Owners Have Right to Review Delinquencies

Fort Myers The News-Press, January 4, 2009

By Joe Adams
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Q: Like many associations, we were forced to set up a "bad debt reserve" in our 2009 budget for owners who have become delinquent in payment of their quarterly assessments. As a director, I have been requested by some owners to release the names of those delinquent members and the extent of their delinquency. Do the owners have the right to this information, or is it protected by privacy laws? **B.G. (via e-mail)**

A: The laws applicable to both condominium associations and homeowners' associations require that certain information be kept as part of the "official records" of the association. Included within required official records are accounting records.

Accounting records must include a separate ledger for each unit owner (in condominiums) or parcel owner (in homeowners' associations) which shows the status of that account's payment.

Any unit owner or parcel owner is entitled, upon written request, to inspect the official records of the association. Accordingly, any member of your association who wishes to review the details of any particular property's payment history and delinquency status may make a written request to review the association's records, and see that information.

However, I do not recommend that the board of directors affirmatively take action to publish the names of delinquent owners, nor otherwise publish information as to the status of any particular account. For one thing, the Florida Consumer Collections Practices Act prohibits the publication of "dunning lists". Likewise, any other type of verbal or written communication that has the potential for causing public embarrassment could result in a legal claim against the association.

Q: Our condominium association's board consists of five members. Our bylaws provide for two-year staggered terms. Our annual meeting is set for January of 2009, where we will be electing three members. What is the status of the two board members who still have one year left on their term? Must their seats be held open for election this year, or are they exempt from the new law until their term expires? Can the vote to continue using the two-year staggered terms be taken at the annual meeting. **T.C. (via e-mail)**

A: Those are both good questions. Unfortunately, the new "election law" which became effective October 1, 2008, leaves more open questions than it answers. You have identified two of those questions.

As to those directors whose term does not expire until January 2010, the state agency which regulates condominiums issued a letter interpreting the statute to mean that such individuals would be "grandfathered" until their terms expire. That is the interpretation that I believe is being universally

applied by attorneys who advise associations, I suppose under the theory that the Florida Legislature cannot remove someone from a corporate board who has been duly elected.

As to the timing of the vote to continue with staggered terms, it is my belief that the vote must take place before the annual meeting. That is because the law requires that the first item of business that must take place at your association's annual meeting is the election of directors. Accordingly, it is not technically appropriate to vote to continue with staggered terms and then have the election, the election must occur first.

I typically recommend that a special meeting be called and be held before the annual meeting, even if it is a special meeting held only a few minutes before the annual meeting.

Q: I just received notice of the new budget for my condominium association for next year and the board proposes to increase the annual assessments by over twenty percent from last year. They say that the increase is due to anticipated bad debts from several non-paying owners and from the decision to hire a management company, which I think is unnecessary. I objected to the budget and told the board my position on the management company at the meeting, but they passed the budget anyway. Isn't there a limit on how much a board can increase the budget? **M.A. (via e-mail)**

A: It is a common misconception that a condominium association board is limited in the amount it can increase a budget from year to year. There is no statutory limit, except of course that any budgeted amounts must be based upon valid association expenses. Some bylaws limit budget increases, but such provisions are considered archaic and rarely found in modern documents.

The source of confusion concerning limits on budget increases is section 718.112(2)(e) of the Condominium Act, which provides that whenever the operating budget exceeds one hundred fifteen percent of assessments for the prior fiscal year, ten percent of the members may petition to call a members' meeting to adopt a substitute budget, and the board must call such a meeting within 60 days. The petition must be delivered to the board within 21 days after the adoption of the initial budget by the board. If a majority of all voting interests, or such higher amount as may be required by the bylaws, vote to adopt the substitute budget, then it is adopted. Otherwise, the original budget shall take effect as scheduled.

Importantly, the one hundred fifteen percent figure is calculated based on recurring operating expenses only. So, if a significant increase in a budget is due to increased reserve amounts, non-recurring expenses, or expenses to be paid for the betterment of the property, the substitute budget adoption option may not even apply.

The adoption of a substitute operating budget is difficult for owners to accomplish. In twenty-two years of practice, I have only seen it pulled off a handful of times. The fact is, the operating budget is based on actual projected expenses. Any substitute budget must still meet all of the legal obligations of the association. In the case of your association, you should know that most association boards have specific authority granted by the governing documents to hire a management company, so I expect that is a valid expense for your association. Since it is likely that the board has the authority to hire a management company and it is also likely that a management contract has already been signed, the association must pay according to the terms of that contract.

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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Two Primary Statutes Address Wheelchair Access in Condos

Fort Myers The News-Press, January 18, 2009

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Q: I live in a high-rise condominium building. Recently, one of my neighbors who is a good friend of mine has been confined to a wheelchair. One problem is that the doorways in the lobby area and out to the pool area are not equipped with automatic handicap accessible doors. In addition, it is nearly impossible to get back into the building from the pool area in a wheelchair due to the lip at the door threshold. Part of the problem is that the building is more than twenty years old and does not appear to have been built with wheelchairs in mind. My question is whether the association must modify the doorways and thresholds to allow wheelchairs to go easily through the common areas of the building? **C.N. (via e-mail)**

A: There are two, primary statutes that address the situation you describe in your question. First, the Americans with Disabilities Act, often referred to as the "ADA", mandates that buildings constructed after January, 1992 must be designed and constructed to be accessible and usable by individuals with disabilities. In addition, buildings which constitute places of "public accommodation" must meet accessibility and use requirements. A building can be a place of "public accommodation" if it contains public facilities, such as a restaurant or hotel, and in the case of private condominium buildings, the definition can be met if the association permits short term leases. The definition and establishment of a place of "public accommodation" can be fairly complex and is beyond the scope of my response to your question. If your building is somehow a place of "public accommodation", then modification of the entryways, public restrooms and other facilities may be required. If your building is not a place of "public accommodation", then the ADA does not require the association to modify the common elements to accommodate a wheelchair or other disabled persons.

However, the Fair Housing Amendments Act of 1988, also referred to as the "FHAA", also applies to this situation. The FHAA prohibits a condominium association from discriminating against people on the basis of a disability, and requires condominium associations to permit disabled persons to retrofit the common areas of the condominium so as to enable their enjoyment of the premises. The key difference between the ADA and the FHAA is that the ADA requires retrofitting and modifications by the association and at the association's expense, whereas the FHAA provides that if retrofitting and modification is to take place, it is at the expense of the requesting owner, and the association can establish reasonable conditions regarding the modification. The FHAA analysis hinges upon whether the requested alteration by a member is a "reasonable accommodation". If so, the association must allow the owner to make such an

accommodation. It is not unusual, in my experience, for disabled owners to spend their own funds to include a swimming pool chairlift or to construct a ramp which will allow a wheelchair or a walker to access the beach area of a beachfront high rise.

Finally, you should know that a reasonable accommodation under the FHAA will be required only if the owner is disabled. The definition of disability is fairly broad and continues to be further expanded by recent amendments to relevant laws. Basically, any impairment of a major life activity will be considered a disability. Because walking is clearly a major life activity, there is little doubt that a person confined to a wheelchair is disabled.

Q: In a recent article regarding two-year staggered terms for condominium board members, you said that you typically recommend that a special meeting be called and be held before the annual meeting, even if the special meeting is held only a few minutes before the annual meeting. I recently received an e-mail from a representative of the DBPR, which said that the vote would need to be taken before the first notice of election to insure staggered terms are approved. Can you clarify this point? **T.R. (via e-mail)**

A: First, I recommend that the vote to reaffirm/ratify two-year staggered terms take place as far in advance of the association's annual meeting as is reasonably possible and practical. However, for some associations, this cannot be done.

In my opinion, there is no legal reason why the "ratification" vote could not take place at a special meeting, held right before the annual meeting.

Because those members of the current board with time left on their term are "grandfathered" under the new law (until their terms expire), it is not necessary in connection with preparation of the first notice materials to know whether continuing with two-year terms will be approved/ratified.

Say, for example that you have a five-member board. Further assume that three seats are expiring at a February, 2009 annual meeting and two seats will expire at the February, 2010 annual meeting. The two seats that are up in 2010 do not need to be held open for election this year. The three seats that expire in 2009 do need to be held open for election. Under this scenario, if the owners approve ratifying continuing with two-year staggered terms, the three persons elected in 2009 will be elected to a two-year term. Conversely, if the ratification does not receive the required vote (majority of all voting interests), then those three persons elected in 2009 would be elected for a one-year term.

It is not legally necessary to record notice of the association's ratification of two-year staggered terms, but I recommend doing so, as this will create a permanent record of the association's actions in this regard. However, the recording need not take place before the annual meeting to be valid. A different answer applies if your condominium documents have three-year terms. You will need to adopt an amendment before the upcoming annual meeting in order to convert to two-year staggered terms. This would require that a special meeting be held before the annual meeting (not the day of), so that the amendments can be properly recorded and implemented in connection with the election set to occur at the next annual meeting.

Additional Facts

Community Association Leadership Conference

The Law Firm of Becker & Poliakoff, P.A. will be holding its annual Community Association Leadership Conference on Saturday, January 24, 2009. The program is open to the public, and is free of charge. The event will take place at the Barbara B. Mann Performing Arts Hall, at Edison College. The facility is located at 8099 College Parkway, S.W., Fort Myers, Florida.

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

This year's program focuses on collection of delinquent assessments and the 2008 changes to the Florida Condominium Act involving staggered terms for directors, insurance, and the numerous changes in the law affecting association operations.

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

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POOLED RESERVES ENSURE THERE'S CASH WHEN NEEDED

Fort Myers The News-Press, January 25, 2009

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Q: Our board of directors has been talking about switching over to "pooled" reserves. Can you explain what this means? **L.A. (via e-mail)**

A: The concept of funding condominium reserves through the "pooling" method, sometimes also known as the "cash flow" method, came into vogue about seven years ago.

The Florida Condominium Act requires an association to include as part of the annual budget, a reserve schedule. Reserves must be set aside for roof replacement, pavement resurfacing, building painting, and any other item of association responsibility with a replacement cost or deferred maintenance expense of $10,000.00 or more.

Traditionally, the reserve schedule accompanying the proposed budget has used the "straight line" method of calculating required reserves. For example, assume that the roof on a condominium building has a twenty year useful life, is ten years old, and will cost $100,000.00 to replace. Further assume that the current amount of money in the roof reserve is $50,000.00. The association will need to collect $5,000.00 per year, over the next ten years, to accumulate another $50,000.00 so as to "fully fund" the roof reserve. This is traditional, "straight line" funding of reserves.

Similar calculations are then made for all other required reserve items (building repainting, pavement resurfacing, and other items with a replacement cost or deferred maintenance expense in excess of $10,000.00), and the annual contribution required to "fully fund" the reserve account is thus arrived at.

If no vote of the unit owners is taken, the board of directors is obligated to collect "fully funded" reserves as part of the monthly or quarterly assessment. The law does permit unit owners to vote to reduce the funding of required reserves, or waive funding of reserves altogether. The law was also amended in 2008 to require that any reserve reduction or waiver vote include bold-faced disclaimer language on the proxy and ballot.

It is important to understand that when reserves are funded on the straight line method, whether fully funded or partially funded, the law provides that reserve funds can only be used for their intended purposes. For example, money could not be taken out of the roof reserve account to pay for painting the building. However, the association can use reserve funds for non-scheduled purposes if approved in advance by a majority vote of the unit owners.

The vote required to waive or reduce reserve funding and the vote to use reserves for non-scheduled purposes (which are technically, two separate votes), each require approval of a majority of the voting interests present, in person or by proxy, and voting at a duly noticed meeting of the association. As with the reserve reduction/waiver vote, a vote to use reserves for non-scheduled purposes must also be accompanied by bold-faced disclaimer language on the meeting proxy and ballot.

The concept of "cash flow" or "pooled" reserve funding is a bit different. Under pooled reserves, it is still necessary for the reserve schedule which accompanies the annual budget to set forth required reserve items (roofs, painting, paving, and other items with the replacement cost/deferred maintenance expense of more than $10,000.00). Further, the "cash flow" reserve schedule must still disclose estimated remaining useful life and replacement costs for each reserve component. The main difference in the cash flow presentation of reserves is that instead of each reserve line item having its own fund balance, there is a "pool" of money in the reserve fund, which is available for costs affiliated with any item in the reserve pool. For example, the painting and roof reserve monies are "pooled" into one fund, so a vote of unit owners is not required for expenditures from the fund, as would be the case in a straight-line reserve scenario where monies from one reserve account would be used for another reserve purpose.

It is important to note that even with pooled reserves, a vote of the unit owners is still required to use reserve funds for operating purposes, or for any expenditure involving items that are not part of the "pool".

The pooling method of reserve funding attempts to predict when a particular item will require replacement or deferred maintenance, and reserves are scheduled and funded so as to insure that a necessary amount of funds are on hand when the work needs to be done. Theoretically, monthly or quarterly reserve contributions can be lowered, while still avoiding special assessments.

Of course, what works in theory does not always work when placed in human hands. In addition to needing a crystal ball to predict exactly when a reserve expenditure will need to be made, reserve contributions may be substantially higher in certain years, such as when the fund is depleted for the replacement of a required item, and there is a short useful life for the next asset that needs to be replaced. Personally, I neither encourage or discourage association clients from switching from straight line funding of reserves to cash flow. There are pros and cons, and it ultimately boils down to a matter of choice. Clearly, straight line funding is the more conservative funding mechanism.

The law is not entirely clear as to how the switch from straight line funding to cash flow funding is supposed to occur. I believe it is the position of the Division of Florida Condominiums, Timeshares, and Mobile Homes that the board of directors has the authority to present pooled reserves, even when straight line reserve funding has typically been used in past years.

However, I also believe that it is the Division's position (and I believe consistent with the law) that if funds that were previously deposited in straight line accounts are going to be put into the "pool", then majority approval of the unit owners is required. Accordingly, as a practical matter, every association which switches from straight line funding of reserves to cash flow funding will need to take a vote, so that the existing money in the straight line accounts can be put into the "pool."

Q: It is my understanding that a condominium association's bylaws take precedence over the condominium statute, as long as the bylaws do not violate the law. It is also my understanding that the condominium statute does not address term limits for board of directors, and that therefore term limits are valid. Is that correct? **J.G. (via e-mail)**

A: I do not believe it is entirely correct to state, across the board, that condominium association bylaws take precedence over the condominium law, although that will be the case in certain instances. As a general matter, the condominium law mandates certain procedural requirements, and leaves room for association choice with respect to others.

As to term limits, the Florida Condominium Act states that "any unit owner" may place their name into self-nomination for the board. There are some limitations in the law, including provisions regarding convicted felons, and new provisions in the law which prohibit persons more than ninety days delinquent in the payment of regular assessments from serving on a condominium association board. There is also a new requirement requiring directors to certify that they have read the condominium documents and will attempt to uphold them, as a condition to board service. The new law also prohibits "co-owners" from a unit from serving on a board.

Otherwise, the statute does not impose any additional qualifications on board service. I do not believe that the question of whether additional director qualifications contained in an association's bylaws are valid has ever been addressed by the courts. However, the state agency which enforces the condominium statute, known as the Division of Florida Condominiums, Timeshares, and Mobile Homes, has addressed similar issues on several occasions.

The Division has ruled, unequivocally, that requirements for residency in the condominium contained in bylaws are invalid. As to term limits, there was an arbitration decision issued a number of years ago which found that term limits contained in an association's bylaws were valid. However, several years ago, the Division reversed its position on this matter in a proceeding known as a "declaratory statement", and ruled that term limits contained in condominium association bylaws are invalid.

Accordingly, the only "law" on the subject (and neither arbitration decisions or declaratory statements are "binding law" in the technical sense) suggests that term limits contained in an association's bylaws are invalid. For that reason, I typically do not encourage condominium associations to include "term limits" in their bylaws, and would not do so until such time as the statute were specifically amended to authorize term limits.

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HOW MUCH DIRECTORS' LIABILITY INSURANCE IS ENOUGH?

Fort Myers The News-Press, February 1, 2009

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Q: I currently serve on the board of my condominium association and am running to serve for another year. With the new statutes passed last year, for the first time I have been asked to sign a certification form stating that I have read and understand the statutes and declaration of condominium for my community. Also, our association attorney informs us that there are new provisions in the Condominium Act that appear to require new duties for directors. The board president tells me that I should not be worried because the association carries directors and officers liability insurance. My question is, how much directors and officers liability insurance is enough, and what happens if somebody makes a claim against the directors in excess of the directors and officers liability policy limit? I enjoy serving on the condominium board, but I certainly do not want to put any of my personal assets at risk. **N.N. (via e-mail)**

A: You are correct that many new provisions were added to the Florida Condominium Act in 2008. It is not clear yet what the legal effect of the changes regarding a director's liability will be. As you probably know since you have served on the board previously, directors have always had a fiduciary duty to be reasonably well informed and to investigate and make a good faith evaluation of issues before voting. Directors have also always been required to keep reasonably apprised of association activities. Therefore, from one point of view, nothing has changed with the new statutes except that previously existing fiduciary duties have been expressly codified in the Condominium Act.

The new provisions in the Condominium Act concerning a director's duty of care are basically the same duties that have been found in the Florida corporate statutes for many years. Only time and perhaps some appellate court decisions will tell whether the new certification requirement for directors, or the inclusion of director and officer liability standards in the Condominium Act, change existing law.

The answer to your first question is that the board should consult with the association's insurance broker/agent as to the appropriate amount of directors and officers insurance coverage (usually referred to as the D&O policy). A million dollars coverage is probably the bare bones minimum. It is my understanding that coverage of three million, or even five million, can be obtained for a modestly higher premium. Obviously, the size of your association and the nature of your operation

has some bearing on risk and the best balance between coverage and cost control.

In answer to your second question, the Florida statutes permit the bylaws of the association to contain comprehensive indemnification provisions which could become extremely important should insurance coverage not be adequate to cover a claim against you arising from board service. You may want to ask the board to check with the association's counsel to ensure that your bylaws contain thorough indemnification provisions. If a claim against a director exceeds the amount of insurance coverage, indemnification means that the entire community essentially acts as your insurer. However, there will likely be no insurance coverage and no right to indemnification in the event criminal action, fraudulent acts, or if willful or reckless misconduct or self-dealing is established.

Q: One topic of particular interest to me is how the sunshine laws apply to condominiums. I believe our condominium association board is in violation of the sunshine laws for holding a board meeting to "plan for" a separate board meeting, without providing notice of their "planning" session. On another occasion, our board held a meeting with the association's attorney and while I know that these meetings are not required to be open, I believe they are still required to be noticed, which did not occur. Thanks for your columns. **L.S. (via e-mail)**

A: Technically speaking, Florida's Government in The Sunshine statutes, Chapters 119 and 286 of the Florida Statutes, do not apply to community housing associations. However, each housing law does contain open meeting requirements and other member rights. These statutes are often referenced to as "sunshine laws" for associations. The law to which you are referring is Section 718.112(2)(c) of the Florida Condominium Act. Under the law, meetings of the board of administration at which a quorum of the members is present (either in person or by telephone) must be open to all unit owners. For example, if you have a five member board, three members sitting in the same room or on a telephone conference together conducting association business constitutes a meeting, whether votes are taken or not. An exception to the "open" meeting requirement exists where the board and the association's attorney meet with respect to proposed or pending litigation, when such meeting is held for the purpose of seeking or rendering legal advice.

All board meetings are required to be properly noticed, even meetings between the board and the association's attorney. Proper notice generally requires posting notice conspicuously on the condominium property at least 48 continuous hours in advance of the meeting except in an emergency. Board meetings at which nonemergency special assessments, or at which amendment to rules regarding unit use will be considered require written notice be mailed, delivered, or electronically transmitted to unit owners and posted conspicuously on the condominium property not less than 14 days prior to the meeting.

I often see attempts by boards to bypass the open meeting and/or notice requirements by saying that their meeting is an "executive session" or is being held "planning" purposes only. Some boards believe that so long as no binding vote is taken at the gathering, the open and/or notice requirements simply do not apply. This is inaccurate. In my opinion, where a quorum of the board is present and discussing association business, a "meeting" is being held, whether votes are taken or not, and the "sunshine" laws do apply.

Local Trade Show Aimed at Associations

On February 20, 2009, the local chapter of Community Associations Institute (CAI) will host its 15th Annual Conference & Trade Expo at the Alico Arena on the grounds of Florida Gulf Coast University. The Expo is open to the public from 9 A.M. to 3 P.M.

Over 80 exhibitors providing services to community associations will be represented. A two hour continuing education course, "2009 Legal Update" will be presented by Attorney Joe Adams

at 8:00 A.M. Both managers and board members are welcome to attend. Registration can be confirmed by calling Robert Podvin at the CAI Chapter's office. The telephone number is 239-466-5757.

At noon, CAI's Florida Legislative Alliance will meet and discuss current legislative issues and proposals. Following this there will be an open forum to debate "Legal and Insurance Issues Confronting Community Associations Today". Local attorneys, insurance brokers and members of CAI-FLA will provide an abundance of information to fuel and debate and respond to the issues presented.

All events are free of charge.

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STATUTE CONTROLS HOW PAYMENT MUST BE APPLIED

Fort Myers The News-Press, February 8, 2009

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Q: The by-laws for our homeowners' association state "all payments received will be applied to the oldest dues, fees, fines, charges or assessments in the order of their date of assessment." When a fine becomes the oldest outstanding assessment, and is paid from the next maintenance fee payment received, can that member then be considered to be in arrears on a portion of his/her maintenance fees? **J.K. (via e-mail)**

A: The short answer is no. The application of payments by a homeowners' association to a property owner's account is controlled by Section 720.3085(3)(b), Florida Statutes, which provides that "any payment received by an association and accepted shall be applied first to any interest accrued, then to any administrative late fee, then to any cost and reasonable attorney's fees incurred in the collection, and then to the delinquent assessment." The term "assessment" as it is used in Chapter 720 is defined by Section 720.301(1) as "a sum or sums of money payable to the association, to the developer or the owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of the parcel, can result in a lien against the parcel." Accordingly, Section 720.3085(3)(b) applies to the application of payments to assessments and as previously stated assessments are only those charges which may become a lien against the property. This is an important distinction because while 720.305(2) allows an association to charge fines, if allowed under the governing documents of the association, such fines may not become a lien against the property. Furthermore, Section 720.305(2) also provides that attorney's fees and costs are recoverable in an action to recover a fine as determined by the court. Therefore, an association must account for assessments and the related accrued interest, costs and attorney's fees separately from fines and their related costs and attorney's fees.

Therefore, turning to the specific question asked, the fine would not become the oldest outstanding assessment, because the fine cannot become an assessment where a fine cannot be secured by a lien on the property. Accordingly, a payment received by an association for the payment of assessments must be applied as provided by the statute. First, to interest accrued on the unpaid assessment, then to any administrative late fee as authorized by the documents and the statute, then to any costs and reasonable attorney's fees incurred in the collection of the unpaid assessments and then finally to the delinquent assessment. Other charges which are owed to the Association but are not assessments, as assessments are defined by the statute, would not be paid out of a payment for

assessments even if those amounts are older than the assessment being paid. Therefore, under the statutory structure governing homeowners' associations, a property owner can pay their regularly accruing assessments and be current with the association with regards to assessments and have an unpaid fine.

Q: I have heard that there is a new requirement requiring directors to certify they have read the condominium documents and will attempt to uphold them. Specifically what documents would comprise the "condominium documents" in this context? **P.M. (via e-mail)**

A: Actually, the condominium statute requires a candidate for the board to certify that he or she has read and understands, to the best of his or her ability, the "governing documents of the association" and the provisions of the condominium statute and "any applicable rules." The term "governing documents" is not defined in the condominium statute, but I believe it means the declaration of condominium, the articles of incorporation of the association, and the bylaws of the association. In this context, it probably also includes the rules and regulations of the association, but that is not clear. The statute uses the term "any applicable rules". This could be interpreted to mean the association's rules and regulations or the administrative rules promulgated by the Division of Condominiums, Timeshares, and Mobile Homes ("Division"), which is the state agency that regulates condominiums.

The statute further requires that the association send out the blank certification form with the first notice of the annual meeting. The Division has taken the position that all candidates must sign and return the certification form in order to be eligible to be included on the election ballot. The statute also requires that the signed certification forms received from the candidates be mailed to all of the owners along with the second notice of the annual meeting and election.

Q: For associations that have two-year staggered terms in their current bylaws, is a majority vote required by the unit owners to "opt in", or can the board make the decision to "opt in" with the staggered terms? **F.V. (via e-mail)**

A: Although the 2008 statute is not a model of clarity, it does say that in order for two-year terms to be valid, the provisions for two year, staggered terms must be contained in the association's bylaws must receive "approval of a majority of the total voting interests." My interpretation of the statute, and I have seen no decisions nor convincing arguments to the contrary, is that a condominium association which currently has two-year staggered terms contained in its bylaws must take a "ratification vote", approved by a majority of all unit owners, in order to continue using two year, staggered terms. Conversely, associations with three-year terms in their bylaws, or term provisions other than two year, staggered terms, require an amendment.

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Best to Get Majority OK For 2-Year Staggered Terms

Agenda Items Must Be Specific

Fort Myers The News-Press, February 15, 2009

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Q: I would like you to please clear up a couple of issues regarding the new condominium election laws. For associations that have two-year staggered terms in their current bylaws, is a majority vote required by the unit owners to "opt in", or can the board make the decision to "opt in" to the staggered terms without a vote of the unit owners? In reading your article, it seems that a special members' meeting must be held in addition to the regular meeting at which the election will be held. And shouldn't the association let the owners know in advance, in the agenda, that elections will be discussed, not just have it under new business without any mention of elections? **G.M. (via e-mail)**

A: As with many new statutes, there are uncertainties as to exactly how the statute is to apply in all situations. The plain language of the new two-year staggered term provision in Section 718.112(2)(d)1 of the Florida Condominium Act requires both that the bylaws provide for two-year staggered terms, and that a majority of the entire membership approve operating with a board elected for two-year staggered terms. Presumably, the purpose of the member ratification requirement is to make sure that a majority of the members support two-year terms when the bylaw provision may have been adopted by less than a majority of all members or when the bylaw provision may have been drafted by the developer.

But what if a two-year staggered term had just been added to an association's bylaws in the past few years and the vote obtained to add that provision was a majority of all members? Unfortunately, the statute does not carve out a clear exception for that situation. Two Declaratory Statements that have recently been issued by the Division of Florida Condominiums, Time Shares and Mobile Homes covering this subject have not clearly determined that such an exception exists. Therefore, the safest approach is to obtain the approval of a majority of the entire membership to continue two-year staggered terms. Furthermore, I believe that the members' resolution be obtained at a members' meeting prior to the annual election in order to have a clear course of action at the annual meeting once it is called to order.

As for your question about meeting notices and agenda items, agenda items must be specific enough to provide reasonable notice of the topic to be addressed. To meet this requirement, it is my advice that specific sub-categories be created under general agenda headings such as "New Business". Otherwise, members might rightly complain that they were not provided with adequate notice of agenda items.

Q: In a previous article you stated that "co-owners" from a unit cannot serve on the board of directors pursuant to the new condominium law. What do you mean by "co-owners"? **P.M. (via e-mail)**

A: Section 718.112(1)(d)1 of the Florida Condominium Act was amended in 2008 to provide that in a condominium association of more than ten units, "co-owners of a unit may not serve as members of the board of directors at the same time." The new law does not define what the term "co-owners" means.

