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Proxy Form Gives Association Fits

Why a space to grant "general powers"?

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

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

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

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

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

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

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

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

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

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

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.

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