistant officers who are not directors, who shall have the same authority as the Association's executive officers, as may be helpful during a state of emergency to accommodate the incapacity or unavailability of any association officer.

- Office Location: The association may relocate its principal office or designate an alternative principal office.

- Government Cleanup: The association is authorized to enter into agreements with local counties and municipalities to assist counties and municipalities with debris removement.

- Disaster Plans: The association is empowered to implement a disaster plan before or immediately following the event for which a state emergency is declared. The Association's emergency plan may include shutting down or shutting off elevators, electricity, water, sewer, security systems, or air conditioners.

- Declare Condominium Property Off-Limits: Based upon the advice of emergency management officials or a licensed professional (such as an engineer), the Board may determine any portion of the condominium property unavailable for entry or occupancy by unit owners and other persons.

- Evacuation: The new law permits the association to require the evacuation of the condominium property in the event of a mandatory evacuation order in the locale in which the condominium is located. The law goes on to provide that if any unit owner or other occupant fails or refuses to evacuate the condominium property where the board has so ordered, the association is immune from liability arising from injuries to such persons.

- Re-Opening Condominium Property: The board of directors, based upon advice of emergency management officials or a licensed professional, may determine when the condominium can be safely inhabited or occupied after a disaster.

- Mitigation of Damage: In one of the more significant clauses of the new law, the association is empowered to mitigate further damage, including contracting for the removal of debris, and the prevention or mitigation of the spread of mold. The association is empowered to remove and dispose of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the condominium property, even if the unit owner is obligated by the declaration or law to insure or replace those items. The association is also empowered to remove personal property from a unit.

- Dry-Out: The new law empowers the association to contract, on behalf of any unit owner or unit owners, for services necessary to prevent further damage. Such services include the drying of units, the boarding of broken windows or doors, and the replacement of damaged air conditioning systems so as to provide climate control. Unit owners are responsible to reimburse the association.

- Special Assessments: The board is empowered to levy special assessments in response to catastrophes, without regard to any provision in the condominium documents which may require unit owner approval of special assessments.

- Borrow Money: The association is empowered, without unit owner approval, to borrow money and pledge association assets as collateral.

The new law states that the special powers authorized under the law are limited to that time reasonably necessary to protect the health, safety, and welfare of the association and condominium occupants. Further, these powers are limited to those cases where the board's action is reasonably necessary to mitigate further damage and make emergency repairs.

Next week, we will complete our review of HB 995 with a review of new laws regarding the maintenance of association records, and some miscellaneous new laws affecting the operation of associations.

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New Condo Law Requires Transparency For Official Records

Fort Myers The News-Press, August 3, 2008

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Today's column is the sixth installment of our annual review of new laws affecting community associations. Today we will complete our review of House Bill 995, which primarily impacts condominium associations, and which has an effective date of October 1, 2008.

First, one correction to a previous column regarding HB 995 needs to be made. In my July 13, 2008 column, I stated that year-end financial reports (compilations, reviews, or audits) could only be waived "two out of every three years." Actually, the law states that year-end financial reports cannot be waived "for more than 3 consecutive years", so actually owners would be entitled to vote for a lower level report three out of every four years.

HB 995 also made some significant changes regarding the keeping of "official records" by condominium associations. The new law requires that all official records be kept for at least 7 years. The only exception in the law is that ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners need only be retained for a period of 1 year.

HB 995 also provides that the official records of an association must be made available for unit owner inspection within 45 miles of the condominium property or within the county in which the condominium is located. There is an exception for timeshare condominiums.

In what may prove to be a significant change, HB 995 provides that an association may comply with records inspection requirements by offering to make the records of the association available to a unit owner either electronically via the Internet, or by allowing the records to be viewed in electronic format on a computer screen and printed upon request.

The new law also provides that any person who knowingly or intentionally defaces or destroys association accounting records, or knowingly or intentionally fails to create or maintain accounting records, may be personally subject to a civil penalty from the state.

The condominium statute exempts from the ambit of "official records" certain information. Under previous law, unit owner medical records, information obtained by an association in connection with the approval of sales or leases, and various attorney-client privileged information is not available for unit owner inspection. The new law expands the exclusions by stating that social

security numbers, driver's license numbers, credit card numbers, and "other personal identifying information of any person" are not accessible to other unit owners. While the specifically listed items in the new law make sense for privacy reasons, it is unclear what "other personal identifying information" might be construed to include.

HB 995 also made a few changes of interest to community association managers. Effective January 1, 2009, "community association management firms" will need to go through a separate licensing process. There is an exception for firms which provide management to condominiums of 10 units or less (provided that such condominium has a budget of less than $100,000.00). The new law will also require that the management firm have at least one individual who is also personally licensed to act as a community association manager.

When someone wanting to become a manager applies for licensure, the new law provides that if the applicant was providing management services without the required license, the state may refuse to grant a license. The new law also states that as to existing managers, disciplinary action may be pursued by the state if a community association manager is guilty of contracting on behalf of an association with any entity in which the manager has a financial interest which is not disclosed.

Next week, we will begin a review of House Bill 601, which once again significantly changes the laws regarding condominium insurance.

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Note Law Changes for Insurance Needs of Owners

Fort Myers The News-Press, August 10, 2008

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Today's column is the seventh installment of our annual review of legislation affecting community associations.

Today we will begin review of House Bill 601, which became effective July 1, 2008. HB 601 once again changes, perhaps fundamentally, the laws applicable to condominium association insurance requirements and provisions regarding allocation of costs after casualty repair. Today, we will focus on some significant changes to the law regarding insurance requirements for individual unit owners.

Section 718.111 (11) is the section of the Florida Condominium Act which regulates insurance. This section of the law was amended in 2003 to provide that unit owners "shall insure" various items that comprise part of the condominium property. These items include floor wall and ceiling coverings, water heaters, built-in cabinetry and counter tops, appliances, electrical fixtures, window treatments, water filters, and air conditioning compressors that service only an individual unit.

There has been some debate as to whether the Legislature's use of the term "shall insure" in the 2003 law meant to impose a mandatory duty on unit owners to insure these items, or was simply intended to clarify that the listed items were not covered under the association's master policy. Most attorneys adopted the former interpretation, a mandatory duty to insure.

However, to the extent that the 2003 law imposed a unit owner duty to insure, there was no provision as to how the association could enforce unit owner insurance requirements, or even if the association had the right to do so. HB 601 lays some of these issues to rest, but will undoubtedly cause some stir in the insurance industry and with associations.

The new law provides that the association "shall require" each unit owner to provide evidence of a currently effective policy of hazard and liability insurance "upon request", but not more than once a year. This language creates some ambiguity since it implies that associations are now mandated to require unit owners to show proof of insurance, but only "upon request." Does the association have a duty to "request" the information? I think that this is the most logical interpretation.

Upon failure of an owner to provide a certificate of insurance within thirty days of the association's request, the association may purchase a policy of insurance on behalf of the owner. The cost of such policy, together with reconstruction costs undertaken by the association but which are the responsibility of the owner, may be collected by the association from the unit owner, secured by a right of lien.

It appears that the association's new statutory option to "force-place" unit owner insurance is permissive, since the statute states that the association "may" purchase the policy.

All unit owner policies issued on or after January 1, 2009, must include "special assessment coverage", which I believe is more commonly referred to in the industry as "loss assessment coverage" in a minimum amount of $2,000 per occurrence. The new law further provides that the condominium association must be an additional named insured and loss payee on all casualty policies issued to unit owners.

The new law also removes air conditioner compressors from the unit owner's insurance responsibility, presumably intending to place that responsibility back on the association (which was the case before the 2003 change to the law). However, there is also some ambiguity on that issue, more on that later.

The new law is also unclear as to when the unit owner insurance provisions come into effect. Although the law itself became effective July 1, 2008, the subsection of the law which obligates associations to require unit owner proof of insurance and the option to "force-place" it, starts by saying that policies issued or renewed on or after January 1, 2009, must comply with the law. However, it is unclear whether the association can require proof of insurance prior to that time, I assume that will be an issue of debate in the coming weeks and months.

Although this law was no doubt a product of good intentions, there are many potential glitches and concerns that will need to be thought through. For example, many unit owners have argued that they have the financial wherewithal to "self insure" and that the association should let them manage their own financial risks. That argument may have merit when dealing with people of substantial financial means, but "self insurance" no longer seems to be an option. Or is it?

Although the law apparently obligates the association to mandate proof of insurance, there is no duty to "force-place it", and no statement as to what the association can do as an alternative means of enforcing the requirement. Presumably, the association would have the legal remedies available for ensuring compliance with the Condominium Act in general.

It is also likely, particularly in this economy and housing market, that many unit owners who do not have insurance are people who are in dire financial straits, in many case "upside down" in their units, and perhaps delinquent in their payment of maintenance fees and their mortgage. If the association "force-places" insurance for these units, even if there is a right to a lien, that may be of little solace at the end of the day if the association's lien is foreclosed by a mortgage lender. In such cases, not only would the other unit owners subsidize that unit's share of the insurance under the master policy (which the association purchases) but also the individual unit insurance. This will likely be seen as an unattractive option in many circumstances.

There is also some cause for concern about the association's duty to keep track of currently effective insurance. Every unit owner will likely have different expiration dates on their policies. Do boards and managers now have a new job to contend with, constantly checking to ensure that individual policies are renewed at their anniversary?

No doubt, these issues will be the subject of future debate, analysis and discussion. Next week, we will continue our review of HB 601 regarding association insurance obligations and casualty repair costs allocation.

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Association Not Obligated to Pay For Some Repairs

Fort Myers The News-Press, August 17, 2008

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Today's column is the eighth installment of our review of 2008 legislation affecting community associations. We continue last week's review of House Bill 601, which became effective July 1, 2008, and which addresses condominium association insurance requirements.

HB 601 is yet another attempt by the Florida Legislature to fine-tune the allocation of insurance responsibilities between the association's master policy and what is required to be insured by individual unit owners, the latter subject being the focus of last week's column. Section 718.111(11)(f) of the Florida Condominium Act now states that every association master hazard insurance policy issued or renewed on or after January 1, 2009 shall provide primary coverage for: (1) all portions of the condominium property as originally installed or replacements of like kind and quality, in accordance with the original plans and specifications; and (2) all alterations or additions made to the condominium property pursuant to Section 718.113(2) of the Florida Condominium Act (the provision of the statute dealing with material alterations and substantial additions).

As noted last week, various parts of the condominium property are specifically exempted from the association's insurance obligation, and are the insurance responsibility of the unit owner.

The new law also states that the unit owner's policy must cover all improvements or additions to the condominium property that benefit fewer than all owners, but then goes on to provide that such items may be insured by the association at the cost and expense of the unit owners having use thereof.

At least to me, it appears that the new law simply intends to codify what has been the general law since 1979, that being that the association insures all fixtures and improvements on the condominium property, as originally conveyed by the developer (or replacements of like kind and quality), unless those fixtures or improvements are on the list of excluded items spelled out in the statute.

One ambiguity in the new law is the requirement that the association insure alterations or additions to the condominium property made pursuant to the material alteration section of the law. When applied to alterations or additions made by the association, the new law makes complete sense, since the association should insure upgrades it has made to the property for the benefit of all owners. However, the relevant clause of the new law could be interpreted to apply to all alterations or additions, even those made by unit owners, since unit owner additions and alterations are also governed by Section 718.113(2) of the Condominium Act.

On the opposite end of the spectrum, additional ambiguity exists in the provision of the new law

that states that improvements or additions to the condominium property that benefit fewer than all owners shall be insured by the owner having exclusive use thereof. Taken to its extreme, this part of the statue could be interpreted to essentially negate all of the association's insurance obligations, by requiring the unit owner to insure improvements that benefit only his or her unit, such as drywall, windows, and balcony screening. I am certain that this was not the intent of the law. Hopefully these "glitches" will be promptly addressed by the Legislature and the law "fine-tuned" some more. It remains to be seen how the insurance industry will sort this out.