In general legal parlance, co-ownership is when two or more natural persons are named on a deed as title holders. The most common form of "co-ownership" is by husband and wife. However, any group of individuals can jointly own real property, including a condominium unit (although some condominium documents contain limitations in this regard).

Where multiple individuals, whether husband and wife or otherwise, own a unit together, they would be considered "co-owners" of the unit and be subject to the limitation of board membership as provided in the new law.

Interestingly, the statute does not address unit ownership by artificial entities (such as corporations or limited liability companies) nor specifically prohibit multiple individuals affiliated with an artificial entity from simultaneously serving on the board. Likewise, the law does not clearly address situations where multiple individuals (such as husband wife) may own more than one unit as to whether they can run for a board seat affiliated with each unit. It appears that the "intent" of the law is that only one person could represent a given unit on the board, but the wording used to accomplish that objective leaves plenty of room for interpretation.

CONFERENCE & TRADE EXPO
Local Chapter Show Set for Associations

On Friday, February 20, 2009, the local chapter of Community Associations Institute (CAI) will host its 15th Annual Conference & Trade Expo at the Alico Arena on the grounds of Florida Gulf Coast University. The Expo is open to the public from 9 A.M. to 3 P.M.

Over 80 exhibitors providing services to community associations will be represented. A two hour continuing education course, "2009 Legal Update" will be presented by Attorney Joe Adams at 8:00 A.M. Both managers and board members are welcome to attend. Registration can be confirmed by calling Robert Podvin at the CAI Chapter's office. The telephone number is 239-466-5757.

At noon, CAI's Florida Legislative Alliance, along with several local attorneys and insurance professionals will meet and discuss current legislative issues and proposals. Following this roundtable discussion, there will be an open forum to discuss "Legal and Insurance Issues Confronting Community Associations Today".

All events are free of charge.

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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How Can You Ensure That Rules Will Be Followed?

Options Include Fines, Eviction, Arbitration

Fort Myers The News-Press, February 22, 2009

By Joe Adams
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Q: I live in a condominium that has been established for quite some time. We have a set of rules and regulations that has been re-written over the years to keep up with the times. The only stipulation in these rules as a consequence of breaking them is a statement that failure to abide by the rules may lead to eviction. Many people do not follow the rules and regulations and the board of directors sends occasional letters addressing some of the infractions, but never seems to follow through. What can be done to enforce the rules? **D.M. (via e-mail)**

A: Eviction is usually not available to associations in addressing violations of rules and regulations. Eviction is a right of a landlord to remove a tenant from the premises. If rules are being broken by unit owners or persons other than tenants, there is no legal basis to evict.

Some condominium documents do permit associations to evict tenants who break the rules and regulations. Although I am not aware of any court decisions on point, most attorneys seem to agree that if eviction is set forth in the condominium documents as a remedy for a violation of rules, it will be upheld. However, most condominium documents do not contain such a clause.

Even when eviction is an available remedy, there are a series of pre-eviction notices and procedures that must be followed in the landlord/tenant relationship, and which probably also need to be followed if an association does seek to evict a tenant. Basically, with the exception of certain egregious infractions, the tenants must be given written notice of their transgressions and an opportunity to stop their objectionable behavior.

In general, the remedy available to condominium associations for violation of rules and regulations is what is known as "injunctive relief", or sometimes referred to in laymen's terms as a "court order." Injunctive relief, as opposed to a judgment for money damages, is an order from a court which orders a person to do something, or stop doing something. Violations of injunctions are punishable by contempt of court, including imprisonment.

Most disputes between associations and unit owners must be submitted to a state-run arbitration program before the parties can go to court. Because the State and Federal Constitutions guarantee the right of access to the courts, the arbitration is not binding. However, arbitration does result in a final resolution of some ninety percent of condominium disputes, at least according to the last statistics I read that were put

out by the state agency which administers the arbitration program.

Perhaps the most significant "penalty" affiliated with both arbitration and court proceedings is that the winning party is entitled to recover their attorney's fees from the losing party. In even the most routine cases, attorney's fees will run in the thousands of dollars, and a hotly contested case can easily run into the tens of thousands of dollars. I have found that the possibility of being assessed for the other side's attorney's fees serves as a strong incentive for both the association and the unit owner to review their position before the matter moves through the legal system. The goal should always be to resolve disputes as early as possible.

Another option for enforcing rules and regulations is the levy of fines. The Florida condominium law permits an association to levy a fine of up to one hundred dollars per violation, with a maximum fine of one thousand dollars for an ongoing or continuing violation. The authority to levy fines must be contained in the condominium documents. Further, if fines are to be levied, the person who is going to be fined is entitled to certain notices, and an opportunity for a hearing. The hearing must be held before a committee of non-board members (and cannot include family members or co-occupants of board members). If the independent committee does not agree with the fine levied by the board, the fine cannot be collected. Fines work for some types of violations, not for others.

Before an association can take legal action (go to court or file for arbitration), the offending party must generally be given written notice of what they are doing wrong and an opportunity to correct their behavior.

Q: I have a question regarding the new insurance law. Your recent article states that the association is supposed to be a "loss payee" under my private insurance policy. How is it that an entity without a vested interest should be listed on the policy as a "loss payee"? I would like to see myself listed as a "loss payee" on the association's master insurance policy. J.F. (via e-mail)

A: You might be interested in knowing that the Florida condominium law stated for many years that the unit owners were considered "additional insureds" under the association's master policy. "Additional insured" status was removed by a 2004 amendment to the condominium statute.

I do not necessarily agree that the association does not have a "vested interest" in the fixtures to be insured by unit owners within the condominium property. There is some benefit to an association in knowing that every unit owner will have the means to make their unit habitable after a substantial casualty, like a hurricane or a fire.

However, the insurance industry shares your concerns about naming condominium associations as "loss payees." There are already a couple of bills floating around Tallahassee (although the Legislative Session does not start for another couple weeks) which would eliminate the provisions of the 2008 amendment to the statute making the association an "additional insured" and "loss payee" under unit owner policies. Stay tuned.

Q: Our developer recently turned over the community to our property owners' association. We have a three-member board. If any of the two of us get together to go over files, blueprints, or otherwise review the community's documentation, must we post notice of this gathering 48 hours in advance? **A.T. (via e-mail)**

A: The law applicable to homeowners' associations defines a "meeting" of the board as any gathering of a quorum of the board where association business is conducted. Although the courts have not interpreted this law in the HOA context, there is a fair amount of case law applicable to public boards which can be reviewed as precedent.

It would seem that the concept of "conducting business" is very broad. While it is clear that two

board members can play golf or eat dinner together (as long as they do not discuss association business), it is likewise clear that formal votes do not need to be taken in order for a "meeting" to occur. In my opinion, it is better to err on the side of the "sunshine" and post notice of the gatherings you have described.

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New 'Election Law' Applies To Condo Associations

Fort Myers The News-Press, March 1, 2009

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Q: I read your recent article regarding the new association election laws. I live in a manufactured home community. Our bylaws allow for three-year terms. Is this still valid? **J.M. (via e-mail)**

A: Probably.

The new "election law" only applies to condominium associations. There are a few RV Parks which might be considered "manufactured home communities" that are set up as condominiums. These associations would need to follow this new law.

However, most "resident-owned parks" are set up as cooperatives or homeowners' associations. The new election laws do not apply to these communities.

Q: Our board of directors recently elected its officers at a board meeting held right after our annual meeting. The board retired into a separate room and the officers were elected there. Aren't meetings where officers are elected supposed to be open to the owners? **K.R. (via e-mail)**

A: Yes, the only board meetings which can be closed to owner observation are those involving pending or proposed litigation, where an attorney is present. In homeowners' associations, board meetings involving "personnel matters" can also be closed, provided that the association's attorney is present.

That being said, I have seen many situations where the board does meet in a separate room to elect officers. This is often necessary because many of the homeowners like to stay in the room where the meeting was held to visit socially afterwards, and the board cannot have a quiet place to conduct its business. As long as the board's organizational meeting was properly posted for the other room, and as long as the other unit owners were entitled to attend (whether they chose to do so or not may be another question), the law was not violated.

Q: I live in a community with several, separate condominiums and a master association all within the same community. For years, we have had one manager handle our entire community and he has done a good job. This year, several new board members were elected and are making an issue of the fact that the manager does not have a written contract. While the entire board understands there can be benefits from a written employment contract, things have worked very well for many years and some are concerned that adding a legal document might needlessly complicate things and maybe even send a message to the manager that he is not trusted by the new board. Could you give your comments on this situation so that we can

decide how to proceed in the best interest of our community. **G.B. (via e-mail)**

A: I suspect you already know that I strongly recommend a written contract for management personnel. Florida law does recognize the validity of verbal employment arrangements, and such arrangements are generally considered "at will" relationships. However, from the perspective of both the employer and employee, I think it is a good idea to have a clear understanding of the relative rights and responsibilities of the parties.

In addition, it is important to outline the specific duties and authority of the manager in a written agreement. This actually helps both the association and the manager to be certain they are "on the same page" with respect to the management relationship. Importantly, the manager must also make certain representations to the association including that he or she maintains the proper community association manager license, and that he or she indemnifies the association against any negligence or willful misconduct. Likewise, there is a mutual benefit to the manager as the association would normally agree to indemnify the manager for any liability that the manager incurs by reason of carrying out his or her duties with due care and in good faith.

Finally, the description of your community, with its several condominiums and a master association, provides another important reason for having a written management contract. It is not clear from your question whether the separate condominium associations are administered by one association, which is called a multi-condominium, or by several different associations. If the community is administered by several different associations, those are each, separate legal entities and each have independent legal relationships with a manager who is performing services on its behalf. It is my recommendation that those separate relationships be clearly established and defined in separate written employment contracts. Further, although many communities do perceive some benefit in all having the same management relationship, I believe that each board of directors should have the authority to decide, at any time, what particular management arrangement best works for their association.

Q: Can the treasurer of a condominium association board also serve as secretary? **I.J. (via e-mail)**

A: Yes.

In the absence of a provision in the bylaws to the contrary, there is nothing in the law that prohibits a director from holding two offices. The combination of secretary and treasurer is, in fact, quite common . Many bylaws prohibit the president from also serving as the secretary, usually because certain formal legal documents are customarily executed by those officers, in separate capacities.

Q: Our condominium association is involved in some foreclosures and we are told that we need to prepare for the inability to collect what is owed to us. How does an association word a line-item in the budget for bad debt? How much should we budget? **P.S. (via e-mail)**

A: I believe that the term "bad debt" is what is customarily used. I have seen "allowance for doubtful accounts" also used. Budgeting for bad debt does not mean that you are excusing the payment obligation. Rather, you are trying to predict what losses may have to be absorbed.

In most "bad debt" situations we see these days, a bank is owed more than the unit is worth, and the bank will ultimately foreclose its mortgage. When the bank forecloses, the previous unit owner's past due debts will be no longer subject to the association's lien, and the bank will only be obligated for the payment of past due fees in the amount of one percent of the original mortgage debt or six months of assessments, whichever is less. Of course, the bank must pay all assessments going forward, after it takes title, and for so long as it holds title.

While the association would typically still have the right to pursue a money judgment or deficiency judgment against the former unit owner after the bank forecloses, it is often not considered cost-effective to do so.

Unfortunately, it is difficult to predict when a bank will decide to start its foreclosure or when the foreclosure process will be completed. There are several complicating factors in this market, including the fact that the court system is clogged with foreclosures and they do not move as quickly as they used to. Further, some banks are not aggressively pushing their foreclosure actions, for a variety of reasons.

Therefore, trying to predict the amount of bad debt you will incur on any particular account is somewhat of an exercise in crystal ball gazing. You will need to predict when the bank will obtain title through foreclosure, and how much was owed by the former owner at that point in time. That is the amount of bad debt you will have to absorb.

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State Has Few Restrictions On Who Can Run For Board

Homeowner Wants to 'Opt Out' of Membership

Fort Myers The News-Press, March 8, 2009

By Joe Adams
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Q: I have a question regarding homeowners' associations. I have read Chapter 720 and can find no reference to any limits or qualifications on the right or ability of a person to run for our HOA board. What is the law on this? **L.T. (via e-mail)**

A: You are correct in noting that Chapter 720 of the Florida Statutes, commonly called the Florida Homeowners' Association Act, does not contain any provisions regarding board member qualifications. However, the law does state that any member of the association may run for the board. Therefore, unlike the current condominium situation, I believe that co-owners of the same parcel would have the legal right to run for the board of directors, so long as they are both named on the deed and are considered members of the association. For the same reason, term limits would probably be considered invalid in the HOA context, although I do not think this issue has been tested in the courts as yet.

Florida's Not-For-Profit Corporation Act (Chapter 617 of the Florida Statutes) provides that directors of a corporation must be a natural person who are 18 years of age or older, but need not be Florida residents, nor members of the corporation, unless the articles of incorporation or bylaws so require.

The Not-For-Profit Corporation Act further states that in the event eligibility to serve as a member of the board is restricted to members of the association, a grantor of a trust is deemed a member of the association and eligible to serve as a director, as is a trust beneficiary, provided that the beneficiary occupies the parcel.

In short, if your bylaws do not contain any qualifications regarding directors, any natural person age 18 years of age or older may run for your board. Your bylaws may impose additional restrictions, but cannot prevent association members from standing for election.

Q: Our homeowners' association is a "neighborhood association", and there is also a "master association" governing our community.

The maintenance fees we collect for the operation of our neighborhood are approximately $225,000.00. We collect another $250,000.00 on behalf of the master association, and pay that money over to the master association. Accordingly, the total money we collect annually is approximately $475,000.00. Are we required to have an audit or a review? **M.B. (via e-mail)**

A: Great question.

First, you need to look at your association's governing documents, probably the bylaws. Most homeowners' association bylaws contain some guidance regarding required year-end financial reporting. If the requirements of the bylaws are stricter than the statute, you must follow your bylaws.

Assuming the bylaws are less restrictive than the statute (or defer to the statute), you need to look at Section 720.303(7) of the Florida Homeowners' Association Act. An association with "total annual revenues" of at least $200,000, but less than $400,000 must prepare a reviewed financial statement annually. An association with "total annual revenues" of $400,000 or more shall prepare an audited financial statement.

The law does not define what "revenue" means. However, if the checks for the master association fees are written to your neighborhood association (and then you pay that money over to the master association), I would think that these sums are part of your "revenues", and therefore your association is required to have an annual audit.

Please also note that a majority of the voting interests present at a properly called meeting of the association may vote to have a lower-level financial report prepared. Assuming an audit is required in your case, the members of the association could still vote, by majority vote, for a review, a compilation, or even a report of cash receipts and expenditures.

Q: I would like to know if it is possible to "opt out" of being a member of my homeowners' association. Also, if I choose to move some place else, may I opt out of their association before I move in. **M.S. (via e-mail)**

A: Chapter 720 of the Florida Statutes defines a "homeowner's association" as a corporation which manages deed-restricted property, where membership in the association is mandatory, and where the association has the right to levy assessments secured by a right of lien. There is no provision in the law for "opting out" of such an association, membership is mandatory for all parcel owners.

There are some voluntary "homeowners' associations" where you can choose whether to be a member or not, these are more common in older neighborhoods.

Q: I was recently elected to serve on my condominium association board. Our board apparently has a habit of passing motions by one director saying "I make a motion to vote yea" on a certain proposal, and another member will say "I second that." The measure is then considered passed. Shouldn't each board member get to vote? **J.H. (via e-mail)**

A: Yes.

A question is typically presented to a board for vote when a member of the board makes a motion, and the motion receives a second. The matter is then supposed to be discussed, and then the vote is taken.

In fact, Chapter 718 of the Florida Statutes (the Florida Condominium Act) requires the vote of every director to be recorded in the minutes regarding each item for which a vote is taken. Directors cannot vote by secret ballot, except when electing officers.

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Carports Divisive Issue For Condo Owners

All pay maintenance; not all can use them

Fort Myers The News-Press, March 15, 2009

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Q: I live in an older condominium complex with 66 units. We have a common parking lot with 42 carport spaces. The rest of the owners have to park in uncovered spaces that are assigned to them by the association. We have several issues concerning the carports. First, people that do not have carports think it is unfair that the entire association pays to maintain the carports. Wouldn't it be more fair if the carport owners paid to maintain their own carports? Second, several carport owners are interested in selling their carports to other owners, but the association board has informed them that they are not permitted to sell a carport to another owner. This makes absolutely no sense to me. Finally, there has been a proposal to add carports so that everyone who wants one can have one, but the association board informs us that the attorney says that 75% of all the members of the association must vote to allow the construction of new carports. The board is concerned that the people that currently have carports will not vote in favor of this addition because it will cost them money and they will have no additional benefits. Can you give some advice or suggestions to address these carport issues? **M.P. (via e-mail)**

A: All three of your questions can be answered by reference to provisions in the Condominium Act and related provisions that may or may not exist in your declaration of condominium. First, it is necessary to determine whether the carports are limited common elements that were assigned to each individual unit at the time the developer sold the units initially, whether the carport spaces are separately deeded parcels of property that are owned by the unit owners, or whether the rights in the carports are conferred by some other type of instrument, such as a lease. In my experience, at least as to carports that were part of the original construction, it is most common that such carport spaces are limited common elements that are appurtenant to the ownership of the unit, and I will assume that is the case for purposes of answering this question.

The Condominium Act specifically allows the declaration of condominium to require the association to be responsible for the cost of maintaining common elements, including limited common elements, or to specifically require the unit owners who own the units to which the limited common elements are appurtenant to pay the cost of maintaining those limited common elements. Therefore, you need to check your declaration of condominium on this important point. Given the facts you described in your questions, I would expect that you would find a provision that requires the entire association to pay the cost of maintaining the carports. If that is the case, that is

simply the way the developer set it up to begin with, probably in an attempt to make the carports more attractive to purchasers as an additional item to purchase. However, a provision can be added or changed to require the owners who have carports to pay the cost of carport maintenance. This can be accomplished by amending the declaration of condominium according to its amendment provision. However, as a practical matter, your declaration probably requires super-majority approval for amendment, and many of the carport assignees may find no incentive for them to take on a greater share of the maintenance costs.

With respect to the ability to transfer carport spaces, Section 718.106(2)(b) of the Florida Condominium Act specifically addresses this point and provides that, if the declaration of condominium as originally recorded, or as amended, permits limited common elements to be transferred, then they can be transferred in conformity with the procedures set forth in the declaration. If the declaration contains no such clause, the rights in the carport pass with title to the unit, as a matter of law, assuming they are designated as limited common elements. Therefore, just like with the cost of maintaining the carports discussed above, the association is able to customize the transferability of the carports according to the wishes of the members.

Finally, you may know that, as a general principle, any perceptible change to the use, function or appearance of the common elements of the condominium is termed a "material alteration". By statute, a material alteration of the common elements may only be made in accordance with any provisions of the declaration of condominium, and if the declaration of condominium does not address the issue, then the approval of 75% of all of the members of the association is required in order to perform a material alteration. Therefore, it is necessary for you to review your declaration of condominium to determine if there is a material alteration vote provision. If there is not, the board and the association attorney are correct that 75% of all the members must vote in favor of adding carports to the common elements. Presumably, your association's counsel has also reviewed whether the manner of adding new carports would be deemed a "material modification of unit appurtenances", which triggers a requirement for unanimous unit owner approval in some circumstances.

Perhaps the owners who already have carports could be convinced to vote for new carports under the theory that the new carports will raise the value of other units, and that will have a positive effect on the entire community.

Q: The bylaws of our homeowners' association state that all payments received by the association "will be applied to the oldest dues, fees, fines, charges or assessments in the order of the date." When a fine becomes the oldest outstanding obligation, and is paid from the next maintenance fee payment received from the member, can the member then be considered in arrears on their maintenance fees? **J.K. (via e-mail)**

A: Your question indicates that you are involved in a homeowners' association, not a condominium association. For condominiums, the answer is clear. The Condominium Act has provided for many years that a fine cannot become a lien against the unit. Therefore, the "application of payment" language found in your bylaws would clearly be improper in the condominium setting.

In the homeowners' association setting, the law is a bit more complex. Prior to 2004, the governing documents for many HOAs permitted fines to be secured by a lien against a parcel. The law was changed in 2004, and Section 720.305(2) of the Florida Homeowners' Association Act now states that "a fine shall not become a lien against a parcel."

Accordingly, at the most basic level, the law for homeowners' associations is now the same as it is for condominiums, and you could not use the "application of payment" language in your bylaws to collect fines, since you would essentially be securing the collection of your fine through lien rights.

There are some who argue that a homeowners' association which exists prior to 2004, whose governing documents permit liens for fines, may still secure the payment of fines through liens. Such an argument is based upon constitutional principals regarding the retroactive application of legislation affecting community associations, and constitutional provisions which prohibit the impairment of contracts (and your governing documents are a contract) by state legislative action. These theories have not, as yet, been tested in the appeals courts, at least to my knowledge.

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Board Meetings Must Be Posted, Open To Members

Votes Can Be Taken On Posted Items Only

Fort Myers The News-Press, March 22, 2009

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Q: Our association recently had a workshop meeting. There was no agenda posted but the notice of the meeting posted. The intention of the meeting was for a majority of the board to simply listen to input from our shareholders, so that we might know their concerns in shaping the agenda for future board actions. We were challenged by one of our shareholders that this was a violation of the sunshine law. Are ³workshop meetings legal? **J.C. (via e-mail)**

A: I assume by your reference to shareholders that your community is a cooperative association, I would speculate a resident-owned park because cooperative governance is the most common form of legal structure in this type of community. The Florida Cooperative Act contains provisions similar to that found in the law for condominiums and homeowners¹ associations. Basically, meetings of the board must be posted at least 48 hours in advance and open to the members of the association. Agendas must be posted in condominiums and cooperatives, not for homeowners¹ associations. Generally speaking, votes can only be taken on items disclosed on the posted agenda. Your inquiry suggests that no votes were taken, and that the entire purpose of the gathering was to receive input from your members. This does not violate applicable law, and in fact seems like a pretty good thing to do for those who have entrusted their investments to your stewardship, through your election to the board.

Q: Our board of directors passed a motion to ban smoking except in the parking area. The ban includes all of the limited common areas, most of the common area (except the parking area) and within every condominium unit. I understand the danger of second hand smoke and recent national trends, but does the board have the legal authority to ban smoking within the walls of my personal condominiums? **T.S. (via e-mail)**

A: The Florida Clean Indoor Air Act, Section 386.204, Florida Statutes, which is a uniform state-wide code that bans the smoking of all tobacco products in enclosed indoor workplaces, provides the authority for the Board of Directors to prohibit smoking within the indoor common elements. Because "work" is being performed, smoking in all indoor meetings of the board, committees of the board, and meetings of the membership would be prohibited. Furthermore, the simple cleaning or maintenance of an enclosed common element is sufficient to impose a ban on smoking within these areas as well.

As to the outdoor common elements and the limited common elements, assuming that the Board has rule-making authority in the governing

documents, a Board-made rule banning smoking is subject to a test of reasonableness according to Florida law. With the known health risks from secondhand smoke, such as cancer and heart disease, the smoking ban is likely to be considered reasonable, especially since smokers have the parking area as a designated area where they are permitted to smoke.

While a smoking ban within the units is also reasonably related to the health, happiness, and peace of mind of the unit owners, and while there may be arguments to support the validity of a board-made rule, such a restriction is best implemented through an amendment to the declaration of condominium. According to Florida's court, restrictions contained within the declaration are "clothed with a very strong presumption of validity and will be upheld and enforceable so long as they are not wholly arbitrary in their application, in violation of public policy, or abrogate some fundamental constitutional right." Florida's courts have even said that "a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts."

Because the Association seeks to ban a lawful activity (smoking) within the units, an amendment to the declaration has a much better chance of being upheld if challenged. In fact, in 2006, a Colorado court upheld an amendment to a declaration of condominium that banned smoking within the boundaries of its condominium units. While not binding to Florida courts, the Colorado case may be a very strong persuasive precedent.

Q: If our association levies a fine, and the owner does not pay, how do we collect the fine? **R.Z. (via e-mail)**

A: The short answer is that you probably have to take the unit owner to Small Claims Court. One obvious question to ask is that if you are going to court, and you are going to hire an attorney, will you spend more in legal fees than you hope to recover from the unit owner?

For condominium associations, the law states that a fine cannot be secured by a claim of lien. Accordingly, assuming a fine has been duly levied, there is a debt owed from the unit owner to the association. As with most other debts, if the debtor fails to pay the creditor, you have to take them to court.

Hopefully, your condominium association's bylaws will provide that the prevailing party in a court action to recover a fine is entitled to recovery of their attorney's fees. The condominium statute does not specifically provide for the recovery of attorney's fees in the collection of fines, although I believe most attorneys would opine that attorney's fees incurred in fine collection are recoverable by virtue of general language in the condominium statutes which permits the recovery of the winner's attorney's fees from the loser in litigation between associations and unit owners.

For homeowners' associations, the law used to permit the filing of liens for unpaid fines, if provided in the governing documents. That right was amended out of the law in 2004. You might be interested in knowing that there is currently a Bill pending before the Florida Legislature which would reinstate the right of an HOA to lien for fines, provided that the fine exceeds $1,000.00. The homeowners' association statute specifically states that in any action between an association and a parcel owner to recover a fine, the prevailing party is entitled to recover their attorney's fees from the non-prevailing party.

Also, it is not necessary to have an attorney in Small Claims Court, and many associations are willing to pursue these actions on their own. The Small Claims Court rules permit any officer or employee of the association to appear on behalf of the association in a Small Claims Court proceeding. A manager is not permitted to appear on behalf of the association unless they are an officer or employee.

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Several Bills Could Affect Condo Associations

Fort Myers The News-Press, March 29, 2009

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It's that time of year again.

Each year, the Florida Legislature convenes in early March for a 60 day session. It has become an annual ritual to seek to change Florida's statutes applicable to condominiums, cooperatives, and homeowners' associations.

The 2009 Legislative Session is in full swing, and there are 14 pending Bills directly affecting community associations.

Here's a look at the highlights of what is in play for condominiums:

- Co-Owner Service on Board: 3 proposed Bills would clarify the 2008 amendment to the statute which prohibits "co-owners" from serving on the board at the same time. The new law would allow simultaneous service by co-owners if they own more than one unit (one seat per unit).

- Director Qualifications: 2 Bills state that if a director does not pay special assessments or fines within 90 days of the due date, they are disqualified from service on the board. The 2008 amendment to the statute only states that 90 days delinquency in the payment of "regular" assessments is grounds for disqualification.

- Pre-Election Certification: 4 Bills appear designed to eliminate the requirement that board candidates certify before they run for office that they have read the condominium documents. Instead, the new law would impose a post election certification for newly elected directors where they would be required to affirm that they have read the condominium documents, and will attempt to uphold the documents and discharge their fiduciary duties as directors.

- Reappointment of Incumbent Board Members: 3 Bills would change the current law wherein a director is automatically reappointed to the board where no one runs for their seat. The new law would provide that incumbent board members who do not seek re-election are not automatically reappointed, but instead would be eligible for reappointment.

- Sprinklers/Elevators/Handrail Retrofit: 3 Bills are aimed at building code compliance. One would push fire sprinkler retrofitting requirements from 2014 to 2025. Another would extend compliance for handrail installations from 2014 to 2016. Yet another eliminates the requirement that multi-family residential buildings greater than 75 feet in height have at least one

elevator capable of operating on an alternative power source.

