

Makeup of Boards Still Contentious

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Although Florida's condominium law has been in effect for over 40 years, and has been interpreted through hundreds of reported decisions by courts and state agencies, there remains a surprisingly large number of unresolved issues in this area of the law.

Today's gray area is the right to be elected to a condominium association board. The condominium statute presumably resolves the issue with some degree of finality where it states that "any unit owner" may run for the board. The unsolved question is whether any exceptions are permissible, or if the exceptions actually swallow up the rule.

The first exception is contained in the statute itself, providing that persons who are convicted felons and who have not had their civil rights restored are not eligible for service on the board.

What about term limits? The state agency responsible for arbitration of condominium disputes has previously ruled that term limits, if contained in the association's bylaws, are enforceable.

Conversely, the same agency has ruled that "residency" requirements are not permissible. For example, an association cannot restrict board members to unit owners who reside at the condominium, or for that matter, in Florida or even the United States.

A twist on this theme involves the validity of a bylaw provision which provides that a director who is delinquent in the payment of their assessments is deemed to have automatically resigned from the board.

The state arbitration department issued an order on November 7, 2003, finding that such a bylaw provision was valid. Apparently after further consideration of the statutory scheme, the arbitrator in the case re-

versed himself, struck down the bylaw, and issued a new order on November 24. After reconsideration, the arbitrator found that since the unit owners elected the board member, only the unit owners could remove her from the board. The arbitrator further ruled that the owner's alleged delinquency in the payment of assessments could not be deemed an "involuntary resignation."

Although not presented as an issue in the case, the arbitrator also observed that the agency would likely invalidate a bylaw provision which provides that a member's missing a certain number of board meetings constitutes resignation.

The arbitrator also offered the opinion that a bylaw provision which limited the right to run for the board to one person per unit would likewise be found invalid.

While arbitration decisions do not carry the force of law in the same manner as appeals court cases, most condominium disputes are adjudicated in the arbitration program, where past decisions are usually relied upon as precedent. Here, the state has come down on the "strict constructionist" side of reading the law.

I think most people would agree that someone who never shows up for a board meeting should not take a valuable spot that someone else may be willing to fill. However, until the law is changed, it appears that just about anything goes when it comes to the right to run for the association's board.

Although there is no arbitration program for homeowners' associations, the law applicable to HOA's also permits any parcel owner to run for the board, so the conclusions reached by the condominium agency are probably applicable in the HOA context. ☺

Seminar offers guidance to new board members

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QUESTION: I am a new member of my condominium association's board. I was wondering if you could tell me about any good educational programs in the Fort Myers area. B.H. (via e-mail)

ANSWER: A free course on Florida condominium and cooperative association regulation will be held on Thursday, December 11, 2003 from 12:30 pm to 4:30 pm at the Seven Lakes Condominium Association, 1965 Seven Lakes Blvd., in Ft. Myers, FL (across from Bell Tower Shops). The course will be taught by Community Associations Institute (CAI), the designated condominium and cooperative educational provider of the State of Florida's Department of Professional and Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes. I am the assigned course instructor.

The course focuses on how federal and state statutes and regulations impact associations. Participants will review guiding documents such as Florida statutes and legislation including the Condominium Act and Cooperative Act, the Fire Safety Act, and the Florida Administrative Code. The course will also touch on federal laws such as the Fair Housing Amendments Act of 1988, the Housing for Older Persons Act of 1995, the Telecommunications Act of 1996, and the Fair Debt Collection Practices Act. Please note that this course does not count for manager CEUs.

Registration is not required, but space is limited. To reserve a space, please call Laura Hagan at 727-525-0962 or e-mail FLeducation@caionline.org. To see a complete list of classes in your area, visit www.caionline.org.

QUESTION: I live in a four-unit condominium which was built eleven years ago. The property is well maintained and we all get along. My question is how we should figure the proper amount of reserves. I feel the current reserves are too low and this may become an issue down the road. K.H. (via e-mail)

ANSWER: The Florida condominium law requires reserves for building repainting, pavement resurfacing, and re-roofing. Reserves are also required for any other item of the community's infrastructure with the replacement cost of \$10,000.00 or more. Typical items include plumbing, windows, and exterior improvements.

Reserves are to be calculated based upon a formula which takes into account the remaining useful life of the asset and its replacement cost. For example, if it will cost \$10,000.00 to re-roof your building, there is currently \$5,000.00 in the roof reserve account, and the re-roofing needs to be done in another five years, you would need to set aside \$1,000.00 per year to "fully fund" that account.

There are companies which specialize in reserve studies, and you can get their names from your local chapter of Community Associations Institute.

QUESTION: Our association meets in executive session on a monthly basis an hour before the open board meeting. There is never any legal counsel present. After reading many of your columns, I do not feel this is correct. What is your assessment? R.M. (via e-mail)

ANSWER: "Executive session" meetings for both condominium and homeowner association boards are improper. If a quorum of the board is present, a "meeting" is being held and must be open to the owners. The only exception is meeting with legal counsel regarding certain privileged matters.

QUESTION: In a recent column you mentioned that if a condominium consists of more than fifty units, or has an annual budget in excess of \$100,000.00, the community's manager must be licensed. Is that true if the manager is a volunteer and does not receive any type of compensation for his or her services? J.D. (via e-mail)

ANSWER: No. Chapter 468 of the Florida laws defines community association management as various practices which are performed in exchange for remuneration. Accordingly, a "volunteer manager" need not be licensed. However, since a person who takes on the duty of "manager" arguably assumes higher duties (and liability) than a volunteer board member, licensure may be a good idea.

QUESTION: Can the board of my HOA apply my quarterly maintenance fee toward an unpaid fine? A.N. (via e-mail)

ANSWER: Unless provided otherwise in the association's governing documents (and I would even then question its legality), the collection of assessments and

finances are two entirely separate issues, and should be accounted for differently. I do not believe it is proper to divert assessment monies toward payment of a fine. ⚖️

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.