

Change to Reserve Law Explained

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Nearly a year after its enactment, the change to the condominium law regarding reserve funding remains largely misunderstood, misinterpreted, and misapplied.

Found at Rule 61B-22.003(f) of the Florida Administrative Code (available on-line at <http://fac.dos.state.fl.us>), the intent of the regulation is to permit so-called “pooling” or “cash flow” funding of reserves.

Under previous law, the only option for a condominium association was “straight line funding” of reserves for roof replacement, building repainting, pavement resurfacing, and any other item of capital expense or deferred maintenance exceeding \$10,000.00 (typical examples would include swimming pools, tennis courts, irrigation systems, clubhouse buildings, plumbing, windows, and structural preservation/concrete restoration).

Of course, unit owners are always given the prerogative of voting to reduce or even completely waive the funding of reserves. However, when straight line funding of reserves is used, reserve monies may only be used for the specified purposes, unless a vote is taken and the unit owners give the Board permission to tap into the fund. For example, even though the building roof may not need to be replaced for another fifteen years, the Board could not use the roof reserve fund for the building’s re-painting.

The pooling method of reserve funding attempts to predict when a particular item will require replacement or deferred maintenance, and reserves are scheduled and funded so as to ensure that the necessary amount of funds are on hand when the work needs to be done. Theoretically, monthly or quar-

terly reserve contributions can be lowered, while still avoiding special assessments.

Of course, what works in theory does not always work when placed in the hands of humans. In addition to needing a crystal ball to exactly predict when reserve expenditures will need to be made, reserve contributions may be substantially higher in certain years, such as when a fund for one item is depleted, and there is a short useful life of the net asset on the list.

I neither encourage nor discourage my condo association clients from switching from straight line funding of reserves to the cash flow method. There are pros and cons, and it ultimately boils down to a matter of choice. Clearly, straight line funding is the more conservative funding mechanism.

The switch from straight line funding to cash flow funding requires a vote of the unit owners, and cannot be enacted by the board. However, once the association switches to cash-flow funding, no further votes of the owners are required.

When the membership vote is taken to change from straight line to pooled funding, the meeting notice must include proposed reserve schedules containing the legally required line-items (they are rather complicated and set forth in the state’s regulations) on both the straight line and cash flow basis. In subsequent years, only cash-flow reserve schedules need to be presented.

Remember, whether straight line or cash flow reserve funding is used, any funding at less than the fully-required amount requires unit owner approval (majority vote) as does the use of reserves for non-scheduled purposes. ☺

Proxies not Allowed in Elections for Directors

QUESTION: Our condominium annual meeting is coming up soon. We have many owners who live out of the country. Can they send in their votes to the association by facsimile? Would you explain a proxy vote? It appears in our documents that proxy votes cannot be used in the election of board members. B.F. (via e-mail)

ANSWER: Unless your association has specifically voted to “opt out” of the procedures set forth in the condominium statute, proxies cannot be used in the election of directors. Rather, a system of two envelopes and secret ballots must be used, and these votes cannot be sent in by facsimile or other means of electronic transmission.

The proxy is in effect an “absentee ballot” and is used for voting by owners who cannot attend the annual meeting for items other than the election of directors. Items typically considered by proxy at association annual meetings include document amendments, budget and reserve voting, and waiver of financial reporting requirements. Curiously, the Condominium Act does not say whether or not proxies can be sent in by fax, although I believe the prevailing view is that fax proxies are acceptable, unless prohibited by the bylaws.

QUESTION: I purchased a condominium unit a couple of weeks ago. I had a home inspector inspect the property, and was told everything was in good shape.

I was understandably distressed to learn that the freon line that runs from my unit’s air conditioner to the air handler has caved in, and needs to be replaced. The home inspector tells me that this was not his responsibility, since it is part of the outside of the building. The freon lines run underground, and then up to the air handler in my apartment. C.C. (via e-mail)

ANSWER: Air-conditioners are almost always located outside of the condominium unit. If your home

inspector was responsible for checking the a/c system, I think you should demand satisfaction from the inspector. You may want to take your contract to your attorney and invest an hour or so of time to determine whether your lawyer thinks you have a good case to take to small claims court.

QUESTION: Many of your columns focus on changes in the law, including new laws passed by the Legislature and ideas that are debated, but do not become enacted into law. In your opinion, what is the greatest need for change in the laws affecting community associations? B.H. (via e-mail)

ANSWER: The condominium law has become far too complicated. Now over fifty pages in length, every perceived slight against the “wrong person” (someone who knows an influential politician) results in a new clause in the law.

The condo statute and its supporting regulations has reached such a point of complexity that many lawyers, are unwilling to assist laymen in navigating through the maze, for fear of liability. For volunteers on a board, forget it.

For homeowners’ associations, the biggest flaw in current law, at least in my opinion, is the lack of meaningful consumer protections for home-buyers. One’s home is the largest financial investment of most Americans. Although Florida has many good developers, it has also had its share of scam artists over the past four decades of growth and development.

The inclusion of warranty rights for single family home buyers, similar to those conferred upon condominium purchasers, would certainly be a good starting point. However, unless the dynamics of state government change radically, I would rate the chances of significant changes as slim. ♠

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.