



Use Care in Special Assessment

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For the past couple of months, many associations have reported staggering increases in the cost of renewing insurance policies, including premiums for those private carriers who will still take business, as well as Citizen's, the state-run insurer of last resort. Unfortunately, many associations prepared their 2006 budgets almost a year ago, and had no inkling that costs would rise so dramatically.

Association budgeting, which is more of an art than a science anyway, can reach a crisis point when an association must pay for a non-optional expense, such as insurance, but does not have the cash on hand to do so. Amending the budget for the year is rarely a viable alternative, since the need for cash is usually immediate. This leaves the association with only two options, borrowing the money or raising it through special assessment of the members.

While bank loans and lines of credit have become an increasingly popular method of addressing cash crunches, the most common method of raising funds is through a one time assessment of the members, commonly known as the special assessment. While the procedures surrounding the levy of special assessments is not overly complicated, it remains one of the most common sources of errors in association procedures.

Assessments, like taxes, are rarely welcome or popular. Most members realize that the board has a fiduciary duty to assess sufficient amounts to operate

the community. However, there are often one or two owners who fail to pay special assessments, whether due to financial hardship or disagreement with the wisdom of the assessment. When a special assessment is unpaid, it becomes a lien against the property and can be foreclosed in the same manner as a delinquent mortgage.

Accordingly, it is important for associations to dot the i's and cross the t's when the levy of a special assessment is involved. As always, the first place to look is the governing documents for the community. While most documents permit the board to levy a special assessment, in some communities a membership vote is required by the documents. In those cases, a vote should be taken. While some argue that unit owner voting requirements for necessary expenses contravene the law, no court has ever made that finding.

Assuming that the board has the authority to levy a special assessment, both the statutes for condominium and homeowners' associations require that notice of the board meeting where the assessment will be considered be posted on the property at least 14 days in advance of the meeting. The notice must also be mailed or hand delivered (with receipt) to each member. The notice must specify the purpose of the proposed assessment, but does not need to include the proposed amount of the assessment (although many associations find it helpful to provide an estimate in the notice).

At the meeting of the board, the adoption of the assessment should be documented in the minutes of the meeting, preferably through a formal resolution. The resolution adopting the assessment should recite the specific purposes for the assessment, the amount due, and the due date. If owners are to be permitted to pay the assessment in installments, all members must be given the equal right to pay in that manner, and the due dates of the installments should likewise be documented.

Once the board has levied the assessment, the members must be notified (by mail or hand delivered notice) that the assessment was approved, the exact amount of the assessment, the purpose(s) of the assessment, the due date, and installment payment options if applicable.

In cases where an assessment becomes the object of a legal dispute, the association will breathe a bit easier if it has made sure that all of the appropriate steps have been followed. ■

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.

Proxy Vote Documents are Part Official Record

Question: Our condominium has had a recent proxy vote to replace the windows. The votes were counted and there were 21 in favor and 24 against. We have 50 units. As per our understanding the proxy is good for 90 days. After speaking with those people that voted against the new windows, we found out that some people were harassed into voting against it, not only by telephone calls but with visits to their door and with wrong information. After a lot more work we now have 2/3rds vote in favor and have sent a 14 day notice of another meeting where the proxies will be recounted. Some owners have asked for information regarding who voted, who did not vote, and how they voted. Is it possible to keep the details of the proxy vote private? The board fears that some owners may use this information to harass and embarrass other owners. B.K. (via e-mail)

Answer: First, although the proxies are good for 90 days, if the owners voted on the windows and the vote failed, you cannot reuse the same proxies for a new vote. Instead, a new notice with new proxies should be mailed to the owners. If however, the meeting was adjourned before the question was called and voted on, then the meeting can be adjourned to another day and the proxies can be used at that new meeting (along with any additional proxies obtained after the adjourned meeting). As to whether the details of the proxy vote can be kept private, the answer is no. The voting documents such as proxies, voting certificates, etc. are official records and must be provided to any owner who makes a records request in accordance with the Condominium Act.

Question: I live in a high-rise condominium building. Our condominium documents require that purchasers of units and prospective tenants submit an application for approval to the Board of Directors. Recently, we have had applications from purchasers that are purchasing a unit in the name of a corporation,

or in the names of several different families. We are concerned that these corporate owners and multiple family owners will use the unit more like a time-share vacation spot and not like a residence. This condominium is my permanent home. Is it legal for a corporation or for multiple families to buy a unit and use it like a time share? R.M. (via e-mail)

Answer: It is generally not possible to limit the manner in which a purchaser holds title to a condominium unit. There is a concept in the law that protects a property owner's right to freely transfer his property. If the Association were to attempt to tell a current owner that he may not sell his condominium to a corporation or to multiple families, the Association may run afoul of this basic right. However, it is permissible for an association to limit the type of use any owner may make of his unit.

For example, a well-written declaration of condominium will often include detailed restrictions on the frequency and duration of leases within the building. In addition, a detailed definition of "guest" will help to prohibit a unit owner from avoiding the leasing restrictions by claiming that an occupant is a guest and not a tenant. Most importantly, where the owner of the unit is not a natural person, or a legally married couple, it is important to define and designate a primary occupant of the unit. Provisions can be included in the declaration of condominium that require all owners to designate a primary occupant. These provisions can restrict the frequency with which the primary occupant designation can be changed. By implementing such a provision, the condominium can hold a corporate or multiple family owner of a unit to the same standards regarding leasing and guests that apply to more conventional title holders such as individuals and legally married couples. Without these primary occupant provisions contained in the declaration of condominium, it is

possible for a corporate or multiple family owner to use a unit as a type of time share.

Question: Our condominium association common element property has suffered a number of damaged or destroyed trees as a result of Hurricane Wilma. I have learned that our association has determined, after consultation with a landscape architect, that certain, different species of trees typically fair better in hurricane conditions than the trees that were damaged or destroyed. The Association recently replaced the trees with the different variety of trees without a unit owner vote. Our governing documents do not mention landscaping or trees. M.K. (via e-mail)

Answer: Although prior arbitrations are not binding precedent, they are a good indication as to how future arbitrators will rule. In a past arbitration decision where the governing documents were silent as to replacement of landscaping, a unit owner challenged

a board decision arguing that the replacement of landscaping in the common elements was a material alteration thereby requiring a unit owner vote. The board successfully argued that it was merely performing its maintenance and repair function. When ruling in favor of the board, the arbitrator reasoned that changes to landscaping do not alter the use of the common elements as would a golf path, deck, or other structural improvement, and that there was less of an expectation of the status quo in the area of landscaping.

Therefore, if your governing documents do not expressly require the association to replace damaged landscaping with exact replacements, your association may have some leeway and discretion in replacing the trees so long as the general scheme of landscaping is not essentially altered. This is especially true if the board's decision has the support of a qualified consultant who has rendered an opinion upon which the board may rely. ■

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