Association Authority Defined

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Today's column is the fifteenth part of our series about updating the legal documents for your community association. In the first fourteen 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 and transfer restrictions; discussed condominium insurance and casualty repair requirements; explored the allocation of responsibilities for maintenance, repair, replacement of property within the community; analyzed issues surrounding alterations within the community; and which actions of the association must be mentioned in the documents.

Today, we will look at clauses that address association authority, and particularly whether board action alone is sufficient, or whether a membership vote should be required. The following list involves typical issues:

- **Borrowing Money.** Surprisingly, neither the statute applicable to condominium associations nor the one that applies to homeowners' associations says whether an association has the authority to borrow money. Most attorneys conversant in this area of the law take the position that unless the governing documents contain limiting language, the board has borrowing authority. I believe that the documents should clearly confer upon the board of directors the authority to borrow money. There are many times when this can be important, especially in the post-hurricane environment. I also believe that if the board is going to mortgage real property owned by the association, membership approval should be required.

- **Acquisition of Real Property.** The Florida condominium statute states that an association cannot acquire title to real property except as provided in the declaration of condominium, and if the declaration is silent, seventy-five percent of all membership interests must approve the acquisition. The HOA law contains no guidance on this point. A well-written set of governing documents will contain specific direction on this point. Because the acquisition of real property can have a material impact on the financial obligations of the association, I believe that a membership vote should generally be required, except perhaps in de minimis situations, such as the conveyance of originally-designated common areas in the homeowner's association setting. It is my belief that there should also be an exception permitting the board to acquire units or parcels, particularly at a foreclosure sale if the association has to foreclose its lien for assessments. Other exceptions might include acquisition of a unit or parcel in connection with an exercise of a right of first refusal.

- **Conveyance of Real Property Owned by the Association.** Typically, in the condominium setting, associations do not own real property. There is an exception in some cases, for what is

known as "association property", as distinguished from "common elements." Ownership of property in the homeowners' association context is common. The condominium statute provides that the conveyance of association property requires a seventy-five percent vote unless otherwise provided in the declaration. Again, the HOA statute is silent. Generally, there should be limits on a board's authority to convey the association's real property.

- **Authority to Grant Easements.** The condominium statute states that the board of directors has the authority to grant or modify easements without approval of the unit owners. There is no guidance in the homeowners' association law. Again, clear guidance in the constituent legal documents will avoid disputes.

- **Bulk Cable Television.** Many communities enter into arrangements for the purchase of cable television services on a bulk-billing basis. The Florida Condominium Act states that this authority is vested in the board of directors. Once again, the law for homeowners' associations is silent on the point. Further, it is desirable to specify how cable charges will be shared, and whether there are situations where a party is excused from paying his or her share of bulk cable television expenses (the most common of which would be vacant lots in the homeowners' association setting).

- **Other Ancillary Services.** Condominiums and to a lesser degree homeowners' associations occasionally provide bulk services to residents, such as interior pest control, air-conditioner maintenance contracts, or even kitchen appliance maintenance agreements (common in resort condominiums). If association funds are to be spent for these purposes, it is preferable to list them in the constituent legal documents.

- **Right to Charge Fees for Use of Common Elements or Association Property.** Many associations permit the private use of association amenities, such as the rental of a community clubhouse for a wedding reception or anniversary party. The documents should address whether the board has the authority to permit private use of common amenities, and the right to charge fees related thereto including security deposits, cleanup fees, and rental for use of the facility.

- **Lease of Common Elements or Association Property.** There are many situations where an association might want to consider leasing a portion of its property to some third party. Cellular telephone antennae on high-rise condominium rooftop buildings is a prime example. Rental of association office space is another. The authority for such actions is best specifically addressed in the constituent legal documents.

In the next installment of this series, we will conclude our review of document amendment tips and strategies with a review of customary bylaw provisions regarding the seating and election of the board of directors. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representingcondominium, 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****.*

Board Worried About Errors in Financial Statements

Question: I am on the board of a condominium association and we are concerned about errors that are appearing in our monthly financial statements. In one instance funds from our restricted reserves were used to pay for a roof at another association. We are into the third month since this was called to the management company's attention, and a correction has not been made. We have lost both principal and interest to this point.

In another instance, a large unused insurance claim which was reported on the July statement has not appeared on the August to October statements.

