



Condominium Law Q&A

APRIL 17, 2006

Gary A. Poliakoff, JD

gpoliakoff@becker-poliakoff.com

TEL: 954.987.7550

FAX: 239.433.5933

Question – We live in a condo with 92 units. We were assessed \$5,000.00 for concrete restoration on two stacks of buildings, which consist of 23 units, and the catwalks. Our storm shutters had to be removed from our patio, which cost us \$150.00 to be put up, again. Also, our tile on our patio has been totally destroyed. We estimate the cost of \$700.00 to replace the tile. My question is who is responsible to pay for what was destroyed and had to be replaced? It is going to cost us \$5,850.00 and the rest of the sixty nine units only \$5,000.00. T.C., Jensen Beach

Answer – There are conflicting opinions as to whether the unit owner or the association is responsible for the cost of repair and/or replacement of unit improvements damaged during the association's repair of the common elements. One school of thought asserts that any incidental damage caused during the association's repairs should be repaired/replaced at the association's expense. Another view is that, if an improvement installed by a unit owner [tile over the balcony slab] has to be removed to allow the association access to a building component which it has the responsibility to repair, the unit owner who made the improvement should be responsible for its removal, repair or replacement. When it comes to hurricane shutters, I am of the opinion that if installed by the unit owner, the unit owner is responsible for the removal and replacement. If installed by the association, then the association is responsible. If the association approved the installation of the tile on the patio without conditioning it on the unit owner(s)

being responsible for its removal and replacement, I am of the opinion that the association is responsible for its removal and restoration. To avoid these types of debate, before an association approves any alterations made by unit owners, its approval should be granted on the condition that the unit owners be responsible for the cost of removal and restoration of the alteration, when the association needs to have access to the common elements for repairs.

Question – Our homeowners association's fiscal year ends October 31, 2005. The present board of directors anticipate a \$50,000 surplus for the year ending 10/31/2005. They are going to (or have already) moved the \$50,000.00 surplus from the operating fund to the reserves, as a line item capital improvement for future new projects. The budget was not reopened to do this transfer. There was not proper notice of the budget hearing. The transfer of the surplus funds was not even included on the agenda of the meeting, so the membership could know what was going to happen. The reserve fund was fully funded for this fiscal year. Our management company states this was a proper transaction. However, in all of your articles, you indicate that surplus should be credited to future assessments and/or refunded to the homeowners. Please advise whether transferring the \$50,000.00 surplus to the reserves can legally be done.

Answer – The Condominium Act was created in Florida, in 1963. It took many years to convince the members of the Florida Legislature that consumer

protection of unit owners who owned lots within planned developments governed by mandatory membership associations was equally important as that offered to condominium unit owners. While the Legislature did reluctantly adopt the Homeowners Association Act in , it did so with the proviso that homeowner associations not be subject to the regulation of the State, as condominiums are, under the jurisdiction of Florida's Division of Florida Land Sales, Condominiums and Mobile Homes. So, we now have a fairly decent Homeowners Association Act which does provide basic protection of the homeowners' rights, yet in the event of a violation, there is no mechanism for enforcement, short of costly and time consuming litigation in the courts.

Accordingly, while meetings of the board must be open to the members, be noticed, have an agenda posted, and the members have the right to speak at the meetings, the HOA Act is frequently ignored because of the difficulty of enforcement. That said, I am of the opinion that transference of year end surplus into a reserve account is an action which must be done at a noticed meeting of the board. Even then, the mere fact that the board transfers surplus into a reserve account, as opposed to refunding it to the members or crediting it against future assessments, does not necessarily alleviate the potential tax consequences of an accumulated corporate surplus. This needs to be reviewed with the association's C.P.A. ■

Gary A. Poliakoff is a founding principal of [Becker & Poliakoff, P.A.](#) and has served as its President since the inception of the Firm. He is on the Board of Governors of the Shepard Broad Law Center of Nova Southeastern University where he is an Adjunct Professor, teaching Condominium Law and Practice.

Mr. Poliakoff is co-author of [Florida Condominium Law and Practice](#), [The Florida Bar Continuing Legal Education](#), 1982, and author of a national treatise, [The Law of Condominium Operations](#), West Group, 1988. Mr. Poliakoff can be contacted by emailing gpoliakoff@becker-poliakoff.com.