One thing that seems clear to me is that the Legislature intended by this new law to overrule an interpretation from the Division of Florida Condominiums dealing with unit owner upgrades, such as balcony enclosures or hurricane shutters. The new law, consistent with a recent ruling from a Florida appeals court, states that the association is not obligated to pay for any reconstruction or repair expenses due to casualty losses to any improvements installed by a current or former owner of the unit or by the developer, if the improvement benefits only the unit for which it was installed, and was not part of the standard improvements installed by the developer on all units as part of original construction, whether or not such improvement is located within the unit.

Recognizing that reasonable minds can differ over legislative intent, the following is a summary of what I think the new law is intended to accomplish.

The association remains responsible for insuring everything that was part of the original construction, except those items specifically excluded (floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments). The association's master policy obligation now includes air conditioner compressors. The unit owner is responsible for insuring those improvements listed above, and upgrades. Insurance responsibilities for upgrades includes upgrades that might have been a developer option, as well as after-purchase upgrades, such as balcony enclosures and hurricane shutters.

If there is an improvement that benefits less than all owners, such as a carport structure, the association can insure that item, but pass the cost on to the benefiting owner(s) only. The authority for this pass through should probably be set forth in the declaration of condominium.

Next week, we will continue with our review of HB 601 with a focus on substantial changes to the law regarding how the board of directors must calculate adequate insurance and set deductibles.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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HB 601 Impacts Condo Association Insurance

Fort Myers The News-Press, August 24, 2008

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Today's column is the ninth installment of our annual review of new laws affecting community associations. Today, we continue with a review of House Bill 601, which became effective July 1, 2008, and which impacts condominium association insurance requirements.

The condominium law has always required associations to maintain "adequate" insurance. The law has never defined what that term means. The new law states that "adequate insurance … shall be based upon the replacement cost of the property to be insured as determined by an independent insurance appraisal or update of a prior appraisal." The law goes on to require that the full insurable value shall be determined at least once every 36 months.

While arguably an improvement over the previous version of the law, the new statute still leaves something to be desired in terms of certainty. The statute does not say that the association must insure for "replacement cost", but rather that adequate insurance shall be "based upon" replacement cost. Does this mean, for example, that a condominium association could insure for a certain percentage of replacement cost and still comply with the law? Does the new law require insurance coverage for upgrades required by new building codes? These are unanswered questions.

The law goes on to provide that when the association is determining the amount of adequate insurance, the association "may consider deductibles." The law specifically permits the board to set the deductible, and provides that deductibles must be consistent with industry standards and prevailing practice for communities of similar size and age, and having similar construction and facilities in the locale where the condominium property is located.

The new law goes further and provides that deductibles may be based upon available funds, including reserve accounts, or "predetermined assessment authority" at the time the insurance is obtained. The reference to reserve accounts being a factor in setting the deductible seems to make sense. For example, if it would cost $100,000.00 to replace a roof, and there is $70,000.00 in roof reserves, the association could theoretically insure the roof for $30,000.00 and have "adequate insurance." But is this wise? It would seem to me that if a roof is damaged by casualty, the association would rather get the money to fix it from its insurers, than have to take the funds out of association reserve accounts. The reference to "predetermined assessment authority" is somewhat mysterious, as nearly every association has some "predetermined" authority to assess, as established by the condominium documents.

Perhaps the most significant aspect of the new law is the requirement that the board establish the amount of deductibles at a meeting of the board for which notice is given to each unit owner in the

same manner as the budget meeting. Specifically, and perhaps subject to more stringent requirements in an association's bylaws for budget meeting notices, notice of the board meeting where the "deductible" is set must be mailed to each unit owner at least fourteen days in advance, and also posted on the condominium property at least fourteen days in advance. The law does not, on its face, limit this requirement to setting deductibles for hazard insurance policies (general casualty and windstorm), but arguably applies to any insurance policy where there is a deductible, including general liability policies and directors and officers liability policies. Lots of paperwork, to say the least.

The notice of the board meeting where the proposed deductible will be set "must state the proposed deductible and the available funds and the assessment authority relied upon by the board and estimate any potential assessment amount against each unit, if any." Good luck with that. Experience has shown that associations often do not know for months, and in some cases years, how much the unit owners will ultimately have to be assessed to pay for the repair of uninsured damage. Requiring boards to get out their crystal ball and estimate such things in advance is certainly, at least in my opinion, asking a lot from volunteers.

Next week, we will continue with our review of HB 601 and the significant new changes to the law that deal with the allocation of costs in post-damage situations, ranging from catastrophic hurricanes to run-of-the-mill pipe leaks.

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Condo Owners Should Heed 'Plaza East'

Fort Myers The News-Press, August 31, 2008

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Today's column is the tenth installment of our annual review of laws affecting community associations. We continue today with a review of House Bill 601, which became effective July 1, 2008, and which primarily addresses condominium insurance and post-casualty repair cost allocations.

As a result of 2003 changes to the Florida Condominium Act regarding insurance, and plenty of opportunity for test cases after the 2004 and 2005 hurricanes, great uncertainty has developed in the law as to who is supposed to pay for what after casualty damage, particularly with regard to damaged items for which no insurance proceeds are available due to a deductible.

In a highly publicized ruling, the State agency which regulates condominiums in Florida (known as the Division of Condominiums, Timeshares, and Mobile Homes) held that the party that is responsible to insure the item is the party that is responsible to pay for loss in situations where insurance funds are not available for a covered loss, which is most often because of a deductible. The Division's opinion was contained in a ruling known as a "declaratory statement", which is technically only binding on the association which asks for it. However, the Division sometimes enforces its interpretations of the law as enunciated in previous declaratory statements, and applies that ruling to other disputes.

The now famous (some might say infamous) declaratory statement involved is known as "In Re: Petition For Declaratory Statement, Plaza East Association, Inc." Therefore, this issue has come to be known as the "Plaza East issue". Simply stated, Plaza East stands for the proposition that for any item an association insures, the association must pay for the repair of damage caused by an insurable event, and if there are insufficient funds for the work, all unit owners must be assessed as a common expense.

Prior to Plaza East, most attorneys who practice in the condominium law arena took the position that the provisions of the declaration of condominium would control in post-casualty cost allocations. While declarations of condominium are by no means universal or consistent on the topic, many provide that unit owners pay shortfalls for unit damage, and the association pays shortfalls for common element damage. Other documents defer to the general allocation of maintenance responsibilities, stating that whoever is generally required by the declaration to maintain the element, pays when there are insufficient insurance proceeds. A minority of documents basically follow Plaza East, and state that the party who insures the elements pays for damage below the deductible or not otherwise covered by insurance.

Let's look at an example of an every day situation in condo living, which may illustrate the point. Let us assume that a water heater on the third floor of a

condominium suddenly bursts. There is no suggestion of negligence (the heater is only two years old). The resulting water leak destroys the drywall in an interior, non-load-bearing partition in the second floor unit directly below.

Further, assume that bursting pipes and sudden water discharges are a covered cause of loss under the association's insurance policy, so there is coverage for the incident. However, the total damage to the second floor interior partition drywall is $2,300.00. The association's deductible under the master policy is $2,500.00. Therefore no insurance proceeds are available.

Let us further assume, as would be common, that the declaration of condominium states that the unit owner owns this partition, and is required to maintain it. Assume also that the declaration provides that if there is insufficient insurance funds available for damage to units arising from casualty, the shortfall is paid by the unit owner, even for unit items insured by the association, such as this wall.

Prior to Plaza East, most attorneys would have advised the association that paying for the drywall damage was a clear unit owner responsibility. The Division's position, according Plaza East, is that since the association insures the wall, the association must pay for the wall's repair, and assess all unit owners for the deductible.

The Plaza East declaratory statement was widely criticized by commentators and practitioners, for a variety of reasons, mainly focusing on different views of the intent of the 2003 amendments to the law. As a result, it was determined that the best approach to lay the issue to rest would be specific legislative guidance on the point. HB 601 does precisely this. Keep in mind that HB 601 is effective now.

HB 601 states that Plaza East is the "default position" of the law (my term, not the term in the law). This means that no matter what a declaration of condominium provides, the association must pay for repair of damage to property it insures, at least if caused by an insured event, regardless of any provision to the contrary in the declaration. As stated above, this most often arises in situations involving a deductible.

However, Plaza East also allows associations to "opt out" of the law's default position, by a majority vote of the entire voting interests. In most cases, this will involve an association voting to follow the provisions of its condominium documents. In other cases, amendments to the documents might be required. In that case, although the law is not clear on this point, it is likely that amendments to documents (if they require greater approval than a majority of the entire voting interests) need to follow the higher voting requirements set forth in the particular community's governing documents. If an opt out vote is taken, various technical paperwork needs to be recorded in the county land records where the condominium is located.

This leaves many (probably most) associations in a curious position. If they want to follow the provisions of their present condominium documents, they need to take a vote and follow the steps set forth in the statute. If they do not, the Plaza East doctrine is the rule that must be followed.

Next week, we will conclude our review of HB 601 with some final comments, and then shift gears with review of some new laws primarily affecting homeowners' associations.

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Common Expenses Can Be a Fuzzy Subject

Fort Myers The News-Press, September 7, 2008

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Today's column is the 11th installment in our annual review of laws affecting community associations. We continue with a review of House Bill 601, which became effective July 1, 2008, and which primarily addresses condominium insurance and post casualty repair cost allocations.

HB 601 addresses an issue that often spawns confusion, how to divide costs in a multi-condominium association. By definition, a multi-condominium association is a condominium association that operates more than one legally declared condominium.

Allocating costs in multi-condominium associations is often frustrating for boards and managers, due to the complexity of the law. The general concept is that the common expenses affiliated with a particular condominium are assessed against only the unit owners in that condominium. Such costs are often referred to as "common expenses of the condominium." Conversely, costs incurred for the benefit of the association as a whole are typically spread among all unit owners in all condominiums, and are often referred to as "common expenses of the association."

There is no hard and fast rule as to what costs are considered common expenses of the condominium as opposed to common expenses of the association. While certain items are clear, there is plenty of room for interpretation in the middle. For example, corporate filing fees are a clear example of common expenses of the association. Conversely, costs affiliated with painting a building in a particular condominium are common expenses of the condominium.

To make things a bit more complicated, the law also permits certain multi-condominium associations to operate on a consolidated financial basis, where there is basically no distinction in allocating costs among the various condominiums. This option exists only for condominiums where at least one of the condominiums was created prior to 1977, and then consolidated financial operations must be approved by two-thirds of the entire association membership.

In general, hazard insurance premiums and post-casualty repair costs are, for those multi-condominium associations that do not operate on a consolidated financial basis, considered common expenses of the condominium (meaning they are borne by unit owners in that condominium only).

HB 601 provides that a multi-condominium association may elect, by a majority vote of the collective members of the condominiums operated by the association, to operate such condominiums as a single condominium for purposes of insurance

matters, including but not limited to the purchase of hazard insurance and the apportionment of deductibles and damages in excess of coverage. The election to aggregate the treatment of insurance premiums, deductibles, and excess damages "constitutes an amendment to the declaration of all condominiums operated by the association", and such costs shall be stated in the association's budget.

This new law appears to constitute a significant departure from previous law, and would permit associations to equally assess all unit owners (or assess on a weighted basis in those condominiums that share expenses in that fashion) for insurance costs and casualty-damage repair, even for post-1977 condominiums, and apparently even if the condominiums do not otherwise operate on a consolidated financial basis.

One question that will no doubt be debated in the future is whether a majority vote is sufficient in cases where the declarations of condominium may require a higher percentage for amendment, such as two-thirds or seventy-five percent. The statue implies that the majority vote is sufficient, but there is a relatively complicated body of law, which is by no means applied consistently by the courts, dealing with retroactive application of amendments to the condominium statute to existing associations.

In last week's column, we looked at how the new law allocates repair costs after an insured casualty, but where there are insufficient insurance proceeds due to the deductible (Condo Owners Should Heed 'Plaza East', August 31).

