



## Board Has Two Ways to Replace Director

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

**Q:** I serve on a condominium board and one of the directors has resigned, as he is moving out of the community. He was just elected this past February, and has most of his two year term remaining. The remainder of the board is divided on whether the board should appoint a director to fill the vacancy or whether the members must vote to fill this vacancy. In addition, the board is divided on whether the replacement director should serve until the next regular election next year, or until the end of the resigning director's original term in two years. Can you please give some direction on the best way to handle these issues? A.C. (via e-mail)

**A:** The Florida Condominium Act provides that, unless the bylaws of the association provide otherwise, there are two methods to fill vacancies on the board. First, the vacancy may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum. Even if only one director remains, due to some unusual circumstances, that sole director may appoint persons to fill the vacancies on the board.

The second method permitted by the statute is to hold an election at which the members of the association elect persons to fill the vacancies. Unless the association has opted out of the

statutory election procedures, the election procedure must conform to the statutory requirements, including a sixty day first notice, the filing of notices of intent to run, and a secret ballot election.

The choice to either appoint new directors or hold an election is up to the board. You should also note that filling of vacancies created by the recall of a director, as opposed to his resignation, is governed by other provisions of the statute and administrative rules which permit the board to fill vacancies where less than a majority of the board members are removed by recall, but require an election by the members to be conducted when a majority of the board is recalled.

In my experience, most well-written bylaws provide that the board of directors shall have the authority to fill vacancies caused by resignation. Having the board fill vacancies is much more efficient and avoids the burdensome and time consuming election process. I do not believe having the board appoint persons to fill vacancies is a problem, because the membership always retains the right to recall directors if they are not satisfied with the person selected.

Finally, the Condominium Act provides that, unless the bylaws provide otherwise, the term of

the director who is appointed to fill the vacancy shall be the remainder of the term of the resigning director. Therefore, in your situation, unless your bylaws provide otherwise, the appointed director shall serve the remainder of the resigning director's two year term.

**Q:** I have read your articles concerning notice requirements for condominium association board meetings. I find it hard to believe that a board cannot kick around ideas without going through the notice requirements and holding open meetings. Are there any options for boards to discuss issues before deciding to put them on the agenda of a meeting? J.J. (via e-mail)

**A:** A meeting of the board occurs whenever a quorum of the board gathers in person, or by conference call, and association business is discussed. With limited exceptions, board meetings are open to all owners and it is prohibited for a quorum of directors to meet secretly or privately to discuss association business. However, less than a quorum of directors can meet to discuss association business.

Some erroneously believe that a board can meet in private to discuss association business in a closed "executive session" or a "workshop meeting." In a condominium association, the only type of closed board meeting that can be held is a meeting between the board and the association's attorney with respect to proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice. In a homeowners' association setting, in addition to the ability to hold closed meetings of the board and the association's attorney with respect to proposed or pending litigation, board meetings can also be closed when a board meeting with the association's attorney is held for the purpose of discussing personnel matters. Even though certain board meetings can be closed, those meetings must still be properly noticed.

One way board members can address issues prior to an official meeting is through the use of e-mail. Although a concept that is not fully developed within the law, e-mail communications are not technically "meetings." However, a board should not substitute e-mails for board meetings, where the actual meeting becomes nothing more than a "rubber stamp" event. I am aware of at least one case where an association was penalized for doing so. Although e-mail communication is good for generating ideas and allowing for the initial review of issues, no decisions should be made or action taken until the matter has been properly addressed and discussed at a board meeting.

**Q:** Our condominium association collects over \$250,000.00 in revenues on an annual basis. A majority of the members have voted to waive any type of audit or review of our financial records. A small group of owners is, however, concerned that there may be wrongdoing by the board. Is this permissible? M.V. (via e-mail)

**A:** The Florida Condominium Act requires that within 90 days after the end of the association's fiscal year, or annually on a date provided in the bylaws, the association must prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association, or received by the association, but no later than 120 days after the end of the fiscal year or date provided in the bylaws, the association must either mail or hand deliver to each owner a copy of the financial report or a notice that a copy of the report will be mailed or hand delivered to the owner, without charge, upon receipt of a written request from the owner.

The Condominium Act further defines the type of financial reports that must be prepared by associations, which is based upon annual revenues. An association with total annual revenues of less than \$100,000.00 shall prepare a report of cash receipts and expenditures; an association with total

annual revenues of \$100,000.00 or more, but less than \$200,000.00 shall prepare compiled financial statements; an association with total annual revenues of at least \$200,000.00, but less than \$400,000.00 shall prepare reviewed financial statements, and; an association with total annual revenues of \$400,000.00 or more shall prepare audited financial statements. You should note that an association operating less than fifty units, regardless of the association's annual revenues, is only required to prepare a report of cash receipts and expenditures. In your case, the requirement is reviewed financial statements.

Although financial reporting requirements cannot be completely waived, if approved by the majority of the voting interests present at a properly called meeting, the association can "waive" a higher financial reporting requirement to a lower requirement (for example, in your case the financial reporting requirement could be "waived down"

from the reviewed financial statements requirement to a report of cash receipts and expenditures or a compiled financial statement). Any such meeting and approval must occur prior to the end of the fiscal year, and is only effective for the fiscal year in which the vote is taken.

Another issue to note is that the Division of Florida Land Sales, Condominiums and Mobile Homes takes the position that the minutes of the meeting where the vote to "waive" a higher financial reporting requirement to a lower requirement must reflect the number of votes cast by the membership to waive the requirement for audited, reviewed, or compiled financial statements and the type of financial reporting that the association will be preparing and disseminating to the membership. I also recommend that the proxy statement used for the meeting specifically recite which level of report the members agree to, if they are waiving to a lower level report.

*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).*