

Residents' Interests Surveyed

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CALL, the Community Association Leadership Lobby is a recently organized advocacy group set up by the law firm of Becker & Poliakoff, P.A., the firm where I practice law. CALL was primarily formed to provide an additional conduit for community associations (condominiums, cooperatives, mobile home communities, and homeowners' associations) to express opinions about needed legislative reforms, and comment on policy and legislative ideas suggested by others.

Legislators are often told, when asking to consider proposed Bills, what board members in community associations, and the residents in those communities, need or want. Of course, the bearers of these messages see the world through their own eyes, and often-times, legislators are afforded limited opportunities to discover the true opinions of those they serve.

CALL has attempted to provide some measure of objective information through its second annual Community Living Survey, which was released on January 12, 2006.

The survey results are based on responses of 1,299 participants who own property in Florida common-ownership community associations. Participation in the survey was invited through various media, and was not limited to clients of the law firm. Further, community association residents who do not serve on their associations' board were encouraged to participate, as were board members. Approximately one-half of the respondents were not board members.

Here's a look at some of the highlights from the survey:

- **Hurricanes Remain a Top Item of Interest:** While over half of the respondents say they do not rely on their association to any significant degree for storm preparation, one-quarter did say they rely "almost exclusively" or "extensively" on their association for catastrophic event preparation. Surprisingly, less than a third (30%) reported any knowledge of increased investment by their association in storm protection as a result of the 2004 and 2005 hurricane events.
- **Keeping Watch on the Pocketbook:** Nearly three-quarters of community association residents are "extremely concerned" about their association's ability to maintain a balanced operating budget, with particular emphasis on rising affordability and availability of insurance. Concerns about the adequacy of the association's reserves came in a close second. Approximately seventy-five percent of the respondents rated their board's handling of financial matters as "good" or "excellent."
- **Board Member Integrity in the Spotlight:** Nearly four out of five respondents rated the individual integrity of their board members as "extremely important." While less than ten percent of the respondents state that their association has had to resort to recall procedures to remove "undesirable" board members, a significant number of respondents

indicated that they do participate in politicking at election time, when they perceive need for a change.

- **Keeping Informed in the Information Age:** The survey attempted to ascertain the avenues through which most community association members receive information about their issues. More than two-thirds (68.5%) primarily relied on newspaper articles. About one-half of the respondents also counted e-mails and association newsletters as a source to keep up with current events in their particular community.
- **Focus on Safety:** A large number of respondents appear to link crime deterrence and the physical safety within their community as a leading indicator of property values. Perhaps surprisingly, while a minority of respondents felt that the percentage of renters in a community and screening new owners

and tenants is important, this did not appear to be a primary area of concern for the respondents.

- **Most Want the Rules Enforced:** Enforcement of a community's rules and regulations enjoys overwhelming support (96.2%) among property owners. Even though one-half of those who responded to the survey did not serve on their board, even non-board members (93.6%) responded that they are in favor of strong enforcement of rules and regulations. Four out of five community association members also support fines to enforce compliance with the documents.

While any survey is only a tool, CALL's survey seems to debunk the myth perpetuated by some that the community association regime is on the verge of anarchy and collapse. The entire survey is available to members of the public at www.becker-poliakoff.com. ■

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.

Condo Documents State Who Can Serve as Officer

Question: The president of our condominium association lives in a unit with his “significant other.” They are not married and the president is not the actual unit owner. What I mean by this is our president is a “trustee” of the property and his “significant other” is the owner. Can a “trustee” hold an office on our board in the State of Florida if his name is not on the deed? V.E. (via e-mail)

Answer: I am not exactly sure I understand the nature of unit ownership you are describing. I presume you are referring to the situation where the unit is owned by a trust, and in this case the president is either the grantor, or beneficiary, of the trust.