HB 601 also addresses how multi-condominium associations "opt out" of the "Plaza East rule." This section of the new law applies to all multi-condominium associations, regardless of whether or not they elect to aggregate insurance expenses. According to Section 718.111(11)(k)(1) of the new law, a multi-condominium association that has not consolidated its financial operations may "opt out of Plaza East" with approval of a majority of the total voting interests in that condominium. The new law goes on to say that such vote may be approved without regard to mortgagee consent requirements contained in the declaration.

To summarize, we have spent the past several months reviewing some fairly significant changes to the condominium laws brought about by HB 995 (effective October 1, 2008) and HB 601 (effective July 1, 2008). Although there are many major changes to the law, I think that the two most important things to remember from these new laws are the following.

First, the provisions of HB 995, outlawing multi-year board terms (with exception for associations who vote to continue two-year staggered terms) is an issue that will need to be addressed by nearly every association (New Law Affects Board Make Up, June 29). Many are already taking votes to ratify continuance of two-year staggered terms.

Secondly, as discussed last week, HB 601 will have the effect of changing insurance deductible cost allocations, an issue that every association faces. Under the new law, the association will be obligated to pay deductible costs for all items it insures, regardless of any contrary provision in the declaration of condominium. However, the new law permits a vote to provide for a different method of cost allocation, also an issue many associations will be closely looking at in the coming months.

Next week, we will turn our attention to some new laws affecting homeowners' associations.

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New Laws Tackle Flags, Receiverships, Liens

Fort Myers The News-Press, September 14, 2008

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Today's column is the 12th installment of our annual review of legislation affecting community associations. We shift gears today and discuss some new laws aimed specifically at homeowners' associations:

- Flags: Section 720.304(2) of Florida's statute applicable to homeowners' associations has been amended effective July 1, 2008 to provide that any homeowner may erect a free-standing flagpole no more than twenty feet high on any portion of the homeowners' real property, regardless of any covenants to the contrary. The flagpole cannot obstruct sight lines at intersections, or be erected upon easements. Homeowners are entitled to display from that flagpole, in a respectful manner, certain flags not larger than 4 ½ feet by 6 feet. Permitted flags include: United States Flag, one official flag of the State of Florida, and various armed services flags.

- Receiverships When There is an Insufficient Number of Board Members: Section 720.3053 and Section 720.313 have been created as part of the HOA law. These amendments provide that if an association fails to fill vacancies on the board sufficient to constitute a quorum, any member may give notice of intent to apply to the circuit court for appointment of a receivership. The new statute contains a prescribed form of petition which must be used, and sets forth the manner in which the petition must be delivered to all of the parcel owners. If a receiver is appointed, the new law requires the receiver to provide all members with written notice of his or her appointment.

- Collection of Delinquent Assessments: The collections law for HOAs has been substantially amended, making it generally similar to the law for condominium associations. Among the more relevant changes are the following:

  - Mortgagee Priority: The new law states that an HOA's lien is inferior to the lien of a mortgagee (unless the assessment lien is recorded first, which rarely happens). However, a first mortgagee, its successors or assigns who acquire title to a parcel by foreclosure or deed in lieu of foreclosure must pay the association the parcel's unpaid common expenses and regular periodic or special assessments that accrued or came due during the twelve months preceding the acquisition of title or one percent of the mortgage debt, whichever is less. This is similar to the condominium law, although

mortgagees foreclosing in the condominium context are only on the hook for six months' assessments.

- Lien Priority: With the exception of the priority of a first mortgage, the HOA's claim of lien is said to "relate back" to the date of recording of the original declaration of covenants, which would give the lien priority over other potential interests, such as second mortgagees, "equity lines", and judgments recorded after the date of the recording of the declaration of covenants. There is a grandfathering clause for current interests which have priority over the association's lien.

- Contents of Lien: The new law contains detailed requirements as to what must be contained in an HOA claim of lien, similar to what is found in the condominium statute.

- Attachment of Rental Income: The new law provides that if a parcel is rented or leased during the pendency of a foreclosure action, the association is entitled to the appointment of a receiver to collect rents.

Next week, we will continue with a review of some miscellaneous laws passed in 2008, affecting condominiums, cooperatives, and homeowners' associations.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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Knowing New Laws Includes Sweating the Little Stuff

Fort Myers The News-Press, September 21, 2008

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Today's column is the 13th and final installment of our annual review of new laws passed by the Florida Legislature affecting community associations. Today, we will wrap up with a review of some miscellaneous changes not covered in previous columns:

- Estoppel Fees: Both the Florida Condominium Act and the Florida Homeowners Association Act require an association, upon written request from a unit or parcel owner, to provide a certificate of outstanding assessments. These are commonly known as "estoppel certificates." The new law states that a unit or parcel owner's "designee" may request the certificate. The new law also states that if the association is going to charge a fee for estoppel certificates, there must be authority for the fee in either a resolution adopted by the board, or in a written management agreement or similar agreement between the association and an outside party (such as a bookkeeping firm). The amount of the fee must be included on the certificate. If an estoppel certificate is requested in conjunction with the sale or mortgage of a unit or parcel, but the closing does not occur, and no later than thirty days after the closing date for which the certificate was sought, the person requesting the estoppel certificate (unless they are the unit or parcel owner) is entitled to a refund, which must be made within thirty days. The new law goes on to provide that the refund amount then becomes the obligation of the unit or parcel owner and the association may collect it from that owner in the same manner as assessments, presumably meaning that the association would have a right to file a lien if the association is not reimbursed by the owner.

- Receiverships: The Condominium Act, the Cooperative Act, and the Homeowners' Association Act have all been amended regarding the procedures for a unit owner's or parcel owner's application for a receivership when there is an insufficient number of board members to constitute a quorum. The new law requires that a statutorily-prescribed form be sent to every owner, by the person intending to apply for a receivership, by certified mail or personal delivery, prior to applying to the court to appoint a receiver. This is presumably intended to give other owners the opportunity to step up and serve on the board, avoiding the necessity for a receivership. If a receiver is appointed, the new law requires the receiver to provide all owners with written notice of his or her appointment as the receiver.

- Common Expenses: The condominium law has been amended to provide that unless the manner of payment or allocation of expenses is otherwise addressed in the declaration of condominium, the expenses of any items or services required by any federal, state, or local governmental entity to be installed, maintained, or supplied to the condominium property must be assessed as a common expense. Examples given in the new statute, are fire safety equipment and water and sewer service, where a master meter serves the condominium.

- Division Jurisdiction: Effective October 1, 2008, the Division of Condominiums, Timeshares, and Mobile Homes will no longer have jurisdiction to become involved in complaints filed by condominium unit owners against their associations, except in matters limited to records access, election disputes, and "financial matters." The new law does not apply to developer-controlled associations, where the Division retains its previous jurisdiction. The apparent intent of the new law is for the Ombudsman to have an expanded role in resolving internal condominium disputes, or have those disputes resolved through arbitration.

2008 was undoubtedly one of the most active years in community association legislation that we have seen in a long time. Please note that there are a number of other changes to the laws which may be relevant to associations, but which have not been discussed in our three-month journey. Prohibitions against "transfer fee covenants" and "SLAPP suits", an expanded role for the Florida Condominium Ombudsman, and new laws on energy devices are but a few examples.

All of the laws adopted during the 2008 Legislation are available from various internet sources, such as On-Line Sunshine, which can be found at www.leg.st.fl.us.

Next week, we will return to the Q&A format for the column.

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Document Update Common As Condo Ages

Fort Myers The News-Press, September 28, 2008

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Q: I have been appointed by my condominium board of directors to serve on a committee to rewrite the condominium documents. Several committee members have canvassed the neighborhood to ask what issues are important to the members. Surprisingly, many members have asked why we need to rewrite the condominium documents and I explained that they had not been updated, except for minor amendments, in the 18 years since they were initially recorded. One member was adamant that, due to his experience in the last condominium he lived in, the documents be amended by crossing through deleted language and underlining new language. He stated that his prior condominium association tried to amend the documents completely, without underlining new language and crossing through deleted provisions, and the members were very frustrated because they could not tell what had been changed. Can you provide information so that I can convince the membership that rewriting the documents is beneficial? Also, can you give me your opinion on the best way to present the amendments, either using the cross-through or underline method or a completely new document? D.S. via e-mail

A: A governing document amendment/update project is a fairly common event in the life of a condominium that is the age of your condominium. The main purposes of these endeavors are to remove any references to the developer that are no longer necessary, to incorporate new statutes that have been enacted since the condominium was established, to consolidate prior amendments into one concise document, and to add or enhance specific provisions based upon experience and case law that has evolved over the years. In many cases, associations come to their attorney for a document rewrite because they have had several instances where their documents were unclear or not helpful in important situations.

The Florida Condominium Act permits the amendment of condominium documents by either using the underline and cross-through method, in which new language is underlined and deleted language is crossed out, or by the "substantial rewording" format, in which the proposed, amended document is presented as a totally new, clean document. As you can appreciate, the overall format, as well as the specific language used in these documents, has continued to evolve over the years. The contrast between a set of condominium documents drafted in the last two years as compared to documents drafted twenty years ago is obvious to even the most casual reader. Even modern day provisions that accomplish essentially the same purpose as their predecessors are written differently in order to bring clarity and certainty to their meaning. Therefore, there is a general preference among many lawyers to completely rewrite the documents. Alternatively, the underline and cross-through method could be used, but the result in many cases would be a nearly incomprehensible document full of underlined and crossed-through

provisions. When a document is rewritten using the "substantial rewording" format, a member who is determined to understand all of the changes simply needs to read the new, amended and restated documents in their entirety. While this task may require several hours, I submit that it is likely no more difficult than trying to decipher underlined and crossed-through provisions and interpreting the meaning of those changes.

Q: I live in a neighborhood of single family houses where everyone has a clay tile roof. Unfortunately, many of the owners have not regularly cleaned the roofs which have become very unsightly. We had our roof cleaned recently by a contractor we located ourselves. The board is finally taking some action to encourage people to clean their roofs. The board has contacted another contractor and arranged to get discounts for owners who agree to use the association's contractor. I am happy that the other owners are being encouraged to clean their roofs, and maybe I should leave all of this alone, but it seems a little unfair that I had to find my own contractor and pay full price and now the association is using its resources to find a contractor for others and to get them a reduced price. Also, what can the association do if some owners don't elect to participate in the association's roof cleaning project? **N.L. (via e-mail)**

A: I assume from your question that you live in a homeowners' association where the members own their own detached homes and are responsible to maintain those homes, including the roofs. That is a fairly typical arrangement in a single family homeowners' association. Even though the individual owners are responsible to arrange and pay the cost of roof cleaning, there are likely covenants in the governing documents of the community that require the owners to keep their property neat and clean. Obviously, such a covenant increases the value of the properties in the community and raises the level of enjoyment of the property for current owners.

It is not unusual for an association to assist its members in efficiently and economically completing the members' obligations under the governing documents. It is not clear exactly how your association is involved with the roof cleaning contractor that they are presenting, but if they have merely identified a contractor who is willing to extend a discount to members if a certain number of members elect to hire the contractor, and if the contracts for the roof cleaning services are directly between the members and the contractor, then I see no problem with the association assisting the members in this manner. It is important that no association funds nor resources be spent on cleaning the roofs of individual owners. Owners should also be told that any concerns about the unit must be addressed directly with the contractor, and not the association.

In answer to your last question about how the association can enforce the roof cleaning requirement for owners who do not voluntarily participate, the association would have to undertake some form of covenant enforcement. Some declarations of covenants include an "enforcement of maintenance" provision, which allows the association to demand that an owner comply with some covenant, and if the owner fails to comply, the association has the right to complete the maintenance and charge the cost of that maintenance to the owner. Obviously, associations are often reluctant to undertake such enforcement of maintenance because the member may object and a confrontation may occur. The association may also need to lay out money of its own and then attempt to collect it from the member. Further, if the association or its contractors enter upon a member's property, there is always a risk that the member may claim that the association's contractor damaged the property or committed some other damaging act.

