



Boards Seek Emergency Powers

Fort Myers The News-Press, June 8, 2006

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

A week ago today marked the official start of hurricane season. With any luck, we will avoid a third consecutive nail-biting summer, glued to the tube, stressing over whether Mother Nature's fickle finger will touch us again.

Without a doubt, concerns related to hurricane protection and post-hurricane issues have become the focal point of community association news in Florida. From skyrocketing insurance premiums to legally mandated disaster plans, the once-tranquil summer months in Southwest Florida seem to be punctuated by hoping for the best, but preparing for the worst.

Today's column is the fifth installment in a series of tips for community associations in planning for catastrophic events, with an emphasis on legal documentation. Today's focus involves the extent to which a community association board can invoke extraordinary powers in the wake of a disaster.

In December of 2005, the Florida Advisory Council on Condominiums issued a report to the Governor and Legislature recommending the consideration of legislation which would grant "emergency powers" to boards in the wake of a catastrophe. However, as is often the case, there is lag time between the development and debate of public policy ideas, and their implementation in the law. As of this date, the Legislature has not adopted

any legislation which would provide guidance to boards during the critical days and weeks following a major catastrophic event.

Accordingly, many associations have legislated their own emergency powers, through amendment to the contract the owners have with each other, called the declaration of condominium (or for homeowners' associations, the declaration of covenants). Here's a look at some common issues that might be addressed through amendment under the auspices of granting emergency powers to the board:

- **Evacuation:** A common challenge faced by associations involves situations where residents refuse to vacate the community, even if a governmental evacuation order has been issued. These recalcitrants often interfere with the association's efforts to secure the premises and shut down the buildings (raise elevator cabs to upper levels, turn off the electricity, affix shutters to points of ingress and egress, etc.).
- **Post-Disaster Mitigation:** While the Florida Condominium Act grants the association the right to enter units for the purpose of preventing damage to the condominium property, the law is silent on the scope of the association's authority to address items typically considered wholly within the owner's realm. For example, after Hurricane Charley, many associations were advised that in order to prevent the spread of

mold, the carpets in the dwellings should be cut out and thrown away. It is typically not feasible for the association to contact each property owner in a post-catastrophic environment, leaving boards with a difficult choice at best. Likewise, the law offers no guidance to the association in terms of taking other actions it would not normally take, such as removal of an owner's furniture and other personal property and storing it so that damage can be mitigated.

- **Authorizing Owner Services:** One of the most common sources of disputes in post-hurricane cases involves the extent of an association's right to bring in "dry-out" contractors to extract water, and then ask the owners to pay for that service individually.
- **Prohibiting Entry Onto The Property:** After a catastrophe, many owners understandably want to get into their home to inspect for damage, or simply take a look around. This is certainly understandable. However, in many cases following significant casualty damage, it is simply not safe for people to come onto the property

due to jagged debris, hanging electrical wires, broken glass, and the like. Additionally, after a major casualty event, associations will often have large crews of contractors on property, shoring up the premises, drying in the buildings, and drying them out. This is a dangerous environment at best. Many contractors will refuse to work on the property unless it is secured against entry by the property owners.

Obviously, there is a fine line between individual property rights and the scope of a board's authority to declare "martial law." A well-drafted protocol, contained in the declaration, will provide a greater measure of certainty in guiding the board through these traumatic times. While no legal document will ever anticipate every problem or challenge, the current void in the law clearly indicates that an association is well served to have some level of guidance in its documents.

Next week, we will take a look at provisions in the constituent legal documents dealing with insurance, post casualty-repair, and the allocation of costs when the inevitable monetary shortfall arises. ■

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.

Proxies Must Meet Specific Requirements to be Valid

Question: In a column a few weeks ago, you answered several questions about when a proxy vote can be given by a condominium owner. You indicated that proxy votes could not be counted in an election of the board of directors of a condominium association. You also stated that Florida law dictates when proxy votes can be used by a condominium association. Do these same rules apply to Homeowners' Associations? J.L. (via e-mail)

Answer: While the Florida Condominium Act places strict limits on the use of proxy votes by members, the Florida laws relating to homeowners' associations generally defers to the bylaws, and does not prohibit proxy voting in electing directors.

