



## Audit Due When Law Specifies

### *Requirements vary with revenues, number of units*

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

**Q:** Last year, a majority of the members in my condominium association voted by proxy to have the association's records audited by a certified public accountant for the year ending December 31, 2006. The association's revenues exceed \$400,000. The audit was not completed until August of 2007. In July of this year, the board voted at a regular board meeting to extend the 2006 audit into this year to include records through the end of May 2007. Can the board extend the certified audit and use more of the association's money to do this without another membership vote and approval? I would appreciate it if you would share your opinion on this and perhaps clarify what Chapter 718 specifically says about this issue. **F.M. (via e-mail)**

**A:** First, the condominium statute requires an association with total annual revenues of \$400,000 or more to prepare audited financial statements. An association with total annual revenues of at least \$200,000, but less than \$400,000, must prepare reviewed financial statements. An association with total annual revenues of \$100,000 or more, but less than \$200,000, must prepare compiled financial statements. An association with total annual revenues of less than \$100,000 must prepare a report of cash receipts and expenditures. An association which operates less than 50 units

need only prepare a report of cash receipts and expenditures, regardless of the association's annual revenues.

Therefore, if your condominium is larger than 50 units, and your association's revenues exceed \$400,000, no vote of the owners would have been required to authorize the audit, it is required by law. However, the statute does permit an association to waive the audit and have prepared a reviewed financial statement, a compiled financial statement or a report of cash receipts and expenditures instead. (Similarly, if the statute requires a reviewed financial statement, the owners can vote to have a compiled financial statement or a report of cash receipts and expenditures. If the statute requires a compiled financial statement, the owners can vote to have a report of cash receipts and expenditures.)

The vote to waive the required financial statement must be approved by a majority of the voting interests present at a properly called meeting of the association, and such meeting and approval must occur prior to the end of the fiscal year, and is effective only for the fiscal year in which the vote is taken.

Additionally, the law requires that the financial report (whether audited, reviewed, compiled or a report of cash receipts and expenditures) be completed, or contracted for, within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws. Within 21 days after the final financial report is completed by the association, or received from a third party (but not later than 120 days after the end of the fiscal year, or another date may be provided in the by-laws), the association must mail (or hand deliver) a copy of the financial report to each owner, or provide notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon written receipt of a written request from a unit owner.

The failure of an association to timely complete the financial statement is considered a violation of the statute, and an association which violates the law is subject to an enforcement action by the Division of Florida Land Sales, Condominiums and Mobile Homes (the "Division") for the failure to comply with the statute. The Division considers the failure to provide the year end financial statements in a timely manner a "major violation" which can result in civil penalties of up to \$5,000 per violation.

As to whether the board can vote to "extend" the 2006 audit to include records through the end of May 2007, this is not specifically addressed by the statute. However, I would not recommend it, because adding extra months to the audit could extend the time it takes to prepare the audit, which as noted above, must be completed within a specified time frame. Further, if the association's revenues again exceed \$400,000 for fiscal year 2007, another audit for fiscal year 2007 will be required anyway, unless waived by the owners. Therefore, some of the financial records for 2007 may be audited twice.

Notwithstanding my statement above, if the board believes, in the exercise of its business judgment, that an audit of the January through May 2007 financial records is warranted and necessary prior to the end of the fiscal year, then I believe the

Board would be within its authority to authorize the "partial year's" audit, without a membership vote. However, a vote of the owners might be necessary if the condominium documents require a vote of the owners for special assessments, or to amend the budget to pay for the cost of the extra audit work.

**Q:** Our residents' association recently turned over from the developer and we just sent out a ballot to vote on amending and restating the governing documents. My questions are whether the ballot must have a date and time that a meeting is to be held for the purpose of voting on the amended and restated documents? If a meeting is held, are there laws or rules governing the counting and security of the ballots? **R.D. (via e-mail)**

**A:** I assume from the terminology you have used that your association is a homeowners association, and not a condominium association. Chapter 720, Florida Statutes, the Florida Homeowners' Association Act, does not contain any requirement that a membership vote be conducted at a meeting. You must look to your governing documents for any such procedural requirements. One provision of the Act arguably requires that notice of a members' meeting be mailed, delivered or electronically transmitted, when permitted, to the members not less than 14 days prior to the meeting, and that is what I normally advise HOA clients.

However, most Florida Homeowners' Associations are formed as Florida not-for-profit corporations, and therefore are also governed by Chapter 617, Florida Statutes, the Florida Not-for-Profit Corporation Act. That law provides that a not-for-profit corporation may obtain the consent of its members by vote at a meeting, or through a written consent procedure, without a meeting. If the board of directors elects to solicit written consents in lieu of voting at a formal meeting, and the board can obtain a sufficient number of written consents from the members to adopt the amendments, then no meeting is required.

However, I rarely advise using the written consent procedure, because the statute requires that the consents must be collected using certain procedures, and also requires post-approval notices that are usually more effort than just holding a meeting. It is sometimes necessary for boards to contact members and solicit their votes on important matters. In my opinion, it is best to provide the board with as much leeway as possible to contact members and attempt to obtain the necessary votes. With a conventional members meeting that is preceded by notice and which makes use of ballots and proxies for those who cannot attend the meeting, there is a much larger window of opportunity for the board to send the notices and solicit the favorable response of the members. In summary, it is possible to conduct a vote of the members without holding an actual meeting at a specified date, time and place, unless prohibited by your governing documents. You must check your governing documents to confirm that there is no prohibition in your association on utilizing the action by written consent procedure.

You also inquired whether there are specific counting and security requirements when a

meeting is held and ballots are submitted. With the exception of the election of directors in the condominium setting, none of the votes that might be taken by a homeowners' association or condominium association are required, by statute, to be conducted using secret ballots. As with most issues in community association procedure, it is necessary to carefully review your governing documents to determine any specific or unique requirements for voting and balloting. However, most votes to amend and restate documents are not secret, and are obtained primarily through proxies. Those proxies identify the unit number and are signed by the member who has submitted the proxy. Likewise, non-secret ballots will also typically contain the name, signature and parcel number of the member submitting the ballot. Because the proxies and ballots are not secret, and are retained by the association and available for all members to review and audit as they wish, there is usually no problem concerning security or counting issues. Any allegation of tampering with ballots or proxies) or questioning who voted and whether that person was authorized to vote, can be easily addressed by a review and audit of the signed ballots and proxies.

*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).*