



Association Can Collect Reserve Fund

Fort Myers The News-Press, May 3, 2007

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Q: We received a notice that our association is establishing a “hurricane reserve” account. No one has given us a reason why this fund needs to be created, but we have been advised that the money to fund the reserve account will never be returned to the owners, nor will any interest be paid to the owners. My three questions are as follows. Is it legal to do what the board is trying to do here? What is our recourse? How can the board do this without a reason? R. C. (via e-mail)

A: It is not clear from your question whether you live in a condominium or in a homeowners association development. If you live in a condominium, the Florida Condominium Act provides that the association has the power to make and collect assessments and to maintain, repair, and replace the common elements or association property. The question of what is or is not a proper assessment can be answered by reference to the definition of the term “common expense.” An association may levy assessments and pay expenses which are proper, common expenses of the association.

The Florida Condominium Act provides that common expenses include the expenses of the operation, maintenance, repair, replacement or protection of the common elements and association property, costs of carrying out the

powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as a common expense by the Condominium Act, the declaration of condominium, the documents creating the association, or the bylaws. As you can see, the definition of “common expense” is fairly broad.

To the extent that the association funds a hurricane reserve account which might be used to pay an insurance deductible in the event of hurricane damage, or pay for uninsured items (such as landscape damage or debris clean-up) it would appear to be a proper common expense of the association.

The Homeowners’ Association Act has less specific provisions concerning proper common expenses and assessment authority of the association. Instead, all assessment authority in a homeowners’ association comes specifically from the governing documents of the association. Therefore, in order to answer your questions in a homeowners’ association context, it would be necessary to review all of the governing documents of the association to determine what is and is not a proper expense subject to assessment.

Your board should also consult with its accountant or other tax advisor to ensure that the fund, as it is

built up, can be shielded from potential negative income tax consequences.

Q: I live in a condominium community with bylaws that state you are only allowed to have one pet, either one dog or one cat, not to exceed twenty pounds. It also states you may have other domestic pets such as birds or fish. Our board of directors recently held a meeting and decided to require all pets to be registered. The registration form states that if you have a dog over twenty pounds they are “grandfathering” it in for the life of the pet. Why can they grandfather an over-sized animal that violates our rules? J.G. (via e-mail)

A: There are a number of reasons why a pet might be given “grandfather” status, notwithstanding rules or restrictions against such pets.

A regulation prohibiting certain pets cannot be enforced retroactively, but can be enforced against all pets brought into the community after the regulation was enacted. Therefore, if the facts show that a prohibited pet was being kept on the premises before a pet restriction was enacted, the dog would need to be “grandfathered” in, as a matter of law.

Additionally, if an association was not previously enforcing its pre-existing pet restrictions, but wishes to now do so, the association may need to “grandfather” in certain pets. This is because an owner may have some valid defenses against an action to remove a pet that is based on a restriction that was not properly enforced in the past.

An association attempting to “breathe life” into a rule that was not properly enforced in the past, may require “drawing a line in the sand” enforcing the covenant from that time forward, while at the same time “grandfathering” existing violations that could be difficult to prosecute.

In either of these situations, it is a good idea for the board to require owners to register existing

pets. This way, there is some certainty as to which pets are being “grandfathered” in, and which pets the new, or revived, restrictions apply to.

Q: Who is responsible for the storage of the official records of a condominium association? I am trying to obtain copies of records from my Association's former manager. The Association has asked the manager to return their records, but the manager has not complied, I assume because they are no longer working for our Association. What can I do? S.G. (via e-mail)

A: The ultimate responsibility for the management of an association is vested in the board of directors, including all recordkeeping duties. The Florida Condominium Act requires that each association maintain many different types of documents as “official records.” These records must be made available to unit owners for inspection. The official records must include a current roster of unit owners, contracts entered into by the Association, meeting minutes, insurance policies, and many other items. The official records of the association must be maintained within the State of Florida. If the records you are seeking are part of the official records of the Association, you are entitled to inspect them, subject to any reasonable rules adopted by the association regarding the frequency, time, location, notice and manner of inspections. The association has 5 working days to comply with your request, and after 10 working days, is presumed to be violating your inspection rights. The association is then subject to potential fees, statutory damages, and attorney’s fees.

The State of Florida, Department of Business and Professional Regulation licenses community association managers (CAMs). If your association has hired a CAM to assist it in maintaining the official records of the association, it is a violation of licensing law for a CAM to deny access to association records to anyone entitled by law to inspect that particular record.

In addition, it is a violation of licensing law for the licensed manager to withhold possession of any original books, records, accounts, funds, or other property of a community association when requested by that association to return those records upon reasonable notice. Generally, reasonable notice means no more than 20 business days after the receipt of a written request by the manager from the association, regardless of any contractual dispute between the manager and the association. Stated otherwise, a CAM cannot use the turnover of records as “leverage” even if it has a contractual dispute with the association.

Q: I live in a small community with a homeowners’ association. At our last meeting, we discussed making changes and/or adding to our bylaws. What is the proper legal procedure for doing this? C.G. (via e-mail)

A: First, I have observed that many owners tend to use the term “bylaws” to refer to all of the documents governing their association. In fact, a homeowners’ association community typically has four main legally relevant documents: the declaration of covenants (sometimes referred to as a deed of restrictions), the articles of incorporation, the bylaws and the rules and regulations.

The bylaws are often called the “corporate housekeeping rules” which govern various aspects of the day-to-day operation of the association, such as notice provisions, the conduct of members’ meetings, the election of directors, the conduct of board meetings, and the like.

Typically, each of the governing documents has its own “amendment clause” which will tell you how amendments are proposed and what vote is needed to approve amendments. Therefore, when amending the bylaws, you will need to review the bylaws’ own amendment clause (you should also check the articles of incorporation, which sometimes also address bylaw amendments). The declaration usually does not address amendments to the bylaws, but should be reviewed in case it does.

If none of the governing documents address amendments to the bylaws, the Homeowners’ Association Act provides that any governing document may be amended by the affirmative vote of two-thirds of the voting interests of the association.

Some governing documents permit the board to adopt amendments to the bylaws without a vote of the owners, but this is rare. Typically, a vote of the owners will be required. If so, the board of directors should authorize the call of a special meeting of the owners for purposes of voting on the proposed amendments. Then, the notice of the meeting, a copy of the proposed amendment, and a proxy I mailed to all owners. At the special meeting, the votes are counted and it is determined whether the amendment passed. If so, the amendments should be recorded in the public records along with a certificate attesting that the proper procedures were followed and that the requisite vote of the owners approved the amendments.

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.

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