

Association Survey May Open Eyes

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Each year, Florida's 160 Legislators (120 Representatives, 40 Senators) are bombarded with requests to support or oppose a broad-ranging spectrum of legislative proposals.

Within that mix there are perennial efforts to change the Florida laws affecting community associations: condominiums, homeowners' associations, cooperatives, and resident-owned mobile home parks.

Although most legislators do rely on paid lobbyists to help winnow the ideas, there is no doubt that the majority of legislators most value the grass roots opinions of their constituents, and the organizations which the constituents form to help convey their message.

Since many of the arguments made about issues facing community associations and influencing its legislation are anecdotal (such as what community association residents "want", what they "like", what they "support", etc.), it is easy for someone with a legislative agenda to claim they "speak for" someone else, although that "someone else" might be surprised to learn that news.

Recently, the Law Firm of Becker & Poliakoff, P.A. (which is the firm where I have been employed for nearly eighteen years) conducted a survey of "association issues." The survey was conducted under the auspices of the firm's Community Association Leadership Lobby ("CALL").

CALL's website and internet updates are available to the Firm's 4,000 community association clients. Approximately 2,000 distinct e-mail users have participated in CALL since its inception about a year ago, mostly constituting board

members, non-board member homeowners, and community association managers involved with these communities.

Contrary to the drum-beat of some pundits, including various web-based association anarchists, the survey's 751 respondents (only half of whom are current association board members) imparted some interesting information and opinions:

- **Occupancy Trends:** Year-round residency is reported by most owners (65.8%) surveyed, with the remaining one-third constituting traditional "snow birds" and investor owners who rent out their property. Surprisingly, 91% of the respondents do not make their property available as a rental during the year. Two-thirds of the survey's respondents were in the 50-64 age range, and approximately half of them were work at least part-time, even if "semi-retired." A full one-third of respondents engage in work-related activities from an office in the home.
- **Reasons for Purchasing in a Mandated Association:** Ease of maintenance and physical amenities top the list. Two-thirds of the respondents also cited personal and physical security as a factor in their purchase decision.
- **Unit Owners' Concerns:** The appearance of the neighborhood and the manner in which the Association maintains common property are the most important concerns to community residents. Following in a close second is Board member integrity, with some emphasis on the perception that certain Board members place their own well-being above the interests of other residents.

- **Enforcing Rules and Regulations:** 99% of the respondents believe that associations should strictly enforce community rules. There is some divergence over whether the board should be able to grant exceptions, with one-third feeling that no exceptions should be granted under any circumstances, and two-thirds feeling that a board should be given discretion to bend the rules in the case of a hardship. 86% of the respondents supported fines as a means of enforcing community rules, and three-fourths of the respondents supported an association's right to foreclose a lien for non-payment of assessments.

- **Financial Concerns:** Affordable insurance is the number one financial worry of community associations and their residents. Many respondents also mention the need for more clarification between condominium associations' master insurance obligations and where the insurance coverage for the individual unit owner kicks in. 8 out of 10 respondents expressed concern about the need for adequate reserve funding, and related problems

that occur when special assessments are used in lieu of reserves, particularly in communities where some owners may not have the financial strength to pay large assessments on short notice.

- **Demographics:** Predictably, the survey shows the largest group of participating associations in the Dade-Broward-West Palm Beach area, with Southwest Florida (Lee, Collier, Charlotte, Sarasota and Manatee Counties) and Central West Florida (Clearwater/St. Petersburg/Tampa) accounting for most of the remaining respondents.

Surprisingly (at least to me), only slightly more than one-half (56.4%) of the respondents reported having an on-site manager or management company, with the remainder of the associations being primarily self-managed by the Board of Directors.

For those interested in the nitty-gritty, the entire survey is available on-line at <http://www.callbp.com/CALLSurveyRptFINAL112904wcharts.pdf>. ☺



Question: Is it legal to borrow funds from a reserve fund for one condominium, to pay for capital replacements in a common area which several condominiums use? The association plans to repay the reserve fund over a twelve month period. R.K. (via e-mail)

Answer: It depends. The Florida condominium law requires reserve funds to be set aside for roof replacement, building repainting, pavement resurfacing, and any other item of deferred maintenance or capital expenditure exceeding \$10,000.00. The association must set up "straight line" accounts for each required reserve item, where the amounts to be reserved each year are computed by a formula which takes into account the remaining useful life of the asset, its replacement cost, and the money currently on hand for the item.