- Bulk Purchase Broadband/Internet: 1 Bill would give a condominium association board of directors the right to purchase "broadband or internet service" as a common expense.

- Mandatory Unit Owner Insurance: 3 Bills appear aimed at eliminating this requirement in its entirety. One of the Bills would still require mandatory HO-6 coverage, but would tweak coverage requirements.

- Unit Owner Loss Assessment Coverage: 4 Bills attempt to clarify language which was added by the 2008 statutes as to whether a unit owner's "loss assessment coverage" (called "special assessment coverage" in the current statute) covers association deductibles.

- Board Meeting Notice to Set Insurance Deductible: 2 Bills would eliminate the disclosure requirements enacted in the 2008 legislation regarding information which must accompany notice of the board meeting where insurance deductibles are set.

- Foreclosing Mortgagee Assessment Liability: There are 4 Bills aimed at this problem. 2 of the Bills would increase a foreclosing lender's statutory liability. Several of the Bills would make a bank liable for all unpaid assessments if they did not complete their mortgage foreclosure within a year.

- Suspensions: One of the pending Bills would permit a condominium association to suspend common element use rights for misconduct, with a hearing, and without a hearing, for assessment delinquency. The same proposal would also permit suspension of voting rights for delinquency in paying assessments.

- Official Records: One proposal would exempt the employment records of condominium association employees (disciplinary records, health records, and personnel records) from the ambit of "official records" which unit owners are entitled to inspect.

Remember, these are all only proposals to change the law, not changes to the law, at least not yet. Stay tuned to read about what passes, if anything.

Next week, we will look at what is on the plate for cooperatives and homeowners' associations.

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Legislation May Affect Homeowners' Associations

Highlights of pending bills summarized

Fort Myers The News-Press, April 5, 2009

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At the half-way point of the 60 day session of the Florida Legislature, a number of bills affecting community associations are still alive, though not all are well. As reported last week, fourteen different bills have been filed in either the House or Senate directly affecting condominiums, cooperatives, and homeowners' associations. It is highly unlikely that all of these bills will go through the required committee hearing process and be presented for vote. Rather, members from each chamber typically caucus and pick one community association bill as the "vehicle" for all of the proposed changes that might ultimately be adopted. From the perspective of the legislative process, there's still plenty of time for this to unfold.

Last week, we looked at proposals affecting condominium associations, primarily focusing on insurance, board member qualifications and foreclosures. Today, we will look at the highlights of pending bills that impact homeowners' associations and cooperatives.

Here's some of the highlights. References to "H.B." denote House Bill. References to "S.B." denote Senate Bill. References to "C.S." denote Committee Substitute: References to "HOA" denote homeowners' association.

- HOA Official Records: C.S./H.B. 27 would permit a homeowners' association to charge personnel expenses in connection with a member's inspection and copying of official records, and would require that member requests to inspect official records be made by certified mail.

- HOA Reserves: C.S./H.B. 27 would remove limits on "statutory reserve" funding to the extent otherwise limited by assessment increase provisions in the governing documents. The Bill would permit termination of "non-statutory reserve" accounts by majority vote. This Bill would also require the HOA's disclosure of under-funded reserves.

- HOA Director Compensation: C.S./H.B. 27: would prohibit compensation of directors unless authorized by the governing documents or approved by a majority of the members.

- HOA Fines: C.S./H.B. 27 would permit homeowners' association fines of greater than $1,000.00 to be secured by a lien.

- Director Elections: C.S./H.B. 27 would permit the bylaws of a homeowners'

association to allow for elections using the "two envelope system" now used in condominium associations.

- HOA Covenant Enforcement: C.S./H.B. 27 would create a new law called "The Home Court Advantage Dispute Resolution Act", which would fine-tune current pre-suit mediation requirements in homeowners' associations, and provide for arbitration instead of court litigation in certain circumstances.

- HOA Foreclosures: H.B. 633 would eliminate a foreclosing mortgage holder's immunity from payment of past-due assessments (which is currently subject to a cap of twelve months of unpaid assessments or one percent of the original mortgage debt, whichever is less), if the mortgage foreclosure is not completed within one year of its filing.

- Regulation of Homeowners' Associations: H.B. 1397 would require the Office of Policy and Program Analysis (OPAGA) to conduct a study as to whether HOAs should be subject to regulation by a state regulatory agency.

- Amendments to HOA Documents: S.B. 998 would negate, retroactively, any requirement for mortgage holder approval of amendments to a homeowners' association governing documents.

- HOA Collection Costs: S.B. 998 would permit a homeowners' association lien to secure management company charges for preparation of collection letters.

- Changes to the Cooperative Act: H.B. 1397 proposes to change approximately 50 sections of Chapter 719 of the Florida Statutes, the Florida Cooperative Act. Most of the proposed changes would result in the Cooperative Act containing identical provisions to those found in the current version of the Florida Condominium Act. Among the proposed changes which would coordinate the two statutes are amendments to the cooperative statute involving insurance, official records, board qualifications, and maintenance of common areas.

When the Session ends, we will report on what ideas survived the process, if any.

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Association Cannot Suspend Services, Amenities

Delinquent owners annoy condo group

Fort Myers The News-Press, April 12, 2009

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Q: We have an owner in our condominium association who is several months behind in his fees. He currently has a tenant in his unit. The association pays the bill for his water, sewage, pool and other amenities. Do we as an association have the right to take any of these amenities away from the renter, and would it be possible to have the renter pay his monthly rent to the association until the delinquency is resolved? **J.Z. (via e-mail)**

A: Your frustration with this situation is understandable. Obviously, many associations are being adversely affected by non-paying unit owners. It certainly adds insult to injury when the board needs to scramble to find ways to cut expenses while non-paying owners or their tenants are making full use of the condominium property, quite literally at the expense of everyone else. However, as currently written, the Florida Condominium Act does not permit an association to suspend the use rights of any unit owner or tenant for non-payment of assessments, or for any reason for that matter. The Condominium Act contains provisions that plainly provide that the common elements, common areas and recreational facilities of a condominium shall be available to all unit owners, tenants and their invited guests for the use intended for such property.

You may recall from my recent column that a bill is pending in the current legislative session which would specifically permit a condominium association to suspend use rights in the common elements for non-payment of assessments. Just as with the current provisions in the Homeowners' Association Act, which does permit suspension of use rights and voting rights, appropriate provisions would need to be in the governing documents of the association in order to take advantage of these new statutory rights, if they are enacted. Under the proposed legislation, condominium associations could also suspend voting rights for members who are in arrears in excess of 90 days in their payment of assessments. Cutting off water and sewer service would not be permitted by the new law, if it is passed, and I do not believe that termination of utilities is permitted under the Homeowners' Association Act either.

As to your second question, it may be possible to establish the legal right to divert rent from a tenant to the association when the unit owner is in arrears. However, there are several "hoops" to jump through in order to accomplish this. At a bare minimum, it is my opinion that there must be a provision in the governing documents of the association which permits the association to demand that the tenant divert rent when the unit owner is in arrears. Even better would be a

provision in the declaration of condominium which requires all leases to be approved by the association and allows the association to prescribe a lease form or addendum form. Then, that lease form or addendum form could specifically include the right to divert rent from the tenant to the association. The association would be an actual party to the lease for the purpose of obtaining and enforcing this right to claim rent directly from the tenant. This additional step of requiring a lease form or lease addendum will bolster the association's position as it is then a direct, contractual party to the lease, and the rent diversion provisions are clear and expressly acknowledged and agreed to by all parties up front. The association's attorney should be involved in the process as there are various other laws which may need to be considered when considering this course of action, even if authorized by the governing documents.

Please also note that the Condominium Act provides that if you record a lien and file foreclosure, the association is entitled to ask the court to appoint a receiver to collect rents during the pendency of the foreclosure suit. The status of the unit's mortgage may impact this remedy. Again, the association's legal counsel should be consulted to determine on a case-by-case basis whether a receivership for the collection of rents is a viable option in dealing with any particular delinquent account.

Q: Can a condominium unit owner request financial information showing the salaries of association employees? **D.S. (via e-mail)**

A: The short answer to your question is yes. The Division of Florida Condominiums, Timeshares and Mobile Homes has adopted agency rules that require a condominium association to maintain accounting records in sufficient detail to permit determination of the revenues and expenses. "Accounting records" under the Division's rules include, among other things, payroll and personnel records of the association.

In the homeowners' association context, the answer is not as clear. There is a provision in Chapter 720 of the Florida Statutes, the Florida Homeowners' Association Act, prohibiting members or parcel owners from reviewing the "personnel records" of the association's employees. Whether or not salary information constitutes "personnel records" of the association's employees has yet to be determined by an appeals court.

Notwithstanding the above, it is important to note that certain employment records are confidential as a matter of law. For example, there are federal and state laws that only permit an employer to request an employee's consumer credit report for "employment purposes." There are also laws that require employers to keep information relating to an employee's drug screening and child support obligations confidential.

Q: I am involved with my homeowners' association. Our covenants prohibit "company logos" on vehicles. I have been told police vehicles are legally exempt from homeowners' associations covenants in Florida. Is this true? **S.S. (via e-mail)**

A: Your covenants appear to use a slightly different term than most governing documents. "Commercial vehicles" is the more commonly used term for the purposes of restrictive covenants.

Police vehicles and other authorized emergency vehicles are most likely exempt from restrictions prohibiting "commercial vehicles." To the extent vehicles with "company logos" are interpreted to be synonymous with "commercial vehicles", it is likely that authorized emergency vehicles are exempt from your Association's restrictions as well. The reasoning and logic for this conclusion may be obvious, but it lies in the fact that a "commercial vehicle" necessarily requires that the vehicle be used in some activity for economic gain. A police vehicle or other authorized emergency vehicle used to serve public purposes is not used in commerce or for financial profit.

A similar opinion was rendered by then Attorney General (now Governor) Charlie Crist in an Advisory Legal Opinion dated June 16, 2005. In that matter, the Town of Davie, Florida inquired whether a marked police vehicle is a commercial vehicle, because a homeowners' association had prohibited parking commercial vehicles within the community, except if the vehicle was stored in a closed garage. The Attorney General's opinion reviewed statutory definitions of "commercial" vehicles and noted that one of the statutes which requires licensure for "commercial motor vehicles" specifically excludes vehicles that are owned by a governmental entity. In addition, the Attorney General noted that another statute defines "commercial vehicle" as "a vehicle that is owned or used by a business, corporation, association, partnership, or sole proprietorship or any other entity conducting business for a commercial purpose."

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Professional Management Not Currently Required

Fort Myers The News-Press, April 19, 2009

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Q: According to the current laws governing associations, are we required/mandated to employ a professional management company or can the elected Board hire a certified accounting firm, a licensed handy man service, and other professional service companies as may be necessary, in lieu of hiring a management company? **R.S. (via e-mail)**

A: Currently, there is no law in the condominium or homeowners' association context which requires the hiring of a management company or a manager. The governing documents for the association may require professional management, but such a provision is rather unusual. However, in the condominium context, the law may change. There is pending proposed legislation that, if passed, would require a condominium association with more than $250,000 in annual revenue to hire a manager or management company. There is no similar pending legislation regarding homeowners' associations.

The dynamics of any given association, in addition to the size and the type of issues facing the association, will be factors in determining whether the association wishes to hire professional management. Management companies are helpful in that they can take care of the day-to-day management of the property and the operation of the association. In addition, management companies often bring expertise to the table. For example, the manager's cumulative experience in hiring certain vendors may be useful information for the board's consideration. In other words, a management company often has had experience in dealing with several different vendors of a particular type and can often advise the association which vendor the manager feels may be best suited for their particular needs.

Q: I have a question regarding the length of time for which a condominium proxy can be held. Our association recently sent out proxy votes on keeping two-year terms for board members. The proxy contained the date for which the meeting was scheduled, but the meeting was not held due to lack of a quorum. Two months later, we were told that the measure passed. I was always under the impression that proxies were only good for the meeting for which they were issued and could not be held for another date. **J.D. (via e-mail)**

A: If a quorum was not obtained when the meeting was initially called, the only lawful action that could be taken would have been to adjourn the meeting to a specific date, time, and place. This is typically done by motion adopted at the meeting by those in attendance.

The Florida Condominium Act specifically contemplates the use of proxies for adjourned

meetings. Section 718.112(2)(b)3 of the Act provides that any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meeting thereof. The law goes on to state that in no event shall any proxy be valid for a period longer than ninety days after the date of the first meeting for which it was given.

It sounds as though your association was able to garner enough votes within sixty days of the original call of the meeting, which is within the ninety days permitted by law, and assuming proper adjournment procedures were followed.

Q: We have an association member who recently got married. Her new husband has not been added to the deed, and wants to run for the board. Is this legal? **L.S. (via e-mail)**

A: Any person age eighteen years of age or older is legally capable of serving on the board of any not-for-profit corporation in the State of Florida. The articles of incorporation or bylaws of the association may prescribe additional qualifications for board membership.

If the articles of incorporation or bylaws for the association restrict board membership to unit owners or parcel owners, the husband would not be eligible to serve. Otherwise, he is eligible to run for the board.

Q: As I understand it, House Bill 601, enacted in 2008, defined the allocated insurance responsibilities between the association's master policy and the condominium unit owners. I believe the association is responsible for insuring everything that was part of the original construction, except those items specifically excluded such as floor, wall and ceiling coverings, appliances, water filters, built-in cabinets among others. However, the new law states that the association's master policy obligations now includes air conditioning compressors.

Does this mean that when a unit owner's air conditioning compressor is replaced, it should be filed as a claim with the association's insurance company? Does the unit owner pay for the repair/replacement, since it is needed immediately, and then file the claim or is permission needed from the association prior to repair in order to file the claim? **J.M. (via e-mail)**

A: You are correct about the scope of the 2008 changes to the law and the re-inclusion of air conditioning and heating equipment (not only compressors) within the insuring responsibility of the association's master policy. Please note that the new law does not specifically spell these items out, but rather by failure to exclude them, places them under the master policy. You should also note that there is a bill pending in Tallahassee which may change this, yet again.

However, casualty insurance only covers damage caused by "casualty", which is a sudden, fortuitous event. Fires, hail, and windstorms are typical examples of casualty. Vandalism may also be covered under an insurance policy.

However, insurance does not provide coverage for replacement due to normal wear and tear. The responsibility for replacement of air conditioner compressors will be governed by the terms of the declaration of condominium, not Florida law. Most declarations require the unit owner to be responsible for these items.

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Condo Association Has Problem Getting Quorum

Fort Myers The News-Press, April 26, 2009

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Q: I live in an association with a master and three other, separate condominium groups. We have a major problem getting unit owners to turn in their proxy and getting a quorum for the annual meetings. What suggestions do you have to improve our return rate? How many times can a meeting be called without getting a quorum before the court will take over the association? I would like to see some kind of consequences for failure to return the proxy when you are not attending the meeting. Would this be possible in a form of a fine? **C.S. (via e-mail)**

A: Unfortunately, other than encouraging your neighbors to take an interest in their community and become involved in association affairs, there is little you can do, at least from the legal perspective, to improve your proxy return rate. Instead, my typical response to your problem is to suggest that the association lower its quorum requirement and establish workable member approval requirements, where possible.

You may know that the maximum quorum requirement under the Condominium Act is a majority of all members. Certainly, if the association wishes, the quorum requirement can be reduced to any level, and we find that many condominium associations use thirty percent of the members as their quorum. Of course, you would need to amend your bylaws to reflect this reduced quorum requirement, and passing that amendment, given your lack of participation, may be difficult. However, if you appeal to the apathetic owners and convince them of the value of having lower quorum requirements so that the association can effectively and efficiently operate, perhaps you might succeed in getting this quorum requirement reduced. While you are at it, you should review your amendment and "material alteration" approval requirements to be sure that they provide for reachable and workable approval requirements.

Some important member votes, particularly at the annual meeting, involve a waiver of financial reporting requirements or the waiver of or reduction in reserve funding. By statute, the vote required for these items is a majority of the members present, in person or by proxy, at a duly noticed meeting at which a quorum is attained. You should also be aware that the Florida Condominium Act specifically states that a quorum is not necessary for the purpose of electing directors in a condominium association. Rather, an election can be held as long as twenty percent of the eligible voters cast a vote.

Your question about how many times a meeting can be called without getting a quorum before the court will take over is interesting. The Florida Condominium Act requires that an annual meeting take place and, obviously, this requires that a

quorum be attained. However, I am aware of associations that, despite their best efforts, cannot attain a quorum. Many condominium documents, as well as Roberts Rules of Order, permit a majority of those present in person or by proxy, even if a quorum is not attained, to vote to adjourn the meeting to a date, time and place certain to attempt to attain a quorum. Arguably, these types of adjournments can be repeatedly done, but only until 90 days after the original meeting, as that is when the proxies that have been received expire. However, depending on what issues were on the agenda to be voted upon, there may be no continuing legal infraction or other requirement that must be met that might cause a court or the Division of Condominiums, Time Shares and Mobile Homes to get involved or cause a member to seek to have a receiver appointed.

Finally, there is no penalty that can be assessed against a member who elects not to participate in the affairs of the association. The right to vote is just that, a right, and not an obligation. While I have never seen a provision in governing documents that attempts to impose a fine or other sanctions for the failure to vote, I would expect that such a provision would be viewed as contrary to the Condominium Act with respect to unit owner voting rights, and would be struck down as improper.

Q: Our board changed the date of our annual meeting, setting it for a month later than last year's annual meeting. Therefore, their term was effectively extended from twelve months to thirteen months. Is this legal? **R.E. (via e-mail)**

A: There is no provision in any of the statutes governing Florida's community associations that require that an annual meeting be held on any particular date. Many associations' bylaws permit the board to set the annual meeting date. In my experience, a vast majority of associations hold their annual meeting during the first quarter of the year, since that typically coincides with Southwest Florida's "season" where, in most cases, the maximum number of owners will be in residence.

If your bylaws require that the annual meeting be held on a specific date, then the board should follow that requirement. However, absent going to court or through arbitration proceedings to get an injunction to require future annual meetings be held when the bylaws require, this is one of those situations where there is not an effective remedy in the law.

Q: Can a condominium association tell someone who has failed to pay a fine that they cannot use the recreational facilities? **D.M. (via e-mail)**

A: No.

The Florida Condominium Act does not permit "lock-out" from recreational facilities under any circumstances.

The remedy for collecting an unpaid fine is typically small claims court.

Q: We have a debate raging in our association as to whether the board of directors is empowered to make certain changes to the appearance of our condominium property. Can you tell us what a "material alteration" of the common property is? **J.F. (via e-mail)**

A: The definition that is most often cited comes from a Florida appeals court case written nearly forty years ago called Sterling Village v. Breitenbach. In holding that a unit owner's installation of glass jalousie windows on screened lanais constituted a "material alteration", the court said: "We hold that as applied to buildings the term 'material alteration or addition' means to palpably or perceptively 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."

Subsequent court decisions have held that changing building colors and changing roof styles constitutes a "material alteration."

The condominium statute provides that there may be no material alteration or substantial addition to the common elements except as provided in the declaration of condominium, and if the declaration is silent, seventy-five percent of all members must approve the change.

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Use of Common Areas Can Be Cut, If You Don't Pay

HOA must be ruled by Chapter 720 to do so

Fort Myers The News-Press, May 3, 2009

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Q: In a recent column, you stated that the Florida Condominium Act does not permit "lock out" from recreational facilities under any circumstances. My question is whether the same law also applies to a single family, gated community operated by a homeowner's association. **L.E. (via e-mail)**

A: No.

Assuming that your HOA is governed by Chapter 720 of the Florida Statutes, suspension of common area use rights is permissible under certain circumstances. Section 720.305(5)2 of the Florida Homeowners' Association Act states that an association may suspend, for a reasonable period of time the rights of a member (or a member's tenants, guests, or invitees) to use the common areas and facilities. The remedy of suspension must be authorized by the governing documents. A suspension may not be imposed without notice of at least fourteen days to the person sought to be suspended, with an opportunity for a hearing. However, a hearing is not required if common area use rights are suspended for failure to pay assessments or other charges, which must also be authorized by the governing documents.

Further, the Homeowners' Association Act permits an association to suspend voting rights of a member for the nonpayment of regular assessments that are at least ninety days delinquent, if authorized by the governing documents. Suspension of common area use rights may not impair the right of an owner or tenant to have vehicular and pedestrian ingress to and egress from the parcel, including but not limited to the right to park.

There is pending legislation for condominiums that would give condominium associations similar rights. At deadline time for the column, the Bill was reportedly in some trouble, and possibly not going to be passed. The results of the 2009 Regular Session of the Florida Legislature will be covered in a future column.

Q: In a recent column you mentioned that the Florida Condominium Act requires that twenty percent of the eligible voters cast a vote to elect directors. Is the law for homeowners' associations the same? **J.M. (via e-mail)**

A: No.

Section 720.306(9) of the Florida Homeowners' Association Act states that the election of directors must be conducted in accordance with the procedures set forth in the governing documents. Further, Section 720.306(2) of the Act states that

the election of directors, if one is required to be held, must be held at, or in conjunction with, the annual meeting or as provided in the governing documents.

Accordingly, if the governing documents for the association so provide, it appears that the law would allow an HOA election to be held as a separate proceeding. Otherwise, the election must be held at the annual meeting, so a quorum must be obtained. Pursuant to Section 720.306(1)(a) of the Act, unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the HOA is thirty percent of the total voting interests.

Q: I live in a gated community which includes a governing association. One of our board members has violated the architectural review guidelines, and continues to ignore the rules. Yet, he sits on the board while ruling on other ARB issues. This does not seem right to me. A number of owners are interested in forcing this individual to resign from the board, or else be removed. What is your opinion on this? **J.F. (via e-mail)**

A: For one thing, there are usually two sides to a story. The individual in question may not feel that he is violating the association's restrictions. That being said, I have certainly seen cases where a person seeks election to the board for the sole purpose of attempting to gain personal advantage. I cannot say that is the case in your situation, but where this happens, I believe it constitutes breach of fiduciary duty.

I assume that your community is operated by a homeowners' association governed by Chapter 720 of the Florida Statutes. Pursuant to Section 720.303(2)(d) of the Florida Homeowners' Association Act, if twenty percent of the total voting interests petition the board to address an item of business, the board shall, at its next regular board meeting (or at a special meeting not held later than sixty days after receipt of the petition) take the petitioned item up on an agenda. Therefore, if you can get twenty percent of the members of your association to sign a petition, you can force the board, as a whole, to address this issue.

You cannot force the director in question to resign. Any director of an HOA board may be recalled from the board, with or without cause, by majority vote of the entire voting interests. The procedure for recalling directors in a homeowner's association is found in Chapter 720.303(10) of the Florida Homeowners' Association Act.

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Association Bills Went Nowhere in Legislative Session

However, SB 714 will bring about changes to condominium law

Fort Myers The News-Press, May 10, 2009

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The 2009 session of the Florida Legislature ended with a thud in terms of community association legislation.

Much needed reforms in the area of collecting delinquent assessments were debated, but ultimately went nowhere. Proposals to require lenders to complete their foreclosures within a year, or to raise the statutory cap on liability for unpaid assessments, encountered fierce resistance from lenders and did not survive the committee hearing process.

House Bill 27 and Senate Bill 880, which would have brought many changes to the association laws, died when the two legislative chambers could not reach consensus on the final version of the proposed new laws, and neither side appeared ready to budge. Among the positive changes that would have come from these laws was a proviso that would have allowed associations to directly attach rentals from tenants when the unit or parcel is delinquent in the payment of assessments. There's always next year.

The main change to the laws that did pass are found in Senate Bill 714, which was approved by the legislature on April 30, 2009. Unless the law is vetoed by the Governor, which there is no signal is likely to happen, the following changes to the Florida Condominium Act will become effective July 1, 2009:

Mandatory HO-6 Insurance: In the "it seemed like a good idea at the time" category, the legislature reversed the 2008 change to the statute which required condominium associations to require unit owners to show proof of individual insurance and "force place" coverage if the owner failed to provide proof of the required insurance.

Loss Assessment Coverage: This change actually amends Section 627.714 of the Florida Statutes and requires that HO-6 policies must include "loss assessment coverage" of at least $2,000, with a maximum deductible of $250.

Replacement Cost Requirement: The new law requires that the insurance appraisal that the association is required to obtain at least every 36 months be based on "replacement cost" of the property, amending the 2008 law that required an appraisal for "full insurable value"

Setting The Deductible: Once again reversing a 2008 change, Senate Bill 714 eliminates the requirement that the notice of the board meeting where insurance deductibles are set disclose the amount of proposed deductible and potential assessments that may be made. However, the law still requires that the notice where deductibles are

set be given by mail to each owner and posted at least 14 days in advance.

Association As Named Insured: Again overturning a 2008 change, the law will no longer require that the unit owner's HO-6 insurance policy name the condominium association as a named insured and loss payee.

Board Elections: If there are fewer candidates who run for the board than there are open seats, the old law provided that the incumbents were automatically re-seated on the board. The new law says that incumbents who do not seek re-election are "eligible for reappointment"; it is no longer automatic.

Co-Owners of Units on Board: Co-owners of units would now be eligible for simultaneous board service if they own more than one unit and are not co-occupants of a unit

Next week we will wrap up our annual review of legislation looking at changes regarding candidate certification forms, repeal of certain elevator generator retrofitting requirements, and the retrofitting of fire sprinklers in high rise buildings

Q: I recently purchased a condominium unit. This is my first experience living in a building operated by the board of directors. It seems that the same people have been on the board since the beginning of the condominium. I was wondering if there is any precedent for term limits in these types of situations. **A.B. (via e-mail)**

A: The Florida Condominium Act states that "any unit owner" is eligible for service on the board of directors. Although term limits have not been addressed by the Florida appeals courts, the issue has been addressed by the state agency which regulates condominiums in Florida, which is known as the Division of Florida Timeshares, Condominiums and Mobile Homes. A number of years ago, the Division's arbitration program ruled that term limits, if contained in an association's bylaws, were valid. Subsequently, the Division reversed its position through a ruling known as a "declaratory statement" and ruled that term limits are invalid. That is the Division's current position on the matter, and in my opinion, the better interpretation of the law.

While the Florida Homeowners' Association Act is a bit more foggy on this point, I believe that the same answer would apply.

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More on SB 714, Which Affects Condominium Laws

Unless vetoed, law takes effect on July 1

Fort Myers The News-Press, May 17, 2009

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Today's column continues our review of Senate Bill 714, the only significant piece of legislation affecting condominium associations which passed out of the 2009 session of the Florida Legislation. No laws were passed affecting the statutes applicable to cooperatives or homeowners' associations.

Last week, we looked at the death of mandatory HO-6 insurance for unit owners, changes regarding the master policy deductibles, board elections, and the question of co-owners serving on the board.

Here's a look at the remaining provisions of S.B. 714:

- **Fire Sprinkler Retrofit:** The new law pushes back the fire sprinkler retrofitting requirement applicable to certain highrise buildings from 2014 to 2025.

- **Director Delinquencies:** The 2008 change to the statute provided that if a director was delinquent by more than 90 days in the payment of regular assessments, they were disqualified from further board service. The new law also states that a director is disqualified from continuing on the board if they are more than 90 days delinquent in the payment of a fine, fee, or any type of assessment, whether regular or special.