If there is no "enforcement of maintenance" provision in the declaration, or if the association elects not to utilize that provision, then the association would need to bring a legal action seeking an order requiring the owner to clean the roof. In a Florida homeowners' association, it is necessary to satisfy the statutory mediation procedures before going into court. If the association prevails and obtains an order in its favor, the association will have a claim to recover all of its reasonable costs and attorney's fees incurred in such an enforcement action.

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Bidding Process Hinges On Budget For Association

Fort Myers The News-Press, October 5, 2008

By Joe Adams
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Q: Does Florida law require a homeowners' association to bid any purchase, or can the board just purchase at any place if it is not a sole source item? **H.S. (via e-mail)**

A: Chapter 720.3055 of the Florida Homeowners' Association Act provides that all contracts as described in the law, or any contract that is not to be fully performed within one year after the making thereof, for the purchase, lease, or renting of materials or equipment is subject to competitive bidding. However, competitive biddings does not apply unless the cost of the item exceeds ten percent of the total annual budget for the association, including reserves. The law does not require the association to accept the lowest bid.

The law is similar for condominium associations, and is found in Section 718.3026 of the Florida Condominium Act. The main difference is that the condominium law establishes a five percent threshold for triggering competitive bidding requirements, while the law applicable to HOAs uses the ten percent standard.

Q: Can a member of the board of directors also serve on the Architectural Review Board? **S.B. (via e-mail)**

A: Unless prohibited by the governing documents for the association, there is no prohibition in the law against a board member serving as a member of the Architectural Review Board.

Q: I read your recent articles regarding the new association laws. Does the new law regarding elections, which provides for one-year board terms, apply to homeowners' associations? **J.M. (via e-mail)**

A: No.

HB 995 only applies to condominium associations regarding this point. HB 995 became effective October 1, 2008.

Under the new law, every condominium association in the State will have to elect board members for one-year terms, in all future elections.

There is one exception to the law. Associations can provide for two-year staggered terms for board members, if approved by a majority of the entire voting interests (there is usually one voting interest per unit), not just a majority of those who vote.

Associations with three-year terms in their current bylaws would need an amendment. Associations that have two-year staggered terms, would need to take a vote to "opt in" to the new law.

Q: I live in a 36-unit condominium. Does HB 995 and the changes made regarding manager licensing apply to us? We are self managed. Are

we now required to hire a manager? **H.V. (via e-mail)**

A: No.

The new law simply lowers what is commonly referred to as the "de minimis exemption" of the manager licensing statute. Under previous law, a manager could manage a community of less than fifty units (provided it had a budget of $100,000.00 or less), without holding a license. The new law reduces the exemption for non-licensed management to ten units or less.

Condominiums of more than fifty units under the old law, or those with more than ten units under the new law, are not required to hire a manager or a management company. However, if a manager is hired, they have to be licensed unless the "de minimis exemption" applies.

Please also note that the "de minimis exemption" is applied on an aggregate basis, so that a manager that managed two six-unit condominiums would now have to be licensed, since they would be managing, in the aggregate, more than ten units.

Q: I have a question regarding House Bill 995, which became effective October 1, 2008. How is the new law on the waiver of audits and other year-end financial reports being phased in? **V.G. (via e-mail)**

A: The law to which you refer now prohibits associations from waiving their year-end financial reporting requirements (audit, review, or waiver) for more than three consecutive fiscal years.

According to a memo issued from the Florida Division of Condominiums, Timeshares, and Mobile Homes, the Division is taking the position that the law applies to waivers taken after the effective date of the law change. Therefore, it is the state agency's opinion that financial reporting requirements may be waived for three consecutive fiscal year-ends following October 1, 2008.

Since it is generally the law that changes to statutes are intended to have prospective application, I believe the Division's interpretation of the law is correct.

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Condo Board Members Elected for One-Year Terms

Fort Myers The News-Press, October 12, 2008

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Q: I have heard that it recently became state law that board members are now forbidden to run for two consecutive terms of office. Is this true? **S.O. (via e-mail)**

A: No.

The amendments to the Florida Condominium Act which became effective October 1, 2008, provide that in future elections of condominium association board members, candidates are to be elected for one-year terms, notwithstanding any contrary provision in the articles of incorporation or bylaws.

The only exception is that if the articles or bylaws allow two-year staggered terms, the association can continue to operate with two-year staggered terms. However, a new vote must be taken, under the new law, to "ratify" the association's agreement to continue with two-year staggered terms. The vote must be approved by a majority of the entire voting interests (there is usually one voting interest per unit).

However, the new law does not impose "term limits." Even if a board is elected for one-year terms, nothing would stop a unit owner from standing for re-election every year.

In fact, in a 2007 declaratory statement, the Division of Florida Condominiums, Timeshares, and Mobile Homes ruled that term limits, even if contained in the association's bylaws, are invalid.

The new law discussed above only applies to condominium associations, not cooperative associations or homeowners' associations.

Q: You recently wrote that the new condominium law prohibits "co-owners" of a unit from serving on the board at the same time. Obviously, a husband and wife owning a single unit could not both serve on the board under the new law. My question involves units owned by corporations. Our bylaws state that any officer of the corporation is eligible to be elected by the board. If a corporation has multiple officers, can they all run for (and be elected to) the board, or can corporate-owned units also only have one director representative on the board? **R.B. (via e-mail)**

A: Great question. There is no clear answer. Unfortunately, this new law suffers from some ambiguities. This is one of them.

Clearly, the intent of the new law was to limit situations where multiple owners of the same unit (usually husband and wife) could be elected to the board at the same time. But what if a husband and wife own five units? They are "co-owners", does that mean they still could only have one of them elected to the Board? In my opinion, they could both be elected since the law prohibits "co-owners" of a "unit" from simultaneously serving, they would be co-owners of multiple units.

As to the corporate officer issue, although probably contrary to the intent of the new law, it would seem that since the corporation is the sole owner, its officers are not "co-owners", and thus eligible for election. Given the intent of the new law, which I do happen to think is an appropriate public policy, your association may wish to consider amending its bylaws to state that each unit is only entitled to elect one director.

Q: I read your recent article regarding assessment collection problems. We are having the same problem that many other communities are having, a high level of delinquencies. Your previous column indicated that the association might be able to rent units that do not pay the association. How is this done? **D.M. (via e-mail)**

A: Both the statute applicable to condominium associations (Chapter 718) and the statute applicable to homeowners' associations (Chapter 720) state that if a unit is rented during the pendency of an association lien foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The law goes on to state that the expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.

This can be an effective remedy in some cases. However, because many association lien foreclosure now end up in mortgage foreclosure proceedings too, there is a chance that the mortgagee may claim priority to attach rents. Most mortgages do assign rents as security for the mortgage, I am not aware of any case law as to whether the provisions of the housing statutes would control over the provisions of the mortgages.

If your community has units in foreclosure that are being rented, the board should consult with the association's counsel as to whether it is cost effective to seek the appointment of a receiver and the attachment of rental income in a given case.

Q: You recently wrote an article which indicated the law regarding "material alterations or substantial additions" has been changed. What is the definition of a "material alteration or substantial addition" to condominium property? **J.P. (via e-mail)**

A: The most often-cited definition comes from an appellate court case that was decided nearly 40 years ago. In finding that the enclosure of a condo balcony with jalousie windows constituted a "material alteration or substantial addition", the court said:

> We hold that as applied to buildings, the term "material alteration or addition" means to palpably or perceptibly vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its functions, use or appearance.
>
> *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971)

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Association Can Be Liable For Crime On Property

Fort Myers The News-Press, October 19, 2008

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Q: I live in a gated homeowners' association. Our entire community is surrounded by fencing, most of which is chain link fence. Over the past couple years, we have had problems with people cutting the fence and pulling it back so that they can enter the community. In that time, there have been two home burglaries and one attempted burglary. Whenever people in the neighborhood notice the fence has been cut, they have been notifying the association, which repairs the fence, but sometimes it has taken several weeks to get the fence repaired. Moreover, the association isn't doing anything to prevent this from happening in the future, although the police have been called on several occasions and I understand a report was made about the damage to the fence. I would like to know whether the association is liable if someone comes into the community through a hole in the fence and either steals property, or worse yet, commits a crime against one of the residents. **N.N. via email**

A.: This is a recurring issue in gated communities such as yours. As an initial matter, I always advise associations to remember that they are not a police force. Just because a community is gated and access is limited, that does not mean that the local police authority is not equally responsible for enforcing criminal laws as in an ungated community. If a resident in a gated community witnesses a crime or is concerned about criminal activity, their first call should be to the local police or sheriff's department, and not to the association. Admittedly, their second call should be to the association, especially under the facts you described above.

Without regard to the security issue, an association board of directors most certainly has the obligation to maintain association property and improvements. I am certain that the declaration of covenants governing your community requires the association to repair the fence, and likely requires the association to take reasonable steps, if any are available, to preclude the fence from being damaged in the future. The ultimate question of whether the association is liable for the criminal conduct of trespassers who enter through the hole in the fence is not settled law in the State of Florida, but is a reasonable cause for concern.

One issue is whether the association has created a reasonable expectation in its residents that it will provide security from criminal activity. There have been cases in Florida where a community was specifically marketed as safe and secure and the association provided security guards, sometimes armed, so that members reasonably expected the association had assumed some duty to protect them. In those cases, when criminal activity occurred, the court found that the association was liable because it had assumed the duty to protect its residents. Therefore, one preventative step that we advise associations to take to reduce the likelihood of being held liable for some criminal act is that the association not provide "security", but provide

only "access control". Moreover, well-written governing documents of an association have a disclaimer provision in all capital letters and bold type advising all residents that the association is not responsible for their personal security. While these steps may help the association to deflect liability, there is no guarantee that these disclaimers will completely insulate the association.

In fact, case law has been established in the landlord-tenant situation, as well as in other, similar situations where the courts have determined that a special relationship exists between tenants and the landlord. The courts have determined that there is a duty for the landlord to protect persons, or at least to warn persons of potential dangers, whether or not the landlord has done anything to create a reasonable expectation that it would protect the persons in question. While this "special relationship" concept has not, to my knowledge, been extended to community associations, it is possible that a court may declare that a special relationship exists between associations and its residents at some time in the future. In any event, where there is known, past criminal activity, it is very likely that the association has at least a duty to warn residents, and possibly a duty to take extra steps to protect residents and their property. In the situation that you describe, perhaps extra access control personnel who patrol the perimeter would be in order. Ideally, the local police agency will assist with these extra security measures.

Q: I have been searching to buy a condominium unit and am interested in the pet regulations, because I have a cat. I recently looked at a property where the recorded documents do not address pets, but there are some rules made by the Board. These rules are given out to the unit owners, tenants, and rental agencies, but they are not recorded. Are rules made up by the Board of any legal standing? **G.M. via email**

A: Yes.

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

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

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

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

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

Rules do not need to be recorded in the public records in order to be valid, there are pros and cons to recording rules.

If you are contemplating a purchase in a community where your ownership of a pet is in direct contravention of a rule, I would suggest you consider other alternatives.

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Assessments Concern Prospective Buyer

Fort Myers The News-Press, October 26, 2008

By Joe Adams
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Q: Now that the real estate market has adjusted, I see an opportunity to invest in some condominium units which are for sale at significantly reduced prices from a few years ago. Even if prices continue to go down for a while, it seems to me there are many bargains on the market now. However, I am aware that many of these lower prices are due to the fact that several units within a single condominium association are in foreclosure or have already been taken by a bank. Since a new owner of a condominium unit will need to pay condominium assessments, I am concerned that the assessments on these bargain units may increase substantially in the coming months and years and my investment strategy might be affected. Can you tell me what information is available to me as a purchaser of a condo unit to investigate the financial condition of the condominium association? **D.T. (via e-mail)**

A: I commend you for doing your homework to understand all of your rights and obligations as a new condominium unit owner. The Florida Condominium Act contains several provisions that will help you to gather important information.

