



Insurance Should be Boards' Business

Fort Myers The News-Press, October 13, 2005

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Today's column is the 10th part of our series about updating the legal documents for your community association. In the first nine editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage restrictions and transfer restrictions, and discussed condominium insurance requirements.

Unlike the condominium requirements discussed last week, the Florida statute applicable to homeowners' associations, Chapter 720, makes no mention of HOA insurance requirements. Rather, the standards for the HOA will be set by the governing documents and concepts of good business judgment and fiduciary responsibility. Like its condominium cousin, the homeowner's association board will want to ensure the governing documents provide guidance and a directive to obtain liability insurance, fidelity bonding and workers' compensation, if required.

The HOA's governing documents will also usually require the association to obtain hazard insurance (fire, windstorm and hurricane, flood, etc.) if there are common area structures, such as a clubhouse or meeting facility. Hazard insurance on the individual homes is a bit trickier. Many homeowners' associations operate in a quasi-condominium setting, and insure the basic building structure against casualty losses. This is especially true in attached-dwelling communities,

such as town house communities, "quads," and similar structures with party walls. In these cases, since there will be no default to the condominium statute for guidance, the documents need to be carefully and precisely written as to who is responsible to insure what, against what type of losses, and who will be assessed (the individual owner or all members of the association) if there are insufficient insurance proceeds for rebuilding.

Another issue occasionally confronted by associations involves scenarios where a homeowners' association amends the governing documents to take over maintenance of a particular part of the individual homes, such as the roofs. In such cases, it is important to make sure that the insurance and repair after casualty clauses in the documents also match up. Otherwise, the individual owners and the association could each be thinking the other is insuring the roofs, only to find out that no one has done so.

Finally, an issue often confronted in updating documents is whether, in a typical HOA setting of single-family detached homes, the association has any business in whether owners carry insurance, or whether they should be permitted to "self-insure." I submit that as a consequence of our recent hurricane experiences, it is entirely appropriate for a homeowner's association to make sure that individual homeowners carry adequate insurance to rebuild their homes after a calamity such

as a hurricane. Otherwise, everyone's property values could suffer if homes in the neighborhood sit unattended for months or years, with the owners choosing to have "walked away," and a likelihood that nothing will happen until a bank forecloses a delinquent mortgage or a real estate investor sees an opportunity.

Next week, we will take a break from the amendment series and talk about the Florida Advisory Council on Condominiums, which is coming to town. The week following, we will pick up the series again with a discussion of amendments to the governing documents regarding the repair of community association property after a casualty, such as a fire, flood, or hurricane.

LEE COUNTY LOSES POPULAR MANAGER

I am saddened to report that Beatrice Diller, a well-known community association manager in Lee

County, passed away recently, after a courageous battle with cancer.

Those of us who called Beatrice a friend, business associate, or steward of our community, mourn her untimely passing at age 53. Beatrice was the owner of Top Management, one of Lee County's most well-respected management firms, and one of the longest-tenured woman CEOs in a somewhat male-dominated business.

I will always remember Beatrice for her unflappable nature, her calmness during periods of crises, and her knack for finding practical solutions to tough problems.

Beatrice served as longtime adviser to local communities such as Kelly Greens, Cinnamon Cove and Harbour Isle. Her leadership in those communities, and many others, will long be remembered, and missed. ■

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.

It's Never Too Early to Learn How Association Works

Question: I live in a new development that is set up as a homeowner's association. Our builder/developer is preparing to turn over control of our association to the homeowners. I was wondering if you could point me toward some resources, a Web site, or other materials that would help us prepare. Our board of homeowners has not yet been elected, but a group of our homeowners is trying to understand the process so that we can operate our community in an orderly and efficient manner.— M.W. (via e-mail)

Answer: I am not aware of any Web-based resources directly on point.

I am aware of one book geared toward the operation of homeowners' associations in Florida which many readers have told me is a concise and understandable layman's guide to operations of homeowner's associations. It is called "The Homeowners Association Manual," Fifth Edition by Peter Dunbar and Marc Dunbar, creators of a similar guide for condominium associations. I believe it is available in most large bookstores, and can be ordered online as well.