The unit owners may vote to waive or reduce the required funding of reserves in any given year, by a majority vote.

Reserves, once set aside in the above-described manner, cannot be used for unscheduled purposes. There are two exceptions to this rule.

First, by majority vote, the association can vote to permit the use of reserves for purposes other than that for which they were set aside. If such a vote was taken, unless the owner's vote required the reserves to be repaid, there is no requirement to do so.

The other exception to the rule involves associations who use the so-called "pooling" or "cash flow" method of reserves. In those situations, all items within the "pool" are proper for capital expenditures from the reserve fund. However, it is unlikely that common areas serving several condominium associations are within the pooled reserve, if your association has in fact set up cash flow reserves.

Therefore, the short answer is that unless your owners have voted to permit the board to use reserves for a purpose other than that for which they were set aside, the board should not do so.

Question: Did the 2004 Florida Legislature pass any legislation dealing with the effects of the Marketable Record Title Act (“MRTA”) on covenants and restrictions of a homeowner’s association? I live in a community which has deed restrictions dated January 17, 1974. The homeowners’ association is voluntary. If the restrictions have expired because of MRTA, is there anything that we can do? D.H (via e-mail)

Answer: The Marketable Record Title Act (“MRTA”) found at Chapter 712 of the Florida Statutes, is primarily intended to facilitate real estate transactions, by eliminating stale claims against real property titles. The general yardstick for MRTA extinguishment is thirty years from the “root of title.” Florida courts have held that covenants and restrictions are subject to MRTA extinguishment. Therefore, if your covenants and restrictions are more than thirty years old, you may have a MRTA problem. You should discuss with counsel whether the restrictions in your community are in fact extinguished by MRTA.

Prior to the 2004 Legislative Session, if a community’s covenants and restrictions were extinguished by MRTA, there was nothing that could be done to “revive” them. During the 2004 Legislative Session, the Legislature adopted amendments to Chapter 720, Florida Statutes, the Homeowner’s Association Act. You can find this legislation at Section 720.403 through 720.407, Florida Statutes. This new legislation provides a procedure for “reviving” extinguished covenants. Communities should not attempt to “revive” their covenants and restrictions without the assistance of a qualified attorney.

Voluntary homeowner’s associations are not governed by Chapter 720. Therefore, there is some question as to whether a voluntary homeowner’s association can use the provisions of the new law to revive covenants and restrictions extinguished by MRTA. You should discuss this issue with counsel as well.

If your covenants have not yet been extinguished by MRTA, as long as your association has the power to enforce restrictive covenants, the board of directors may vote to preserve the covenants against MRTA extinguishment. “Preservation” is a different issue than “revival.”

It is my understanding that there may be an effort to amend Chapter 712 to also permit voluntary associations, which have been assigned or otherwise have enforcement rights, to also take advantage of the 2004 amendments to the law.

Question: I reside in a condominium consisting of 21 units. All of the units have been sold. I was told that our association would be able to elect a board of directors to run our own affairs. Recently, we were told that the developer and his lawyer are “working it out.” Shouldn’t we have formed an association by now? What are our options? H.H. (via e-mail)

Answer: The Florida condominium statute provides that unit owners other than the developer are entitled to elect a majority of the board of directors after varying “triggering events” occur. One “triggering event” is three months after the sale of ninety percent of the units that will ultimately be operated by the association. The developer has 75 days from the “triggering event” to call the meeting.

If the developer fails to properly notice the meeting for transition of control (often called “turnover”), any unit owner is entitled to call the turnover meeting. I would recommend that you organize your owners and have an attorney review the matter. If all of the units have been sold, you are entitled to elect the board, or soon will have the right to do so. If your developer does not call the meeting in a timely fashion, you have the right to do so.

Question: I am a board member of our homeowner’s association. The board is considering amending our governing documents (declaration of restrictions, articles of incorporation, and bylaws) to make them easier to amend. All the documents currently require a two-thirds votes. Is this legal? A.G. (via e-mail)

Answer: In my opinion, there is nothing in the law that would prohibit such an amendment.

In fact, many associations seek to make their documents easier to amend. Many HOAs, in particular, have tremendous voter apathy problems. I typically recommend that governing documents require a super-majority vote amendment (two-thirds or seventy-five percent), but that the voting be based

on those who actually vote (in person or by proxy) at a properly noticed meeting of the association, and not the entire population.

That way, people who choose not to vote are not effectively voting “no” on measures the participating owners may wish to see passed. ⚖

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.

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