If the management company cannot fully explain and correct the accounts, what steps should we take? For instance is there a Florida governmental department or agency to whom we can appeal for assistance? J.G. (via e-mail)

Answer: As with all contractual relationships involving a community association, the first step is to review the contract between the association and management company. For example, you need to understand whether the contract requires the management company to be responsible for the monthly financials, or whether that work is actually performed by an entity with which the association has another direct contractual relationship, such as an accounting firm.

Like any other contractual relationship with a service provider, the board should continually monitor whether it is getting value for the fee being paid. If not, it might be time to think about shopping around for another management relationship.

If the board is considering a change, it is very important to review the contract for termination procedures. I always recommend that contracts with service providers, particularly community association managers, be terminable by either party, with or without cause, on reasonable notice (such as thirty or sixty days). However, I have seen many management contracts which contain lengthier terms, often one year, sometimes three years.

If the association is subject to an agreement that is not terminable at will, then cancellation would only be permissible if there is a breach of contract which is not cured. This would typically require the association to give the manager written notice of deficiencies and the opportunity to correct them.

If the board feels that the relationship is worth salvaging, which may well be the case, I would recommend that the board ask the top executive from the management company to attend a meeting of the board. The board should lay out its concerns, and determine if the management company has the willingness and ability to correct the deficiencies in performance.

The mistakes and omissions which you describe are certainly material. If you have lost interest on deposits, the management company should make good on it.

Community association managers in Florida are regulated by the Department of Business and Professional Regulation. The DBPR does not get into routine contract and performance disputes, but can discipline licensed managers for legal violations, or acts of gross misconduct. Further information can be obtained from the DBPR by navigating its website at www.state.fl.us/dbpr/.

Question: I live in a condominium that is a series of duplex buildings. In other words, I share a party wall with one neighbor, and the other buildings are located along a common street. My next-door neighbor is a nice person, but has an annoying habit of playing his saxophone into the late hours of the evening. When it is cool, he keeps his windows open, which makes things that much worse. I work in the medical field and must leave for work very early every morning. I read our association documents and saw there is a section that says that the association can stop nuisances in the condo. I do not want to start World War 3 with my neighbor, but I feel like I am a prisoner in my own home. What do you recommend? L.A. (via e-mail)

Answer: I recommend that you call or visit your neighbor and lay out your concerns. It may be that he is unaware of the noise he is creating. Unfortunately, many condominiums are not known for the sound-proof quality of their buildings.

If your neighbor is unwilling to work with you, you will then need to consider whether to take the matter a step further. The nuisance clause in your condominium documents confers rights upon you, not just the association. You may have legal recourse to seek relief from the nuisance, although you should obviously take all steps to resolve the matter without resorting to the legal system.

The role of the association is tricky in matters like this. In my experience, many associations are hesitant to enforce nuisance complaints, because they are perceived as picking one neighbor's side over the other's. Obviously, playing a saxophone is a lawful activity, your neighbor is doing it within the confines of his home, and the question is where the line should be drawn in balancing your rights against his.

For example, many associations decline to become involved in "neighbor vs. neighbor" noise disputes, unless more than one owner has filed a complaint about the noise. If all else fails, you should investigate buying some earplugs. Good luck.

Question: I received a violation notice from my homeowners association to remove my U.S. flag which is affixed to the front of my townhome. I have heard there is a recent law forbidding an association from forcing homeowners from removing a U.S. flag. I am a combat veteran from Iraq and I am very upset about this. Could you please advise me of the law allowing me to fly a U.S. flag. S.H. (via e-mail)

Answer: Generally, an association has the right to create rules and regulations, including such rules and regulations that deal with displaying flags. However, the association cannot prevent an owner from displaying a United States flag that is displayed in accordance with Florida law.

In the homeowners association setting, Section 720.304(2), Florida Statutes states:

> Any homeowner may display one portable, removable United States flag or official flag of the State of Florida in a respectful manner, and on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day may display in a respectful manner portable, removable official flags, not larger than 4 ½ feet by 6 feet, which represent the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, regardless of any declaration rules or requirements dealing with flags or decorations.

The Condominium Act contains a nearly identical provision, but does not reference the "flag of the State of Florida".

Also in the homeowners setting, Section 720.3075(3), Florida Statutes states:

Homeowners association documents, including declarations of covenants, articles of incorporation, or by-laws, may not preclude the display of one portable, removable United States flag by property owners. However, the flag must be displayed in a respectful manner, consistent with Title 36 U.S.C. Chapter 10.

Therefore, so long as your United States flag is displayed in conformity with the above-referenced statues, the association cannot require you to remove it. ■

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