- **Director Certification:** The law will no longer require that the association's first notice of annual meeting include a form signed by candidates which certify that the candidates have read and will enforce the provisions of the condominium documents and Florida law. However, under the new law, directors who are elected will be required to certify in writing that they have read the condominium documents and will uphold them to the best of their ability. This certification must be made to the board's secretary within 90 days of election. Alternatively, a newly elected director may submit a certificate of completion of an educational program administered by the State. Failure to timely file the written certification or educational certificate automatically disqualifies the director from service on the board.

- **Time-Shares:** S.B. 714 provides that the 2008 law which prohibits multi-year terms, except for two-year staggered terms where a ratification vote is taken, does not apply to timeshare condominiums. The law regulating co-owners from simultaneously serving on the board will also not apply to time-shares.

- **Fire Prevention:** A condominium that is one or two stories in height and which has an exterior means of egress corridor is exempt from installing manual fire alarm systems as required by Section 9.6 of the most recent edition of the Life Safety Code, which his incorporated in the Florida Fire Prevention Code.

- **Elevator Safety:** S.B. 714 repeals Section 553.509(2) of the Florida Statutes. This law, adopted in 2006, required buildings of at least 75 feet in height to have at least one public elevator capable of operating on an alternate power source for emergency purposes.

Please keep in mind that S.B. 714 has not yet been presented to the Governor for signature. Assuming that the Governor does not veto the law, it will become effective July 1, 2009. We will keep you posted on the fate of S.B. 714.

Q: Section 720.303(2)(d) of the Florida Homeowners' Act states that twenty percent of the voting interests may require the board to call a special board meeting to consider a particular item of business. In a previous column, you stated that other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition. What do you mean by this statement? **E.B. (via e-mail)**

A: The petition process in the law applicable to HOAs is intended to provide members the ability to "force" the board to at least take up items within the board's province. It is perhaps easiest to illustrate the application of the law through a hypothetical example.

Let us say that you live in a community operated by a homeowner's association that contains 100 homes. The community and association are self-managed, meaning that the association does not employ a manager or a management company. The board does not seem inclined to change the status quo.

There are a number of homeowners in the community who think that professional management would be a great benefit, but they "just can't get the board to listen." The association's bylaws clearly provide that the selection of management, if any, is a board prerogative. What are the owners to do?

One option is to recall the board and populate it with people who would hire a management company. A recall would require a fifty-one percent vote and adherence to specific statutory procedures. Recalls are usually divisive, and most people do not see that process as the first matter of choice in being heard on an issue.

An alternative to recall would be for 20 homeowners to sign a petition requiring the board to consider whether a manager or management company should be hired. If such a petition is served on the board, the board would be obligated to take up the item at a regular board meeting or at a special board meeting. In either case, the board meeting needs to be called within 60 days of the date of service of the petition.

Under Chapter 720, every homeowner would be given the right to speak to the issue, for at least three minutes. Interestingly, and in contrast to condominiums, Chapter 720 does not otherwise provide a general right by members to speak at board meetings.

So your meeting is held, and the "pro management forces" have their say. The board is not obligated to vote to hire a management company, nor even put a motion on the table to consider the issue. Rather, the board has discharged its statutory obligation by listening to what the petitioning owners have to say about the issue and deciding what action, if any, would be taken as a result of the petition.

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When Must Developer Turn Over Association Control?

Fort Myers The News-Press, May 24, 2009

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Q: I live in a newer condominium where the association has not yet been turned over to the members. It is my understanding that once all of the units are sold, the developer must turn over control of the Association. However, since the real estate market has slowed down, very few units are selling and it is not clear at all when the developer might turn over control of the association. Obviously, the owners who do live here would like to have control, or at least more input into association matters such as landscaping, maintenance service and of course, budgeting. Can you explain when the developer must turn over control to the association and what we might do in the meantime to have more input into our community? **A.O. (via email)**

A: As with many answers to condominium law questions, the answer to your specific question is found in the Florida Condominium Act, Chapter 718 of the Florida Statute. In summary, the statute provides that the developer of a condominium must allow unit owners other than the developer to elect not less than a majority of the members of the board when any one of several benchmarks are reached. First, the developer must transition to owner control three years after fifty percent of the units that will be operated ultimately by the association have been conveyed to purchasers. In addition, the developer must turnover control of the association three months after ninety percent of the units have been conveyed to purchasers. Also, if all units have been completed and some have been conveyed, as in the case of your condominium, and none of the others are being offered for sale by the developer in the ordinary course of business, then the developer must turn over control of the association. Another situation requiring turn over by the developer is when some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business. The statute provides that a developer must turn over control of an association seven years after recording the declaration of condominium without regard to how many units have been sold or whether the developer is actively marketing or constructing units. This seven year mark is the outside date at which turn over must take place. Finally, the statute provides that if the developer files a petition seeking bankruptcy protection or if a receiver is appointed for the developer and retains the appointment for more than thirty days, the developer must turn over control of the association.

As you can see, there are several benchmarks or triggering events that you need to analyze and it would not be unusual in this market for one of these lesser known triggering events to apply. You should also be aware that, in condominiums with less than 500 units, the developer is permitted to retain at least one seat on the board, as long as the developer holds at least five percent of the units for sale in the ordinary course of business. For

condominiums with more than 500 units, the threshold is two percent.

"Turnover" is essentially an election of unit owner board members. The statute requires the developer to commence the election process seventy-five (75) days after occurrence of one of the triggering events described above. At that time, the developer must give a sixty-day first notice of an election meeting and must conduct the election as required by the Condominium Act.

Finally, you inquired as to how members might have a more active role prior to turnover. The Condominium Act does provide that when owners other than the developer own fifteen percent or more of the units, the unit owner shall be entitled to elect no less than 1/3 of the members of the board of administration. I assume your community has at least fifteen percent of the units conveyed to purchasers, and, if so, you may have at least one unit owner member who is willing to serve on the board.

Also, it is important to understand that, even though the control of the association has not been turned over to the unit owners as of yet, the unit owners have all of the same rights as when association has been turned over with respect to inspecting official records, attending board meetings, and insisting upon compliance with the "sunshine" law provisions of the statute, which require notice and open board meetings in most cases.

Q: I have a question regarding a need to obtain quotes for proposed projects at our condominium complex, such as landscaping. Is there a dollar amount in relation to getting quotes? Also, can these quotes be verbal, or do they have to be in writing? Is there a certain number of quotes that must be obtained for each project? **D.R. (via email)**

A: As with the previous question, all of your answers lie in the Florida Condominium Act. The concept you are referring to is known as "competitive bidding." If a contract for the purchase, lease or renting of materials or equipment, or for the provision of services, requires payment by the association exceeding five percent of the total budget of the association, including reserves, competitive bids must be taken. In my opinion, "competitive bidding" requires two bids, three or more is better; but not legally required. I believe that bids must be submitted in writing, because the law requires that bids received by the association be maintained as part of the association's official records for a period of one year. The association does not need to accept the lowest bid.

There are several exceptions to the law. Bidding is not required in the event of an emergency situation. Bidding is also not required if the business with which the association desires to enter into a contract is the only source of supply within the county serving the association. Further, contracts with employees of the association, and contracts for attorney, accountant, architect, community association manager, timeshare management firm, engineering, and landscape architect services are not subject to competitive bidding requirements.

Using your example, if the cost of your landscaping service is more than five percent of your budget, the contract must be competitively bid.

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Owners, Investors Agendas Differ

Changes that limit rights call for vote

Fort Myers The News-Press, May 31, 2009

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Q: Our condominium association is considering limiting the number of investor-rental units. We would like to "grandfather in" our present rental owners, but limit rental owners by number or percentage in our association. Does Florida law specifically govern this action? What are the pros and cons? Thank you. **J.G. (via e-mail)**

A: Your question is a common one, and is a long-standing issue that has affected local condominiums.

Historically, developers have marketed condominiums to seasonal retirees ("snowbirds"), full-time residents, and "investors." Investors typically buy units with the hope of their increasing in value and ultimate sale at a profit. In the meantime, investors will likely rent out the unit in order to pay for its carrying costs (mortgage payments, taxes, and association maintenance fees).

In my experience, those owners who look upon the condominium as their home tend to want more services, a higher level of maintenance, and some degree of control over the community's collective behavior. Conversely, while investor-owners certainly want to see appropriate maintenance in order to protect their investment, they tend to be more focused on cost control and the ability to easily place tenants in the units. Of course, these are not universal observations, since many condominiums (particularly beach-front resort condominiums) are geared almost solely to the investor-owner.

Generally speaking, changes aimed at limiting rental rights need to be pursued through an amendment to the declaration of condominium. This will typically require a unit owner vote and some level of super-majority approval, typically two-thirds or seventy-five percent of the unit owners, which may be based upon the entire membership or based upon those who vote, depending upon how your documents are written.

In 2002, the Florida Supreme Court issued a landmark decision called Woodside v. Jahren, which ruled that a proper amendment to a declaration of condominium could essentially eliminate leasing rights altogether. The Supreme Court's theory was that when you buy into a condominium, all of your rights are amendable as set forth in the declaration of condominium.

Some people felt that the Supreme Court's ruling placed an unfair burden on investors. In 2004, the Florida Legislature was convinced that it should enact a law that modified the Supreme Court's ruling. Effective October 1, 2004, the Florida Legislature enacted what I call the "Rental

Amendment Grandfathering Law." This law says: "any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment."

Accordingly, to the extent an amendment "restricts" rental rights, unit owners who do not vote in favor of the amendment (or those who do not vote at all) are automatically "grandfathered." This would lead one to ask why anyone would vote in favor of such an amendment, since a favorable vote takes away rights that others retain. For this reason, many amendments aimed at rentals "grandfather" all existing unit owners.

As to the implementation of a maximum number of units that can be rented at one time, I have seen a few associations adopt such amendments. They require effort to enforce, and a fair system for deciding who gets the next turn for a rental.

The law for cooperatives and homeowners' associations is somewhat different, and the principles discussed above are limited to the condominium setting.

Q: Is a condominium association board under any obligation to read all owner correspondence aloud at meetings? **M.A. (via e-mail)**

A: No.

There is nothing in any of the statutes governing associations in Florida which require the board to read owner correspondence aloud at board meetings. There is also no law which prohibits it.

Whether it is a good idea depends upon a number of factors, including the size of the association and the nature of the issue at hand. Letters sent to the association by owners are part of the "official records" of the association, must be maintained for a period of seven years, and are available for inspection by any other unit owner.

Q: Our condominium association board of directors does not replace trees that have died in order to save money. Isn't this is a decision for the membership? **B.S. (via e-mail)**

A: First, particularly with newer developments (and by this, I mean those approved within the past decade), local governmental units (cities, towns, and counties) often require certain minimum vegetation requirements as part of the approval of the development plan. For example, I have seen development orders that require so many trees of a certain type, per acre. Generally speaking, these development orders require that the trees be maintained on an ongoing basis, and be replaced if they die.

Absent a governmental directive, your board of directors has a fairly wide degree of latitude with respect to landscaping decisions. While most changes to the physical appearance of condominium property are deemed "material alterations or substantial additions to the common elements" (and thus usually requiring a unit owner vote), more leeway is given with landscaping. That is because landscaping, by its nature, is always in a dynamic state (growing, dying, etc.).

However, there is some point in a continuum where unit owner approval for landscaping changes would be required. For example, if a condominium was originally designed with lush tropical landscaping and the board wished to change to a "Southwest desert look", a material alteration would clearly occur.

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Crist's Veto of Senate Bill 714 Comes as a Surprise

Proposal Addressed Insurance Rules

Fort Myers The News-Press, June 7, 2009

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In a move that surprised most observers, Governor Charlie Crist vetoed Senate Bill 714 on June 1, 2009. The provisions of S.B. 714 were discussed in this column on May 10, 2009 and May 17, 2009. Although passed in the Senate by a vote of 38 to 0, and passed in the House of Representatives by a vote of 114 to 2, the bill will not become law in light of the veto.

As mentioned in the previous columns, S.B. 714 addressed mandatory unit owner insurance requirements, procedures for the board regarding setting insurance deductibles, co-owners of units serving on the board, extension of fire sprinkler retrofitting requirements, the repeal of certain elevator generator requirements, and several other "glitches" in the current laws.

In his Veto Message, Governor Crist said: "This bill, similar to House Bill 391 passed during the 2006 Session and vetoed by Governor Bush, extends the date after which local authorities may require the retrofit of applicable residential common areas with a fire sprinkler from 2014 to 2025. I share Governor Bush's concerns that this delay presents an unacceptable safety risk, especially to Florida's elderly condominium residents."

The Veto Message goes on to state that the Governor is sensitive to the costs associated with fire sprinkler retrofitting "especially in these challenging economic times." The Governor also directed the Department of Business and Professional Regulation to initiate a comprehensive review of actual retrofit costs and the impact that retrofitting may have on insurance premiums. The Department is required to submit a report of findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by October 1, 2009.

While there may be room for reasonable disagreement on the fire sprinkler retrofitting issue, it is certainly a shame that several other needed changes to the law that were part and parcel of S.B. 714, especially in the insurance area, were the proverbial baby that was thrown out with the bath water.

Theoretically, the Legislature could override the Governor's veto, although that seems unlikely. Better luck next year.

Q: In 2005, our association added a new reserve item to replace a fence. Once that project is complete, if there is a balance of money in the reserve account, can it be put into the general

operating fund? One of our owners says that the money needs to be refunded. **D.R. (via e-mail)**

A: If the fence is the association's maintenance responsibility (and I assume it is since you are reserving for it), it will need to be replaced again in the future. Accordingly, you should keep the fencing reserve account in tact and can use any left over money as the initial fund balance for the fencing reserve account. If the board wishes to move the money out of that fund, I believe a unit owner vote is required. If a unit owner vote is taken, the owners can vote to do whatever they want with the money, including putting it in another reserve fund, applying it to operating needs, or having the money refunded to the owners.

The board will be in a position to make a recommendation on which option should be voted upon, if a vote is to be taken, or the unit owners could also submit a petition for a vote on the item. In general, there is no legal obligation to refund the money to the unit owners, unless the issue is put to a membership vote and that is what the owners approve.

Q: I have a question regarding mandatory unit owner insurance and the requirement that the association be named as a loss payee. We have already requested proof of insurance from our owners. From what I read in your column, the law has changed so that unit owners no longer have to show proof of insurance on their condominium units. Is that correct? **D.R. (via e-mail)**

A: No. As noted above, Senate Bill 714 would have repealed the requirement that associations ask for proof of insurance from the unit owners. It seems to be a law that few associations find helpful. Regardless, the bill which would have changed the law was vetoed by the Governor.

Q: I am on the board of my homeowner's association. We have a number of board members who are seasonal residents and cannot attend meetings over the summer. Can board members attend board meetings and vote by speaker phone? **J.B. (via e-mail)**

A: Yes. Section 617.0820(4) of Florida's Not For Profit Corporation Act addresses this issue. The law states that unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by any means of communication by which all directors participating simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

Accordingly, unless prohibited by your articles of incorporation or bylaws, board members may participate in board meetings by telephone. There should be a speaker phone at the official location of the meeting so all of the directors (as well as owners in attendance) can hear what is being said by the director on the telephone, and the director who is on the telephone can likewise hear what is being said in the room where the meeting is being held.

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Curiosity Not Enough to Look At All Club Records

'Proper purpose' can open more access

Fort Myers The News-Press, June 14, 2009

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Q: I belong to a private country club that is not a mandatory membership association. I have asked to see certain contracts, and was told that I do not have the right to review contracts. Is that correct? **H.Z. (via e-mail)**

A: The laws applicable to mandatory membership associations (condominium associations, cooperative associations, and homeowners' associations) contain very broad rights for association members regarding the inspection of corporate records. In the association context, the members are basically entitled to inspect every record the association has, unless the record is protected by some type of privilege or exemption in the statute. The most prevalent exemptions in these statutes involve attorney-client privileged information, medical records, private financial information, and other sensitive personal information regarding other association members.

In the private country club context, the law is different. Inspection rights are not governed by any of Florida's housing statutes, but rather by Florida's Not-For-Profit Corporation Act, Chapter 617.

Section 617.1601 of the statute sets forth the records which not-for-profit corporations are mandated to keep. These include minutes, the corporate documents (articles of incorporation and bylaws), and written communications to all members for the past three years. Pursuant to Section 617.1602 of the law, a member of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, the corporate documents, minutes, and written communications.

However, in order to inspect other corporation records, the member must state why he or she is asking for the records and demonstrate a "proper purpose." The law defines a "proper purpose" as a "purpose reasonably related to such person's interest as a member."

Although the "proper purpose" standard is not a very difficult standard to show, you do need to demonstrate the reason you are asking for the records, which cannot be mere curiosity.

Q: If our condominium association obtains title to a unit through foreclosure, does the association's master insurance policy cover interior furnishings which are typically required to be insured by the individual unit owner? **C.T. (via e-mail)**

A: I doubt it.

Most condominium master insurance policies which I have read only require the insurer to insure those portions of the condominium property which

the condominium documents and state statute obligate the association to insure.

Although your association should obviously check with its insurance advisors, I suspect the association would need to purchase a separate unit owner's policy, usually called an HO-6 policy, if it wishes to insure those items in an association-owned unit which are generally the unit owners' insuring responsibility. In general, these include floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing.

Q: If the windows in my condominium unit were damaged due to an attempted break-in, is the association responsible for the repair expense? **H.H. (via e-mail)**

A: It depends.

Typically, the declaration of condominium will describe who is responsible for maintenance, repair, and replacement of the windows. Generally speaking, that party would be responsible for the repair.

There may, however, be another way to look at the situation. Pursuant to a 2008 change to the law, a condominium association is liable for "casualty" damage that would be covered under the association's insurance policy, but for which insufficient insurance proceeds are available, usually due to the deductible. This is the so-called "Plaza East Rule." An association can, by majority vote, opt out of the Plaza East Rule.

If the damage to your window was considered a "casualty" and/or covered by the association's master insurance policy through vandalism or malicious mischief coverage, the repair may be an association responsibility, regardless of any provision in the condominium documents, under the Plaza East Rule. A careful review of your condominium documents would also be required to further explore this theory as well.

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Management Company Change Rarely a Problem

Fort Myers The News-Press, June 21, 2009

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Q: I serve on the board of directors of my condominium association. The board recently decided to hire a new management company to manage our association and the question was raised about the responsibilities and obligations of our old management company to help us in the transition. Obviously, the old management company has very little incentive to assist us, but we certainly need their assistance in obtaining all of our records, and hopefully having them communicate important matters to the new management company. Can you advise what we should know and what we should do to make sure the transition to the new management company is smooth and successful?
F.O. (via e-mail)

A: As you may know, Community Association Managers (CAMs) in Florida are licensed by the Department of Business and Professional Regulation, also known as the DBPR. The requirements for licensure and conduct are established by Chapter 468, Florida Statutes, and related administrative code provisions at 61-20, Florida Administrative Code. The statute, administrative code, and oversight by the DBPR work together so that transition from one management company to another rarely causes problems for the association.

First, because CAMs are licensed, they must take courses and pass a test to confirm their knowledge and understanding of applicable laws and regulations. They are also subjected to background checks to establish good moral character. As a result, the vast majority of community association managers are professional, business oriented people who understand that clients sometimes come and go. Therefore, you will most likely have good cooperation from your old management company.

In the unlikely event you experience any difficulty, you should note that Chapter 468, Florida Statute, prohibits a CAM from committing any act of gross misconduct or gross negligence in connection with performing management services. The Administrative Code specifically prohibits a CAM from withholding any original books, records, accounts, funds, or other property of a community association when requested by the community association to deliver those items upon reasonable notice, even if there is a contract dispute between the parties. Reasonable notice is defined to extend no later than 20 business days after receipt of written request. The administrative code specifically states that the failure to provide such records in the stated time is considered gross misconduct under the statute. Therefore, the return and receipt of all association property and information from the CAM is directly addressed by the statute and the administrative code.

While transition from one management company to another is not, in my experience, often a problem, it is also prudent for an association to include helpful provisions in its management

contract in anticipation of termination. It is a good idea to include a provision specifying that all the property and information held by the management company on behalf of the association remains the property of the association. In this day of computers and digital information, it is also important to specify that financial and other records will be turned over to the association in a useable digital or electronic format. On one occasion, a management company told one of our clients that the digital files belong to the management company, but that the management company would print hard copies of the financial information. Obviously, this is an unsatisfactory result for the association and such a dispute can certainly be avoided by clear language in a contract.

Finally, it would not be unreasonable to include a provision in the management contract that the manager will cooperate during the period leading up the expiration of the contract. Typically, most management contracts provide for 30 days notice of termination with or without cause. I do not recommend signing management contracts that do not contain a liberal termination clause of this nature.

Since the manager will be compensated during that 30 day notice period, it is reasonable to include provisions that the manager will cooperate by communicating with the association and/or the new management company and will do so in good faith. Again, because the vast majority of community association managers are professional business persons, cooperation from them in the transition to a new management company can normally be expected.

Q: Our community consists of single family homes. Our board of directors recommended an amendment to our governing documents which would provide for the association to maintain individual yards, including mowing of grass, as a common expense. Some owners want to continue to take care of their own lawn and do not want to pay for this to be done on a group basis. A meeting was held and a vote was taken to go with the group program. Is there any way that this decision can be reversed? **L.R. (via e-mail)**

A: Typically, property in a homeowner's association contains two basic components, the parcel and the common areas. In almost every case, the governing documents for the association will require the association to maintain the common areas, as a common expense.

The extent of maintenance of individual property (parcels) varies from community to community. Some homeowners' associations perform virtually no maintenance on privately owned property, while others are more akin to condominium associations and maintain a substantial portion of individually owned property, in some cases including exterior portions of the buildings (homes).

Provisions for maintenance of parcels is typically addressed through the deed restrictions for your community, which is most often called a declaration of covenants, or sometimes referred to as CC&R's (covenants, conditions, and restrictions).

In my opinion, if the declaration of covenants governing a homeowner's association is properly amended, parcel maintenance responsibility can be shifted, including yard maintenance. If your declaration was properly amended, it would appear that the only way to reverse the decision would be to seek another amendment to the declaration, changing back to the previous way of doing things. Most declarations contain a process whereby a set percentage of homeowners can file a petition with the board and require an amendment to be put up to a vote.

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Unit Owner Has Right to Records

Board member has that authority, too

Fort Myers The News-Press, June 28, 2009

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Q: This is my first year on our condominium association's board. I am the vice president. I have requested from our management company, at least four times, copies of the 2008 financial statements and tax returns. The management company says "we will send it over", but I never seem to get it. What recourse do I have as a board member and unit owner? **P.M. (via e-mail)**

A: There are two different levels to your question. First, regardless of your position as a board member and vice president, you are a unit owner in your condominium and have certain rights. Section 718.111(12) of Florida's Condominium Act states that every unit owner has the right to inspect all "official records" of the association, which would include last year's financial statements and tax returns. Unit owners are entitled to access to official records by making a written request to the association. The association has five working days from receipt of a written request to make the records available for inspection. After ten working days, a rebuttable presumption arises that the association has wrongfully withheld access to official records.

If an association does not honor a unit owner's records access rights, the association is exposed to statutory damages of $50.00 per day, up to a maximum of $500.00. Also, the unit owner who is denied records access rights has the ability to file legal action against the association, and would be entitled to recover their attorney's fees if it was determined that access to records was wrongfully withheld.

Setting aside your rights as a unit owner, you also occupy a fiduciary position due to your status as a board member and the association's vice president. Therefore, you should have unfettered access to the association's financial records, and the role of your management company is to support you in discharging your duty. There is obviously some breakdown in communications here. I would recommend that you bring this issue up before your board, with your management company representative present, to determine why there is a perceived lack of cooperation between the managers and the board.

Q: Our homeowner's association has taken over operation from our developer. We have dismissed the services of the management company. The new board wishes to place some liens on the property of homeowners who are well past due in paying their assessments. Is there any legal reason why we cannot do this? There is nothing mentioned in the Florida Statutes about who can place liens, only how to do it. **M.T. (via e-mail)**

A: Even if you had retained the relationship with your management company (or hired a new one), your managers could not prepare liens on your behalf. In 1996, Florida's Supreme Court issued a ruling, in response to a petition filed by a Florida community association manager, as to what actions by a manager would or would not constitute the unauthorized practice of law. The court specifically ruled that preparation of a claim of lien on behalf of an association constitutes unlicensed practice of law and is therefore an improper function for a community association.

As to board members preparing liens, the law is a bit fuzzier. It is well established in the law that a person can act as their own attorney. You can write your own will, or represent yourself in court, not to say that doing so is a good idea.

However, when a member of a corporation's board is acting on behalf of the corporation, it is not the same thing as representing yourself. In my opinion, a board member's preparation of liens is probably the unlicensed practice of law (and is certainly so if they are paid), although I have been advised that the Florida Bar does not presently take an aggressive enforcement position on this issue. While there are certainly cases where it makes sense for the association to economize on the use of legal counsel (for example, I often recommend in certain types of small claims court cases that an association represent itself), preparing liens is not an area where I would skimp.

If your association retains an attorney to prepare claims of lien, your attorney should have a fixed fee schedule for the performance of this service, so you will know what your financial obligations will be. More importantly, pursuant to Florida law, the attorney's fees which you incur in the preparation of the claim of lien are recoverable from the property owner, and at least in theory, ultimately cost the association nothing. However, that does not always prove to be true in this economic climate, particularly if your association's lien is wiped out by a superior mortgage. In the homeowner's association context, a foreclosing mortgage holder is typically only liable for the payment of twelve months of unpaid maintenance assessments due from the previous owner, or one percent of the original mortgage debt, whichever is less.

These are historically challenging times for associations. Delinquencies are at an epidemic level, as reported in the media nearly every day. There is no one-size-fits-all collections strategy that will work for every association. Individual factors (the percentage of delinquencies, how many owners owe more on their mortgages than their property is now worth, and whether there are rental occupants in delinquent units), all play a part in deciding how to best ensure (or at least try to ensure) that everyone pays their fair share. In my opinion, your board would be ill advised to try to navigate these waters without the assistance of legal counsel who is experienced in this area of the law.

Q: I would like to know when it is allowed by law for a condominium association to appoint a non-owner to the board. We had our board meeting last February. There were enough unit owners who ran, and four were elected. One of those people later resigned. The board then appointed a non-owner to the board. Is this legal? **D.D. (via e-mail)**

A: Absent a contrary provision in the association's bylaws, which would be very unusual, vacancies on the board of directors are filled by the remaining members of the board. Unless the bylaws provide otherwise, the board fills the vacancy for the remaining term of the person who resigned.

There is no requirement in the law that members of condominium association boards be unit owners. If your bylaws require that a board member be a unit owner, then that provision would apply. Accordingly, absent a provision in your bylaws limiting service on the board to unit owners, your board had the right to appoint a non-owner to fill the vacant seat.

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Condo Owner Wants to Force Repairs to Amenities

Developer-appointed board unresponsive

Fort Myers The News-Press, July 5, 2009

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Q: My fellow condo owners and I are becoming increasingly frustrated with the condition of our pool, fitness room and other amenities. The pool filter pump has been broken for some time and the fitness room air conditioner also is broken. These maintenance issues render these amenities virtually useless. What can we do to force the association to correct these problems quickly? The main problem is that the developer still controls the association and so the developer-appointed board members are not responsive to our demands. Is there any way we can force the developer to turn over control of the association since they do not appear interested in properly maintaining these common elements. **T.H. (via e-mail)**

A: First, as a legal matter, the fact that the association is still under developer control is of no legal consequence regarding the maintenance issues you described. The pre-turnover association is the same legal entity as the post-turnover association, and has all of the same obligations to maintain the common elements. However, because the pre-turnover association is administered by a board of directors made up of developer-appointed directors, and because the unit owners do not have the ability to recall those directors or vote them out of office, the pre-turnover association is very different than a unit-owner controlled association from a practical perspective.

