

Annual Meetings Coming Up

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In two short months, another year will have passed us by. Most community associations will soon hold their annual meeting, and pass the torch of community governance on to a new group, or at least a board with some new faces.

In order to ensure a smooth handoff to those who follow, here are some year-end planning tips for your association:

Annual Meeting Preparation: For condominiums, remember that two notices must be sent before the annual meeting. The first notice must be sent to each unit owner at least sixty days in advance of the meeting. Any unit owner desiring to stand for election to the board may file their name into candidacy at least forty days before the annual meeting. The second notice, which must be sent no less than fourteen days before the annual meeting (some bylaws require thirty days minimum notice), must include a ballot naming all candidates who have run, along with the appropriate voting materials for the business meeting (election envelopes, notice, proxy and documentation involving specific voting items). For homeowners' associations, one notice for the meeting is typically sufficient, unless provided otherwise in the bylaws.

Waiver of Audit Requirements: For condominiums with annual receipts in excess of \$400,000.00, a certified audit performed by an outside CPA must be performed for each fiscal year. If receipts are \$200,000.00 to \$400,000.00, a "Review" must be performed. "Compilations" are required when receipts fall between \$100,000.00 and \$200,000.00. These requirements can be waived by a majority vote of the unit owners. However, the vote must take place prior to the end of the fiscal year. Since most associations' fiscal year ends December 31, the vote must be taken before the end of the year in order to be effective. Homeowners' associations, and condos which have waived the formal reports, must still provide basic year end financial reports to the membership.

Budgets and Reserves: Again, since most associations operate on a calendar fiscal year, the budget should, optimally speaking, be in place no later than late November or early December. Condominium association budgets must include fully funded reserves unless a vote of the unit owners has been taken, and a majority have approved the reduction or waiver of funding of statutory reserves. Do not forget that the law was recently amended to permit a vote to permit the "pooling" or "cash flow" method of reserve funding (see December 22, 2002 article titled "Reserve Rules in Effect Monday"). For homeowners' associations, reserves are optional (although a good idea) unless otherwise required by the governing documents.

Contract Review: One of the biggest liability traps for associations is legal problems arising from self-renewing contracts. Many contracts run on a calendar year basis and automatically renew unless cancelled a set time before the next renewal date, often thirty or sixty days. Even if the association intends to stay with the same provider, it is sometimes advantageous to cancel a contract, so that it does not automatically self-renew, and bidding and negotiations can take place.

Update Official Records: One of the greatest disservices that an outgoing board can do to its successors is to leave the official records of the association in a state of disarray. Make sure that all charts of accounts are up to date, that a current owners' list is turned over, and that the records are organized in some useful fashion.

Have Insurance Policies Organized: Community associations carry many forms of insurance, such as casualty, liability, worker's compensation, flood, directors and officers, fidelity bonding, and umbrella coverage. Typically, these are separate policies and will have different expiration dates, usually one year from the purchase of the initial policy. Make sure that the new board has a chart indicating what policies are in place, the amounts

of coverage, and when the policies are up for renewal. Obviously, the day you are served with a lawsuit is not the time to learn that a previous board dropped the ball in renewing the association's insurance policy.

Prepare a Written Summary of Outstanding Action Items: Particularly with communities which are not professionally managed, unresolved items such as unit owner complaints often "fall through the cracks." If the new board has to rely solely on minutes of past meetings to determine the status of unresolved matters, it is likely that something will slip past. The outgoing board would greatly benefit the incoming board by preparing a list of unresolved action items, such as owner complaints, contracts in-progress, pending legal matters, and the like.

If you follow these few simple guidelines, and do unto future board members as you wish your predecessors had done for you, your neighbors will thank you when it is their turn at the helm.

Now on to reader mail.

Restrictive Covenants Confusing

QUESTION: The declaration of covenants for our community, which is governed by a homeowner's association, states: "the provisions of this declaration shall affect and run with the land and shall exist and be binding upon all parties claiming an interest in the development until January 1, 1995, after which time the same shall be extended for successive periods of ten years each." Since the language specifies the ending, is that where they end, or does the thirty year Marketable Record Title Act provision you mentioned in your previous column apply? Is a vote required to extend the covenants, or are they automatically extended? J.H. (via e-mail)

ANSWER: Your question is a good one, as it demonstrates a very fundamental and common misunderstanding between three separate concepts that apply to restrictive covenants.

The first concept is the duration of the covenants. Since covenants running in perpetuity are disfavored in the law, most covenants run for a specified time (usually

twenty-five or thirty years) and then are automatically extended for successive periods (usually ten years), unless a vote is taken to amend or terminate the covenants. In most cases, this is simply an "automatic extension," and requires no action by the homeowners or the homeowners' association to keep the covenants alive.

The concept of amendment is different, it is when the homeowner wants to change something. Most modern covenants contain a separate amendatory clause and procedure (usually a super-majority vote such as two-thirds or seventy-five percent). Older covenants often do not contain a separate amendatory clause. At common law, covenants which do not contain an amendment can only be amended by unanimous approval of the property owners. However, covenants without amendment clauses can sometimes be amended during the "renewal periods," discussed above.

To confuse things a bit more, the Florida statute applicable to homeowners' associations provides that covenants which do not contain an amendment clause may be amended by a two-third vote.

The application of the Marketable Record Title Act (MRTA) exists separately from issues of extension or amendment. The Marketable Record Title Act is intended to extinguish stale claims against property, and to assist in simplifying real estate transactions. Florida's courts have held that the law applies to covenants within a homeowner's association. Generally speaking, the safest yard-stick to use for potential extinguishment by MRTA is thirty years from recordation of the original covenant, although the law is a bit more complicated than that. By virtue of the 2003 amendments to the law, MRTA extinguishment can now be prevented by a vote of two-thirds of the board, provided that certain procedures are followed.

The basic nature of your deed restrictions (their duration, how they are amendable, and the effect of MRTA), are very fundamental questions for every community, and should be reviewed by legal counsel familiar with these issues. Good luck. ⚖️

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.