Even though proxies are permitted to be used more liberally in a homeowners' association, the proxies must meet specific legal requirements to be valid. For instance, the proxies must be signed by the person authorized to execute the proxy and the proxy is only valid for the specific meeting for which the proxy was originally given (or a lawful adjournment thereof). Also, the proxy must state the time, date, and place of the meeting for which the proxy is being given. There may be additional requirements on the use and form of a proxy in the bylaws of the Association.

Question: I am looking for information about whether a condominium association must comply with the Americans with Disabilities Act. Our association does not have a club house or an onsite office. All residents are assigned a carport. We have a resident that wants a separate carport for their use in addition to the carport assigned to them. The board has made several offers, all have been refused. J. S. (via-e-mail)

Answer: The Americans with Disabilities Act ("ADA") is applicable to a condominium association (or homeowners association) if the community contains a "place of public accommodation." A place of public accommodation is a place open to the public such as a restaurant, fitness club, or the like. Condominiums which permit transient rentals are also subject to the ADA. Most condos are not governed by the ADA.

Even if the ADA does not apply to your association, the Fair Housing Amendments Act ("FHAA") does. The FHAA protects persons with disabilities from discrimination in any activities relating to the sale or rental of dwelling, in the provision of services or facilities in connection with such dwellings, and in the availability of residential real estate related transactions.

The FHAA requires an accommodation for persons with handicaps if the accommodation is reasonable and necessary to afford handicapped persons equal opportunity to use and enjoy housing. An accommodation or modification which allows the handicapped residents (or persons associated with them) to experience the full benefit of the tenancy must be made unless the accommodation or modification imposes an undue financial or administrative burden on the housing provider or requires a fundamental alteration in the nature of its program.

Should the resident in question need two carports or parking spaces (for example, to park a specially equipped vehicle and a vehicle of a live-in caregiver) a reasonable accommodation may be required. On the other hand, the association could not take away a space that had been assigned to another owner as a limited common element. Each "reasonable accommodation" case depends on its specific facts. Because of the exposure affiliated with violation of

fair housing laws, your board is well advised to obtain an opinion from legal counsel, based on the specific facts of your case.

Question: I cannot find anything official about finalizing the minutes of board, committee or members' meetings in our community association. The secretary prepares a draft of the minutes and sends it to each board member. When are meeting minutes final and legal? I have been told that minutes are not final and approved until the next board meeting where a motion can be made to approve the minutes from the previous meeting. If the next board meeting is not for 30 days or longer, that seems like a long time for minutes to be a draft, especially if a copy is requested by an owner. It seems like there should be a legal process including a timeframe for completion. B.C. (via e-mail)

Answer: The Florida Statutes that govern condominium, cooperative, and homeowner associations require that minutes of board, committee, and members' meetings be maintained as a part of an association's official records, and that members have the right to inspect and copy the official records. There is no legal requirement in any of those laws establishing a timeframe within which minutes must be finalized. It is common that at

the next board, committee, or members' meeting, as the case may be, that the minutes from the previous meeting are approved.

It is clear that final, approved minutes are a part of an association's official records. The question that arises is whether drafts of unapproved meeting minutes are also considered official records. The relevant statutes governing the various types of associations do not specifically refer to "final" or "approved" minutes as being a part of the official records, rather they just refer to "minutes" generally. In other words, no specific distinction is made between drafts of unapproved minutes, and final approved minutes.

Also, each of the relevant statutes contains a "catch all" provision indicating that all records of an association, not otherwise specifically set forth in the statute as official records, but that are related to the operation of the association are also a part of the official records. Therefore, it is my opinion that drafts of unapproved minutes, at least once they are circulated by the drafter, are a part of the association's official records for which members have the right to inspect and copy. Whenever drafts of unapproved meeting minutes are created, they should be clearly marked as such to avoid any confusion that they are not final, approved minutes. ■

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