



Association Directors Ought to be Insured

Fort Myers The News-Press, March 22, 2007

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Q: The documents of our homeowners' association state that "to the fullest extent permitted by Florida law, the association shall indemnify and hold harmless every director against all expenses and liabilities imposed on him in connection with any legal proceeding because of his having been a director of the association." Given this language, is it necessary for the association to carry directors and officers liability insurance? C.C. (via e-mail)

A: You may know that the association that administers a declaration of covenants governing a community is, in almost all cases, a not-for-profit corporation organized under Chapter 617 of the Florida Statutes, known as the Not For Profit Corporation Act. Chapter 617 includes a provision that permits a corporation to indemnify officers or directors against personal, monetary damages. Indemnification is not permitted under the statute if the director breached or failed to perform his or her duties by committing a violation of the criminal law, or engaged in a transaction from which the director derived an improper personal benefit, or in certain circumstances where the director acted with conscious disregard for the best interests of the corporation, or engaged in willful misconduct, or acted recklessly or in bad faith with a malicious purpose. In other words, if an officer or director acts willfully in violation of

his or her duties, then indemnification is generally not available under the law.

To be clear, "indemnify" means to protect against damage, loss or injury. Essentially "indemnify" means to insure. Indemnification provisions are not mandatory in homeowners association documents, but are advisable in order to attract members to volunteer to serve as board members.

Because the association, by indemnifying directors and officers, is insuring the directors and officers against costs and damages they may incur due to certain lawsuits, it would be prudent for the association to obtain directors and officers liability insurance in order to mitigate its potential liability under the indemnification provisions. These policies, usually called D&O (directors' and officers' liability) policies, or E&O (errors and omissions) policies, are readily available in the insurance market.

Chapter 720 of the Florida Statutes, the Florida Homeowners' Association Act does not require any particular insurance, but most well-written governing documents do contain insurance requirements, often including a requirement for directors and officers liability insurance. I would not advise a director or officer to serve in an

association that does not have adequate directors and officers liability insurance coverage in place.

The same concepts, in general, apply in the condominium setting as well.

Q: I live in a homeowners' association. We are in the process of proposing updated governing documents. Our current declaration of covenants and association bylaws require the affirmative vote of 75% of all voting interests in order to amend those documents. The proposed, amended declaration and bylaws require the "affirmative vote of at least 2/3 of the voting interests who are present and voting, in person or by proxy, at a duly called meeting of the members of the association." In addition, the proposed document changes are trying to lower the quorum requirement to 20% of the members. If these provisions pass, is it true that 2/3 of 20%, or 14 of the 102 members in our association, could change the documents in the future? D.B. (via e-mail)

A: Determining the appropriate vote requirements for an association is often difficult, and may vary from association to association depending on the level of participation of the members. In my experience, a requirement for approval by 75% percent of all voting interests (there is usually one voting interest per lot or parcel) is a difficult obstacle to overcome, and is usually impractical. The failure to vote in your community is the equivalent of a "no" vote. A simple solution may be to reduce the amendment requirement to "a majority of all voting interests." However, even an amendment requirement of 51% of all members can be difficult to achieve for some associations.

The amendment approval requirement proposed by your association is often considered more reasonable, because if all members participate, it will take a supermajority of all members to pass an amendment. On the other hand, the lack of participation by some members under the proposed method will not preclude the association from

adopting important amendments. I do agree that it is necessary to have a sufficiently high quorum requirement under your association's proposed method so that there is some obstacle to having unreasonable or unadvisable amendments easily adopted by a small minority of members.

You may know that the Florida Legislature has recognized the obstacle that can be created by a high quorum requirement, and has determined that 30% percent is the highest quorum requirement that may be adopted for a homeowners' association (although some older documents pre-date this statutory requirement and actually have higher quorum requirements). Typically, a reasonable quorum requirement can be determined based on the experience of the Association. If the Association has often had difficulty obtaining a quorum at 30%, it may be reasonable to reduce the quorum requirement to 20% percent. However, as you have noted, an amendment provision that allows amendments to be approved based upon the affirmative vote of some percentage of a quorum can result in a very few people successfully amending important document provisions.

Ironically, the increased member participation that would address your concerns with the proposed amendment method would also, likely, eliminate the need for that method in the first place.

Q: I am a member of my condominium's board of directors. Our president has told me that I should attend a committee meeting to approve certain expenditures by our manager, but I know that no notice of the meeting was posted at our clubhouse. I thought committee meetings had to be noticed in the same way as regular meetings of the board. Is this right? O.U.B. (via e-mail)

A: It is not unusual for a community association's leadership to be confused about the rules governing committee meetings. In some cases, the association lapses into a habit of a

treating committee meetings as informal gatherings, which can lead to trouble.

In both condominium and homeowners' association settings, there are certain committees that are subject to the same statutory requirements as board meetings (such as notice requirements, the right of owners to attend, etc.). In a condominium setting, any committee meeting that either takes final action on behalf of the board, or makes recommendations to the board regarding the association budget, are subject to all such statutory requirements. All other committee meetings in a condominium setting are also subject to the same statutory requirements as board meetings unless they are specifically exempted from those requirements by the bylaws. In my experience, there is usually no such exemption in the bylaws for committee meetings, unless the bylaws have been updated recently by counsel familiar with condominium operations.

The committee in your case, in approving certain expenditures by your manager, is arguably taking final action on behalf of the board and therefore that committee meeting is subject to all of the same statutory requirements as board meetings, including notice requirements. Even if your committee is not empowered to take final action on behalf of the board or to make recommendations to the board regarding the association budget, that committee is still subject to the statutory requirements unless your bylaws specifically say it is not.

In a homeowners' association setting, committees which can make final decisions regarding the

expenditure of association funds, and committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community, are always subject to the same statutory requirements as board meetings. Other committees in a homeowners' association, however, do not have to follow such statutory requirements, regardless of whether or not they are specifically exempted from those requirements by the bylaws.

Q: I am presently trying to obtain a FHA reverse mortgage. I live in a condominium association. The FHA requires that a reserve account be funded at \$1,000.00 per unit. In this case, \$24,000.00 would be required for the reserve account. Presently, the reserve is only \$7,000.00. Does Florida law require a minimum dollar amount for reserves based upon the number of units in a condominium? JH (via e-mail)

A: The Florida Condominium Act requires that reserve accounts for capital expenditures and deferred maintenance items be maintained by the association, including reserves for roof replacement, building painting, and pavement resurfacing (regardless of the amount of deferred maintenance expense or replacement cost) and for other items where the deferred maintenance expense or replacement cost exceeds \$10,000.00. The membership can vote, on a yearly basis, to waive or reduce the funding of these statutory reserves. Also, set dollar amounts for reserve accounts are not required by the Florida Condominium Act.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, cooperative, 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.