



Association Slip-ups Common

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Serving on the board of your condominium association can be a rewarding experience. In addition to helping protect your investment, volunteering for the board provides civic involvement opportunity, and can even forge life-long friendships.

However, the operation of community associations in Florida has become big business. Even though directors are typically not paid for their efforts, many actions or inactions of an association can result in legal liability. In my experience, most mistakes made by associations do not result from ill intentions, but rather lack of knowledge.

Last week, we covered the first five of the ten most common association mistakes: failure to adopt rules regarding notice posting; failure to adopt hurricane shutters as required by state statute; inappropriate handling of unit owner records inspection requests; mistakes made when dealing with certified letters from unit owners; and signing contracts offering no protection to the association;

Today, we will round out the list with five additional mistakes commonly made by associations:

- **Inadequate Specifications For Construction Contracts:** As noted last week, community associations in the State of Florida let billions of dollars worth of contracts each year. Many of these contracts involve significant expenditures, including painting projects, re-roofing, landscape

improvements, window installations, and structural restoration. One of the most common sources of dispute between associations and contractors arises from the association's disappointment in the final product delivered. The association will have a difficult legal position if the contract does not specify the scope of work in detail, including products used, permissible deviations, and assurance that when the work is tied into the property, the association receives a functional result. For example, a painting contractor may apply a perfectly appropriate coat of paint to a building, only to have it start peeling off months later because of defects in the building surface. Likewise, a new and costly course of shingles will do little good on a roof whose decking has reached the end of its service life. Accordingly, an extra investment in preparation of specifications by an outside consultant, such as an engineer, is usually a wise choice. Otherwise, the association risks the contractor telling the association "I did what you told me to do", when the job turns sour.

- **Following The Construction Lien Law:** Chapter 713 of the Florida Statutes, commonly known as the Florida Construction Lien Law, contains a fairly complicated and detailed process that must be followed by associations (and all owners of property) to avoid liens being placed against the property if a subcontractor or material supplier is not paid. If the association does not follow the law, it can end up paying twice for the same

work. Compliance with the construction lien law includes filing a document in the public records as a “Notice of Commencement”, cataloguing notices from potential lienors known as “Notices To Owner”, and securing “Lien Waivers” from potential lienors as progress payments are made, and Final Lien Waivers when final payment is made. Although the contractor may be ultimately liable for payment to subcontractors and material suppliers, that is of little solace to an association if the contractor has gone belly-up.

- **Conducting Association Votes:** I have encountered many situations where an association pays an attorney to draw up amendments, a resolution authorizing alterations to the condominium property, or similar documentation to address a situation where a membership vote is required. Then, to “save money”, the association has its manager “send out the vote”, or does so on its own. In many cases, an association may send out some type of “ballot”, and give owners a certain amount of time to reply. More often than not, there are technical and procedural defects in the process, which can invalidate the action taken. In general, most actions of an association must be conducted at a duly noticed meeting of the association, with proper notice given pursuant to the requirements of the governing statutes and bylaws for the association. Additionally, Florida law requires a specified form of proxy to be used in owner voting. It is also important to ensure that notices are properly mailed, appropriate affidavits retained as proof of mailing, and that the notices are posted.
- **Authorizing Alterations To Condominium Property Without A Unit Owner Vote:** As we all know, material alterations or substantial additions to condominium property require approval of seventy-five percent of all unit owners, unless the

condominium documents say something different. Some do, some do not. Slip-ups by associations in this arena generally fall into two categories. First, an association may be involved in some type of renovation, maintenance, or “redecorating” project, which includes aesthetic alterations which require a vote, perhaps along with necessary changes to comply with new codes for which no vote is required. If the association does not get a vote at all, the entire project can be subject to legal challenge. Secondly, unit owners often ask to change the appearance of the condominium property for the benefit of the owner, such as enclosing a balcony. These actions often also rise to the level of “material alterations or substantial additions”, and require a membership vote, unless the documents grant approval authority to the board.