First, any person who has executed a contract to purchase a unit may make a written request to the association concerning all assessments and other monies owed to the association by the seller. Within fifteen (15) days after receiving that request, the association shall provide a certificate containing the required information signed by an officer or agent. The association is permitted to charge a reasonable fee for the preparation of that certificate, if authorized by board resolution or provided in an agreement with a management company or bookkeeping firm. Clearly, this provision allows a purchaser an opportunity to avoid assuming liabilities previously incurred by the seller. You should be certain that your purchase agreement with the seller clearly provides that the seller will be responsible for paying all existing liabilities to the association either prior to or at the closing of the sale of the unit.

In addition, the seller is obligated to provide a prospective purchaser with several relevant documents, including current copies of the declaration of condominium, articles of incorporation of the association, bylaws, and rules and regulations of the association. In addition, the prospective purchaser is entitled to receive the most recent annual financial reports of the association and a document maintained by the association entitled “Frequently Asked Questions and Answers”, which provides a summary of important provisions affecting the condominium unit, including voting rights, unit use and leasing restrictions, whether there is any obligation to pay rent for the use of recreational or other common

use facilities, a statement of the amount of the assessment owing on each type of unit and whether those assessments are due monthly or quarterly, and whether the association is currently a party to a court case where liability may exceed $100,000.00. This disclosure sheet also notes whether there is mandatory membership in any recreational facilities and related fees.

Not only must the seller provide all of this information to the prospective purchaser, but any contract for the resale of a residential condominium unit must contain language that acknowledges that the buyer has received all of this information at least three (3) days prior to executing the contract, or a provision giving the buyer a right to terminate the purchase contract within three (3) days after receipt of all of the required information. Any purchase contract that does not include one of these provisions is voidable at the option of the purchaser prior to closing.

In addition, you can make a request of the association to provide additional information, but the Condominium Act does not require the association to respond. The association may respond, and limit its liability for making any disclosures by stating that it is responding in good faith to the best of its ability. If the association were to elect to respond to your specific questions, it may charge $150.00, the cost of photocopying and the cost of any attorney's fees incurred in connection with any response. Obviously, if you are going to make any specific requests for information to an association, you should confirm up front what costs and fees you would be liable for in the event the association elects to respond.

However, as a practical matter, you can negotiate with the seller and require him to obtain and provide any information that you require. You may know that the Condominium Act provisions concerning current unit owner access to association records is very favorable to unit owners. While the seller is not legally entitled to review all documents concerning specific, pending foreclosure actions that are held in the association records, the seller is entitled to up-to-date financial records showing unpaid assessments and other relevant information concerning specific units. Moreover, there are considerable materials available online through the county clerk's website and the tax collector's and property appraiser's websites which will allow you to do research and find relevant information concerning pending liens, foreclosures and title transfers in the community.

Q: We have scheduled a special meeting of our members for the end of this month. We are voting on keeping a board with two year terms, as is required by the new law. Since many of our residents have still not returned from their northern homes, we are concerned about getting a quorum for the meeting. What are our options? **K.F. (via e-mail)**

A: First, the association should open and log in the limited proxies as they are received in the office. Contrary to the misperception of some people, there is nothing illegal about opening and pre-tabulating the proxies as they come in (only envelopes used in the election of directors are required to be kept sealed until the time of the meeting).

If you have the volunteers or staff to do so, I would then call people who have not sent in proxies and ask them to please vote. This issue is not controversial nor even very interesting to most unit owners, so it is easy for them to set the materials aside and forget about them.

A common question that I am asked is whether it is acceptable to have proxies sent to the association by facsimile (fax), or sent as a scanned document (such as a "pdf" file). Unfortunately, there is no clear answer to this question in the law, it is not addressed in the condominium law. Most attorneys I have spoken with on the issue take the position that if the bylaws permit fax or pdf proxies, that is a valid provision. Conversely, some bylaws require the original proxy to be delivered at the time of the meeting, in which case, only originals would suffice. If the bylaws are silent, it is an open question.

When the meeting is called to order, the first thing that must be done is to determine whether there is a quorum present. In most condominiums, a quorum is a majority of the voting interests (there is usually one voting interest assigned to each unit). If there is a quorum, you can proceed with the vote. If there is not a quorum, then the only lawful action that can be taken is to adjourn the meeting to a set date, time and place, which should be voted upon by those who are at the meeting (in person or by proxy). Those who are at the meeting in person should be asked to fill out a proxy for the adjourned meeting in the event they cannot make it to the rescheduled meeting.

The proxies received for the original meeting are valid for up to 90 days, which would give the association time to call those who did not send in proxies and ask them to do so. Notice of the adjourned meeting does not have to be mailed out or posted, although posting is often a good idea. It is not uncommon for associations to have to adjourn meetings to obtain sufficient voter participation to pass a measure. As to this item, it will be necessary for the association to complete this process before your upcoming annual meeting. Good luck.

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PART OF INSURANCE LAW GENERATES CONFUSION

Fort Myers The News-Press, November 2, 2008

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Q: Our condominium association is trying to gather proof of insurance from our unit owners, in response to the recent changes to the Florida condominium insurance laws about which you have written. At least one insurer has told their insured (the unit owner) that they will not name the association as a "loss payee" and that the new law is not effective until January 1, 2009. Also, we have an owner who refuses to purchase insurance. Should we buy the insurance and bill her, or should we have our lawyer send a letter first? **D.R. (via e-mail)**

A: Although enacted only a couple of months ago, this part of the new law has already generated a tremendous amount of debate and confusion. While the effective date of this law (House Bill 601) is July 1, 2008, some parts are specifically stated to be only applicable to insurance policies issued on or after January 1, 2009. Further, it would seem to make sense (although the law does not specifically say so) that the changes would not apply to existing policies, and would only come into force when the policy is renewed.

The provision of the new law which states that the association must be an "additional named insured and loss payee on all casualty insurance policies issued to the unit owners" does not say whether it is effective July 1, 2008 or January 1, 2009. I have heard both points of view argued, I suppose it will become a moot point in the relatively near future.

I am also told by my acquaintances in the insurance industry that the requirement that associations be named as "an additional named insured" is considered a rather radical requirement by insurers. There appears to be a substantial question as to whether insurance companies that have traditionally written HO-6 policies will be willing to write this coverage. However, it is (or soon will be) clearly required by the law, so the industry is going to have to figure out how to deal with compliance if companies are going to write HO-6 policies.

I am also told that the new law's requirement that every HO-6 policy contain "special assessment coverage" of no less than $2,000.00 is also causing great concern within the insurance community. By the way, this requirement (for special assessment coverage) clearly applies only to policies issued on or after January 1, 2009. It appears that the term the Legislature should have used in the law was "loss assessment" coverage, which is an insurance product that has historically been available to reimburse unit owners when they are assessed by their associations for uninsured casualty damage, such as in the aftermath of a hurricane. However, the term used in the law is "special assessment" coverage, which is a much broader concept.

Associations levy "special assessments" for many items, including operational expenses. Are these assessments to be insured by the new law?

With respect to "force-placing" individual insurance policies, this is the only enforcement mechanism stated in the law. While perhaps a valid idea theoretically, "force-placing" HO-6 insurance will not be an effective remedy where the unit owner who is the subject of the action is already delinquent in their other obligations to the association, and on the verge of losing their unit to a foreclosure. It seems quite unlikely that the other unit owners would find it acceptable to shoulder more burden in carrying the costs for that unit than they already are.

In response to your inquiry, associations are generally obligated to provide "notice and opportunity to cure" before taking formal legal action, and I would recommend doing so before force-placing insurance. A letter from the association's attorney would seem to be the most effective way to provide notice and opportunity for compliance.

There are so many questions about the new law, that there is already talk of "glitch" legislation in 2009 to address these open questions. On a related note, there is also a grass-roots movement afoot to make foreclosing lenders responsible for a greater share of past-due assessments, as many feel that the "free ride" that they get under the current law is simply unfair. Stay tuned.

Q: Our condo community master board is made up of ten members who are the respective presidents of our various building associations. Each of the buildings has their own association. Those buildings elect their own boards. Those boards elect a president, and the president is automatically on the master board. The master board then elects its own officers (president, vice president, etc.). How does the new law on staggered terms apply to this master board? **T.D. (via e-mail)**

A: It sounds to me like your "master" association is what is commonly referred to as a "condominium master association." This is the case if membership in the master association is limited to condominium unit owners or condominium associations. In such a case, your association is governed by Chapter 718 of the Florida Statutes, known as the Florida Condominium Act. If so, the new laws on director terms, which became effective October 1, 2008, would apply to your master association.

Under the new condominium law, all directors will serve one year terms unless the bylaws permit two year staggered terms, and a majority of the voting interests of the association affirmatively approve continuing with two year staggered terms.

Conversely, if your master association has any non-condominium members (such as single family home owners or homeowners' associations), Chapter 718 does not apply. Rather, it is likely that the association would be governed by Chapter 720 of the Florida Statutes, which is commonly (although not officially) cited as the Florida Homeowners' Association Act. The Homeowners' Association Act does not contain the board term laws that are now found in the condominium statute.

Your master association may also wish to check as to whether its election process complies with current legal requirements. The State of Florida has ruled through a declaratory statement called In Re: Heron Master Association, Inc., that condominium master associations must follow an election process which involves popular voting.

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Law Says Very Little About Association Board Decisions by E-mail

Fort Myers The News-Press, November 9, 2008

By Joe Adams
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Q: Please advise as to what decisions our association board members can make by e-mail. **C.M. (via e-mail)**

A: Good question. There is no clear answer in the law.

Obviously, electronic mail (e-mail) has become a permanent part of our society's way of communicating with each other. Text messaging is not far behind, and videoconferencing is also coming more into vogue.

Unfortunately, the laws for community associations do not react well to cutting edge technologies. The only provisions regarding electronic communications currently found in the community association statutes provide that owners in condominium and homeowners' associations can waive the right to receive printed/mailed notice of certain association meetings, and instead consent to receive those meeting notices by e-mail. There is no provision in the law for the owner to interact back with the association through electronic media, such as electronic voting.

E-mails present a particularly tough question. Clearly, board members cannot "vote" by e-mail, voting is required to take place at a duly-noticed board meeting, open to observation by the owners (with limited exceptions applicable to attorney-client privileged matters). I am aware of one condominium association board which received a stiff fine from the State of Florida a couple of years ago, for conducting all of their business by e-mail. The board apparently voted on everything by e-mail, and held a meeting once a year to ratify all of their decisions.

Very few boards actually "vote" by e-mail. The more problematic question is whether the debates which often take place among board member e-mail groups regarding issues that may come up for a future vote constitute a "gathering of a quorum of the board conducting business", which is how the law defines what an association "board meeting" is.

I am not aware of any court rulings or administrative agency decisions on the point. Most attorneys I have asked about the issue believe that debating board issues by e-mail does not violate the "sunshine law" applicable to associations, so long as the e-mail discussion does not occur in "real time" (such as a "chat room"). However most attorneys also opine that such e-mails should be retained as part of the association's "official records", and made available to owners upon request, unless subject to a legal privilege (such as the attorney-client privilege).

This is clearly an area where the Legislature should focus some attention.

Q: I have a three-part question that comes into play because of the current foreclosure activity happening here in Florida. First, when a mortgage holder acquires title to a condominium unit as part of a foreclosure proceeding, do they automatically become a member of the association? Second, are they liable for ongoing maintenance fees? Third, as the default owner, are they liable for the monies owed to the association by the former owner? **B.C. (via e-mail)**

A: When a mortgage holder (technically known in the law as a "mortgagee") acquires title to a condominium unit through foreclosure of their mortgage lien, the mortgagee then becomes a "unit owner", just like every other unit owner. The mortgagee becomes the owner on the date a "Certificate of Title" is issued by the County Clerk of Court after the foreclosure proceeding has been concluded. As of that date, the mortgagee becomes liable for all future assessments, has the right to vote, and basically takes on all of the rights and responsibilities of a condominium unit owner. As a practical matter, most mortgagees which foreclose on condominium units try to sell them as quickly as possible. After all, banks are in the business of lending money, not owning real estate.