Unit owners are not able to force turnover of control of the association due to developer performance issues. You may recall from one of my recent columns, that the Florida Condominium Act provides times and triggering events for when the developer must permit the non-developer unit owners to hold a majority of the board of director positions ("When Must Developer Turn Over Association Control?", May 24, 2009).

Individual association members do not have authority to directly contract to have these items fixed or to take action themselves. However, the unit owners do have legal standing to demand that the association board fulfills its obligations as set forth in the condominium documents and the law. The Florida Condominium Act clearly states that the association shall maintain common elements. I would also suspect that the board's duties, as set forth in your condominium documents, require the association to maintain the common elements for the use and benefit of the owners. Any unit owner could certainly file a legal action to compel the association to meet its legal and fiduciary obligations. Pursuant to the Condominium Act, any breach of fiduciary duty by a developer-appointed board member will also be attributable

to the developer entity itself. While proving a breach of fiduciary duty is not always easy and depends on the specific facts of each case, this liability may be enough to encourage the developer to address your maintenance concerns.

If the pool pump or the fitness room air conditioner, or any other amenities are still under warranty, the association board should diligently pursue any recourse through those warranties. Failure to do so clearly is adverse to the interests of the association and could possibly form the basis of a breach of fiduciary duty claim against the board.

Q: If a management company comes to present their proposal to our board, does that meeting have to be open to all residents? Also, can the board vote to contract with a management company without a vote by all owners? **D.R. (via e-mail)**

A: As is known by most everyone who has anything to do with Florida condominiums, the law requires that "meetings" of the board be open for all unit owners to observe, subject to certain exceptions involving the attorney-client privilege. Further, unit owners must be permitted to speak at board meetings with reference to designated agenda items.

The most commonly accepted definition of a "meeting" of the board is any gathering of a quorum of the board where association business is conducted. Your inquiry suggests that a quorum of the board will be present for the management company's presentation. Therefore, if association business is being conducted, then the meeting must be open.

In my opinion, it is fairly clear that listening to a management company's proposal is "conducting business." It is well established that votes do not need to be taken in order for business to be conducted. Therefore, if a quorum of the board will be listening to the management company's proposal, the meeting should be duly posted and open to unit owner observation and statements.

The question of whether a unit owner vote is required to hire a management company is not addressed in the law. This will be addressed in your condominium documents; the declaration of condominium, articles of incorporation, or bylaws. With rare exceptions, the condominium documents will confer adequate authority upon the board of directors to hire a management company, without a unit owner vote.

One caveat is in order. Some condominium documents, particularly those which govern older communities, limit the amount of assessment increases unless some level of unit owner approval is obtained. The law does not impose limitations on assessment increases (but does provide a petition/review process if assessments exceed the previous year's by more than 115 percent). If your association's documents limit the board's authority to increase assessments above a certain amount without a unit owner vote, you would likely need a vote to hire a management company if payment of their fee would take you over the limit. I also strongly encourage associations whose documents contain assessment increase limits to eliminate them. Recent history has shown, particularly in the area of insurance increases, that these "spending caps" do not work well, and often cause needed maintenance to suffer, which can be detrimental to property values.

If your association does hire a management company, please note that the Florida Condominium Act requires that the contract be in writing, and contain certain terms. I also recommend that a management contract be terminable by either the association or the management company, with or without cause, upon reasonable notice (such as thirty or sixty days).

Q: I recently attended a condominium law seminar. A case was discussed about the need for a unit owner vote when the association changed the color of condominium buildings. What was the holding in that case? **R.P. (via e-mail)**

A: I believe the case you are referring to is Islandia Condominium Association, Inc. v. Vermut. The case was decided in 1987 by Florida's Fourth District Court of Appeal, and applies to condominiums.
The Islandia condominium development consisted of 47 buildings, laid out in clusters, grouped by color. There were approximately seven different color groups, with each group of buildings having matching trim and roofs.

The board decided that for the sake of uniformity, all the buildings would be painted in the same color scheme, light brown. The declaration of condominium for this community required a two-thirds vote of the unit owners for material alterations or substantial additions to the common elements.

The appeals court ruled that under the facts of this case, the change of color was a material alteration or substantial addition to the common elements, and thus required a two-thirds vote. The court ordered that a vote be taken of all owners as required in order to obtain approval of the color change. If there was not approval by two-thirds of the owners, then the association was ordered by the court to repaint all of the buildings to their original color scheme.

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New Law Raised Filing Fee for Foreclosure Actions

Fort Myers The News-Press, July 12, 2009

By Joe Adams
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Q: I heard that the law recently changed and the clerk of the court will require $2,000.00 as the filing fee for a foreclosure complaint. Is this true? If so, does it apply to community association lien foreclosures, or just mortgage foreclosures? **R.X. (via e-mail)**

A: Senate Bill 1718 became law June 1, 2009 and raised the filing fee for foreclosure actions filed in Florida's circuit courts. The new law applies to both mortgage foreclosures and community association lien foreclosures. The amount of the filing fee depends on the value of the claim. For claims up to $50,000.00, the new filing fee is $395.00. For claims more than $50,000.00, but less than $250,000.00, the new filing fee is $900.00. If the value of the claim exceeds $250,000.00, the new filing fee is $1,900.00.

The statute also provides for an additional fee of $4.00 to be paid to the clerk. So, four dollars is to be added to all of the amounts above. This fee schedule applies to lawsuits with up to five defendants, but if more than five defendants are named in the lawsuit, the filing fee goes up another $2.50 per defendant.

The new law requires that the plaintiff (the party filing suit) state the value of its claim in writing, meaning in the complaint. It also instructs the plaintiff how to calculate the value of the claim if a mortgage foreclosure action is involved. The law does not provide instruction on how to value the claim if the claim is anything other than a mortgage foreclosure. As to how a community association should value its claim, it is probably best to add together the principal amount of unpaid assessments and interest.

Before the change in the law, the filing fee was about $300.00. So for the vast majority of association foreclosures, those involving claims of $50,000.00 or less, the filing fee has increased by about $100.00.

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Condo Association Rules Don't Allow Voting by E-mail

Fort Myers The News-Press, July 19, 2009

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Q: I am currently a condominium association board member. Our board has five members. Our president and management company continually do business and vote on issues via e-mail. We recently had a situation where our insurance was due and at the last meeting it was decided that it would be voted on by e-mail whether to finance it or not. Obtaining the insurance was not the issue that I had, it was how it was voted. We also recently had a plumbing leak where the decision to have the problem taken care of was voted on by e-mail. I contacted the Department of Business and Professional Regulation and asked these questions. They stated that nothing could be voted on by e-mail. Is this correct? **C.A. (via e-mail)**

A: Yes, the DBPR's position is, in my opinion, correct. The reason is that voting on association matters must take place at a duly-noticed board meeting, open to observation by owners, with a limited exception for attorney-client privileged matters. The "open meeting" requirements, codified under Chapters 718, 719 and 720 (governing condominium associations, cooperative associations and homeowners' associations respectively) serve to provide owners the opportunity to participate in the discussion leading up to the vote, and to observe the vote itself. Holding a vote by e-mail does not generally give owners a chance to participate nor observe, and flies in the face of the open meeting requirement.

That said, I am aware of no prohibition against board members and/or the association manager discussing or debating association business by e-mail. But the actual vote on the item must take place in an open meeting. In my opinion, at least in most cases, such e-mails will constitute official records of the association, subject to owner inspection. However one DBPR arbitrator recently ruled that e-mails existing on the personal computers of individual directors are not official records of a condominium association.

I have heard it argued that where a quorum of the board debates association business by e-mail, a board "meeting" is being held. Obviously, where a quorum of the board is gathering in person, by telephone conference, or in some other type of "real time" setting (for example, a "chat room" setting), a board meeting is being held. However, I am not of the opinion that discussions or debates by e-mail constitute board meetings because the board is not gathering in "real time" such that they can contemporaneously hear one another's comments and respond. However, I am not aware of any court ruling or administrative agency decision clarifying this point, one way or the other. It is an area where the law should be clarified by the Legislature.

There is no doubt e-mail is a helpful tool in our daily lives. However, it should not be used to

subvert the transparency which is supposed to be part of a community association's decision-making process.

Q: I am president of a condominium association. The board of directors wants to "pool" (i.e., fund on a cash flow basis) our reserve funds which have historically been calculated and funded on a straight-line basis. I am confused by a previous article on this subject which states at one place that the Florida Division of Condominiums supports the board's authority to present pooled reserved funding to the members even when straight-line reserved funding has been used in the past. Another statement in that article is that the approval of a majority of those members present at a duly noticed meeting of the association is necessary in order to make the switch from straight-line reserved funding to pooled reserved funding. Therefore, my question is, can the board of directors decide on switching from straight- line reserve funding to the cash flow method, or must the owners approve the switch? **D.C. (via e-mail)**

A: The Florida Condominium Act has long required reserve funding to be included in the annual budget of a condominium association. Reserve funding is required for roofing, painting, and paving, and any other deferred maintenance or capital expenditure items that will cost more than $10,000.00. Deferred maintenance refers to items that require maintenance less frequently than annually, such as painting, or swimming pool refurbishing. Capital expenditures are expenses to replace items with a useful life greater than a year, such as a pool heater or air conditioner that serves the common elements. Importantly, once reserve funds are collected and designated for a particular purpose, they cannot be used for any other purpose without approval of a majority of the members at a duly noticed meeting of the association where a quorum is present. So the reserve funds are restricted and effectively held in trust by the board.

The statute also permits associations to reduce or completely waive the amount of reserve funding from year to year. But just as with the restriction on the use of reserve funds described above, any reduction or waiver of reserve funding requires that a majority of the members who are present at a duly noticed meeting of the association where a quorum is present must approve the reduction or waiver of reserve funding each year.

Prior to December, 2002, reserve funds were required to be funded based on a straight-line funding method. With straight-line funding, items or categories of property are identified and separate reserve accounts are set up for each item or category. For expensive items with long useful lives, such as roofs, associations using the straight-line method often have substantial funds tied up in a restricted account. Those funds cannot be used for other purposes without member approval. Prior to the administrative rules that allow cash flow method reserve funding, many associations believed these substantial, restricted reserve accounts to be an ineffective and imprudent money management practice. Therefore, on an annual basis, those associations would take a member vote to both allow the association to use all reserve funds for any capital expense or deferred maintenance expense, and to reduce the full reserve funding requirement. These associations were effectively "pooling' reserves, but needed to conduct annual member voting to achieve that result.

In response to this practice of effectively pooling reserves, the Division of Condominiums enacted administrative rules in December, 2002 to allow associations to fund and maintain reserve funds using the cash flow method. All of the same capital expenditure and deferred maintenance items must first be identified, and the anticipated date of replacement or repair and anticipated cost must be calculated and included in the budget. But because the reserve fund is held in a pool and all funds are available for any reserve fund items without the need for annual member approval, the cash flow method of reserve funding results in a lower annual contribution requirement than the straight-line method.

In 2002, when the cash flow funding administrative rules were adopted, there was an

initial question whether associations that had already established and maintained straight-line reserve funds could switch to the cash flow method and contribute existing funds to a reserve pool. The first statement you cited above simply confirms that the Division of Condominiums will allow associations to switch from straight-line reserved funding to cash flow funding and the board is allowed to propose that to the members. The second statement you cited above confirms that a majority of the members at a duly noticed meeting must approve the switch if existing funds that were accumulated under the straight-line method of funding are to be put in the "pool." Member approval is required not because the association is switching funding methodologies, but because the statute still restricts the use of reserve funds to the items listed on the reserve account, and some funds previously designated for a very specific item under the straight-line method will now be available and can be used for some other purposes under the cash flow method.

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Here's Overview of Association Voting Instruments

Fort Myers The News-Press, July 26, 2009

By Joe Adams
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Q: Our homeowners' association bylaws allow for voting in person or by proxy. Can we amend the bylaws to allow voting by absentee ballots? **E.M. (via e-mail)**

A: I believe it would be helpful to provide a general overview of the written voting instruments typically used by associations.

First, a "ballot" generally refers to a written instrument used by a member to directly cast a vote. In my experience, "ballots" for voting on items other than the election of directors are typically used when the member is physically present at a meeting. A ballot can also refer to a written instrument used to elect directors in an association. Pursuant to the Florida Condominium Act, and many homeowners' associations' documents, election ballots may be submitted to the association and are valid to count the election vote of a member who is not physically present at the election meeting. Therefore, in the case of election of condominium association board members, and in many homeowners' association elections, the ballots which are cast are what most people typically understand to be "absentee ballots".

Next, there are proxies. A proxy is a written, signed instrument that gives one person the power to vote on behalf of the legal holder of the voting right. There are two kinds of proxies. The first is a general proxy which gives the person empowered to vote, or "proxy holder", all of the authority to act on behalf of the member who gave the proxy. In other words, with a general proxy, the proxy holder completely steps into the shoes of the member. A limited proxy empowers a proxy holder to attend the meeting on behalf of a member, but specifically limits the proxy holder to vote a certain way on specific agenda items.

Pursuant to the Condominium Act, limited proxies must be used for any vote taken to waive or reduce reserve funds, to waive the financial reporting requirements under the statute, to amend any of the governing documents of the association, and for any other matter described in the Act which requires or permits a vote of the unit owners. In the condominium setting, no proxies, limited or general, shall be used in the election of board members. However, the Homeowners' Association Act contains no limitation on the use of general proxies, and unless the governing documents of a homeowners' association provide otherwise, members have the ability and right to utilize a general proxy.

Since your association is a homeowners association, it is my view of the law that your association may properly adopt amendments which set forth the manner in which votes shall be cast,

and that procedure could permit absentee ballots. I would also note that the commonly-used limited proxy is, effectively, an absentee ballot when used to vote on issues that require member approval. The main difference between a "absentee ballot" and a "limited proxy" is typically that an absentee ballot is used when secrecy in voting is desired.

For condominiums, I view the law differently. Condominium voting is governed by Chapter 617.0721 of Florida's Not for Profit Corporation Act, which states that members of the corporation, if entitled to vote, "may vote in person… or by proxy executed in writing by the member." As noted above, the Condominium Act states that limited proxies must be used for various types of unit owner votes. The condominium statute used to permit association's to "opt out" of limited proxy voting procedures, but the ability to "opt out" was removed by amendment to the Condominium Act effective October 1, 2008. Accordingly, I do not believe that "absentee ballots" are legally proper in the condominium setting, except in connection with electing directors.

Q: You previously wrote an article on condominium rentals and you said that the rental policy depended on the provisions of the condominium documents. You also cited a Florida Supreme Court ruling and a 2004 law. It seemed clear to me that unless a unit owner votes in favor of an amendment imposing rental restrictions, the unit owner could continue to rent their unit, assuming they purchased their unit before the amendment was adopted. My question is whether a condominium association can amend the documents to limit the duration of a lease, or to limit the number of times each year a unit is rented?

A: The short answer to your question is yes, a condominium association may amend the condominium documents to limit the duration of leases or how many times a unit can be rented during the course of a year. The real question is whether such amendments are enforceable against existing owners who do not consent to such amendments. The answer to that question is no.

I receive many inquiries to this column about the 2004 amendment to the Florida Condominium Act, which I refer to as the "Rental Amendment Grandfathering Law." The enactment of the Rental Amendment Grandfathering Law essentially changed a 2002 ruling of the Florida Supreme Court in a case called Woodside v. Jahren. In that case, the Court held that a proper amendment to the declaration could eliminate leasing rights altogether, on the theory that an owner buys into a condominium with knowledge that the rights conferred by a declaration of condominium are amendable.

The Rental Amendment Grandfathering Law provides that any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of the amendment. Therefore, any amendment that changes the minimum lease term, or the number of times a unit may be rented in a year, is not be applicable to an existing owner who does not consent to the amendment, and the existing owner is "grandfathered" under the old provision.

In 2008, the Division of Florida Condominiums, Timeshares and Mobile Homes, the state agency that regulates condominiums, ruled in a proceeding known as a "Declaratory Statement" that an association, at least in some circumstances, may impose procedural rental restrictions, even against an existing owner who does not consent to the amendment. In that decision, the Division ruled that the association could impose transfer fees, require all owners to submit a rental application, and require all prospective tenants to go through the association's approval process. While Declaratory Statements do not have the binding force of law, there appears to be room to argue that some rental amendments are enforceable against all owners, whether they consent to the change or not.

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Owner Has Legal Right to Examine Association's Documents

Attorney-client privilege an important exception

Fort Myers The News-Press, August 2, 2009

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Q: I am becoming increasingly concerned with the financial well-being of my condominium association. We have a few owners who are delinquent in the payment of their assessments, and that is causing a strain on our budget. In addition, the board made some roof repairs over the past 6 months, and I understand additional roof repairs are planned. I made a request to look at the records of the association and was disappointed to be told that I would have to travel to the manager's office in Lee County when I live in Collier County. I was also told that the contract documents for the roof work are not available for my review because there is a possible lawsuit against that contractor for the work that was performed. Obviously, I am not happy with the response I received to my request to review records. Could you please tell me if I am being treated fairly and legally? **A.R. (via e-mail)**

A: As you may know, the Florida Condominium Act contains several provisions designed to establish the right of members to attend board meetings, to attend certain committee meetings, and to inspect and copy association official records. The Act defines the "official records" of the association very broadly. In fact, the definition includes any record not specifically listed by the statute which is related to the operation of the association.

There are some very important exceptions to the members' rights to inspect these documents. It should be no surprise that the Act allows the association to separate, and hold as confidential, records protected by the lawyer-client privilege and any record protected by the work-product privilege, which typically includes records prepared by the association attorney or by a director or manager at the attorney's express direction in anticipation of litigation. Also exempt from inspection are documents which reflect mental impressions or litigation strategies and theories that are prepared in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

But as to the records that are available for inspection, the Act contains provisions that are helpful to the members. Specifically, the association is required to provide the opportunity to inspect records within 5 working days after a written request is received by the board or its designee. Failure to provide the records for inspection within 10 working days creates a rebuttable presumption that the association

willfully failed to comply with the requirement and the member may claim actual damages or minimum damages of $50.00 per day for up to 10 days. Moreover, a member who is not given the opportunity to inspect records under the statute has the right to file a complaint with the Division of Condominium, Timeshares, and Mobile Homes and you can expect that the Division will take action to compel the association to comply with the statute.

The portion of the statute governing the logistics of where the records must be made available was amended effective October 1, 2008. Section 718.111(12)(b) now provides that records must be made available to unit owners within the county in which the condominium property is located or, if outside the county, then within 45 miles of the condominium. The new statute also provides that, should a requesting member agree, the association can comply with the records inspection request by allowing the member to review records on a computer screen and print copies upon request. Obviously, these new statutory provisions are designed to accommodate associations that do not have an office on the condominium property, and which might contract with a management company that is headquartered some distance away. The Legislature obviously believes that 45 miles is an appropriate distance to require members to travel to inspect records.

Finally, with respect to the association holding back certain records related to the contract dispute, it seems clear to me from your question that the initial contract itself is certainly an official record that is available for review, even though that contract is a subject of a lawsuit. However, any written communication between the board and the attorney with respect to the dispute and any engineering reports or other information that was generated by the board or the association's attorney to develop strategy or create a case on behalf of the association, is certainly confidential and is not required to be disclosed until after the dispute has been resolved.

Q: Our HOA has an Architectural Review Committee ("ARC") consisting of five members. Our HOA Board has five Directors, two of whom are permanent members of the ARC, not including our President. The By-Laws of the HOA state that the President "is an ex offico member" of all standing committees of the HOA. All ARC meetings are properly noticed per the sunshine laws. Assuming all ARC members attend a properly noticed meeting and the President attends, either in his ex offico Committee member role or in his role as an Owner, does this constitute an illegal "gathering" of the Board per the sunshine statutes? If yes, what impact can this have on the ARC matters discussed at this meeting and the subsequent Board approval of such actions? Do the President and the remaining two Board members, although owners, need to refrain from attending these ARC meetings owing to their fiduciary obligation to operate the Association in accordance with Florida law? **G.B. (via e-mail)**

A: I believe it would be helpful to provide a general overview of the law regarding meeting notices for homeowners' associations. Section 720.303(2), Florida Statutes, states that a meeting of the Board occurs whenever a quorum of the Board "gathers to conduct association business." This statute further requires that all 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." It should be noted that not less than fourteen days written notice is required in certain circumstances, as well. The requirement for posting notice also applies to ARC meetings.

If the President attends and participates as a committee member in an ARC meeting, along with the two other Board members who also serve on the ARC, a quorum of the Board has been established. Therefore, since "Association business" is being conducted at the ARC meeting under this scenario, a Board meeting has occurred, which must be properly noticed. This can become a tricky situation because if the ARC votes on a certain item, and all three Board members (who also serve on the ARC) also vote on the matter, an

argument can be made that the actual Board, not just the ARC, has voted on and addressed the subject issue.

To avoid any complications that may arise going forward, the Association should amend the bylaws to omit the provision that the President serves as a member on every committee.

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Language on Architectural Changes Must Be Specific

Fort Myers The News-Press, August 9, 2009

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Q: Two years ago I purchased my home in a gated community. I have decided to refresh the landscaping and add several new shrubs and, hopefully, a large shade tree. I understand I must get approval before I install my new landscaping. I have spoken with the association president to find out exactly what I need to do, and she said that I might not be allowed to put a big shade tree in the front of my yard. When I asked the reason for her comment, she stated that the architectural review committee has identified over-grown trees, and mature trees that now appear to have been planted too close together, as a problem with the appearance of the community. Apparently, since I have a very small front yard and both of my neighbors on each side have large, mature trees, I might not be allowed to plant a tree in my yard. I want the neighborhood to look good too, but it seems unreasonable that I can't have a tree in my front yard. Can you advise how I should approach this issue? **T.L. (via e-mail)**

A: Historically, covenants and restrictions have typically authorized the formation of an architectural review committee and authorized the association to adopt design guidelines and other criteria that an owner must follow to make alterations to his home or lot. In many cases, the architectural review committee authority is couched in terms of language such as "in keeping with the general character of the neighborhood", or to maintain "harmony" of appearance in the community. However, such broad, discretionary criteria might be viewed as giving an architectural review committee unlimited authority to approve or disapprove proposed changes on a whim. In fact, that has never been the case. The board of directors or an architectural review committee is always held to a standard of consistency in enforcing covenants and restrictions. The defense of "selective enforcement" has long been established and is frequently used by owners to challenge the decisions of a Board or a committee. Basically, selective enforcement involves the conclusion that one homeowner is unfairly being held to a different standard than other homeowners. If proven, selective enforcement is certainly a valid theory upon which to challenge board action.

In 2007, the Homeowners Association Act was amended to include Section 720.3035. It is not entirely clear what, exactly, this new statutory provision requires as it has yet to be tested in court, to my knowledge. However, the Statute provides that an association's architectural review authority to approve plans and specifications for location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement, must be specifically stated or reasonably inferred in the declaration of covenants

or in other published guidelines and standards that are authorized by the declaration of covenants. It is generally believed that this statute requires detailed specifications and guidelines to be in writing. A reasonable debate continues as to whether authority couched in terms of "in keeping with the general character of the community", or "in harmony" with other improvements, is specific enough to meet the new statutory requirements. The conservative view is that something more specific is required.

Therefore, in your particular situation, it may be helpful to explore the written provisions of your community's covenants or design guidelines that the association might have in place. If the association's disapproval of any of your planned improvements is inconsistent with those written design guidelines, or if the restrictions and requirements that the committee places upon your lot are inconsistent with the restrictions and requirements enforced for other lots, then you may have a reasonable argument that you are entitled to make the improvements that you propose.

Q: My mother's small condominium association (40 units) has a rule that an individual or corporation can only own two units. The Board controls this by giving pre-approval of unit sales. Are such restrictions on sales legal? **S.S. (via e-mail)**

A: I am aware of declarations of condominium that limit the total number of units that any person or single entity can own in the condominium. In my opinion, such a restriction is best placed within the declaration of condominium, not a board-made rule.

The standard for review of a restriction contained in a declaration of condominium is whether the restriction is wholly arbitrary, in violation of public policy or in violation of an individual's constitutional rights. I do not believe that a restriction prohibiting multiple unit ownership is wholly arbitrary or violates public policy or an individual's constitutional rights.

There are several arguments that support the reasonableness of a limitation on the number of units that one owner may simultaneously own in a condominium. First, if one person or corporation owns multiple units, it is very likely that such an owner will be holding the units as a rental pool, and not owning the units for permanent occupancy. Obviously, a condominium, particularly a smaller condominium, which has a significant number of units held in a rental pool will not have the same character and living environment as a condominium with primarily permanent occupant owners. It is not wholly arbitrary for an association to want to establish and maintain an environment of primarily permanent occupants.

Secondly, experience shows that absentee owners with multiple units, as well as their guests and tenants, do not always take very good care of the units or the common element property.

Third, where one individual owns multiple units, particularly in a small condominium, any financial difficulties of that person or corporation that cause them to not be able to pay their assessments could have a devastating effect on the financial condition of the association.

Finally, again in particularly small associations, if one person owns several units, the voting balance in the community can be adversely affected. Obviously, a single owner with multiple units held as a rental pool will often have vastly different objectives or priorities than permanent occupant residents. That fact, together with substantially greater voting power than individual unit owners, might allow the multiple unit owner to dominate association operations.

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Ways to Qualify for Tax Exemption on Electricity Sales

Separate meters one of many requisites

Fort Myers The News-Press, August 16, 2009

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Q: I am a property manager for a gated community. Our only common area is a guardhouse with two gates and street lights on the main boulevard. I have a resident who thinks that the Association can save thousands of dollars each year with the sales tax exemption on utilities used in common areas of community associations. I have been having a difficult time in finding a good explanation of exactly what is required to qualify for the exemption. **(K.W. via e-mail)**

A: Generally, the sale of electric power or energy by an electric utility is subject to sales tax. However, pursuant to Section 212.08(7)(j), of the Florida Statutes, certain sales are exempt from taxation provided that they meet two qualifications. First the sale must be to a residential household. Secondly, only "exempt transactions" are included.

To satisfy the first requirement, the Florida Department of Revenue has determined that the electricity need not be used solely inside a residence. Rather, as provided in Section 12A-1.053 of the Florida Administrative Code, electricity used in common areas in a residential development may also qualify under the residential household exemption. The Florida Department of Revenue, in its Technical Assistance Advisement 9A-004, defined "common areas" to include "any portion of a development that is not included within the private living quarters. Therefore, in a residential development, the common area could include roads within the development, parks, area pools, playgrounds, and the like. The area does not have to be contiguous to each residential unit or space to qualify as a common area."

Additionally, the exempt use must be metered separately from non-exempt operations so as to qualify for the exemption under the second requirement. If separate meters are not installed, and a part of the electric power or energy is used for a "commercial purpose", the entire sale is subject to taxation. For purposes of distinguishing between exempt and non-exempt operations, the Association must establish that the common area is intended for the exclusive use of the owners, tenants, and guests and is not held out for use by the public. Also, owners, tenants, and guests must not be charged a fee for the use of the common area in order for the exemption to apply. Regular assessments paid to the Association which are used for maintenance of the common area, do not act to disqualify the Association from applying for the exemption.

