



Don't Force Board to be too Stingy

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As reported in last week's column (*Storms Have Implications For Condo Associations*, May 11), the start of another hurricane season in Florida has, with good reason, garnered more attention than in years past. The fallout of the 2004 and 2005 hurricanes is perhaps just beginning to manifest itself. From ever-shrinking availability of coverage to astronomical insurance rate increases, Floridians are becoming increasingly attuned to the economics of Mother Nature's vagaries.

In response to last week's column, I received numerous e-mails lamenting shocking insurance increases. One of the condo sections of the Cinnamon Cove development in Fort Myers wrote to tell me what is apparently becoming a common story. After being dropped by their private carrier, the association was forced to go on the open market to try to find insurance. No carrier would pick them up, and they were required to place hurricane insurance through Citizens, the state-run insurer of "last resort." Annual premiums went from \$4,500.00 per year to approximately \$25,000.00 per year, an increase of nearly six hundred percent.

Lest it be thought that the phenomena is limited to Southwest Florida, I received an e-mail from a villa community in the Orlando area that was also forced to purchase insurance through Citizens, since no private carriers would bid. Rates increased from \$14,000.00 to \$93,000.00, another increase in the six hundred percent range.

Unfortunately, many communities judge their board by how low they keep monthly maintenance fees. Boards caught up in this philosophy find it necessary to rob Peter to pay Paul. Unfortunately, "Peter" may involve necessary physical maintenance, adequate management, appropriate investment in professional assistance, landscape, and other "luxuries" of that ilk.

As mentioned in last week's column, like the days of fifty cent per gallon gasoline, the times they are a changin', or perhaps have already changed. In addition to educating association members about the realities of condo economics of the new millennium, associations should also remove any impediments found in the governing documents which limit the board's ability to exercise its fiduciary responsibility. As mentioned last week, a surprising number of condominium associations have assessment restrictions contained in their declaration of condominium or bylaws. Some documents require membership approval for increase of the budget over a certain percent, some require membership approval for special assessments, some require approval in both circumstances.

In many cases, members are hesitant to give up their line-item veto, perceiving their approval rights as a check against spendthrift boards. In reality, at least in my opinion, communities that cannot raise necessary capital to operate will eventually suffer in property appreciation values (a thought lost on

many during the current boom-town real estate market), as corners are cut, necessary maintenance left to the next board, and decisions requiring professional input made on a wing and a prayer.

Owners can be protected against the board who wants to pave the streets with gold through proper language in the documents limiting authority for upgrades to the property, sometimes called betterments, technically called material alterations or substantial additions to the property. I believe it is entirely appropriate for membership approval to be required for aesthetic improvements. However, politicizing regular and special assessment

authority regarding necessary expenditures rarely accomplishes the intended result.

Therefore, I believe associations should take a close look at their governing documents and determine if impediments exist to the board's ability to assess and collect necessary funds for the operation of the community. If so, those impediments should be removed through amendment.

Next week, we will continue this series with a look at some other provisions in the condominium documents that come into play in pre-disaster and post-disaster planning. ■

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.

Listing Owners Present at Meetings Not Common

Question: Our condo association allows owners to attend the board meetings, but does not list any as “owners present” in the meeting room in the minutes. They do list the board members present. Shouldn’t they list the others attending the meeting just for record purposes? M.S. (via e-mail)

Answer: There is no provision in the Florida Condominium Act that requires meeting minutes to reflect individual owners present. At the same time, there is no prohibition against meeting minutes containing that information.

From a practical standpoint, however, it may not be feasible to list all the individual owners present, particularly in large association settings. I do not believe that listing members present at board meetings is a common practice.

Question: I am a homeowner in a mobile home park governed by Chapter 720 (the Homeowners’ Association Act). The membership of our community recently removed a director on our board in a recall vote. Can this recalled director ever run for the board of directors again? B.V. (via e-mail)

Answer: There is nothing in the statute that would prohibit the recalled board member from running for a seat on the Board. Therefore, the recalled board member could choose to run and could be elected by the owners to the board again. However, the Board could not, when deciding to fill the vacancy created by the recall, appoint the recalled Board member to fill the vacancy created by his recall.

Question: Our condominium association funds capital expenditures by special assessment. We have no reserves. Can the “common surplus funds” within our annual operating budget be used to

defray some of the costs of capital expenditures thereby lowering special assessment to each owner? J.L. (via e-mail)

Answer: A condominium association’s budget must include reserve accounts for capital expenditures and deferred maintenance (for roof replacement, building painting and pavement resurfacing, and for any other item for which the deferred maintenance expense or replacement cost exceed \$10,000), unless the owners vote to waive the funding of the reserve accounts. Therefore, if your association does not have any reserves, it should be obtaining a vote of the owners every year to waive the funding of the reserve accounts.

Regarding the use of the common surplus funds, if the Association is rolling over the surplus funds at the end of the year (and you should discuss with your accountant the tax implications and the proper procedure for doing so), this money can be included in the next year’s operating budget to reduce assessments or to fund an unrestricted “contingency” account for purposes of paying for unexpected repairs. In that case, the Board would have the authority to use the money in the operating budget’s contingency account to pay for the repairs, thereby reducing the need for a special assessment or to reduce the amount of the special assessment.

Question: My wife and I recently closed on the purchase of a condominium unit, only to find out later that the seller failed to disclose a report which indicated that a special assessment would be passed, as well as additional defects at the Association which would require future assessments to be levied. I would like to know if we have any recourse against the seller and/or can we force the seller to pay the assessments based on their failure to disclose. D.M. (via e-mail)

Answer: In the State of Florida, a seller of a home is under a duty to disclose to a potential purchaser any facts regarding the home which may materially affect the value of the property which are not readily observable and are not known to the buyer. Although I am not aware of any case decisions on point, this would arguably include the disclosure of a planned special assessment and/or any defects in the condominium property of which the seller is aware.

Should a seller fail to disclose material facts, he or she may be subject to an action based on breach of contract or misrepresentation. Under Florida law, a right of action may also exist against a broker, if one was involved, on the theories of negligence and misrepresentation, should it be proven that the broker was also aware of facts which affected the value of the property in question, and failed to disclose. ■

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