



## Associations Crunches by Insurance

Fort Myers The News-Press, November 16, 2006

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Many condominium associations, reeling from sticker shock over the cost of renewing insurance premiums, are now trying to figure out how to pay for it.

As discussed previously in this column, many local associations are seeing insurance premiums escalate at phenomenal numbers, such as five hundred or six hundred percent. Several associations have told me that well over half their annual budget is now devoted to paying for insurance.

A number of associations have asked about “borrowing” from reserve funds to soften the cash-crunch caused by unpredictable insurance premium increases, which are compounded by the fact that many insurers require premium payments in one lump-sum, often at the beginning of the year, when cash is tightest.

Florida law requires every association to prepare and adopt an annual budget. The annual budget has two components, the operating component and the reserve component. Insurance is required, by law, to be provided for in the association’s operating expenses. The association is also obligated by law to assess sufficient amounts in advance to fund all anticipated operating expenses, plus expenses previously accrued for which payment has not been made.

However, theory and practice are not always the same thing. So, what is an association to do when it is time to pay for insurance, and there are no operating funds

available to do so? In my Q&A column for today, special assessments and bank loans are two options that were discussed. The third option, the use of reserve funds, is a bit trickier.

Section 718.112(2)(f) of the Florida Condominium Act states that reserve funds and any interest accruing thereon shall remain in the reserve account or accounts, and shall be used only for authorized expenditures, unless their purpose is approved in advance by a majority vote at a duly called meeting of the association.

Therefore, in my opinion, if an association wishes to make reserve funds available for operating purposes, including paying for insurance, a unit owner vote is required. For example, I deal with many associations which take a “standing” annual vote to give the board a degree of latitude with respect to the use of reserves for operating purposes. Some associations vote to require that reserves used for operating funds be “paid back” over the course of the year, although that is not legally required. Rather, the owners decide through their vote how much leeway the board should have.

Some associations have also asked whether it is legally permissible to use assessment monies earmarked for reserves for operating purposes such as insurance, before the money is put into the reserve account. Rule 61B-22.005(6) of the State’s financial regulations for condominiums states that reserves in the adopted budget must be funded with the same

frequency that assessments are due from owners. In other words, if the association collects assessments monthly, the reserve account must be funded monthly. If the association collects its assessments quarterly, the reserve fund must be collected quarterly. Therefore, a vote would likewise be required to defer funding the reserve account to meet cash flow needs.

Contrary to apparent popular belief, there is no “emergency” exception in the law which would permit the board to tap into reserves. Unit owner approval

must be obtained. Therefore, associations wanting to plan in advance for a rainy day, may wish to consider voting each year to give the board some flexibility in the use of reserve funds.

For homeowners’ associations, there are no statutory restrictions regarding reserves. Theoretically, and in the absence of a limitation in the governing documents, the HOA board could use reserves to fund unexpected insurance costs, as well as operating expenses in general. ■

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*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](mailto: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](http://www.becker-poliakoff.com).*

## Majority of Voting Interests Can Recall Board Member

**Question:** Does the board of directors have a legal right to impose a special assessment to fund “unexpected” increases in insurance premiums? It seems to me that the insurance premium increases should have been anticipated. Will this set a precedent whereby the board can impose a special assessment every time there is an increase in an operating expense? C.L (via e-mail)

**Answer:** Unfortunately, we have all become painfully aware of the dramatic increase in insurance premiums subsequent to the recent hurricanes. While some increase in insurance premiums may have been anticipated, the dramatic extent of the increases has even taken many insurance agents by surprise. If the budget adopted by your association at its last budget meeting did not establish sufficient funds in order to pay the increased insurance premiums, a special assessment is one of the options to cover that expense.

Insurance premiums are a proper common expense and many associations have either levied special assessments or borrowed against lines of credit in order to pay the increased premiums. Your board will, of course, be required to follow the procedures in both the condominium documents and relevant sections of the Condominium Act to properly levy special assessments, or borrow from a bank. If your documents require membership approval for assessments or borrowing, the Board should seek that approval.

The action that your board has apparently taken is a common one. Accounting for the “new world of insurance” will likely be addressed by many associations in the upcoming budget cycle. Until then, levying a special assessment is one of the proper steps to take to cover the increased insurance premiums.

**Question:** If condominium documents and the Condominium Act give the association the right, and impose the obligation, to maintain and preserve the condominium property, what rights does a unit owner have when the board of the condominium only enforces the restrictions they feel are important? For example, many condominiums have rules prohibiting people from placing personal property upon the common elements, but what happens when board members do not follow the rules themselves? Are they failing to carry out their responsibility to the unit owners? K.J. (via e-mail)

**Answer:** The board clearly has an obligation to enforce covenants and restrictions contained in the condominium documents of an association. If a unit owner believes that the board is not fulfilling its obligations, I believe the unit owner should first write to the board and explain the issue, and cite relevant provisions from the governing documents supporting the unit owner’s comments.

Not every perceived rule violation is, however, cut and dried. This is where the “business judgment rule” comes into play. The business judgment rule basically states that the board of directors’ decision on any given matter will be respected and upheld as long as the board acts in a reasonable manner.

Board members are generally not personally liable for breach of their duties unless it can be shown that they have engaged in fraud, criminal activity, or self-dealing. Therefore, it is difficult to establish liability for breach of fiduciary duty on the part of a board member in an individual capacity, except in clear cases that meet the established criteria. However, there are other avenues for a unit owner to pursue.

First, the Condominium Act establishes the authority of any unit owner to bring an action against any other

unit owner, or the association, to enforce the statute, the declaration, the articles of incorporation or the by-laws. Every unit owner is a party to the “contract” that is contained in the condominium documents, and therefore every unit owner has standing to enforce those documents against all other parties, including the association.

Alternatively, as a more “political” solution, a unit owner can take steps to recall the existing directors.

**Question:** My homeowner’s association is self-managed with an annual budget of over \$500,000.00. We are thinking of hiring a community association manager. Does this person have to be licensed? B.D. (via e-mail)

**Answer:** There is no Florida law requiring that a condominium or homeowner’s association hire a community association manager, regardless of size or budget. However, if an association hires a manager,

the manager may be required to hold a license, depending on the size of the association, and whether the person is paid for their services.

Florida law defines a community association manager as someone who is licensed to provide community association management services. Community association management means the performance of certain practices which require specialized knowledge, judgment, and managerial skill, when performed for compensation and when the association or associations served contains more than 50 units or the association has an annual budget or budgets in excess of \$100,000.00.

Since your association’s budget is over \$500,000, if you plan on hiring a manager who will be accepting compensation for services, that person will need a license. If you plan on paying an officer or director of the association to act as your manager, that person would also need a license. ■

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