In its Technical Assistance Advisement 92A-061, the Department of Revenue provided useful examples of exempt and non-exempt sales. For example, coin-operated laundries and vending machines do not qualify for the residential exemption since these types of systems and uses represent a commercial use of the electricity. Common areas for which the residential exemption

for use of electricity would apply include lighting for parking lots, swimming pools, common rooms (such as a lounge or recreation hall), and hallways and stairwells for access to the units.

As applied to your question, the guardhouse, the two gates, and the streetlights on the main boulevard should be exempt from taxation provided that all are located on Association common areas, are reserved for the exclusive use of subdivision residents without change, and are metered separately from non-exempt uses.

Before the exemption will apply, the Association must file a writing or document with the appropriate utility company which demonstrates that the electric power or energy is being purchased for residential household use. The Association will need to contact the applicable utility company to determine if the provider has forms it supplies for this purpose.

Q: My community finds itself in a situation that I imagine is fairly common these days. Specifically, our developer was caught in the real estate downturn and is unable to sell out the remainder of the community. Therefore the association has not been turned over to the owners yet, and probably will not be in the near future. But there are many owners who are anxious to become involved and start taking actions to better the community. We want to form committees including social committees and a neighborhood watch committee. We are even willing to a form a beautification committee and collect contributions from owners if necessary. There are people who live on cul de sacs who would be willing to donate some of their own money to make the cul de sac islands look better. Is there any legal prohibition to owners forming committees and taking action while the developer is still in control? **H.P. (via e-mail)**

A: Unfortunately, your situation is more common today than ever before. I am aware of many associations that are still under developer control with little hope of sufficient sales in the near future to trigger turnover of association operations to the homeowners.

First, I would suggest you approach the developer with your ideas for forming committees. The committees you have identified are all beneficial to a community and the developer should be receptive to assisting you, if not formally authorizing and empowering your proposed committees.

Even if the developer is not cooperative, certain "committees" may be formed without its permission. When living in a deed restricted community governed by an association, you do not forfeit any of your rights to freely associate with others. However, any committees that are not formed by the association must be careful not to hold themselves out as being part of the association.

For example, a "beautification committee" would not be entitled to alter, even if for the better, the landscaping or other common areas of the association without express approval from the association. However, you could certainly still have a social committee and a neighborhood watch group regardless of the developer's cooperation of lack thereof. You should contact your local law enforcement agency for guidelines and resources regarding neighborhood watch programs.

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Several Florida Laws Cover Right to Approve Buyers, Lessees

Fort Myers The News-Press, August 23, 2009

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Q: Should the board of directors of a condominium association do background checks on purchasers or renters of condominiums? If so, should there be a fee? **V.H. (via e-mail)**

A: It depends. If the declaration of condominium provides that the association has the right to approve the sale, transfer or lease of a unit, the association may conduct a background check on the potential purchaser or tenant. As part of that process, it is advisable that the association have a standard application form that a potential purchaser or lessee completes. A standard application form would give the association the necessary information to perform a background check, and should clearly provide that the applicant is authorizing the association to conduct a background check. Furthermore, the governing documents of the association should set forth the reasons for denying approval of an applicant.

Additionally, a number of provisions of the Florida Condominium Act apply to the association's right to approve potential purchasers or lessees. Section 718.112(2)(i) of the statute specifically authorizes an association to charge a fee in connection with the approval of the sale or lease of a unit. However, in order for the association to have the authority to charge the fee, the association must have the authority to approve the transfer (sale or lease) in the first instance, and the fee must be authorized by the documents. The statute goes on state that the fee must be preset "but in no event may such fee exceed $100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant".

Furthermore, if an association does obtain information regarding a potential purchaser or lessee in connection with the association's approval rights, the association must recognize that such information may not be made available to the association membership for inspection.

Q: Several cars have been broken into in my community over the past few months. Most of my neighbors believe they "know" who is responsible because there is a group of kids that lives in our community who we know, for a fact, have been in trouble with the law before. These kids often have several friends visit the community, which is gated, but of course their friends are allowed to come over as guests. We have asked the board of the association to keep these visitors out and to take other action to stop these car break-ins. However, the board does not seem to be too interested in doing anything. Does the law provide any ability for the members to force the board to take some action here and protect our property? **D.P. (via e-mail)**

A: A common issue in community associations involves determining the association's obligation to keep the members and their property safe. As a general matter, whenever members witness a crime or suspect criminal activity, they should always make their first call to proper law enforcement authorities, and not to the association. Sometimes members misunderstand the association's purpose and function. The association is not the primary keeper of the peace, nor is it an emergency services provider. In fact, Florida courts have held that one way for an association to incur liability for criminal acts of others is to take on a "police" role and thereby create a reasonable expectation that the association is providing protection.

There have been reported court cases in Florida in which community associations have been held liable for the criminal activity that takes place in the community. There is a long line of case precedents that impose certain duties on landlords. These cases and the legal principles created by them have begun to be applied to community associations by the courts. Landlords have always been held responsible to warn and to take reasonable steps to protect tenants or their guests from foreseeable criminal activity and harm. For example, if a shopping center has had some late night robberies or criminal activity in the parking lot, it is incumbent upon the shopping center landlord and/or the store owners to warn patrons with appropriate signage or other warnings, and to keep the area reasonably safe, which may include adding additional lighting, cameras or even live security personnel. In a residential setting, a residential landlord would have similar obligations to warn and provide a reasonably safe environment. While the legal relationship between a landlord and tenant is substantially different than the legal relationship between an association and its members, some of these general principles of landlord liability have been applied in the community association context. Therefore, your association may have a duty to warn its members about the break-ins and take some steps to make the community safer.

In the case that you describe, it is obviously not proven that the youth who reside in the community, or their friends, are in fact responsible for these break-ins. It is always difficult for an association to decide whether it should issue a written warning to its members, and what specific detail to include in such a warning, because the association must be careful not to defame anyone. In the case you describe, it may be appropriate to send out a flier or a newsletter cautioning people to lock their cars, keep their exterior lights on during the evening, and to be cautious given the recent break-ins. But in my opinion it would be a huge mistake to identify "suspects", either explicitly or by inference.

Similarly, while the association can possibly prohibit guests from entering the community when those guests have previously caused a disturbance or damaged property in violation of the governing documents (and even then, a court order may be necessary), the association must have some definitive proof of that prior conduct. Otherwise, the member whose guests are being excluded would have a valid claim against the association for a violation of that member's rights.

As a practical matter, a community neighborhood watch might be your best, most practical solution. You can consult with local police authorities to learn how a neighborhood watch program can be implemented.

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Community Challenge Is To Balance Interests

Fort Myers The News-Press, September 6, 2009

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Q: My community includes a common area with basketball and tennis courts. I have young children, and unfortunately, the basketball court is a bit too far for them to go and play by themselves. I have considered buying a portable basketball hoop for my driveway, but have learned that portable hoops are prohibited by the association. We have a nice neighborhood, so I can understand why restrictions like this are in place, but there are many families with younger children living here, and I suspect most owners would not object to a basketball hoop. How can I change this restriction to allow basketball hoops? **J.P. (via e-mail)**

A: Your question reflects one of the biggest challenges in shared ownership communities; the need to constantly balance and resolve competing interests. As I have mentioned previously in this column, associations are unique and it is up to each, individual association to determine the types of restrictions, if any, that it will have in place. If the developer put the basketball hoop rule in place and none of the owners who purchased the homes really care, then you may have an easy time achieving your goal (pun intended). But, if this restriction was in the original, developer documents, it is possible some of the owners bought in partial reliance on this and other similar restrictions. Or, this restriction may have been added by the members after turnover of control of the association from the developer, in which case you might have an uphill battle.

Obviously, the prohibition of basketball hoops serves an aesthetic interest because a street lined with portable basketball hoops and other recreational equipment is, at least in some peoples' minds, less attractive than a street without such equipment. In addition, particularly in communities where the homes are built in very close proximity to one another, a basketball game that is taking place next door can sound as if it is in your own living room. So there are some compelling reasons for some people to want to restrict basketball hoops in driveways. On the other hand, few people would argue with the premise that children should be given the opportunity to regularly engage in appropriate recreational activities.

Your options are to either live with the rule, try to have it changed, or to challenge its validity. Your efforts to change the restriction will depend on whether the restriction appears in the declaration or is a board-made rule. If the restriction appears in the declaration, it is almost certainly valid, and your efforts should be focused on having a declaration amendment proposed and passed pursuant to the amendment provisions in the declaration. Obviously, your biggest job would be

to conduct a grass roots campaign to get support for your proposed amendment.

If the restriction is in the form of a board-made rule, then the board of directors, alone, may change the restriction. Again, your biggest challenge, presumably, will be to get support from the members and demonstrate that support to the board of directors.

There may be a couple of angles for challenging the restriction. First, if the restriction is a board-made rule, you can check to make sure that all of the procedural requirements were met when the rule was adopted. This would require looking at the statute, which requires 14-days notice of any board meeting at which a rule restricting lot use is adopted, as well as the governing documents of the association to determine the scope of the board's rulemaking authority and the procedures required to adopt valid rules. However, if you were to find a deficiency in the procedures used to adopt the rule, your victory would likely be short-lived as the board could readopt the rule using proper procedures.

If the restriction is contained in the declaration, there is very little you can do to challenge that restriction, unless the provision was added by amendment and the amendment procedures were not followed. One other possible argument, which is a real stretch in my opinion, might be to challenge the restriction as discriminatory. An association that has a multitude of restrictions that actively tells the world "no kids allowed", may be susceptible to a claim of "familial status" discrimination, which is illegal discrimination against families with children. However, I do not believe that a single restriction prohibiting basketball hoops would come anywhere near the level of proof needed to establish such discrimination, especially in a situation like yours where the community does in fact provide a common area basketball court.

Therefore, your best bet is to get involved in your community, poll your neighbors, and do some old-fashioned politicking. In the end, the majority, or whatever percentage is set forth in your association documents, rules.

Q: We are a small, self managed condominium. Our community is not gated. We have a swimming pool that is unlocked during the day. Occasionally, especially in the summer when there are few members in residence, un-invited people from the apartments down the street come and use our pool. What is our association's liability if one of these people is injured on our property? **L.A. (via e-mail)**

A: The nature of your question requires a brief discussion regarding the law of negligence. Generally, to prove negligence, one must show a legal duty of care was violated and that the violation of the legal duty proximately caused the injury and damage alleged. In the context of a landowner (in this case, the condominium association), the legal status of the person on the property will determine the duty of care owed. A greater duty of care is owed to those individuals who are residents or have specific permission to be on the premises as opposed to trespassers. Generally, a landowner owes no duty to a trespasser other than to not intentionally injure the trespasser.

However, this analysis changes with respect to pools and children. Florida law recognizes a legal concept referred to as the "attractive nuisance doctrine." The attractive nuisance doctrine may impose liability upon a landowner with respect to injuries arising from children in relation to pools whether they are trespassing or not. In a general sense, the law presumes that children do not recognize the danger or risk associated with pools and, therefore, landowners should take reasonable precautions to protect wandering children. What is reasonable will vary by circumstances. At the least, the association should confirm that the pool and surrounding areas (fences, gates, etc.) comply with all applicable local, state and federal standards.

Another important player in this issue is the association's insurance agent. Your agent will be

able to provide advice as to proper insurance coverage, and may also be able to have your insurers or a third party assist in making risk management recommendations.

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Management Company Owner Also a Resident

Fort Myers The News-Press, January 11, 2009

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Q: I am a member of a homeowners' association. Our board recently hired a new management company. The owner of the management company is also a resident/property owner in our community. Some of us feel that this creates a conflict of interest. What is your opinion on this? **T.W. (via e-mail)**

A: As long as the owner of the management company is not also a member of your association's board of directors, I do not believe that conflict of interest concerns in the traditional legal sense are presented.

There is no legal prohibition against contracting with a property owner within your community. I have seen a few associations which have bylaw provisions which prohibit contracting with association members, but such provisions are certainly the exception.

There are a couple of different ways to look at this. Some may argue that because the owner of the management company also has an investment in your community, he or she will go "above and beyond" to ensure that the community's needs are served, thus protecting their own investment and keeping their friends and neighbors happy. Others would argue that contracting with an association member is a bad idea, because friendships and internal community politics could obscure the objective viewpoint the board should have in dealing with contractors.

Whether contracting with a neighbor or a total stranger, I always recommend that contracts between community association management firms and associations contain a liberal termination clause, with or without clause, upon reasonable notice (such as thirty days).

Q: I live in a high-rise condominium. Each year around the holidays, one of my neighbors, hosts holiday parties that often cause loud noise which reverberates through my unit. I have asked him on several occasions to keep the noise down and each time he apologizes, but the parties continue and so does the noise. Is there anything I can do to prohibit him from having these parties which ultimately keep me up for most of the night each time he has a party. Also, this same unit owner will often leave a trash bag full of trash outside the door of his unit rather than bringing the trash to the trash chute located at the end of the hallway. Eventually, the trash is thrown away, but it often remains in the hallway for a whole day or so. Is anything that can be done about this "trashy" situation? **B.M. (via e-mail)**

A: While you may not be able to require your neighbor to cancel his holiday parties, his actions regarding the noise and trash may give rise to "legal nuisance" or a claim of nuisance under your condominium documents, if there is such a provision. However, before considering any kind of nuisance action, I would recommend that you

make a more formal effort to solve these problems with your neighbor on both issues before escalating the situation. Neighbor-to-neighbor discussions can often cure the problem before considering legal action. If your attempts to resolve this verbally have not worked, you might wish to send the neighbor a letter outlining the specific incidents which you believe have created a nuisance. You might even consider having an attorney write the letter on your behalf.

If your attempts for voluntary resolution are not successful, then you may want to consider filing a claim for "legal nuisance". Florida law says that a "legal nuisance" is the commission or an act or omission of a duty which either annoys, injures or endangers the comfort, health, repose or safety of the citizens, which unlawfully interferes with, tends to obstruct, or in any way renders unsafe or unsecure other peoples' lives and infringes on their property rights. Generally speaking, a property owner may put his own property to any reasonable and lawful use so long as they do not deprive other owners of their right to enjoy their property.

Whether or not your neighbor's conduct rises to the level of actionable nuisance will be determined by the standard of a reasonable, objective person. Therefore, if you are hypersensitive to noise for example, you may not be able to pursue a nuisance claim. Ultimately, the noise or presence of trash must be more than merely an "annoyance" to a reasonable person.

Q: Our condominium association recently set up an election for seven positions. Five board members were to be elected from year-round residents, two were to be part-time residents. I am of the opinion that an owner is an owner, and that year-round residency status should not be a criteria in the election process. All owners should have the same rights and responsibilities. What is your view of this matter. **J.C. (via e-mail)**

A: The Florida Condominium Act states that "any unit owner" may file the appropriate papers to stand for election to the board. The law contains a couple of criteria for the disqualification of director candidates, felony convictions and a recent change in the law regarding unit owners who are more than ninety days delinquent in the payment of assessments.

Otherwise, it is generally said that any unit owner may run for the board. The state agency which regulates condominiums in Florida, known as the Division of Florida Condominiums, Timeshares, and Mobile Homes has previously ruled that residency requirements are not valid. In fact, reversing a previous ruling, the State has also held that term limits are not valid.

Co-owners of a unit are also now precluded from simultaneously serving on a condominium association board.

You should ask your association to review this issue with its legal counsel.

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Condo Owner Wants Improvements Stepped Up

Sub-association won't act on issues

Fort Myers The News-Press, September 13, 2009

By Joe Adams
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Q: I live in a fairly large community with a few sub-associations and a master association. Our sub-association, which happens to be a condominium, would benefit from several improvement projects. There are quite a few owners who would support better landscaping and other improvements, even if it meant spending a little more money than the regular monthly assessment. Our association already has adequate funds to complete several of these projects, but the board simply will not move these projects along. We thought that maybe the master association could step in and either complete some of these projects on its own, or somehow use its authority to require our sub-association to complete some of these projects. Can the master association help us? **C.H. (via e-mail)**

A: There are a variety of reasons that a developer will develop a large parcel of land using a "master association" and several "sub-associations", often referred to as "neighborhood associations." Those reasons include legal, financial, and marketing considerations. In such cases, a master association's function is usually to own and maintain common areas that are for the use and benefit of all members of the various neighborhoods in the community. The best examples of master association common areas are gate houses, roads, community centers, and recreational facilities. In many cases, these master common areas make up the vast majority of all common areas of the community.

In fact, I am aware of many neighborhood associations set up as HOA's that own or administer no common area property whatsoever. Instead, those associations usually have the limited purpose of enforcing architectural control standards and use restrictions. Condominiums, on the other hand, often include all of the real property within the perimeter boundaries of the condominium, and the condominium association usually exclusively administers that property.

Given all this, it is first necessary for you to determine whether the property that you and your neighbors wish to improve upon is a common area of the master association or property of the sub-association. If it is owned by the master association, then clearly it is appropriate to ask for the master association involvement. However, if the property is owned or administered by your neighborhood association, the master association likely has no authority to insist upon the improvement unless the desired projects involve cleaning up an unsightly or nuisance condition.

Q: Our homeowners association has a problem with feral (wild) cats. There seems to be increasing numbers of these cats in the community, and there have even been some incidents where

cats have approached people and acted aggressively toward them. One person was scratched. I have contacted the board of directors of the association about this issue, but several members of the board have questioned whether it is appropriate for the association to take any action. Can you advise whether other associations have addressed this issue, or similar issues? **C.J. (via e-mail)**

A: The first order of business is to determine the scope of your association's legal authority, including its spending authority. The governing documents, primarily the declaration of covenants, will usually spell out the association's authority. In some cases, the governing documents of a homeowners' association specifically limit the association's authority to owning and maintaining specified common area property. In such communities, spending association funds on issues or projects other than the maintenance of those common areas is improper. On the other hand, some governing documents use broad language that authorizes the association to spend funds on matters that "promote the health, welfare, and happiness of its members." Arguably, just about anything could fit under this broad authority.

If your association finds that it does have the legal authority to spend its funds on the feral cat issue, you should be sure to consult with local government officials to determine what is and is not permitted. A brief search of the internet referencing both "feral cats" and various municipalities in Southwest Florida, quickly identifies several non-profit groups that are interested and active on this issue. You would be wise to contact some of these groups to become educated about practical tips to address your concerns, and to make sure you are aware of all laws relating to taking action. Ideally, if there is trapping and relocation involved, the association would be able to hire a qualified, reputable trapper who can ensure compliance with laws and protect the association through the contractor's insurance and an indemnification agreement.

Most association governing documents include covenants and restrictions that the board must enforce. Most well-written homeowners' association documents contain a general provision that prohibits creating nuisance conditions. I am aware that some people feed feral animals and it is my understanding that such feeding can contribute to the issue you are experiencing. I would expect that the association could, and should, take action to prohibit members who might be feeding these feral cats because that may be attracting them to your community and creating the nuisance situation you describe.

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How Should Association Pursue Delinquent Fees?

No easy answer to tough situation

Fort Myers The News-Press, September 20, 2009

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Q: Our condo association has several units in arrears on association fees as well as special assessments. If we file a lien we only get a maximum of six months of assessments. We currently have several units over one year delinquent. My questions are whether we can file for payment in small claims court, and whether we can we take further action of garnishment of wages after judgment in favor of the association. Also how would this apply to foreclosures? **R.M. (via e-mail)**

A: It should come as no surprise, given the economic realities of the current real estate market, especially here in Southwest Florida, that I get questions like this frequently.

As an initial matter, you state that you are concerned about filing liens because "we only get a maximum of six months of assessments." Section 718.116(5)(b) of the Florida Condominium Act provides that the association's claim of lien secures all unpaid assessments (both regular and special) which are due and which may accrue subsequent to its recording of the claim of lien and prior to the entry of a certificate of title, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Accordingly, the association's claim of lien secures not only six months of unpaid regular (monthly or quarterly) assessments, but all unpaid assessments due at the time the claim of lien is recorded, and all unpaid assessments which accrue subsequent to the recording of the claim of lien.

Historically, the right of the association to record a lien and to foreclose that lien, and to collect costs and attorneys' fees incurred in the process has been a very effective tool for the benefit of community associations. Of course, when there is a first mortgage on the property, and the fair market value of the property is less than the amount owing on the first mortgage, most all of the benefits of the statutory lien and foreclosure provisions are lost, or at least blunted. This is because a first mortgage that has been recorded before the association's lien is recorded has legal priority over the association's lien. If the first mortgagee does foreclose or take a deed in lieu of foreclosure from the owner, there is limited joint and several liability of the first mortgagee (6 months past assessments or 1% of the original mortgage amount, whichever is less, in the case of a condominium unit, and 12 months past assessments or 1 % of the original mortgage amount, whichever is less, in the case of a homeowners' association).

To secure the right to pursue other assets of a delinquent owner, a well-drafted association foreclosure complaint will include a separate count

which seeks a money judgment against the unit owner. However, when a money judgment is issued, all the association receives is a piece of paper which the association must then go out and collect. A money judgment creditor, which is what the association would be in that case, is an unsecured creditor that finds himself in line behind all secured creditors, such as mortgagees, taxing authorities, and other types of lien holders, and in a "pool" with all other unsecured creditors racing to find assets.

In our historical experience, almost every unit owner who is on the verge of losing his unit in a mortgage foreclosure does not have other assets readily available to satisfy unsecured debts. Admittedly, these strange economic times give rise to situations where investor owners are walking away from properties based upon their economic evaluation of those specific properties, and those investors may have substantial assets elsewhere. For this reason, the association needs to evaluate whether to pursue individual owners personally on a case-by-case basis. In addition, many such investor owners are out of state, and any attempt to collect from them would require retaining legal counsel or a collection agency in another jurisdiction.

If the amount in dispute is less than five thousand dollars, small claims court is an option. However, I have not seen much success with this alternative. For one thing, if the owner's only asset is the unit, and it is their primary residence, a small claims judgment would not overcome homestead protections. Further, if there is no mortgage foreclosure in the mix, the association is clearly in a better legal position through a lien foreclosure. Where a mortgage foreclosure is involved, the lender has to name the association as a party to the suit (or it loses its statutory assessment liability cap), so the association will find itself in court anyway.

With regard to your question about garnishment, while garnishment may be a tool that an association can use to recover the amounts owed in a judgment, there are specific rules which must be complied with in seeking to enforce a writ of garnishment. Garnishment is controlled by Chapter 77, Florida Statutes, and there are specific protections for wage earnings contained in that law. For example, with respect to garnishing wages, there are certain exemptions in the law which protect the wages of particular individuals.

For example, if the individual is the head of a family, their wages may be protected from garnishment. If the wages sought to be garnished are derived from social security, welfare, workers compensation, unemployment compensation, veteran's benefits, retirement benefits, pension benefits, life insurance, disability or certain educational or medical savings accounts, that income is likewise protected in whole or in part from garnishment. Accordingly, while garnishment can be a useful tool to collect on a judgment in some instances, it has its limitations.

In summary, there is no magic or easy answer in dealing with these difficult situations. Some associations feel that the best bet is to simply do nothing, and wait for the mortgagee holder to foreclose. While this strategy may produce the best net financial benefit in some situations, disaster can follow this strategy. If owners know that the association will take no action to enforce the collection of assessments, others may stop paying. Further, and perhaps more problematic, the association's failure to treat all unit owners equally in the collection of delinquent assessments can raise "selective enforcement" problems if the association does choose to pursue collection of a particular delinquent account.

The association should carefully review each individual delinquency with legal counsel prior to making a decision as how to best proceed. Reportedly, the end of this historic property value "adjustment" is in sight. Let's hope so.

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State Sets Factors to Consider In Fair Market Value

Three approaches to valuation offered

Fort Myers The News-Press, September 27, 2009

By Joe Adams
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Q: I own two nearly identical units in a small condominium. One unit is on the first floor, and the second is nearly directly above on the second floor. When I received my notice for proposed taxes this year, I noticed that the market value of the unit on the second floor was nearly $9,000.00 dollars higher than the first floor unit. In speaking with the Lee County Property Appraiser's Office, I was told that second floor units were assigned a higher value due to a "view adjustment." Since the market value is used to determine the assessed value, and this is the first time that I've noticed such a difference, can you please explain what the Property Appraiser considers in assigning the market value to a property? **C.M. (via e-mail)**

A: The factors a property appraiser must consider in assigning the fair market value, the amount a willing purchaser would presently pay a willing seller, are set forth in Section 193.011 of the Florida Statutes. Three approaches to valuation can be used: (1) Direct Sales Comparison, (2) Replacement Cost, and (3) Capitalization of Income. The Lee County Property Appraiser's Office uses a computer-assisted mass appraisal system that incorporates elements of all three approaches to arrive at its conclusions as to the fair market value of properties throughout Lee County.

The Direct Sales Comparison method looks at similarly situated properties which were purchased between January 1 and December 31 of the previous year. Accordingly, for the 2009 tax year, the Property Appraiser would look at sales that took place between January 1, 2008 and December 31, 2008. In determining the fair market value of properties based on the Direct Sales Comparison, the Property Appraiser must determine the actual sales price of the real property, irrespective of furnishings or club memberships which might have been included in the sale. Additionally, the Property Appraiser must consider sales which are classified as "outliers" – those which have sales prices well above or below those of similarly situated properties. An example of such an outlier would be a sale where the seller agreed to a purchase price below the actual value of the home because the seller needed the cash right away. Finally, the Property Appraiser must make certain that the sale was an arm's length transaction or, in other words, a transaction in which the buyer and seller act independently and have no relationship to each other so as to avoid any artificial impact on price.

The Replacement Cost method is based on how much money it would take, at current material and labor costs, to replace the property with one just like it, taking into account depreciation of improvements which are not new.

The Capitalization of Income method is typically applied to commercial properties, those properties which do, or could, provide income. Apartment complexes, retail store space, and office buildings are typical examples. In applying this method, the property owner must supply and the Property Appraiser shall consider income-related information such as revenues, operating expenses, insurance and maintenance costs, degree of financial risk incurred by owning the property, and the return the typical owner would expect to receive on the specific property.

General factors to be considered in all of the approaches include the location, size, and condition of the property. By way of example, waterfront properties are generally assigned a greater value than non-waterfront properties. Additionally, the larger of two similarly-situated properties will likely be assigned a higher value.

The Property Appraiser must also take into account the present use of the property as compared to the highest and best use to which the property can be expected to be put in the immediate future. This allows the Property Appraiser to account for development restrictions placed on the property by documents recorded in the public records together with those imposed by local, state, and federal governments. An example of a restriction on the highest and best use is a conservation easement placed on all or a portion of the property. Conservation easements typically restrict development and, thus, would greatly reduce the highest and best use of a property which could otherwise be developed.

Outside sources, such as the state of the economy of the forces of supply and demand, also affect the fair market value.

The assessed value is the fair market value less any consideration for the "Save Our Homes" Cap or Agricultural Classifications. The assessed value less any exemptions, such as the Homestead Exemption and Senior's Exemption, provides the taxable value.

In addressing your question specifically, the "view adjustment" is one of several building features the Lee County Property Appraiser uses to assign a fair market value to a property. The effect these features will have on the fair market value varies based on the location of the property and is ultimately dependent upon the purchase price any willing buyer would pay for a similar unit. For instance, in some parts of Lee County the floor the unit is located on has no effect on the fair market value. In other parts of Lee County, a buyer may pay more for a ground floor unit than a unit on a higher floor and, thus, the first floor unit will have a greater fair market value than those on higher floors. There is no magic formula to apply nor simple explanation to give. Rather, it is a matter of where you are located and how much people at the current time are willing to pay to live there as well.