With respect to past-due assessments, a foreclosing first mortgagee of a condominium unit is liable for six months of unpaid assessments or one percent of the original mortgage debt, whichever is less. The mortgagee must pay these sums within thirty days of taking title, or a lien can be filed against them. The first mortgagee's preferential position (six months assessment/one percent of original mortgage debt limitation) only applies if the mortgagee named the association as a defendant in the lawsuit where the mortgage foreclosure took place. A second mortgagee is typically liable for all unpaid assessments.

The law is essentially the same for homeowners' associations, with one significant difference. A foreclosing lender in the HOA context, is liable for twelve months' worth of unpaid assessments (as opposed to only six months in the condominium context) or one percent of the original mortgage debt, whichever is less.

Q: We live in a community that is governed by a homeowner's association which is still under developer control. As seems to be happening everywhere, sales have come to a halt, although our developer is still technically "in business", but sitting on a large tract of land slated for future development. What are the laws on our having the right to elect our own board of directors? **B.K. (via e-mail)**

A: Assuming that your community was created on or after October 1, 1995, the answer to your question lies in Section 720.307 of the Florida Statutes. You can find all of the Florida Statutes from many on-line sources, including Online Sunshine at www.leg.state.fl.us.

This law provides that members other than the developer are entitled to elect at least a majority of the board three months after ninety percent of the parcels in all phases of the community that will ultimately be operated by the association have been conveyed to members, unless a lower threshold is set forth in the governing documents (which is rarely the case).

This is one area where the HOA law is much more pro-developer, when compared to the condominium law. For condominiums, transition of control can be mandated three months after ninety percent of the planned units have been sold, or three years after fifty percent of the contemplated units have been sold. Unit owners in the condominium context are also entitled to transfer of control if a developer files bankruptcy, is put into receivership, or ceases selling units in the ordinary course of business. However, these consumer protections do not apply in the HOA context.

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Political Signs Can Be Tricky Despite First Amendment

Fort Myers The News-Press, November 16, 2008

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Q: During the recent election, I put some signs in my yard supporting the candidates I endorsed for office. My homeowner's association sent me a letter, telling me I had to remove the signs. While the election is now over and I took the signs down anyway, I want to know what to do in the future. Even though I understand that I am subject to regulations of my HOA, do I not have free speech rights? **B.R. (via e-mail)**

A: Good question. To my knowledge, this issue has never been addressed by the Florida courts, nor are there any specific provisions in Florida's housing statutes addressing political signs.

The first question is whether the governing documents for your community prohibit signs. If, for example, there is a blanket prohibition against signs (rather than the ability to erect signs if approved by the Board), then the restriction would appear to be clear on its face, and prohibit political signs in yards.

Whether members of a community association enjoy "free speech" rights is the subject of some debate. Most legal opinions I have seen on the topic conclude that the constitutional protections of free speech do not apply in the association context. The underlying premise for this position is that the actions of an association are not "state action", which is necessary to trigger constitutional protections.

In a Florida appeals court decision that arose in a Naples neighborhood, a homeowners' association sued an owner who refused to remove a "For Sale" sign, which violated the restrictive covenants. The judge ruled in favor of the homeowner, finding the association's rule to be an abridgement of free speech. On appeal, the appellate court sided with the association, finding that the association was not an arm of the government, and hence there was no "state action." Quail Creek Homeowner's Association, Inc. v. Hunter.

Clearly, a different rule applies to local government. The landmark case on this point is City of Ladue (Missouri) v. Gilleo, a 1994 decision of the United States Supreme Court. A homeowner in the City of Ladue posted a 24 x 36 inch sign which read: "Say No to War in the Persian Gulf, Call Congress Now" (this involved the first Gulf War). The City advised the homeowner that the sign violated the City's ordinances, which it justified by the sign's potential to obstruct views, distract motorists, and create an eyesore. The Supreme Court ruled that the homeowner's constitutional speech rights trumped the City's regulatory interests.

There are obviously legitimate considerations on both sides of this debate. However, my interpretation of the law is that such a restriction would be upheld in the association context. Of course, if the members of the association do not like the restriction, your covenants likely contain a petition process for amendment.

Q: Our HOA documents provide that board members may be paid for performing their duties. My question is whether board members who are paid are required to hold a manager's license under Florida law. **K.C. (via e-mail)**

A: Section 468.431(2) of the Florida Statutes defines "community association management" to include any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration, and when the associations served contain more than ten units or have an annual budget in excess of $100,000.00: controlling or disbursing funds of an association; preparing budgets or other financial documents for an association; assisting in the notice of conduct of association meetings; or coordinating day-to-day maintenance for the development.

This law used to provide that a license was only required for persons who performed these services for pay when done "for the public", meaning that a person who was paid for performing "management services" for their own association would not need to be licensed. The "for the public" exception was removed from the law some time ago.

It is my understanding that the state agency which regulates manager licensing takes the position that if a board member is paid for their services (which must be authorized by the association's bylaws), that the person receiving remuneration must have a community association manager's license if they perform any of the above-listed functions.

Q: I would like to know what Florida's laws are pertaining to the length of time that hurricane shutters may be deployed (left in the closed position). There is a debate in my community about this issue. **G.C. (via e-mail)**

A: The Florida law applicable to homeowners' associations does not address hurricane shutters at all. The condominium law addresses shutters and other forms of hurricane protection (for example, impact glass), but focuses on procedures for mandatory installation and the board's right to promulgate aesthetic specifications.

This is a common issue in many communities. Residents who are "seasonal" argue that if they cannot leave their shutters deployed while they are away, they will not be able to protect their home from damage when a storm is approaching.

Conversely, as many people will argue the other side of the case, stating that a "shuttered up" community looks abandoned, may invite burglars, and the like. Further, the advent of many new types of hurricane barriers (including various types of screens and galvanized panels) introduce products that are often considered less aesthetically acceptable than traditional roll-down shutters, which are permanently affixed to the building.

In the homeowner's association context, I believe that the provisions of the governing documents, including properly made reasonable rules of the board of directors, control the issue. For example, I have seen recorded covenants which specifically state that shutters can only be deployed when a certain level of storm warning has been issued, and must be taken down within a specified time thereafter. I believe such a covenant would be enforceable in the HOA context. Slightly different considerations may apply under the condominium laws.

This is definitely an issue where the Florida Legislature could come up with sensible regulations that accommodate both sides of the debate.

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co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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Statutes Disallow Three-Year Terms for Condo Board

Fort Myers The News-Press, November 23, 2008

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Q: Can you tell me if there has been any clarification of Section 718.112(2)(d)(1), Florida Statutes, regarding the terms of condo board members. Our association currently has three-year staggered terms for our five board members. We will likely be unable to hold a special meeting before our annual meeting in January. Can you tell me what our available options might be? **B.D. (via e-mail)**

A: The amendments to the Florida Condominium Act which became effective October 1, 2008, provide that in future elections of condominium association board members, candidates are to be elected for one-year terms, notwithstanding any contrary provision in the articles of incorporation or bylaws. The only exception is that if the articles or bylaws allow two-year staggered terms, the association can continue to operate with two-year staggered terms. However, a new vote must be taken, under the new law, to "ratify" the association's agreement to continue with two-year staggered terms. The vote must be approved by a majority of the entire voting interests (there is usually one voting interest per unit).

It should be noted that the new law does not specifically address how terms of three-years or more should be handled. It is my understanding from speaking with representatives from the Division of Condominiums, Timeshares and Mobile Homes (the "Division") that the new law implies that only two-year terms are allowed, if approved by the members, and new terms of three-years or more are no longer permissible. As a result, you will likely need to amend your governing documents to allow for two-year terms, instead of the three-year terms currently authorized by your governing documents, and hold the "ratification" vote prior to your annual meeting.

If you do not amend your governing documents and obtain the "ratification" vote prior to the annual meeting, newly elected board members in your association will serve one-year terms.

Q: Does the board of directors of a homeowner's association have the legal right to ban renters from having pets? **A.R. (via e-mail)**

A: Typically, a board of directors has the authority to adopt reasonable rules. This authority should be specified in your association's recorded declaration of covenants, articles of incorporation, or bylaws. If the board has this authority, it is important to determine whether the board may adopt rules without a vote of the owners. Sometimes, the owners need to vote and approve rules that are adopted by the board. In some cases, the owners may actually have the right to veto a board rule. However, in most instances the board

has the power to adopt rules without owner input or approval, at a properly noticed board meeting.

A board-made rule cannot contradict any existing provision within the association's recorded declaration of covenants, articles of incorporation or bylaws. If, for example, your association's declaration of covenants (sometimes called deed restrictions) actually permits tenants to have pets, then the board rule would not be enforceable.

You indicate that your association is a homeowners' association. While I am not aware of any Florida case law concerning the enforceability of a board-made rule that applies only to tenants in a homeowner's association, there are a couple of arbitration decisions concerning such rules in the condominium setting. Arbitration decisions apply only in the condominium context, and have no binding legal effect in a court of law. As such, a judge is free to accept or reject the holding of any condominium arbitration decision.

Condominium law arbitrators have concluded that a properly adopted board-made rule that applies only to tenants use rights regarding units (apartments) is valid and enforceable. However, at least in the condominium context, tenants cannot be treated differently regarding the right to use common elements. The condominium arbitrators have specifically stated that certain tenant-specific rules regarding unit use are not arbitrary in their application, do not violate public policy and are not violative of any constitutional right.

Q: We own a unit in a condominium located on the water. We have a local owner who does not live in his unit, but who shares it with family and personal friends as guests. In the past few months, he has apparently allowed a friend to bring a boat in, using the association's ramp and keeping the boat at the association's docks. The boat owner does not stay at the condo, but comes and goes, usually on weekends. Some members are concerned that, 1) it does not seem right for someone who is not an owner to have the privilege of using our association docks, and 2) we are concerned that our association has liability if some kind of accident occurs at our docks or on the seawall. We would appreciate your insight. **P.C. (via e-mail)**

A: You may know that owners of condominium units can make use of the unit in any legally permissible way, subject to covenants and restrictions contained in the declaration of condominium or the rules and regulations. I am not aware of any state laws or local ordinances that are violated when a guest of an owner of a condominium unit uses the association's amenities in the manner you have described in your question. However, it may be possible that some local ordinance is being violated by such use, and you may wish to explore that possibility.

The more practical solution for the association, assuming that most of the other members share your concern, would be to include provisions in the declaration of condominium or rules and regulations which limit guest usage of condominium property, including the association's docks. Such provisions are common as many associations wish to control the use of condominium property in order to preserve the quality of life for permanent residents and owners. You should first confirm that your current condominium documents do not already contain adequate provisions to restrict guest activity. If no such provisions exist, you may consider amending the documents to prohibit guests from utilizing association amenities in the absence of the association member. Alternatively, the association could allow guests to occupy a unit and use common amenities, but such guest usage could be reasonably limited. The association's legal counsel should be asked to draft the provision, once an internal consensus is reached on the appropriate policy.

Your second concern regarding potential liability of the association is always an important issue for associations, even in the absence of the guest issue that you describe. Your first line of defense as an association is to be certain to have adequate insurance in place. Moreover, if there are concerns about the physical integrity of the marina area, the

board of directors should consult with a qualified construction professional to confirm that the design and condition of the docks and seawall are adequate to meet state and local requirements and do not include any hazardous or dangerous conditions.

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Violations Can Expose Boards to Lawsuit

Fort Myers The News-Press, November 30, 2008

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Q: Our community, which includes single family homes and coach homes, is governed by an elected board of directors. Some residents think that the board may be having private meetings. I was told that the Florida Homeowners' Association Act states that meetings with a quorum of directors present are to be open to all members, but does not specify any penalty for noncompliance. Is this true? **D.F. (via e-mail)**

A: Chapter 720 of the Florida Statutes is also commonly (although not officially) known as the Florida Homeowners' Association Act, or HOA Act. Under the HOA Act, a meeting of the board of directors occurs whenever a quorum of the board gathers (in person or by telephone) to conduct association business. All meetings of the board must be open to all members, except for meetings between the board and the association's attorney with respect to pending litigation, proposed litigation, or personnel matters, and where the contents of the discussion are otherwise governed by the attorney-client privilege. (The Florida Condominium Act is similar but curiously does not contain the exception regarding personnel matters.)