- **Levying Special Assessments:** Contrary to popular belief, Florida’s condominium statutes do not empower a board to levy special assessments. That authority must be conferred by the condominium documents. Further, particularly with older condominiums, there is often a clause buried somewhere in the documents stating that membership approval is required before a special assessment can be levied. Accordingly, before an association considers the levy of a special assessment, it should ensure that proper authority exists. Assuming that the board does have the authority to levy a special assessment, the Florida Condominium Act contains very strict and detailed procedural requirements that must be followed, in addition to any more stringent requirements that may be contained in the condominium documents themselves. At the least, notice of a board meeting where a special assessment is to be considered must be mailed (or hand-delivered, with receipt) to each unit owner at least fourteen days in advance of the board

meeting, and the notice must also be posted conspicuously on the condominium property fourteen days in advance. An affidavit is required as proof of mailing and posting. The notice must contain a statement that a special assessment will be considered, and the purpose of the proposed assessment. Once the board levies the special assessment, a second notice must be sent out

indicating that the assessment was levied, the due date of the assessment, and this notice must once again reiterate the purpose of the assessment.

While no human endeavor, including the operation of an association, may operate mistake-free, perhaps some lessons learned from the school of hard knocks may save a mis-step for your association. ■

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

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

Telephone Conferencing to Board Meetings is Legal

Question: Since purchasing our condominium six years ago, the Board has recommended the association members vote for “partial funding” of our reserve accounts at the annual meeting. Funds in all reserve accounts were depleted to help pay for concrete restoration of the lanais in the complex. Upon receipt of the proposed budget for 2006, which included expenditures for 2005, the reserve accounts balance is listed as zero. To my knowledge, no vote to use reserve funds for other than their designated purpose was ever taken. To further complicate this issue, no information was included in the budget expenditure report other than what I already mentioned. Does the Board have the authority to use the reserve funds for other purposes without majority vote of the association members and are they not required to list the reserve accounts individually in the budget report? B.B. (via e-mail)

Answer: The Florida Condominium Act, Chapter 718, Florida Statutes, provides the answers to most all of your questions. Section 718.112(2)(e) requires that the proposed annual budget be delivered to each unit owner at least 14 days prior to the board’s budget meeting. A proposed budget would, necessarily, include fully funded reserves for the upcoming year. Then, if a majority of the membership present at a duly noticed members’ meeting votes to waive or reduce reserve funding, they may do so as permitted by Section 718.112(2)(f)2. Finally, Section 718.112(2)(f)3 requires all reserve funds to be used only for their designated purpose, unless a majority of the unit owners at a duly noticed members’ meeting votes to redirect the reserve funds for other purposes. You should confirm whether your association has elected use the cash flow method, or pooling method of reserve funding. If so, it may be permissible to use all reserve funds in the pooled account for concrete restoration. However, it would be necessary to

include in the next proposed annual budget reserve funding that would replenish the reserve account to its required level.

Question: I would like to extend my lanai 9 feet beyond my building line which puts it on common ground.

Over the past twenty years, about one-third of the owners have extended their lanais onto common ground with the Board’s knowledge. The Association’s attorney has recommended to the Board of Directors not to approve this request. He says that it violates the Condominium Act. Since 35% of the villas have violated this Act in the past with no consequences, can I legally extend my lanai because of past practices? K.J. (via e-mail)

Answer: The association’s attorney is correct. Subject to the terms of the original declaration as recorded at the time the association was formed, the Florida statutes state that every unit owner is entitled to an undivided ownership interest in the common elements. Constructing your lanai into the common area would violate the other unit owners’ rights to this property. If, however, the other unit owners unanimously approve an amendment to the original declaration to permit you to build your lanai into the common area, you may be permitted to do so.

With regard to the other unit owners that have constructed their lanais onto the common area, I would suggest that the board investigate whether or not this was done in conformity with the requirements of the original documents as recorded at the time the association was created. If this was not done, you should ask the board to investigate the need to either remove the structures, or in the alternative, to seek the unanimous approval of the unit owners in order to permit their continued existence.

Question: Our homeowner's association recently read a letter from the association's attorney regarding a contentious matter at a meeting of the board. Now, the board refuses to let residents read or have access to the letter. Is this legal for them to do? The letter was posted on the agenda for discussion at the board's meeting under the topic "Letter From Association Attorney."

Answer: In general, all records of a homeowner's association are considered part of the "official records", and must be made available for inspection by any parcel owner, within ten days of the association's receipt of a written request. However, the law exempts

certain documents from its reach. Specifically, Section 720.303(5)1 of the Florida statute applicable to homeowners' associations exempts any record protected by the lawyer-client privilege.

The lawyer-client privilege in the law is broad, and would shield this document from availability to members under general circumstances. There is a question as to whether the board's reading of the letter at an open meeting constitutes a waiver of that privilege, I would tend to think so, but I am not aware of any case decisions on point. You would have to decide if it is important enough for you to become the test case. ■

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