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No One Can Force You to Participate in Association Meetings

Fort Myers The News-Press, October 4, 2009

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Q: Our board and management company require that members of our homeowners' association submit proxies before the annual meeting to establish a quorum, even if the members are in attendance at the meeting. Can they do this? Many of us want to vote at the meeting. **M.H. (via e-mail)**

A: First, there is nothing an association can do to "force" an owner to participate in meetings at all. Participation in the affairs of your association, like voting for elected officials, is something of a civic duty.

Parcel owners in a homeowners' association have the right to vote in person and subject to provisions of the governing documents, vote by proxy. It is customary for associations to encourage owners to send in proxies for the meeting, so that the association can determine in advance whether a quorum will be established. As you may know, Chapter 720 of the Florida Statutes, commonly referred to as the Florida Homeowners' Association Act, states that a quorum at a meeting of the HOA members is thirty percent of the voting interests, unless a lower number is specified in the bylaws.

Generally speaking, a proxy is revocable at any time by the person who gives the proxy. Therefore, it would seem appropriate for your association to encourage owners to send in proxies before the meeting, just in case the owner cannot make it to the meeting, or decides not to attend. But, if the owner shows up at the meeting and wishes to vote in person, they have the right to revoke their proxy and vote in person.

Q: Our condominium association employs a building and grounds maintenance person, and an office administrator. Both of our employees have had a difficult year because their spouses have lost their jobs. However, in both cases, our employees' performance has been excellent. We are aware that both employees are struggling to make ends meet and the board wishes to give each of them a bonus now, in addition to the year-end bonus that we have given in the past. The board discussed this at a recent meeting and one of the members protested that the board is not permitted to give such a bonus because it was not included as an item in the budget, whereas the year-end bonus was accounted for in the budget. In fact, our association has a fairly significant surplus this year because our landscape project ended up costing much less than we anticipated in our budget. Could you please confirm our understanding that the board can give

a bonus to these employees regardless of the fact that the bonus is not specifically included in the budget? **J.C. (via e-mail)**

A: The Florida Condominium Act empowers the association to manage and operate the condominium property, which includes the hiring and management of employees. Most condominium documents vest the authority for day-to-day operation of the association in the board. Barring any specific prohibition in your governing documents, the general powers and authority contained in the Florida Condominium Act and in the Florida Not-For-Profit Corporations Act would allow the board to pay the mid-year bonuses you described. In my experience it would be unusual for any of the governing documents of the association to limit the board's authority in this matter.

A couple of cautionary notes may be in order in this situation. First, as I am sure you are aware, the year-end bonus that I understand you typically award reflects a full year's service. Obviously, it is possible that one or both of your employees might not complete this year of service. However, I understand from your question that the employees' performances to-date have been exemplary and I assume the board has decided to reward that service to-date. In addition, as with any bonus program, it is important to manage expectations of the employee, especially to avoid creating a reasonable expectation that might give rise to an obligation to pay a bonus. This point highlights the need for a written employment agreement that clearly spells out the compensation requirements, together with clear communication to the employees that any bonus is a discretionary reward for service, and should not be relied upon by the employee.

Also, the board should always be mindful of one of its primary obligations to the association to operate in a fiscally prudent manner. If paying these bonuses would in any way adversely affect or endanger the association's finances, then I would agree that the board should reconsider paying them. However, you have indicated that the association account has adequate surplus from a landscape project that came in under budget. This raises an important point about annual budget surpluses. Specifically, a budget is a good faith estimate of anticipated expenses in the coming year. Those good faith estimates are reflected in specific line items, and I would expect that your budget for this year included a line item for the anticipated landscape project. Since that project came in under budget, the surplus is retained in the association account and can be used in this fiscal year for any proper common expense of the association. As noted above, the management and operation of the condominium, together with the right to hire employees to assist the board in performing those management and operation functions, is a proper common expense of the association.

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E-mail Inspection Not Addressed in Florida Statutes

Related questions also unanswered

Fort Myers The News-Press, October 11, 2009

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Q: Do condominium unit owners have a right to inspect e-mail correspondence between the association board of directors and the property manager? **L.A. (via e-mail)**

A: I have heard knowledgeable people come to opposite conclusions on this topic. It is not specifically addressed in the Florida Statutes, though it certainly ought to be.

According to a March 2, 2002 memorandum from the Office of DBPR's General Counsel, "condominium owners do have the right to inspect e-mail correspondences between the board of directors and the property manager as long as the correspondence is related to the operation of the association and does not fall within one of the three statutorily-protected exceptions." It should be noted that there are now more statutorily-protected exceptions that have been enacted since the 2002 memo.

The DBPR's position is based on the premise that e-mail correspondence "relates to the operation of the association", and is no different than a paper record which does the same thing.

Related questions, still unanswered in the law, are whether computer data of individual board members (information kept on or deleted from their personal computer) somehow becomes the association's property, or is the private property of the computer owner. Further, there is no guidance in the law on whether e-mail correspondence between groups of board members which do or do not constitute a quorum are "official records." Again, either side of the case could be argued, and may depend on the facts of the specific case.

It seems fairly clear to me that the overall intent of the statutes is to provide for "transparency" in the operation of associations, and that doubts should be resolved in favor of the owner's right to information.

Q: We are not happy with our management company's main office support, mostly due to financial record keeping and collections problems. The management company appears to be overwhelmed. However, we do not want to lose our on-site manager. He has been with us for several years and is top notch. We have considered hiring him directly as a full-service manager, which would actually save us money, but he pointed out a "non-competition" section in his employment contract with the management company which states that he is not allowed to work for any condominium he worked with for the management company for one year. Is this legal? **C.S. (via e-mail).**

A: A covenant not-to-compete is a fairly common provision in a community association manager's employment contract with a management company.

Non-compete clauses are limited by statute. Specifically, Section 542.335 of the Florida Statutes governs restraints on trade. A contract that restricts or prohibits competition will only be held valid if the restriction is limited to a reasonable period of time, a reasonable geographic area and a reasonable line of business. The statute creates a presumption that six months or less is valid and two years or more is invalid.

While a complete analysis of the law is too involved and too fact dependent to cover in this column, in order to enforce the non-compete agreement, the management company would need to show that the restriction serves a "legitimate business interest." These interests include preservation of substantial relationships with existing or potential clients, and client good will.

You also need to look closely at your management contract with the management company. It is not unusual for such contracts to include a provision where the association agrees to not hire a manager supplied by the company for a set period of time.

There are two potential practical solutions to this problem, assuming your attorney concludes that the non-compete clause is valid. First, if you tell the management company you are not happy and that the association is going to terminate them in any event, and if the manager is planning to quit the management company no matter what, the management company may be less concerned about the manager since all the damage will be done and they may release any claim under the non-compete covenant. Alternatively, perhaps the manager or the association could negotiate some agreed payment to buy out the non-compete clause.

Q: The president of our condominium association refuses to follow Chapter 718, our declaration, or our bylaws, and has stated he does not have time to waste reading these documents. We have asked the board and the management company to just follow the law so that the association can be properly managed, but they continually say that everything is subject to interpretation. I do not believe a recall is the answer because it will only divide the association more. Do you have any suggestions? **B.K. (via e-mail)**

A: Pursuant to Section 718.112(2)(a)(3) of the Florida Condominium Act, every person who submits their name to run for the board must sign a certification form which attests to the fact that he or she "has read and understands to the best of his or her ability, the governing documents of the association and the provisions of this Chapter and any applicable rules." There is simply no excuse for any member of an association board to state they do not have the time to read and attempt to understand the documents which control the governance of the association. If that is the case, then they do not have the time to serve on the board and should resign.

However, if they refuse to resign, it is likely that recall is your most practical remedy. As you have suggested, recall actions are almost always divisive, often costly, and can lead to litigation. Presumably, your association will soon be coming into its annual meet cycle. The best solution you have is political. Put together a group of candidates who will agree to make a reasonable effort to follow the rules that you all agreed to live by when you bought into the condominium, and have them run for the board.

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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Pointe Royale, Shadow Wood Associations Honored

Fort Myers The News-Press, October 18, 2009

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It seems that everything written about real estate in Southwest Florida these days is bad news. I am pleased to share some good news, spotlighting the accomplishments of a couple of local community associations.

Last year, the Florida Community Association Journal announced its first annual "Communities of Excellence" competition, which was co-sponsored by the law firm of Becker & Poliakoff. Community associations from around the State were offered the opportunity to submit applications in a variety of categories.

It was recently announced that the Journal's highest award, 2009 Community of the Year, went to Pointe Royale Condominium Association of Fort Myers.

The independent panel of judges seemed particularly impressed with the community's tradition of civic involvement. According to long-time manager Bobbie Golfes, at least seventy-five percent of the residents of Pointe Royale regularly volunteer their time to local charities such as Hope Hospice and Lee Memorial Hospital. President John Stefani said: "We are fortunate to have a very caring group of owners who are active in our local community."

When asked Pointe Royale's secret to success, Stefani stated: "We are very stable financially, and we think that helps attract a great group of people." Manager Bobbie Golfes noted that the community's membership roster reads like a local "Who's Who", including well-known educators, public servants, and businesspeople.

Nestled in downtown Fort Myers on the Caloosahatchee River, Pointe Royale consists of three high-rise buildings, accounting for 141 residential units. Although one of the original downtown condominium complexes, Golfes points out that the association has spent somewhere in the neighborhood of four million dollars over the past several years in renovations and updating the property.

A second local community taking home an award was the Shadow Wood Community Association of Bonita Springs. Shadow Wood took honors in the Disaster Preparedness category.

Shadow Wood is the master association for the Shadow Wood Community, located in the area of Bonita Springs generally known as The Brooks. According to General Manager Sheryl Hilburn, the association administers 1,481 homes. Hilburn oversees a staff of some 40 employees. The association is managed by a five-member board.

Since most associations have some kind of disaster plan, Hilburn was asked what set Shadow Wood apart from other competitors for the top prize. Hilburn said: "This area has been hard-hit in the past, storms and other disasters are on the forefront of many of our residents' minds." She noted that the association obtains an annual engineering audit to assess actual physical plant conditions and stages "mock drills" at least once a year. Shadow Wood has even gone as far as to develop a "hazardous material spill drill", which includes responses from local fire safety and EMS officials.

Hilburn says "we are lucky to have an experienced staff and many talented residents willing to help out."

Kudos to Pointe Royale Condominium Association and Shadow Wood Preserve Community Association for jobs well done.

Q: We think that any member of our HOA who wants to be on the ballot should have their name included on the ballot. Has the Florida statute changed to make this happen? We have also been told that the nominating committee has lost all power and can only "suggest" candidates. What is the law on this? **J.R. (via e-mail)**

A: This is one area where the law applicable to homeowners' associations and condominium associations is very different.

For condominiums, the governing statute prohibits nominating committees, and provides that any eligible person who nominates themself by a set deadline is entitled to have their name placed on the ballot. Further, condominium association ballots must list the names of all candidates alphabetically, and cannot even designate which candidates are incumbents.

Conversely, the Florida Homeowners Association Act is virtually silent on board elections. Chapter 720.306(9) of the Homeowners Association Act simply states that the election of directors must be conducted in accordance with the procedures set forth in the governing documents. Accordingly, if a nominating committee is authorized by the governing documents, it may function in the traditional sense. Proxies may also generally be used in HOA elections, but are illegal in condominium elections. It should also be noted that in the HOA context, any member may nominate himself or herself as a candidate for the board at the meeting where the election is to be held.

This is one area where the two laws should be the same, and the condominium law is definitely the better model as it promotes both fairness and secrecy.

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It's Important to Handle Condo Budget Decision Well

Fort Myers The News-Press, October 25, 2009

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Q: I have owned my condominium unit for almost 5 years now. It is time for the board to prepare a new budget for next year, and based upon the budget adoption process in prior years, I am concerned that my condominium is not doing this right. The first year I was here, the board did not even adopt a budget until February, because of Hurricane Wilma I assume. Then, when they did adopt the budget, it was well in excess of 115% of the prior year's budget, which I have been told is prohibited. The past 2 years, the budget has included full funding for reserve accounts, which keeps the total assessment too high, in my opinion. Finally, I have gone to the last 2 board meetings where the budget was adopted, and it was clear to me that the budget had already been decided upon and there was no opportunity for members to discuss changing the proposed budget. Can you address these issues and clarify the budget adoption process? **M.M. (via e-mail)**

A: You are correct that budget season is upon us for associations that have a January 1 – December 31 (calendar) fiscal year, which is the vast majority of associations in my experience. Ideally, the budget for fiscal year 2010 will be adopted in November or early December in order to give members adequate notice of their new assessment obligation. Your board should check your association's governing documents carefully as there are sometimes additional budget adoption and notice of assessment requirements that the board must be sure to meet.

Your first question concerns the effect of the board not adopting a budget before the beginning of the next fiscal year. If that happens, it is my opinion that the association is still permitted to collect assessments in the same amount as the prior year. However, there has never been a case precedent to support that position, nor is the issue addressed in the condominium statute. Obviously, it is not wise to fail to timely adopt a budget. The Florida Condominium Act requires that an annual budget be prepared, and if the failure to timely adopt a new budget results in a short fall of funds that is detrimental to the association, the directors could be exposed to some criticism and there may even be some potential liability for the association.

The next issue you raise concerns the amount of the increase in the annual budget from year to year. It seems to be a common misconception that the board of directors is limited by law as to the amount it can increase the annual budget from year to year. In fact, in the absence of a contrary provision in the governing documents of the association, the board has unlimited authority to increase the budget so long as the budgeted items constitute proper common expenses of the association. However, the statute does provide an opportunity for members to propose and adopt a

substitute budget in the event the board-made budget exceeds 115% of the prior year's assessments, not including assessments for reserves. The statutory procedure for the unit owners to challenge the budget and propose their own budget requires that 10% of the members petition to propose a substitute budget, and then a majority of all voting interests must approve the substitute budget, unless the bylaws require adoption by a greater percentage of the voting interests.

It is the obligation of the petitioning members to prepare the proposed, substitute budget. In my experience, most significant increases in budgets from year to year are justified by necessary expenses, insurance premium increases being the most common culprit. Any substitute budget must be reasonable in light of anticipated expenses and cannot leave the association with a cash flow problem. If a substitute budget is adopted which does not allow the association to meet its obligations, a special assessment will likely be necessary to make up the short fall.

Next, your comments suggest that the board may have in the past deliberated and decided upon a budget prior to the formal budget meeting. It is important to understand that while the statute requires that a budget be adopted at a board meeting which is preceded by 14 days notice sent to all members of the association, together with a copy of the proposed budget, the 14 day notice requirement only applies to the meeting at which the board actually adopts the budget. It is perfectly legal for a board or committee to have meetings to prepare the budget and discuss the proposed budget in advance of the formal budget adoption meeting. Those preparatory meetings can be held on 48 hours posted notice, just like any other board or budget committee meeting, and are open to unit owner observation and comment.

As for the formal budget adoption meeting itself, I do agree the board should attend that meeting with open ears and open minds because the members of the association do have a right to speak at the budget meeting and to appeal to the board with their points about the proposed budget. Importantly, because the budget that is sent to the members 14 days in advance of the meeting is a "proposed" budget, it is permissible for the board to alter that proposed budget and adopt an actual budget at the meeting, even if changes are made. In other words, the formal budget adoption meeting is not intended to be, and should not be, a "rubber stamp" of a decision already made.

Finally you make reference to the board's decision to include fully funded reserves in the proposed budget. As you may know, the Florida Condominium Act requires a board to prepare a budget that includes a schedule of fully funded reserves. Fully funded reserves can only be reduced or waived by a majority vote of the unit owners. The decision to propose a unit owner vote on the reduction or waiver of reserves, has historically been left exclusively to the board of directors. However, if the board decides not to put a waiver or reduction up to a vote, the members could force the issue of voting on a reduction of reserve funding by filing a petition with the board which contains a sufficient amount of signatures to call a unit owner meeting pursuant to your bylaws.

It is important to note that failure to fund reserve accounts fully each year will almost certainly result in the need for special assessments or additional funding in future years. The decision of whether or not to fully fund reserves is, in large part, a philosophical decision for each association. However, at least in my view, it is clearly not wise to make that decision based solely upon the desire for lower annual assessments.

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Question Arises When Board Member Resigns Her Seat

Fort Myers The News-Press, November 1, 2009

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Q: Our association's annual meeting is coming up in December. We have a seven member board, who serve two-year terms. Our board members' terms are alternated so that four are elected one year, three the following year, and so on. Three seats are up this year. One of our directors, who has a year and two months left on her term, just sold her home and resigned from the board. Since that seat was not open for election at the upcoming annual meeting, does the board fill that vacancy. If so, for how long. If not, how is the election for this seat handled at the annual meeting? **A.L. (via e-mail)**

A: It depends.

If your association is governed by the condominium law, it is first necessary to make sure that you have, since enactment of 2008 changes to the statute, "ratified" keeping two year terms for your board members. The ratification vote needed to be approved by a majority of the entire voting interests in the association (there is usually one voting interest per unit). If such a vote did not take place, and your bylaws pre-date the 2008 change to the statute, then your directors should only be elected for one year terms.

Assuming that a condominium association has properly provided for two-year terms, Section 718.112(2)(8) of the Florida Condominium Act states: "Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors … Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled." The law does, however, permit the seat to be held open for election rather than appointment.

Therefore, unless the condominium association's bylaws provide otherwise, this vacancy would be filled by the board for the remainder of the unexpired term of the resigning board member (until December 2010). However, the board could decide to hold the seat open for election this year, which also would be legally permissible, but not the usual way of dealing with a situation like this.

If your association is governed by the Florida Homeowners Association Act, Chapter 720 of the Florida Statutes, or the Florida Cooperative Act, Chapter 719 of the Florida Statutes, the answer is a bit trickier. Neither the Homeowners Association Act nor the Cooperative Act directly address how

board vacancies are filled. Therefore, in the HOA and cooperative context, it has always been necessary to look to the provisions of Florida's Not-For-Profit Corporation law, Chapter 617 of the Florida Statutes.

For many years, Section 617.0809 of that law stated that board vacancies were filled by the remainder of the board for the unexpired term, easy enough to figure out. However, this law was changed effective October 1, 2009. Section 617.0809(3) now provides: "The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected."

The new law apparently applies to HOAs and cooperatives regardless of any provision in the bylaws to the contrary. I am not sure why the Legislature found it necessary or appropriate to make this change, but it did, and it is the law today for cooperative and homeowners' associations.

If your association is governed by Chapter 719 or Chapter 720, it would appear that the board can only fill the vacancy created by the director's resignation until the next annual meeting. Unfortunately, the law is not clear how that seat is to be filled at the next election. In my opinion, the most logical interpretation of the new law is that this seat would be elected at your annual meeting for a one-year term only, while the remaining three seats will be elected for two year terms.

This leads to the obvious conundrum of how to run such an election. Again, there is no guidance in the new law. There are probably a number of procedures that could be employed, and which would be best guided by your association's attorney. It would seem that one option would be to have two separate balloting procedures, one for the two year seats, and one for the one year seat. This leads to several obvious questions, including whether someone could run for both a one year seat and a two year seat.

Another option, although not supported by any language in the statute, would be to give the three highest vote recipients the two year seats and the fourth place finisher the one year seat. This, of course, assumes that there are more candidates than there are open seats, which is often not the case.

Unfortunately, the lack of guidance in the law makes a cut and dry answer difficult, but like all challenges, solutions certainly exist.

Q: Our condominium association foreclosed on a unit. The unit had a large mortgage on it, but the mortgage holder did not attempt to stop the foreclosure or bid on it. The association has a purchaser lined up. Does the bank still have any rights? **L.H. (via e-mail)**

A: As a general matter, the association's assessment lien is almost always inferior to a purchase money first mortgage. Accordingly, if your association has foreclosed the delinquent unit owner, the mortgage still exists. Some associations rent units which they acquire through foreclosure, waiting for the bank to decide what to do. However, the foreclosure of the assessment lien does not "wipe out" the first mortgage, and it is still a valid lien on the property, absent unusual circumstances.

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Who Must Cover Repairs After Water Heater Ruptures?

Association's insurer is likely on the hook

Fort Myers The News-Press, November 8, 2009

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Q: I live in a 16 year old condominium building which has three levels of condominium units stacked upon each other. Over the years, we have had several incidents where water leaks from the second or third floor have caused damage to not only the units where the leaks originated, but to units below as well. Every time this happens the association consistently requires each unit owner to repair their own damage. There was a recent incident where a hot water heater ruptured on the third floor. The second floor unit was heavily damaged, but now two weeks later, the mess has still not been cleaned up. The owners are seasonal residents and are not at the unit. The association has so far refused to make any repairs because, as I understand it, the board believes this is the unit owner's responsibility, or even the third floor unit owner's responsibility for failing to maintain the water heater. Who is responsible to clean up the second floor unit? **M.S. (via e-mail)**

A: First, whenever you have damage to condominium property, it is necessary to determine whether the cause of the damage was a "casualty" event or a maintenance problem. A casualty event will implicate the insurance provisions in the Florida Condominium Act, whereas a maintenance failure is generally addressed by specific provisions in the declaration of condominium. Casualty events are generally defined as sudden, unexpected events that cause damage. In my experience, a burst water heater is usually classified as a casualty event and is typically covered by insurance. An example of a maintenance failure would be a slow drip from a water supply line that develops and progresses over time.

Effective July 1, 2008, the Florida Condominium Act was amended to substantially revise the insurance and casualty repair obligations of the association. The statute provides that the association must insure all portions of the condominium property as originally installed or replacements of like kind and quality, as well as all alterations or additions made to the common elements or to association property by the association. The unit owners are required to insure all of their personal property as well as floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and counter tops, and window treatments, including curtains, drapes, blinds, hardware and similar window treatment components or replacements of any of those items. This has been the basic law for many years.

The important revisions to the statute now require that if the insurance proceeds received under the association's policy are inadequate to pay for the cost of repair of any casualty damage to association-insured property, due either to the deductible or the fact that the damage exceeds the insurance coverage, then the association must pay the cost of repair of all items it insures, as a common expense. There is an exception to this rule if the association has affirmatively voted to "opt out" of the statutory procedure.

Therefore, assuming that the damage caused by the burst water heater includes items that the association is obligated to insure, then the association should submit a claim to its insurance carrier. Any shortfall in insurance proceeds to repair those items of property that the association insures should be paid for by the association as a common expense, unless the association has opted out of the new law by majority vote, in which case the declaration of condominium controls.

This new statute differs from the old law, which might explain the way the association previously handled damage repairs. In my experience, water damage events almost always affect common elements, and because the association has an obligation to maintain common elements and to protect other units from damage caused by water intrusion or resulting mold, the association should promptly act to mitigate against further damage. Both the second and third floor unit owners should notify their HO-6 (interior unit dwelling policy) insurance carriers of the incident as well.

The insurance provisions of the Condominium Act do acknowledge that a negligent party may be held liable for damage caused by his negligence. However, given the urgency to clean up water damage and prevent further damage including mold, the negligence question should be put off until after mitigation of further damage takes place.

Q: Our condominium association has been fortunate to have the same president for the past 12 years, and he has done a great job. Unfortunately for us, he has decided not to run for re-election this year. Because of his lengthy and truly remarkable service to the association, I proposed that the association purchase a gift for him to honor his service. However, one of the other directors, who actually supports giving him a gift as well, raised the issue whether or not the association could spend money on a gift for him since it would be a form of compensation. Could you tell me if that would be legal? **W.H. (via e-mail)**

A: Unfortunately, barring some specific provision in your governing documents that would permit the board to pay compensation to a director or to give a gift, the association is not permitted to give a director a gift that is paid for with association funds. The basic reason for this is that an association is only permitted to spend money on valid, common expenses. In my experience, the definition of common expenses established by a declaration of condominium rarely, if ever, includes expenditures for gifts to directors. As an alternative, I would suggest that you solicit contributions from condominium owners separate from the association finances, and purchase a gift using those voluntary contributions. I would hope that a sufficient number of other owners would share the board's view of the outgoing president's past service.

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Should Your Condo Association Directors Be Paid?

Bylaws spell out any compensation

Fort Myers The News-Press, November 15, 2009

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Q: Our condominium association has a difficult time finding volunteers who are willing to serve on our board. It has been suggested that we should pay our directors. After all, doing the job properly does take up a substantial amount of time, especially for the president. What is your opinion on this? Is this legal? **J.D. (via e-mail)**

A: From the non-legal perspective, I have conflicting feelings. Directors of for-profit companies routinely receive some stipend. On the other hand, board members of civic and charitable organizations are usually not compensated. The condominium association, while typically a not-for-profit corporation, does have many attributes of a for-profit company.

Using another analogy, town council members, county commissioners, and similar decision-makers in the governmental setting are also paid. Again, service on an association board is very similar to membership on a local government board.

Having said all of that, I believe that if the prospect of compensation becomes a motivating factor in seeking election to association boards, there will be more negative than positive effects. For one thing, association members often expect a lot from their board members, even when they are volunteers. Paid board members might be seen as live-in employees, there to serve their employer's every need, no matter the time of day or night.

Also, I would think that the standards of conduct, and the attendant personal liability, would be viewed more strictly when compensation is involved. Further, having a paid board would place the board itself in the position of both employer and employee. Who would monitor whether the board is doing a good job and earning their pay?

From a purely legal standpoint, you may be aware that the Florida Condominium Act provides that, unless otherwise provided in the bylaws, the officers shall serve without compensation. Most bylaws specifically prohibit directors from being compensated, although I have seen some documents that permit directors to be compensated if a certain percentage of the association members approve the payment of compensation.

It is important to distinguish between compensation and expense reimbursement. It is absolutely appropriate for officers and directors to be reimbursed for out-of-pocket expenses incurred in service to the association. Most well-written governing documents of an association will specifically list administrative expenses as a proper, common expense. A good example would be if a non-resident director is required to travel to Florida to attend a court hearing for the association, then

reasonable travel costs would certainly be reimbursable. Similarly, reasonable phone bills, postage, and the cost of office supplies that are purchased by directors for the sole benefit of the association are appropriate for reimbursement.

The difficult question with expense reimbursement is often whether the amount of the particular expense is reasonable. To address this issue of reasonableness, it is advisable that the association board pass a resolution which sets out parameters for what expenses are reasonable and will be reimbursed and how, precisely, directors should go about incurring expenses and seeking reimbursement from the association. It should be noted that the Florida Administrative Code governing condominium association financial affairs requires that all expense documentation be retained in the official records of the association. Therefore, at a minimum, any reimbursed expense should be clearly and completely documented.

Q: I am the secretary of my condominium association and we are having an issue with a unit owner. We have a management company that takes care of most all of the operations of our condominium. All of the board members are either seasonal residents or regularly travel, so we rely on the manager extensively. The management company keeps all of our books and records at their office. The unit owner made a request to review the records, and the manager made the records available for inspection at his office. However, the owner believes that some records were not produced and now insists that I produce the records personally by mailing him copies. As I stated, I don't have the records and I am not in a position to second guess the manager about what records exist and what records were produced. My question is whether I can safely ignore the continued demands of this unit owner since the manager has already provided the records for his review? **D.I. (via e-mail)**

A: Your question involves several issues under the Florida Condominium Act. First, the Act contains provisions that give unit owners broad authority to inspect records. Other provisions of the Act give owners the right to ask substantive questions in a certified mail letter and to receive substantive responses from the association. The statute establishes some significant consequences if the association does not respond to either of these requests in a timely manner. So it is never advisable to ignore written correspondence from a unit owner. Even if you suspect that a letter repeats prior inspection requests that have already been granted, or prior questions that have already been answered, you need to carefully review and consider every communication as it may contain something new.