Further, notice of all HOA board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. In the alternative, if notice is not posted in a conspicuous place in the community, notice of each board meeting must be mailed or delivered to each member at least seven days before the meeting, except in an emergency. For communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association.

The HOA Act does not contain any "penalty" for a violation of the open meeting laws. However, board members have a fiduciary responsibility to operate the community within the bounds of the law and, can expose the association to legal action, and the complaining party's attorney's fees, for violations of the law.

Q: I am a member of the board of directors of our condominium association and I am also a snowbird. Our president has called board meetings without notifying me or another board member, although the meeting notice was apparently posted on the condominium property, in accordance with condominium law. A quorum of three was present at the board meetings. My question is this: Does the condominium law require that all board members be notified of the meeting date and

agenda prior to the scheduled meeting? If not, how does an absent board member make his views known regarding issues discussed at those meetings prior to the meeting? **C.H. (via e-mail)**

A: The Condominium Act addresses the notice of board meetings that must be given to unit owners. The condominium law requires 48 hours posted notice on the condominium property of all board meetings. If the board is adopting the budget or levying a special assessment or changing the rules and regulations regarding unit use, the notice of the board meeting must be mailed fourteen days in advance of the meeting to all unit owners and also posted fourteen days in advance.

The condominium law does not address specifically the notice that must be given to other board members. However, most association bylaws will address the notice that must be given to other board members. You should look in the section of your association's bylaws that discusses board meetings and see if there is a provision that addresses the notice that must be given to other board members for regularly scheduled board meetings and/or special meetings of the board. I suspect that there will be something in there requiring notice to the board members. Typical bylaws provisions require two days notice to the board members of the meeting, either by mail, e-mail, telephone, or facsimile, but the provisions vary from association to association and also will vary based on the age of the bylaws. As a duly elected board member, you have the right to insist that you be given proper notice of board meetings.

Q: We live in a new development operated by a homeowners' association. The board is considering a proposal to amend some of the governing documents but there is confusion as to what number constitutes the "total votes of the association." The current declaration reads: "This declaration may be amended, changed, or added to, at any time and from time to time, upon the affirmative vote (in person or by proxy) or written consent, or any combination thereof, of owners holding not less than two-thirds (2/3) of the total votes of the association…"

Our HOA bylaws give the board the power to suspend a member's voting right if the member is in default of payment of any assessment. Currently, a substantial number of voting members are 3 months or more delinquent in paying their monthly assessment. A majority of these homes are vacant and are in various stages of lien/foreclosure. If the board suspends the rights of these members, is the "total votes of the association" reduced? **L.C. (via e-mail)**

A: Your question points out a distinction between the condominium statute (Chapter 718, Florida Statutes) and the homeowners' association statute (Chapter 720, Florida Statutes). In the condominium context, voting rights cannot be suspended. But, pursuant to Section 720.305(3) of the Homeowners' Association Act, voting rights in a homeowner's association can be suspended if the governing documents provide, and if the homeowner is more than 90 days delinquent in the payment of regular annual assessments.

Although a homeowner's voting rights can be suspended, it is my opinion that it does not change the number of "total votes of the association", the standard apparently used in your current governing documents." If your documents based amendments on "eligible voters", a different result might apply. I suppose this is a fairly debatable point of law, and perhaps a good issue for legislative refinement.

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Proxy Form Gives Association Fits

Why a space to grant "general powers"?

Fort Myers The News-Press, December 7, 2008

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Q: My condominium association seems to have a real problem understanding the proxy form that our attorney provides. I understand that general proxies are not allowed in condominiums, but why then is there a space on the form that allows a member to grant "general powers"? Can you please clear this up once and for all? **S.L. (via e-mail)**

A: The Condominium Act requires that limited proxies be used for votes taken to waive or reduce reserves, to waive financial reporting requirements, to amend the declaration, articles of incorporation or bylaws, and for other matters for which the Act requires or permits a vote of the unit owners. This last clause concerning "other matters" refers to such issues as material alteration votes, or the recently added requirement for a majority of members to vote to allow two-year, staggered director terms.

A limited proxy is the functional equivalent of an absentee ballot, as it specifically directs the proxy holder how to vote on an issue, and leaves no room for the proxy holder to exercise his own discretion. A general proxy, on the other hand, vests the proxy holder with all of the voting authority of the member as if the member were at the meeting himself. Apparently, when general proxies were permitted in the past, they were believed to create an opportunity for abuse as members who were interested in a certain issue would collect general proxies from members who were not interested, and then armed with super voting power, those members would control the association. Important issues were sometimes decided not based upon the merits of the issue, but based upon who could gather the most proxies. Presumably, the methods used to obtain those proxies were sometimes unscrupulous. To address these perceived abuses, the legislature decided to force members to at least cast their own votes on certain issues.

Moreover, the legislature required the Division of Condominiums, Time Shares and Mobile Homes, as it is now named, to provide a form proxy. The statute requires an association to use a proxy that substantially conforms to the Division's form. That form, known as BPR Form 33-033, can be found on the Division's website, and includes the "general powers" language you mentioned in your question. The issues that a proxy holder might vote on using "general powers" include all of the non-substantive issues that might arise at a members' meeting, such as whether to adjourn, or whether to waive the reading of prior meeting minutes, or appoint a specific presiding officer for that meeting, when appropriate. Without the "general powers" language, a proxy holder who attends a meeting invested with only the limited

proxy powers that are given for specific, substantive issues, would have no legal authority to vote on these non-substantive matters. It is interesting that the Division's form grants the member an option of whether to grant general powers or not. In my experience, it is this option that causes most of the confusion surrounding the limited proxy form. Seemingly, the form could be drafted to include those general powers in all cases. But because the statute requires use of a form that is "substantially conforming" to the Division's form, the safest approach is to use that form as any deviations are at the association's risk.

Q: Over the past year, our condominium association has taken title to several units through the foreclosure process as a result of the owners' failure to pay assessments. The association has attempted to sell off those units and, on one occasion so far, has been under contract, but the deal did not close on the unit. The prospective purchaser's real estate agent requested a payoff letter, or what I understand to be an "estoppel certificate", the cost of which was covered initially by the prospective purchaser. When the deal fell through, the prospective purchaser requested reimbursement of the fee. Our association went ahead and reimbursed the money and now I am wondering if we were required to do so. Can you please comment. **J.B. (via e-mail)**

A: Both the Florida Condominium Act (Chapter 718 of the Florida Statutes) and the Florida Homeowners' Association Act (Chapter 720 of the Florida Statutes) were amended on July 1, 2008 to set forth new provisions regarding "estoppel certificate" fees. Both laws now require that within fifteen days after the date on which a request for an estoppel certificate is received from an owner or mortgagee, or his or her designee, the association must provide a certificate signed by an officer or authorized agent of the association stating all assessments and other monies owed to the association by the owner with respect to the property (either the condominium unit or the parcel, as the case may be).

Both laws further provide that the authority to charge a fee for the certificate must be established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract. The fee is payable upon the preparation of the certificate. If the certificate is requested in conjunction with the sale or mortgage of the property but the closing does not occur, and no later than thirty days after the closing date for which the certificate was sought, the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payer that is not the property owner, the fee shall be refunded to that payer within thirty days after receipt of the request. The refund then becomes the obligation of the property owner, and the association may collect it from that owner in the same manner as an assessment, including the right to file a lien for nonpayment.

The Florida Homeowners' Association Act simply provides that an association may charge a fee for the preparation of such certificate, whereas the Florida Condominium Act specifies that the fee charged in connection with the preparation of the estoppel certificate must be "reasonable." There is no explanation as to what amount would be "reasonable" nor am I aware of any case law interpreting this language since the law is still relatively new. Accordingly, you may want to check with the association's attorney to determine the industry standard in your area is for this type of fee. In any event, both statutes require the amount of the fee to be included on the certificate.

Therefore, in response to your inquiry, your association was required to refund the estoppel certificate fee so long as the payer followed the steps outlined above for requesting a refund of the fee. Since the association is the unit owner, there is no basis under the new law to seek collection from any one else.

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Homeowner Feels Fenced In By Board Decision

If You Want Change, Get on Board Yourself

Fort Myers The News-Press, December 14, 2008

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Q: My HOA board consists of five members. Two of them have repeatedly made decisions without input from other board members or residents. To give you an example, they recently decided, and went under contract, with a contractor to install a PVC fence in place of our wooden fence and to make the new fence higher than the current one. It's going to cost $6,500.00, and residents would rather we simply repair it. Homeowners have voluntarily agreed to repaint the fence. However, the issue never came up for discussion among residents prior to the contract. It came up at the recent meeting, but the board members said there was no reason to discuss it because it was already a done deal.

This happens a lot. And the only response we ever get is, "we're allowed, and if you want to have a say, volunteer for the board." However, we all pay the same amount every month and should have a say no matter what.

Are we able to force a community vote? Are we able, as a community, to impose a new rule stating anything over a certain dollar amount requires a community vote? **T.M. (via e-mail)**

A: You probably will not like my first answer. I agree with the board, the best way to effectuate change in a community is to get on the board yourself. In my opinion, not only as a matter of civic duty, but to protect your investment, every owner in a mandatory membership association should take a turn at board service. If nothing else, it helps you appreciate the volunteer services performed by your neighbors.

With respect to the fence issue, although I know it is a common occurrence, I have concerns about property owners doing any type of manual labor for their association, including fixing or painting a fence. There are many reasons why volunteer labor is not a good idea. There is only one good reason for it, it is free. At the least, the association should check with its insurance agent to make sure any injury to a property owner, whether stepping on a rusty nail, or falling off a ladder would be covered if a claim is made.

In terms of the board's right to change from a wooden to a PVC fence, the law applicable to homeowners' associations does not limit nor prohibit "material alterations" of common areas, as is the case in the condominium context. However, some HOA governing documents do place limits on a board's authority to alter the property, and some documents include expenditure limits as well. I gather from your question that you have reviewed your community's governing documents and see no such provision. If that is the case, then an amendment to the governing documents would be necessary. Most HOA governing documents

require some type of super-majority approval for change (usually two-thirds or seventy percent), some are based on the entire voting interests, some are keyed only to those who actually vote.

Typically, the board of directors has the authority to initiate proposed amendments. For amendments to be initiated outside of the board (i.e., by the homeowners), there is usually a petition process in the governing documents.

Finally, you state that two of your directors make decisions for the board, but that you have a five-member board. As a general matter, the board of directors must act at open meetings, and notice of board meetings must be posted in the community at least forty-eight hours in advance. The law applicable to homeowners' associations does impose "transparency" requirements in the operation of the association, and board meetings are not intended to be a "rubber stamp" for decisions that have already been made outside of the "sunshine" requirements of the law.

Q: Is it legal for the board of directors of my condominium association to place their recommendation on how unit owners should vote on the issue of directors' terms on the limited proxy? The issue at hand is whether or not the association should keep the staggered two-year board terms or allow the board terms to default to one year terms, as set forth under the Florida Condominium Act. **A.M. (via e-mail)**

A: The issue of board terms is a somewhat controversial change to the law which took effect on October 1, 2008, following the Florida Legislature's amendments to the Florida Condominium Act (Chapter 718 of the Florida Statutes). The new law provides that the terms of all members of the board shall expire at the annual meeting and such board members may stand for re-election unless otherwise provided by the bylaws. In the event that the bylaws permit staggered terms of no more than two years and upon approval of a majority of the total voting interests, the association board members may serve two-year staggered terms.

In my experience, boards will often indicate on the limited proxy how it would recommend that the owners vote, and this is legally permissible. In fact, I have often had association members complain when the board does not include a recommendation on proxy questions. Those who oppose a measure are free to campaign against the recommendation. The limited proxy will contain a specific entry by which the unit owner can either vote "for" or "against" the item in question.