Your community is fortunate to have a group of interested citizens who want to protect your investment. As a practical matter, there is little that you can do legally until elected to the board. However, that does not mean that you should not understand the process and, so to speak, have your ducks in a row.

Those who are interested in serving on your association's board should study the governing documents for the community; the declaration of covenants; articles of incorporation; bylaws; and rules and regulations (if there are any).

I would recommend that your homeowner's association retain an attorney who is conversant in this area of the

law to be available for consultation as questions arise. You should also determine whether the community is going to be self-managed, or if you are going to hire a management company. Most management companies will provide proposals, and free-of-charge interviews, even before the turnover occurs. You will also want to establish relationships with a certified public accountant and an insurance agent.

Homeowners' associations governed by Chapter 720 of the Florida Statutes come in all shapes and sizes. Some have thousands of members, own significant assets (golf courses, clubhouses, etc.) and employ scores of personnel. Others' jurisdiction may be limited to ownership of a street, or some other minimal common area, and the enforcement of covenants and restrictions for the community. The exact nature of your community will largely dictate how much "due diligence" is necessary to pursue in connection with your turnover. At the least, you need to insure that the common areas are properly deeded over to the association, free and clear of liens and encumbrances. You should also inventory the contracts to which the association is a party, so that you are aware of the association's contractual obligations, contract renewal dates, and the like.

More substantial associations in terms of size and jurisdiction will also need to look at issues like surface water management, personnel, and common area warranty issues.

One of the most important things for the association, when you take over control, is to make sure that all required insurance is in place. Many associations do not carry directors and officer's liability insurance prior to turnover, and one of the first orders of business should be to make sure that your volunteer directors and officers are protected against lawsuits through insurance.

If your community was created after Oct. 1, 1995, the developer must also comply with the turnover requirements found in Chapter 720 of the statute applicable to homeowners' associations. In general, this requires all of the books and records of the association to be turned over from the developer-controlled board, to the homeowner-controlled board, within 90 days of the turnover meeting. Good luck.

Question: We have 31 members in our association. My question is how you determine what a "majority" is for voting purposes. For example, if 15 votes favor a measure, 14 vote against, and two do not vote, is that "majority approval," or do we need 16 votes? Can you shed any light on this issue. — G.O. (via e-mail)

Answer: This is a common question, and unfortunately there is no one-size-fits-all answer.

First, you need to read each of the governing documents for your community; the declaration of covenants, articles of incorporation, and bylaws. Each of them should spell out specific voting requirements for certain actions, such as amendments of each of those documents.

In a homeowner's association, each home (usually referred to as a parcel, lot, or unit) is normally assigned one vote, which is called a "voting interest." Let us say for example that the bylaws provide that they can be amended "by a majority of the entire voting interests." Here, it is clear that you would need 16 votes for an amendment.

Conversely, the bylaws might say something like "these bylaws may be amended by a majority of the voting interests present and voting, in person or by proxy, at a duly called meeting of the association at which a quorum is present." In this scenario, you would only need to establish a quorum for a meeting (typically 30 percent in a homeowner's association) and the majority of those who vote (in person or by proxy) would carry the measure. Therefore, in your example, the measure would carry with 15 in favor, 14 opposed, and two not voting.

Unfortunately, many documents are not clearly written on this point. For example, if the bylaws simply say that they may be amended by a "majority vote," does this mean a majority of the entire voting interests, or only a majority of those who vote? While Robert's Rules of Order suggest that voting is based upon those who actually vote, Robert's Rules of Order are not part of Florida's law, and are not incorporated into many documents. Further, even if the documents incorporate Robert's Rules, I am aware of at least one condominium arbitration decision which found that a majority of the entire voting interests would need to approve the measure under that language.

In order to protect the board of directors from challenges to association actions, when in doubt, ask the association's attorney for an opinion on the required vote to pass a particular measure. An attorney experienced in this area of the law should be able to provide an answer with minimal research and expenditure on your part. ■

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.