Secondly, your reasons for having a manager are valid and typical. But it is extremely important that the board remembers that the board is ultimately, solely responsible to meet all of the requirements of the statute and the governing documents of the association. The association manager is the agent of the board. The manager's actions or omissions are attributed to the board just as if the board members had taken action personally. Therefore, you and other members of the board should investigate the specific claim of this owner concerning the records and make sure that the association, through the manager, has met all of its obligations.

Finally, the Act requires that the records be available for inspection by members within the county where the condominium is located, or if outside the county, within 45 miles of the condominium. An owner is not entitled to have records copied and sent to him. When an association receives a written request to have records copied and sent, the better practice is not to ignore the request, but to write back to the unit owner and advise that he is allowed to inspect the records, and to direct him how to make arrangements to do so.

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Reader Wants To Find Laws On Condo Associations

Members Not Mailed Minutes of Meetings

Fort Myers The News-Press, November 22, 2009

By Joe Adams
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Q: Can you point me to the sections of Florida Statutes that state how to run an association? I live in a small ten-unit condominium and our members never receive minutes of Board meetings. Also, we have one director who is not a unit owner. Is this permissible? **A.D. (via e-mail)**

A: Chapter 718 of the Florida Statutes, also known as the Condominium Act, is where you will find most of the legal requirements to run a condominium association. All of the Florida Statutes are available on-line, and can be found through the use of most search engines. The Condominium Act is separated into six separate parts. Assuming your association has already transitioned from developer control, you will want to focus your attention on Part I of the Act, which sets forth the fundamental authority of condominium associations and provides some detailed rules on day-to-day operations.

You will also want to review Chapter 61-B of the Florida Administrative Code and your condominium documents, as both of those sources will provide additional requirements. The provisions of the Florida Administrative Code applicable to condominiums can be also be found on-line. One of the sites where these rules are posted is the website of Florida's Department of Business and Professional Regulation, through its Division of Florida Condominiums, Timeshares, and Mobile Homes.

There are also a number of organizations which provide printed materials and seminars regarding condominium operations. These include industry groups, law firms, accounting firms, and management companies. The Division's website also has a number of resources and links that are helpful in understanding condominium operations.

With respect to receiving minutes of board meetings, I assume your board is keeping minutes of its meetings and just not sending them to the owners. As you may be aware, minutes of all meetings of an association (whether board meetings or unit owner meetings) are required to be kept in written form. Minutes must be kept as part of the official records of an association for at least 7 years, although I typically recommend that minutes be maintained perpetually. Minutes must be made available for inspection by unit owners upon written request.

There is no requirement under the Condominium Act for the board to send minutes to the unit owners. Some associations routinely mail out minutes, some do not. The reasons most often cited for not mailing out minutes are cost and lack of volunteers to do the work. Although probably

not likely to occur in a ten-unit condominium, many associations also have constructed their own websites, where minutes are posted.

With respect to non-unit owners serving on the Board, there is no requirement in Florida law that a condominium association director be a unit owner. However, the association's articles of incorporation or bylaws may provide otherwise. Accordingly, unless your articles of incorporation or bylaws expressly require a director to be a unit owner, a non-unit owner may sit on your board so long as he or she is properly elected or appointed to serve.

Q: I understand that the Florida Condominium Act now requires owners to provide the condominium association with proof of insurance on their units. Can you please let me know where it states that the association must be named as an additional insured on the unit owners' policies? **C.S. (via e-mail)**

A: The insurance section of the Act was amended effective July 1, 2008 in an attempt to clarify insurance obligations and to provide a clear and consistent approach to condominium insurance. Unfortunately, several provisions in the new statute create substantial ambiguity.

First, Section 718.111(11)(g)2 of the law provides that the association "shall require each owner to provide evidence of a currently effective policy of hazard and liability insurance upon request, but not more than once per year." In my opinion, this sentence establishes the requirement that condominium unit owners must have insurance covering their units. But the statute is confusing because it does not require that the association do anything other than request for proof of insurance. I have also heard it argued that the "upon request" qualifier means that an association can choose not to ask for proof of insurance by simply not "requesting" the information. I do not believe that was the intent of the Legislature, but the language used in the law certainly leaves something to be desired.

The statute also allows the association to "force place" insurance on any unit that does not provide proof of insurance, but the association is not required to do so. The consequences for the owner who does not have insurance, or for the association that does not obtain proof of insurance, are not set forth in the statute.

The requirement that unit owners have insurance is also confirmed in Section 718.111(11)(g)4 of the 2008 law, which requires unit owners to be responsible for the cost of reconstruction of any portions of the condominium property for which "the unit owner is required to carry casualty insurance." It is in this same subsection 4 where the provision which you inquired about appears, and provides that the association must be an "additional named insured" and "loss payee" on all casualty insurance policies issued to unit owners.

These issues, as well as several other ambiguities in the 2008 changes to the insurance statute, were clarified by Senate Bill 714 in 2009. However, that Bill was vetoed by Governor Crist due to his concern with other, unrelated language that would have extended a fire sprinkler retrofitting requirement deadline applicable to certain condominiums from 2014 to 2025. Hopefully these issues will be addressed in the upcoming legislative session, as they continue to cause uncertainty for condominium associations in Florida.

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Meeting Notice Requirements May Differ

Fort Myers The News-Press, November 29, 2009

By Joe Adams
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Q: Our HOA recently held a budget workshop to discuss a draft budget that will be considered and approved at our next board meeting. There is some debate whether we are required to mail the proposed budget out to our membership 14 days in advance of the board meeting where it will be considered. **R.W. (via e-mail)**

A: Unlike the Condominium Act, the Florida Homeowners Association Act does not have an explicit requirement that notice of the board meeting at which the budget will be considered be sent along with a copy of the proposed budget to the membership 14 days prior to such meeting.

Rather, Section 720.303(2)(c)2. of the statute provides that 14 days notice must be mailed and posted in advance of a meeting at which a special assessment will be considered. However, your question deals with the board meeting at which the proposed budget will be adopted, not a special assessment. The board's budget meeting need only be noticed as a normal board meeting, which requires posted notice 48 hours in advance of the meeting or if notice is not posted, notice must be mailed or delivered to each member at least 7 days in advance of the meeting. The posted notice would need to disclose that a regular assessment (i.e., the annual assessment resulting from adoption of the budget) will be considered at the meeting.

I would reiterate that this is different than the obligations imposed by the Condominium Act, which does require 14 days mailed and posted notice of the board's meeting. A copy of the proposed annual budget must also be provided with the meeting notice in the condominium context.

Also, your own bylaws can impose additional notice requirements.

Q: Our homeowner's association has an Architectural Review Committee consisting of 5 members. Our HOA board of directors has 5 directors, 2 of whom are also permanent members of the ARC. If all ARC members attend a duly noticed ARC meeting, and one of the three remaining board members of the board also attends as an observer, does this constitute a quorum of the board of directors? **P.B. (via e-mail)**

A: The Florida Homeowners Association Act defines a board meeting as "whenever a quorum of the board gathers to conduct association business." Accordingly, whenever such a board meeting occurs, the meeting must be properly noticed and be open to attendance by all members, with the limited exception that closed meetings are permitted in the HOA context between the board and the association's attorney to discuss proposed or pending litigation or personnel matters.

Further, the law states that meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community, must be noticed and open to the membership as well.

Given that the third member of the board of directors is attending the Architectural Review Committee meeting to simply observe the proceedings, as is his or her right as an owner in the community, it would be my opinion this is not a meeting of the board of directors. However, notice of Architectural Review Committee meetings must also be posted, regardless of who else attends, and open to attendance by owners, regardless of how many board members may or may not be in attendance.

Q: I am a community association manager and handle both condominium and homeowner associations. Recently, one of my homeowner associations adopted an amendment that referenced the wrong section of the bylaws, but the language on the amendment was accurate. I know the Condominium Act addresses nonmaterial errors involving amendments, but what about the Homeowners' Association Act? What constitutes a material error and are numbering mistakes material? **B.M. (via e-mail)**

A: Your question illustrates yet another distinction between the Florida Condominium Act and the Florida Homeowners' Association Act. The Condominium Act provides that nonmaterial errors or omissions in the amendment process will not invalidate an otherwise properly promulgated amendment. Unfortunately, there is no similar provision in the Homeowners' Association Act.

Under general principles of contract law, a document can be "reformed" (corrected) to reflect the true intent of the parties. Thus, I believe that the board of an HOA can reasonably argue that it likewise has the authority to correct nonmaterial errors or omissions in the amendment process, including correction of typographical or numbering errors.

Q: We would like to have one of our homeowners' association board members, who is an investor owner, attend board meetings by telephone. Is this legal in Florida? **K. K. (via e-mail)**

A: Section 617.0820 of the Florida Not-For-Profit Corporation Act specifically provides that, unless the articles of incorporation or bylaws provide otherwise, directors may participate in regular or special meetings of the board through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting.

Also, association members who physically attend the meeting must be able to hear what is said by all directors. Therefore, all board meetings need to have a physical location for association members to attend in order to hear the discussion through the use of a speakerphone or similar apparatus.

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It May Not Be Legal To Not Invite Board Member

Spot for Notices Must Be Designated

Fort Myers The News-Press, December 6, 2009

By Joe Adams
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Q: Would you please give me your opinion on the following issues in the condominium setting. First, is it legal to deliberately not invite a board member to participate in a board meeting unless the board member is needed to attain a quorum? Secondly, what is your opinion about posting board meeting notices and minutes of such meetings only in the lobby of the building when half of the owners are seasonal residents. The only time these "snowbirds" know what is going on is when they are here in residence or once a year when they are notified of the annual meeting. **J.C. (via e-mail)**

A: Regarding your first question, deliberately not inviting a board member to participate in a board meeting is, in my opinion, not legal. There is no express provision governing this issue under the Florida Condominium Act (Chapter 718) nor under the Florida Not-for-Profit Act (Chapter 617) except a provision in Section 617.0822(2) of the statute which requires two days' notice for special board meetings, unless the articles of incorporation or bylaws provide for a longer or shorter period.

However, every set of association bylaws I have ever read require the board to send notice to all directors prior to holding a board meeting. Every elected director has a fiduciary duty to actively participate in the affairs of the association, and use their best judgment in advancing the interests of the association. Obviously, this requires the ability to attend board meetings and listen to information upon which such decisions can be made. If a group of directors "cut out" a particular director for political purposes, I would go so far as to say as those directors could face breach of fiduciary duty claims.

One issue that frequently arises is whether an association must allow absentee directors to participate in board meetings by telephone. While the statutes clearly make it permissible for board members to participate in board meetings by telephone, there is nothing in the law which says that an association must allow their directors to call into board meetings. In my view, directors who cannot be physically present when a board meeting is being held should be given the right to call into the meeting, at the association's expense.

In response to your second question, the Florida Condominium Act requires that the board adopt a rule designating a specific location on the condominium property where notices of board meetings must be posted.

Many associations are unaware of or forget about the requirement to adopt a rule designating a specific location on the condominium property

where notices are posted. If the lobby of your building is a conspicuous location on the condominium property, which I assume it is, it is entirely appropriate for the board to notify unit owners of scheduled board meetings through posting notices in the lobby.

It is not legally required, nor customary, to personally notify every unit owner in a condominium when a board meeting is going to be held other than through the posting method. You should be aware that notice of certain board meetings must be mailed to every unit owner, fourteen days in advance, including notice of the board's budget meeting, notice of board meetings where special assessments will be considered, and notice of board meetings where changes to rules and regulations regarding the use of units will be considered.

As to posting meeting minutes, there is no requirement to post minutes on the condominium property and again, it is not customary to do so. Some associations mail out the minutes or post them on a web-site, but this is not legally required either.

As you may already know, the association is required to keep a book of all minutes of board and membership meetings, which minutes must be retained for a period of not less than seven years. Any owner wishing to personally see the minutes can then send a written request to do so.

Q: Our timeshare condominium uses proxies to elect directors. However, I was of the impression that proxies were prohibited in the election of directors. Can you clarify? Also, what is the difference between a general proxy and a limited proxy? **L.P. (via e-mail)**

A: Timeshare condominiums are governed by both the Florida Condominium Act (Chapter 718) and the Florida Vacation Plan and Timesharing Act (Chapter 721).

Although the Condominium Act requires directors to be elected by secret written ballot or voting machine only, timeshare condominiums are specifically exempt from this requirement, as well as several other election requirements under the Condominium Act. Further, there are no established election procedures codified under the Timeshare Act that a timeshare association must follow. Accordingly, the issue of elections is generally guided by the association's bylaws, which are usually written to permit the use of proxies in elections. Therefore, unless specifically prohibited by the timeshare documents, timeshare associations may use proxies to elect their directors.

As to your second question, the difference between a "general proxy" and a "limited proxy" is the amount of authority given to the proxyholder. A general proxy permits proxyholders to vote however they see fit on any matter presented at a membership meeting. Conversely, a limited proxy asks the unit owners (or unit week owners in the timeshare context) to specify their vote on a particular matter, and the proxyholder must thereafter vote in that manner at the membership meeting.

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Emergency Gives Association Right of Condo Access

Water Leak Causing Damage Downstairs

Fort Myers The News-Press, December 13, 2009

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Q: Our condominium unit has been damaged by a water leak from the upstairs unit. The association has investigated the cause of the water leak and found that the seal and caulking around the sliding glass door on the upstairs balcony is defective and must be repaired to stop this leak. The association's attorney determined that the repair is the responsibility of the association. He contacted the upstairs unit owner, who does not live in the unit but rents it to short-term tenants. The upstairs unit owner refused to make arrangements to allow the association's contractor to fix the balcony because there is a steady stream of tenants using the unit over the next several weeks and months. Obviously, as the unit owner who is being damaged by this leak, we cannot wait until it is convenient for the upstairs unit owner to have this repaired. The manager told us that the association would just go in and make the repair without the unit owner's approval, but that the owner has not provided a key. Do you have any suggestions for us to resolve this problem before it causes anymore damage? **J.C. (via e-mail)**

A: The situation you describe reminds me of the principles discussed in a landmark decision of the Supreme Court of Florida in 2002. In the Woodside v. Jahren case, the Supreme Court cited prior decisions and noted that condominium living is unique and involves a greater degree of restrictions upon the rights of the individual unit owners when compared to other types of property ownership. The court noted that reasonable restrictions concerning use, occupancy and the transfer of condominium units is necessary for the operation and protection of the owners in the condominium concept. Clearly, in your situation, the upstairs unit owner needs to better understand this general principle of condominium living.

As you may know, the Florida Condominium Act expressly provides that the association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair or replacement of any common elements or any portion of the unit that is to be maintained by the association, or as necessary to prevent damage to the common elements or to a unit or units. You explained that the source of this leak has been determined to be an association repair responsibility, and therefore, the statute would apply to that situation. In my opinion, it does not matter that the upstairs unit owner has tenants or guests or any other, similar, situation that makes it inconvenient for the association to access the unit and the balcony.

As a practical matter, the association should write to the owner and demand access to the unit to repair this leak. If the unit owner does not reply

and allow access, the association could simply knock on the door and attempt to gain voluntary access from any tenant or occupant. Given the nature of this issue, including water damage, potential mold, and additional damage to the common elements and to your unit, it may be reasonable for the association to hire a locksmith to gain access to the unit, as this may very well qualify as an emergency that would justify accessing the unit even when the owner has refused to give permission. However, this type of entry should never be performed without consultation with the association's attorney, who may recommend seeking a court injunction, as an alternative, and depending on the exact facts of the case.

Because of difficulty in reaching absentee owners, and because of potential emergency situations, many associations have requirements in their governing documents that unit owners provide keys to the association. While any such requirement is better placed in the declaration of condominium, since declaration provisions are clothed with a presumption of validity, there is ample support in state arbitration decisions that a board-made rule requiring each unit owner to give a key to the association is reasonable and enforceable.

One important, related point is that an association that holds keys to all units, or that accesses any unit, must be sure to take reasonable steps to protect the property of the unit owner. The keys must be kept in a secure place with formal procedures and controls to make sure the keys are not misused. In addition, whenever an association accesses a unit, it is advisable that more than one person access the unit and, in certain cases, depending upon the work that is to be done in the unit, careful notes or pictures should be taken to document who entered the unit, what was done, and any notable conditions or findings within the unit. Obviously, if an association enters a unit, especially when the unit owner has instructed them not to enter, there is always a risk that the association might be accused of causing damage to the unit.

Q: I am a newly elected treasurer of a homeowners' association, charged with the responsibility of collecting payments for assessments. Recently, an owner, who is delinquent for his most recent regular assessment, as well as a recent special assessment, rendered one payment insufficient to cover both assessments. How should I apply the payment? **J.L. (via e-mail)**

A: Since your association is a homeowners' association, it is governed by Chapter 720 of the Florida Statutes, commonly (although not officially) know as the Florida Homeowners' Association Act. The Act provides that any payment received by an association shall be applied first to any interest accrued on the delinquent account, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the principal of the delinquent assessment. Please note that administrative late fees and interest must be specified in the governing documents for your association in order for the association to have the right to charge for same.

There is no guidance under the Act on how to apply payment as between two assessments, although the general practice is to apply payment toward the older assessment first. Therefore, in your situation, you should apply the payment first to any interest accrued, then to any authorized administrative late fee, and then to any costs and reasonable attorney's fees incurred in collection. Once those amounts are paid, you should apply payment to the delinquent assessment that came due first, with any remaining amounts being applied towards the principal or second assessment.

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Board May Think Need for Lights Outweighs Cost

Budget must include bad debt expense

Fort Myers The News-Press, December 20, 2009

By Joe Adams
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Q: I would like your opinion on the spending authority of my homeowners' association board. Like many associations, we have a number of owners who have not paid their assessments and are in foreclosure. This has clearly affected our budget because the board has increased assessments for next year. I went to the budget meeting and the reason for the increase was mainly due to concern about future, unpaid assessments. What I don't understand is that the board went ahead with its plan to invest several thousand dollars to replace holiday lighting and decorations for the two entrances to our community. The additional electric bill to our association for these holiday lights will be several hundred dollars. How can the board legally raise assessments against the owners when it is spending money on holiday decorations that are nice, but hardly necessary and not a smart use of money in these economic times? **E.S. (via e-mail)**

A: The legal analysis of your question focuses on whether or not spending association funds on holiday decorations is a proper common expense of the association. As you may know, a board of directors of a homeowners' association may only spend funds on expenses that are either expressly or impliedly established as common expenses by provisions in the governing documents of the association. Such provisions often vary, but always include authority for the association to maintain and administer the common areas that it owns. Some governing documents include very broad provisions that the board may spend funds on any expense related to the "health, safety and welfare" of its members, and such a provision is often interpreted very broadly.

In the end, spending association funds on holiday decorations and lighting is similar to a board's decision to perform landscape maintenance and common area upkeep. There are different degrees of maintenance and upkeep that are within the discretion of the board but still result in the board meeting its legal and fiduciary duties to the association. Apparently, your board of directors believes that the expense of these holiday decorations, which may well have been part of the estimated budget for the current year, are appropriate and reasonable, even in these economic times. Just as a board may decide that new garden mulch, well-trimmed trees and shrubs, and well-kept plants and flowers are an important part of their work as a board to maintain the common areas, they apparently have also decided that the members enjoyment of the holiday decorations, and perhaps the reputation of your neighborhood in the larger community, outweigh the cost of the holiday decorations and lighting.

As for the general issue of budgeting and increasing assessments to account for potential bad

debt due to unpaid assessments, that is a common and recommended strategy for many associations. As you may know, putting together a budget is an exercise in estimating and making reasoned decisions. It is rare that the estimated budget results in collecting the exact amount of funds needed to pay all expenses. But any known expense, including bad debt expense, must be included in any budget.

Q: I live in a condominium with about one hundred units. Five of the units have been foreclosed upon and were purchased at the foreclosure sale by a corporation. All five of the units are leased. Are representatives of the corporation qualified to run for the board of directors? Since the corporation owns five units, would it be possible for the corporation to nominate five candidates? **H.R. (via e-mail)**

A: The Florida Condominium Act provides that in an association with more than ten units, co-owners of a unit may not serve as members of the board of directors at the same time. Condominium associations are also subject to Chapter 617 of the Florida Statutes, Florida's Not For Profit Corporation Act. This law provides that directors must be natural persons who are 18 years of age or older but are not required to be members of the corporation unless the articles or bylaws so provide. Chapter 617 also provides that if eligibility for the board of a condominium is limited to members, the grantor or beneficiary of a trust that owns a unit is deemed to be a member and eligible for the board provided that the beneficiary occupies the unit.

Neither the condominium statute nor the not for profit corporation statute directly address the eligibility of representatives of artificial entities, except trusts, to serve on a condominium board of directors. Although the prohibition against "co-owners" of a unit serving at the same time indicates an intent that only one person can represent a particular unit on the board, this provision of the law does not specifically apply to artificial entities.

The answer to your questions will depend on the specific provisions in your bylaws. If the bylaws limit board eligibility to voting members, and require corporations to designate their voting member in a "voting certificate", then it is likely that the only representative from the corporation that would be eligible to serve would be the person named in the voting certificate. However, if board eligibility is not so limited in your bylaws, then there appears to be nothing to prohibit the corporation from nominating multiple candidates.

Q: I own a unit in a small condominium. Most of my neighbors are seasonal residents and do not participate in community affairs. We have failed to get a quorum at an annual meeting for several years. However, the existing board continues to serve. How can these board members continue to serve if we do not have a quorum at the annual meeting to hold an election? **D.E. (via e-mail)**

A: It is true that in order to convene and hold a meeting of the members, a quorum must be obtained. The Florida Condominium Act states that unless a lower number is provided in the bylaws, a quorum is a majority of the voting interests in the Association. However, despite the need to obtain a quorum to conduct business at a members meeting, there is no quorum requirement for director elections. Specifically, the Condominium Act states that only 20% of an association's voting interests need to cast a ballot in order to have a valid election of directors.

Therefore, your condominium association may not have a sufficient number of participants year-to-year for member meetings. However, it may have sufficient participants to hold an election of directors. Furthermore, even if 20% of the voting interests did not cast a ballot in an election, no election needs to be held if the number of vacancies to be filled on the board is equal to or exceeds the number of candidates running for election.

Finally, if no person is interested in running for the board when a vacancy occurs, then the director whose term expired is automatically reappointed to the board with no need for an election.

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Local CAI Chapter Hands Out Its Annual Awards

Also, does law allow the towing of boats?

Fort Myers The News-Press, December 27, 2009

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Each year, the South Gulf Coast Chapter of Community Associations Institute honors those who have stood out in the local community association scene. On December 5, 2009, the local CAI Chapter held its 28th Annual Meeting and Awards Night, and recognized the following people for their contributions:.

- Board Member of the Year: This year's award was presented to Mr. Frederick ("Fritz") Heiss of the Avalon Bay Condominium Association of Fort Myers in recognition of outstanding service to his board and community.

- Volunteer of the Year: This year's award was presented to Mr. Joe Gennaro of Southwest Property Management of Naples for his work on CAI's Education Committee.

- Partner of the Year: This year's award was presented to Sherwin Williams/Flex Bon Paint Companies.

- On-Site Manager of the Year: This year's award was presented to Ms. Joyce Gillespie of Herons Glen Homeowner Association of North Fort Myers for displaying a consistently high level of professionalism, diplomacy and work ethic.

- Portfolio Manager of the Year: This year's award was presented to Mr. Jay Vandall of Associa-Benson's Management Company of Fort Myers.

- Richard D. DeBoest, Senior Community Association of the Year (1,000 Units or More): This year's award was presented to Seven Lakes Association of Fort Myers.

- Richard D. DeBoest, Senior Community Association of the Year (500 - 999 Units): This year's award was presented to the Longshore Lake Foundation of Naples.

- Robert A. White Humanitarian of the Year: This year's award was presented to Riverwoods Plantation Condominium Association located in Estero.

Congratulations to all.

Q: I sit on the board of a condominium association. We have a few owners that park their boats in the community longer than permitted, which is 12 hours under the condominium

documents. Does the law permit towing of boats? **A.P. (via e-mail)**

A: The short answer to your question is yes, although you must proceed with caution when it comes to towing any type of vehicle. As I have previously referenced in this column, towing is a "self-help" remedy and such remedies are generally disfavored under the law. At a minimum, in order to tow, an association's condominium documents should contain towing authority and the association must strictly comply with the requirements of Section 715.07 of the Florida Statutes, Florida's "Towing Statute." While the Towing Statute specifically permits a condominium association to tow "unauthorized" vehicles, there is no appellate case law in Florida indicating whether this law only applies to trespassers, or permits towing as a remedy to enforce the provisions of the condominium documents. I believe most community association attorneys take the position that if towing is authorized as a remedy in the condominium documents, it is an appropriate remedy, as long as the Towing Statute is followed.

The Towing Statute applies to vehicles and vessels alike, and defines "vessel" as any watercraft, barge, and airboat used or capable of being used as a means of transportation on water. However, "vessel" does not include a seaplane or a "documented vessel."

The Towing Statute permits an owner or lessee of real property (or, in your case, the association), or their authorized representative, to remove any "unauthorized" vehicle or vessel from the property, by a person regularly engaged in the business of towing vehicles or vessels without liability, provided certain conditions are met. Such conditions generally include, among other things, posting notice of the association's intent to tow away unauthorized vehicles, at the vehicle owner's expense. The notice must contain reflective lettering of a specific size, and such notice must be placed in certain areas throughout the community. You should also check your condominium documents to see if there are additional notice requirements. Sometimes, condominium documents will require the association to provide written notice of the association's intent to enforce the condominium documents before any type of remedy can be pursued. Even where that is not the case, your association would possibly want to give additional written notice anyway, to give the offending owners a chance to comply before their vehicle or vessel is towed.

Q: There are several unit owners in our condominium who have laid claim to portions of the common property. They assert that the areas are limited common elements for their exclusive use. How do I determine if these areas are, in fact, limited common elements for their exclusive use? **K.D. (via e-mail)**

A: The Florida Condominium Act defines "limited common elements" as those portions of the common elements which are reserved for the exclusive use of a certain unit or units "as specified in the condominium declaration." Therefore, in order to determine if a particular area of condominium property is a limited common element, you must review your condominium declaration or perhaps its incorporated exhibits, such as the survey or site plans for the property.

If the area your neighbors have laid claim to is specifically described in the declaration as a limited common element, then it is a limited common element. The designation of a particular portion of the condominium property as a limited common element is important for a number of reasons. First and foremost, limited common element use rights (which are generally exclusive to a particular unit) are described as an "appurtenance", meaning that they pass with title to the unit. Also, if a portion of the common elements is designated as a "limited common element", the declaration of condominium may require the association to maintain the element at the expense of all owners, may require the unit owner to maintain the element, or may require the

association to maintain the element, but only at the expense of the benefiting owner.

The appurtenant assigned use rights of certain limited common elements, such as boat docks, can add substantial value to a condominium parcel. As such, it is important for your declaration to clearly define limited common elements and for the association to maintain accurate records regarding their assignment.

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