In making its recommendation, the Board may want to provide justification for its position, which can be done in a separate letter to unit owners. For example, the justification most often cited for keeping two-year staggered terms is that staggered terms allow for continuity and experience on the board, as opposed to an election of an entirely new board each year.

Q: I own a condominium unit that I am trying to sell. The condominium association is paid three months in advance. The other day I went to check on the condo. I could not get into the development. The card reader on my car would not give me access. Finally, someone came by and I followed the car to gain access. I went to the office and was told that I did not pay my master association fees for the year. Therefore, the association was blocking me from access to the community. Is this legal? **D.S. (via e-mail)**

A: Your inquiry does not specify whether your "master association" is governed by the condominium law (Chapter 718 of the Florida Statutes) or the law applicable to homeowners' associations (Chapter 720 of the Florida Statutes).

If all of the "subassociations" within the community are condominiums, then the condominium law applies. If all of the "subassociations" are homeowners' associations, or a mix of condominiums and homeowners' associations, then the homeowners' association law applies.

In my opinion, condominium associations cannot suspend the right to use common areas for nonpayment of assessments. The remedies for addressing delinquencies are limited to those set

forth in the Florida Condominium Act, which does not include suspension of use rights.

Conversely, Chapter 720 (the law applicable to homeowners' associations) does permit suspension of the right to use common areas for non-payment of assessments, if authorized by the governing documents. However, that law also provides that suspension of common area use rights "shall not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel." Accordingly, if the gate you mentioned is the only means of ingress and egress to your unit, it is not proper for the association to block you out, even if the fees to the master association have not been paid, and even if it is a homeowners' association.

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

Unit Owner, Not Tenant, Responsible For Insurance

New Law Still Causes Confusion

Fort Myers The News-Press, December 21, 2008

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Q: I read your recent article regarding the requirement for condominium unit owners to purchase insurance. We own a unit, in common with another, which we purchased for investment purposes and rent out. Does the new law require the unit owner or tenant to purchase the insurance? It is my understanding that prior to this time, there was no such requirement in the law. **O.S. (via e-mail)**

A: For a thorough discussion of this aspect of the new law, see my column of November 2, 2008 entitled "Part of Insurance Law Generates Confusion." This column can be accessed on the internet at www.becker-poliakoff.com.

First, your understanding is not entirely correct as to the previous law. The Florida Condominium Act was amended in 2003 to provide that unit owners "shall insure" those portions of the condominium property that are not insured by the association. However, the old law contained no mechanism to enforce that requirement.

The new law permits (but does not require) a condominium to "force place" individual unit insurance, if the unit owner fails to provide proof of insurance, thirty days after the association's request. The association's expenses in procuring this insurance are secured by a right of lien against the unit.

There is considerable confusion as to which parts of the new law became effective on July 1, 2008, and which parts become effective January 1, 2009. I have seen position papers from the Florida Association of Insurance Agents (FAIA) and the Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) on the topic. The FAIA and the Division appear to reach opposite conclusions. I suppose that will become a moot point in a couple of weeks, when the new year arrives.

It is my understanding that there is also resistance in the insurance industry to writing individual unit owner policies (commonly referred to as "HO-6" policies) in compliance with the new law. Among the hesitations of the insurers are the new requirements that the association be specified as a named, additional insured under the unit owner's HO-6 policy, and the requirement for $2,000.00 in "special assessment coverage", a term that is apparently not used in insurance jargon.

Based upon communications I have seen from various quarters, it seems very likely that the Florida Legislature will address this issue in the near future. There is a Special Session of the

Legislature (called for early January), but I have no knowledge that this issue will be taken up at that time. Rather, it would seem that the issue will most likely be addressed during the regular session, which begins in March and ends in May. Therefore, any change to the law (if there is one) would likely be six months down the road. There seems to be a move afoot to repeal this provision, in its entirety. Of course, it is always a risky proposition to plan your affairs on what a state legislature may or may not do in the future.

Accordingly, unless and until the law is changed, it is my view that associations should use their best efforts to comply with it.
In response to your question regarding who is responsible for purchasing the insurance, it is the unit owner, not the tenant.

Q: Can someone who votes by a limited proxy change their mind, revoke their proxy, and vote differently on the voting item in question? **B.B. (via e-mail)**

A: A proxy is generally considered revocable until it has been registered at the meeting for which the proxy is given.

Therefore, if someone in an association votes a certain way on a proxy question, and changes their mind, they have the right to revoke their proxy and cast their absentee vote in a different manner.

In the event of conflicting proxies, the later-dated proxy is usually considered the controlling instrument.

Q: Our condominium association is experiencing financial difficulties, with a high number of unit owners in default in the payment of their assessments to the association. Most of these unit owners are also in default of their mortgage, and many foreclosures are pending.

We are told that if the bank forecloses, they will only be liable for six months of unpaid assessments or one percent of the original mortgage debt, whichever is less.

Our proposed annual budget for 2009 has a line item for "bad debt." The board says that this item is intended to estimate the shortfalls we will experience due to these delinquencies. Isn't it illegal to excuse these owners from payment of their assessment under the condominium statute? When someone buys from the banks aren't liable for the previous owner's unpaid assessments? **H.B. (via e-mail)**

A: Condominium associations are required to prepare budgets in accordance with "generally accepted accounting principles ("GAAP"). It is my understanding that GAAP recognizes "bad debt" as an appropriate expense item for budgeting purposes. Your CPA could confirm this. I can tell you that budgeting for "bad debt", or "doubtful accounts" is not uncommon, particularly in this economic climate. The fact that the association budgets for "bad debt" or "doubtful accounts" does not mean that the association is waiving the right to collect unpaid assessments. Rather, the board is attempting to paint a realistic picture of the cash flow situation the association may expect to experience in the upcoming year, so that there are sufficient funds on hand to meet the operating needs of the association, which is a legal requirement.

You are correct that Section 718.116(9) of the Florida Condominium Act, in general, prohibits an association from excusing one member from paying their share of assessments unless all other unit owners are likewise excused. However, this law does not apply to the issue of the mortgagee's liability, which is set by law, and which you have stated.

An association whose interests are foreclosed by a superior mortgage may have recourse against the former unit owner. For example, if there is equity in the unit, the association can claim an entitlement to excess proceeds at the foreclosure sale. Unfortunately, these days, many owners are "upside down" in their units (their outstanding mortgage amount is more than the value of the property), and in such cases, there would not likely

be excess proceeds available at the foreclosure sale for the association to claim.

There are also procedures in the law for pursuing money judgments (instead of foreclosure) and "deficiency judgments" against the former unit owner. In many cases, particularly with out-of-state debtors, or people who may not be able to pay off a personal money judgment, many associations consider pursuing such claims as spending good money after bad. These issues can be discussed on a case-by-case basis with the association's attorney.

As to your other question, if a bank (or other mortgagee) forecloses its mortgage and wipes out the association's assessment lien, the party who later buys the unit from the bank is likewise not liable for the previous owner's unpaid assessments.

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Cleaning Up Property Not As Easy As It Looks

Fort Myers The News-Press, December 28, 2008

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Q: I live in a development that is governed by a homeowners' association. More and more, we are seeing owners "walk away" from properties they can no longer afford due to the poor economy. This leaves a void as to who is to care for their properties in their absence. Many times, the properties fall into disrepair, which causes potential buyers to think twice about purchasing in our community. Other owners are generally careful to maintain their properties, but it is those few abandoned properties that are scaring away potential buyers, and as a result, property values within our community have plummeted. Our association is considering taking on the task of fixing some of these abandoned properties to preserve property values and to make the community more attractive to potential buyers. Can we do that? **M.D. (via e-mail)**

A: You indicate that your community is a homeowners' association, presumably governed by Chapter 720 of the Florida Statutes, also commonly (although not officially) referred to as the Florida Homeowners' Association Act. If that is the case, then the answer to your question will depend on what your governing documents say.

Unlike the Florida Condominium Act, Chapter 718 of the Florida Statutes, which grants a condominium association the irrevocable right of access to each unit during reasonable hours for maintenance purposes, the Florida Homeowners' Association Act does not expressly authorize a homeowners association to access an owner's lot, let alone to make repairs where the owner fails to do so. Thus, the authority to do so must be contained in the governing documents.

Especially with more modern, well drafted documents, you will often find a clause in your documents which says that when the homeowners fail to maintain their property, the association is authorized to enter the premises and make repairs at the owner's expense, after reasonable notice has been provided to the owner. Of course, what is "reasonable" will depend on the circumstances.

Unfortunately, your situation is far from unique in today's economic climate. Owners in dire financial straits often do not make their mortgage payments. The bank will eventually initiate foreclosure proceedings. Under these circumstances, the owner may feel there is no way to salvage their interest in the property, or it is just not worth it for them, and they simply "disappear." In many cases, it is difficult for the association to ascertain the whereabouts of owners who have abandoned their properties, and thus notify the owner of the association's intent to access the property and make repairs. Still, the association must make a reasonable effort to fulfill the notice requirement.

Where there is a mortgage and the bank has initiated foreclosure proceedings, it may also be appropriate to notify the bank of the situation. Banks are often unaware of the circumstances and upon being notified, may send someone out to maintain the property, since they have a substantial economic interest in it, and are usually conferred the right to do so by their mortgage agreement, or may seek court permission to do so. Other times, the banks are not equipped to have someone look after foreclosed properties, or they just do not believe it is worth the investment.

If your association is considering the task of caring for "abandoned" properties (if authorized by your governing documents), please be aware that there may not be a way to recover the expenses incurred. A property owner who is unable to make mortgage payments, or carry out any other financial obligations (such as paying assessments to the association), is also likely unable to pay the cost of repairs on their "abandoned" property.

I would recommend consulting with the association's legal counsel to verify whether the association has the authority to enter the property and make necessary repairs. Your attorney should also advise whether this is a proper expenditure of association funds, especially if the prospects of ultimately recovering the money spent are dim. Entering else's property without proper legal authority may give rise to a trespass claim, notwithstanding the laudable intention of preserving the property values in your community.

Q: I am concerned about the way my condominium association board is adopting a budget for next year. It is December, and they have not yet even sent notice for the board meeting to adopt the budget. There is no way that members will know what to pay on January 1, 2009. If this happens, are members excused from payment altogether? Apparently, the board is trying to confirm its insurance premium amounts for insurance that renews on January 1 and is also trying to determine the exact amount of a landscape contract renewal that comes up in mid-January. **V.C. (via e-mail)**

A: If you talk to any property managers beginning in about mid-October and continuing through November and December, most all of them are scrambling to finalize budgets. I liken it to tax season for accountants. The fact is, putting together a budget for a condominium association is an exercise in estimating much more than it is a precise determination of the exact amount of expenses for the association in the upcoming year. You cited two examples, those being insurance premiums and the renewal of service contracts, that can throw a monkey wrench into the best budget plan. For an established association, historical experience and data should be helpful to make a close estimate of actual expenses. Unfortunately, in this economic climate, most boards must also factor in a potential "bad debt" amount to account for assessments that will possibly not be collected due to non-paying owners.

The good news is that the board is only required to make its best estimate of the upcoming expenses of the Association. In the event that the estimate proves insufficient, absent a contrary provision in the condominium documents, the board always has the ability to amend the budget during the year. In order to do so, the board must follow the same notice and budget adoption procedures as are required to adopt the original, annual budget. Moreover, if the association has an urgent need for funds during the course of the year, and again absent any limitation in the condominium documents, the board may levy a special assessment.

Your concern about the January 1 deadline and the due date for your first installment for next year is legitimate. However, even if the new budget is not adopted in time, most practitioners would argue that the association is legally able to continue collecting monthly assessment amounts based upon the prior year's budget, although I am not aware of any case decisions on point.

Clearly, the board has an obligation to adopt a new budget as soon as possible and should rely on its ability to estimate the budget and not be overly concerned about getting the budget amounts exactly correct.

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