



Courts Err on Side of Homeowner

Fort Myers The News-Press, August 4, 2005

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Summer time in Southwest Florida means blistering heat and humidity, vacations, and the ability to eat in your favorite restaurant without an hour's wait in line. For community association attorneys, the summer months are also the time of year where time is set aside to assist clients in updating the legal documents for their community.

As any association which has been involved in litigation knows, a poorly written set of documents can mean losing a case that should have been won. After all, the courts are historically hesitant to enforce restrictions against the free use of property, and typically err on the side of the homeowner when there is ambiguity or vagueness contained in association regulations.

In the next several editions of this column, I will take a look at the issues commonly confronted by associations when bringing their documents into the 21st century.

As avid readers of this column well know, there are some areas where the laws for condominium associations and homeowners' associations are very similar, and some areas where they are quite different. In the document update area, there are some major differences in issues commonly addressed by condominium associations, and those tackled by their HOA counterpart. I will try to highlight the differences, where possible.

I have assisted many community associations in updating their documents, and find some common mistakes, and also some practices which increase the chance of success. In the coming weeks, I will share those too.

First, some definitions are in order. In condominiums, the constituent documents are typically referred to as "the condominium documents." In homeowners' associations, the relevant documents are usually called "the governing documents."

The condominium documents consist of a declaration of condominium, articles of incorporation, bylaws, and rules and regulations. For HOA's, the governing documents consist of a declaration (usually called declaration of covenants, deed of restrictions, or some similar name), articles of incorporation, bylaws, and rules and regulations.

The declaration is in the nature of a deed restriction, or covenant running with the land, and is usually considered the most important document on the totem pole. The declaration will deal with fundamental issues like who owns what (boundaries between units and common elements or boundaries between parcels and common areas), who insures what, provisions regarding repair after casualty (such as a fire or hurricane), general maintenance and repair responsibilities, rental restrictions, transfer restrictions, easements, and the more fundamental use restrictions, such as requirements for single family use and prohibitions

against nuisances. The declaration also creates the two fundamental aspects of community association governance: the requirement to pay assessments secured by a lien for nonpayment; and, provision for mandatory membership in a governing association which passes with title to the property.

The articles of incorporation are sometimes called the “charter” for the corporation, and is the document which is filed with the Florida Division of Corporations to create the association. The articles of incorporation are typically a fairly brief form document, often two or three pages, usually providing for perpetual existence and basic corporate powers and duties.

The next document in the continuum is the association’s bylaws. I often refer to bylaws as the “corporate housekeeping rules”, because they are typically aimed at providing details about how the association is to be run from a procedural standpoint. Typical issues addressed in association bylaws include the size of the board (how many directors there are), terms of office (for example, whether there are staggered terms), notice requirements, and quorum standards. Bylaws will also establish a list of required corporate officers, how they are seated (most bylaws permit the board to appoint the officers), and whether officers

must also serve as directors. A complete set of bylaws will also address meeting procedural issues, such as whether Robert’s Rules of Order are to be applied in the conduct of association meetings. Budgeting, assessments, and financial details are usually addressed in the bylaws as well.

The rules and regulations are the “do’s and don’ts” for a community. In most condominiums, rules are established by the Board of Directors, although some condos require unit owner approval for rule adoption, and such a requirement is enforceable. Homeowners’ associations occasionally have rules and regulations as well, although much less frequently than in the case of condominiums.

Condominium rules are usually aimed at pets, vehicle parking, changes to the property, and other behavioral-oriented issues. Rules for a homeowner’s association will often target the same areas, and may also flesh out architectural control standards, supplemental to the building controls contained in the declaration.

Next week, we will take a look at how association legal documents are amended, including the required votes and procedures. I will also share some tips on increasing the chances of success in getting updated documents approved the first time around. ■

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.

Question: You recently wrote a series of columns regarding the sunshine law for association boards. Is that material available on-line? B.H. (via e-mail)

Answer: Community Association Sunshine Law Course 101 is available on-line at the web-site of the Law Firm of Becker & Poliakoff, P.A. To download the pamphlet, go to www.becker-poliakoff.com. Click on "Areas of Practice." Then, click on "Community Association Law." The Sunshine Law Course is the first document that appears under "Articles & Publications" and can be downloaded from the Firm's web-site.

Question: I am hoping that you can clarify a question I have about waiving reserve funding. I know you need a "majority vote" to reduce or waive reserves. Our association has 32 units. We received 20 votes on the waiver question. A majority of those who voted agreed to the waiver, but it was not 17 votes. Does a "majority" mean that what a majority of those 20 who voted counts, or do we need 17 votes? The statute is confusing to me. Also, I was wondering if there was a minimum amount of reserves that must be kept by law. I have been told that there is a \$10,000.00 minimum, but I have not been able to find anything in the law about that. L.C. (via e-mail)

Answer: The Florida Condominium Act at Section 718.112(2)(f) requires every condominium association to budget for reserves for deferred maintenance and capital expenditures. The reserve budget must set aside funds for roof replacement, building repainting, and pavement resurfacing, regardless of the cost of those items. Further, reserves must be set aside for any other item where the deferred maintenance costs or capital expenditure exceeds \$10,000.00. Common areas in this category would include swimming pools, tennis courts, clubhouses, building plumbing, windows (if they are the responsibility of the association) and the like.

Reserves must be funded based upon a formula which takes into account the remaining useful life and replacement cost of a reserve item. For example, if your condominium building's roof has a remaining life of ten years, and you would need \$100,000.00 more than is currently on hand to replace it, you would need to set aside \$10,000.00 per year in the roof reserve. This is known as "fully funded" reserves.

Florida law permits the waiver or reduction of fully funded reserves, by a majority vote. I agree with you that the statute is not well worded, and several attempts by the Florida Legislature to clarify it by amendment have been less than helpful. The interpretation most commonly applied is that the "majority of the quorum" standard applies. Therefore, as applied to your situation, 11 of the 20 who actually voted could make the decision, you would not need a majority of all 32 owners to consent to the waiver.

Question: Our condominium association is facing a difficult dilemma, and I am hoping you can help. Our association's board is comprised of five directors. One has resigned and another sold his unit and is therefore no longer qualified to remain on the board (pursuant to the language in our governing documents). The board was prepared to consider the appointment of two owners to replace these directors (four have volunteered to be considered). One of the three remaining directors has decided she does not want to participate because "her candidates" will not likely be appointed to fill the vacancy. This director has "boycotted" the last two board meetings, thus preventing a quorum and filling those seats. What is your opinion on this issue?

Answer: Section 718.112(2)(d)8 of the Florida Condominium Act states that unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the "affirmative vote of the majority of the remaining directors", even if the remaining directors constitute less than a quorum.

As there are three remaining directors, two of them can vote to fill the vacancies, and in my opinion could establish a quorum of two at a meeting limited to that purpose. Therefore, unless your bylaws say something different, I think your two directors can move ahead. The board members would be wise to get a confirming opinion from the association's attorney.

Question: Our condominium association is part of a master planned community. We belong to an "umbrella organization" where issues for the entire community are discussed. My question is whether the umbrella organization must follow the sunshine laws. S.G. (via e-mail)

Answer: It depends. If the umbrella organization is a voluntary group, then the requirements for posting notice of meetings, owner participation rights, minute-keeping, and the like do not apply. This answer presumes that a quorum of your board would not participate in meetings of the umbrella organization.

Conversely, if membership in the entity is mandatory for your unit owners or your association, then the umbrella organization would either be a condominium organization or a homeowner's association. In this case, the "sunshine" laws would apply. ■

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