



Association Holdovers Remain on the Board

Fort Myers The News-Press, March 15, 2007

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Q: I serve as president of a condominium association. We have a five member board. Three positions on the board will expire this year. What happens if there are no nominations for those positions? The incumbents have not submitted letters of resignation nor did they submit self-nomination papers. P.T. (via e-mail)

A: This issue is not specifically addressed in the Florida Condominium Act, and often is not addressed in an association's bylaws. Chapter 617 of the Florida Statutes, the law governing not for profit corporations, states that each director shall hold office for the term to which he or she is elected or appointed, and until his or her successor has been elected or appointed and qualified, or until his or her earlier resignation, removal from office, or death.

Thus, "holdovers" who do not seek re-election arguably remain "on the board." Presumably, these holdovers do not want to serve on the board, otherwise they would have submitted their names as candidates for the board. In such cases, they should turn in written resignations and the remaining board members would fill the vacancies created by the resignations. If the "holdovers" do not resign, then they would be entitled to remain on the board.

Q: I am a homeowner in a community where the main road has a posted speed limit of fifteen miles per hour. Due to a continuing expansion of the community, we have been flooded with speeding construction vehicles, including sand trucks, which have traveled as fast as fifty miles per hour down our street. We have complained to the developer, but the foreman said he must witness the speeding in order to issue a violation to the driver, though he did state that video evidence may be acceptable. We have also tried to have the police enforce the speed limit in our community. The association board voted to invite the police into the neighborhood, but the police chief stated that he has no authority in a private community. Can anything be done? T.H. (via e-mail)

A: I believe that obtaining video tape evidence of the speeding would be an excellent first step toward resolving this problem. First, you could take the video tape evidence to the construction foreman and demand that he take action. If the foreman fails to take action, the video tape evidence can be used in an enforcement action by the association against the developer. If control of the association has been turned over to the members, you should know that the owner controlled board is empowered to enforce the valid restrictions and rules against the developer who owns property governed by the declaration of

covenants, conditions and restrictions. The developer has most likely retained the right to bring construction vehicles through the community until such time that the community is fully developed. However, any such rights do not typically include the developer's exclusion from other restrictions and reasonable rules passed by the board. Therefore, the association is within its rights to levy fines, if the association has authority to levy fines, as well as to file legal action against the developer seeking an order to compel compliance with the restrictions and rules.

The statement of the local police official that his department has no authority or ability to enforce traffic regulations within your community is not correct. While that statement may be initially true, Florida Statutes provide that a municipality or a county may exercise traffic enforcement jurisdiction over any private road or roads if the municipality or county enter into a written agreement with the party or parties owning or controlling such private road. Such agreement between policing authorities and associations are not mandatory, and the municipality or county may elect not to enter into such an agreement, but the legal ability to enter into an agreement and enforce traffic regulations within a private community is available under state law. Other provisions of the Florida Statutes specifically provide that the board of directors of a homeowners association, may, by majority vote, elect to have state traffic laws enforced by local law enforcement agencies on private roads that are controlled by the association.

Q: My condominium association is still controlled by our developer. I paid my assessments based on an operating budget that listed items that were never built, so the Association actually has a hefty surplus right now. Am I entitled to a refund? T.U. (via e-mail)

A: Generally, any revenue collected that is in excess of the actual amount spent during a given year is held by the association as common surplus.

While the Florida Condominium Act does provide that any common surplus is owned by the unit owners in the same shares as their ownership interest in the common elements, it does not require the association to return the excess funds to the unit owners. In the case of excess funds remaining from a special assessment, the board of directors can decide to return the unused revenues to the unit owners or apply them as a credit toward future assessments.

Q: We have a five member board of administrators. A quorum of three members is needed to hold a board meeting. My question is if a motion is made and the vote comes out with two members voting yes and one member voting no, does the motion pass? Our bylaws state that a quorum for the transaction of business at any regular or special meeting of the administrators shall consist of a majority of the members of the board, but a majority of those present at any regular or special meeting shall have power to adjourn the meeting to a future time. D.L. (via e-mail)

A: In addition to the language in your bylaws stating that a majority of board members constitutes a quorum, there is probably also language indicating that the acts approved by a majority of those board members present at a meeting where a quorum has been established constitutes the acts of the association. There is similar language in the Florida Not For Profit Corporation Act, Chapter 617 of the Florida Statutes, which your association is subject to. In your case, three out of five board members constitutes a quorum, and if two of those three board members vote in favor of a motion, the motion passes, even though a majority of the entire board did not approve the action.

Regarding the language in your bylaws allowing a meeting to be adjourned so that a quorum can be obtained, that is also in line with provisions of the Florida Not For Profit Corporation Act. That provision of the law allows a majority of the board

members who are present at a meeting, even though a quorum has not been established, to adjourn the meeting to a future time so that a quorum can be established.

Q: I live in a community of 36 condominium units which consists of two buildings with two floors (18 units on each floor). The buildings are located just on the edge of a flood plain. A number of years ago, the members voted not to require the association to purchase flood insurance. For the last eight years, the subject has been placed on the annual meeting agenda for the members to vote and the members have voted against the purchase of flood insurance each year. One of the owners has recently asked the association to get an elevation survey, due to his belief that flood insurance is required. Is it legally acceptable for the membership to vote on this issue each year and obtain or not obtain flood insurance in accordance with their vote? J.R. (via e-mail)

A: The Florida Condominium Act requires a unit-owner controlled association to use its best efforts to obtain and maintain adequate insurance to protect the condominium property that is required to be insured by the association. The statute does not specifically mention flood insurance as part of the “adequate” insurance required. In fact, the statute contains language implying that flood insurance is optional, and not mandatory. Most commentators, however, opine that the requirement for “adequate” insurance

would include flood insurance when the condominium is located within a federally designated special flood hazard area. Given the uncertainty in the statute with respect to flood insurance, the association must review its declaration of condominium to determine whether flood insurance is mandated by any provisions contained in the declaration.

If not required by the declaration, the association may elect not to obtain flood insurance, and the possibility of a successful challenge to that decision by a member will be very uncertain. Unfortunately, it is my understanding that most directors and officers liability insurance policies exclude from coverage any claim against the association or its directors for failure to obtain insurance. Therefore, the safest approach from the board’s standpoint may be to obtain flood insurance.

Conversely, if your declaration clearly requires flood insurance to be purchased, the association must do so, without regard to whether the members vote from year to year to forego obtaining flood insurance. If the declaration mandates flood insurance, the members must formally vote to amend the declaration to remove the flood insurance requirement in order to permit the association to not obtain flood insurance, but an annual “advisory” vote is not sufficient.

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.