Florida Statutes do not really offer much guidance as to who can serve as an officer of a condominium association. Therefore, you must look to the condominium documents, usually the bylaws. Sometimes the bylaws will indicate that an officer must be a unit owner, or even must be a member of the board. Sometimes the bylaws will say that anyone can be an officer, including non-owners. Therefore, the answer to your question is really found in your association’s condominium documents and any limitations that might be contained in them.

A related topic is the eligibility to serve as a board member. Florida Statutes do not give a whole lot of direction in this area either. The Florida Not-For-Profit Corporation Act states that directors must be natural persons who are eighteen years of age or older, but they do not need to be residents of the state or members of the corporation unless the articles of incorporation or bylaws so require. The Condominium Act adds that a person who has been convicted of any felony by any court in the United States and who has not had his right to vote restored is not eligible for board membership. Again, you still need to look to the condominium documents for guidance as to further restrictions on who may serve on the board.

If the condominium documents restrict eligibility to those who are members of the association, and only owners are members, an issue that often arises is when the unit is

owned in trust. The Florida Not-For-Profit Corporation Act addresses this, and indicates that the grantor of a trust, or the beneficiary of a trust, is deemed a member of the association and is eligible to serve as a director of the condominium association. In the case of a beneficiary of the trust, an additional requirement is that the beneficiary must actually occupy the unit.

Question: We have two questions regarding the purchase of condominium units. 1) If a board of directors of a condominium association exercises its right of first refusal to purchase a condominium unit, in what name would association purchase the unit? 2) When there is a unit for sale or subject to bank foreclosure, the property manager is often privy to such information prior to the board. Is there a conflict of interest if the property manager makes an offer on a unit in the community that is for sale or in bank foreclosure? M.S. (via e-mail)

Answer: In response to your first question, I assume you are referring to the right of first refusal, or option to purchase, that often exists in favor of the association in the declaration of condominium. Arbitration decisions in Florida have upheld an association’s right set forth in a declaration to disapprove a proposed transfer if the association agrees to purchase the unit in question on the same terms as the disapproved transfer. In such a case, the association would purchase the unit in the Association’s corporate name, and the unit would become association property and not common element.

Your second question appears to involve units in the community that are for sale or subject to foreclosure. There is a concept in corporate law known as the duty of loyalty of directors. The duty of loyalty requires directors and officers to pursue opportunities on behalf of the corporation if any particular opportunity is in line with the corporation’s business plan and objectives. Therefore, the fiduciary duty of loyalty may prevent a director from seizing an opportunity for himself to purchase a unit that the association may also be interested in purchasing. However, I do not believe an association should be “in

the business of” purchasing units that are for sale or are being foreclosed upon within the community, unless there is some specific purpose consistent with the association’s obligations under the governing documents. With respect to a property manager seizing an opportunity, I do believe the fiduciary duty of loyalty that applies to corporate directors also applies to property managers.

Question: Our homeowner’s association has no outside management (no management company or on-site manager) and is managed exclusively by the board of directors and its appointed committees. Is it a conflict of interest for a real estate agent who sells homes in our community to serve on the board and hold the office of president? If this is not illegal, are there ethical issues involved? A.B. (via e-mail)

Answer: As mentioned in the previous question I answered, the law does not contain much in the way of limitations on who can serve on an association’s board. Although governing documents often contain limits (such as a requirement that one be a property owner), I have never seen a limitation that would preclude someone in a certain

profession (such as a real estate agent) from serving on the board. In fact, I doubt that such a limitation would be legal since both the laws applicable to condominiums and homeowners’ associations permit any property owner to stand for election to the board.

Whether someone who does business in the community is the best candidate for your board is a political question for your neighbors to answer, through the election process. If this individual is elected to the board, there is no reason that they cannot serve. In fact, some might argue that a real estate agent who earns his or her living by selling homes in your community would have as great an interest as anyone in keeping property values high.

Clearly, there may be situations where this particular director may find himself or herself faced with a conflict of interest. For example, if your community approves the sale or lease of homes, and a transaction in which your board member is involved as a realtor is up for discussion, I believe they would be well advised to abstain from voting, after disclosing their involvement in the transaction. ■

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