



Board Member Delinquent

Being behind in paying fees not cause for disqualification

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Q: How does a condominium complex prepare to have a board member removed? One of our board members is behind in his assessments and monthly association fees and we have begun the process of a lien on his condo. We feel a board member needs to set a good example and this is not a good example. **M.B. (via e-mail)**

A: First, being delinquent in the payment of assessments is not a legal disqualification for being a candidate or serving on the board. The board, however, should pursue its remedies against a director who is in arrears in payments with the same diligence and utilizing the same procedures as any other owner.

The Florida Condominium Act, and related provisions of the Florida Administrative Code, provide the exclusive method in which a board member may be recalled from the board. In summary, the statute vests the recall power in the members of the association, and not in the board of directors. The practical reasons for this may be obvious, but the permitted recall method is designed to make sure that the ultimate control and authority over the association is held by the members of the association.

There are two general ways in which a director may be recalled. First, ten percent of the members of the condominium association may sign a

petition and call a recall meeting. You should note that the members can actually call this meeting themselves, and do not need to rely on the board to do so. Although boards do not need to call this membership meeting, sometimes boards will assist in the process and do so. If a majority of all voting interests vote to recall one or more directors, then the board must hold a duly noticed board meeting within five full days of the adjournment of the recall meeting to certify the recall. Upon certification by the board, the recall is effective immediately. In the event the board does not certify the recall, the board must petition for arbitration with the Division of Florida Land Sales, Condominiums and Mobile Homes within five business days of the meeting in which it failed to certify the recall so that an arbitrator may review the board's decision not to certify the recall. There are very detailed requirements as to how the recall meeting must be conducted to ensure fairness and preserve the integrity of the recall vote. Those specific requirements are contained primarily in the Florida Administrative Code.

Alternatively, if a majority of all voting interests sign a written agreement calling for the recall of one or more board members, which agreement meets all of the statutory and administrative code requirements, then no member meeting is necessary and the board must proceed to hold a board meeting within five full business days after

receipt of such an agreement to certify the recall. As with the member meeting recall procedure, failure to certify the recall agreement requires the board to petition for arbitration.

The recall procedures and requirements set forth in the Condominium Act and Florida Administrative Code are fairly complex and must be strictly followed, but are designed to maintain ultimate control of the association with the members and to help ensure the integrity of the recall process.

Q: The board of my condominium association recently announced that they would be entering every unit in order to inspect the fire sprinkler system. Many owners believe the board has ulterior motives. My question is, when is the board legally allowed to enter our units? Can they do it whenever they want? **S. F. (via e-mail)**

A: The Condominium Act provides a unit owner with the exclusive possession of his or her unit. However, there are situations for which the Condominium Act grants the association the right to enter units. For instance, the association has the irrevocable right of access to each unit during reasonable hours when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration of condominium. You would need to review your declaration of condominium to be sure, but it is a good bet that your association maintains the fire sprinkler system. I believe that a maintenance obligation also infers an obligation to inspect such items. If your association must maintain the fire sprinkler system (which means it also needs to inspect that system to make sure it is functioning properly), then the association has the right to conduct the inspection.

Additionally, the Condominium Act gives the Association the irrevocable right to enter units as necessary to prevent damage to the common elements or to a unit or units. An example of this would be a necessary emergency repair on a water pipe that, if left unfixed, could cause damage to the adjoining units and/or the common elements.

On a related issue, it is often mistakenly believed that the Condominium Act requires owners to give keys to their units to the association. This requirement is not based on statute, rather most condominium documents will provide that pass keys to units must be provided. A number of condominium arbitration decisions have held that such provisions in the condominium documents, including validly promulgated rules and regulations, are valid and enforceable.

Q: Our homeowners' association was established in 1995. Since then, we have operated without the authority to fine members who violate the governing documents. We are considering adding fining authority to the Association's powers, and would like some general advice in doing so. First and foremost, we would like to know of any potential pitfalls to adding fining authority. **A.C. (via e-mail)**

A: Your association is like many others who find themselves needing more "teeth" to enforce the Florida Homeowners' Association Act and the association's governing documents. Keep in mind that in addition to fining, suspending use rights is also an available tool to bring people's conduct into compliance with the restrictions governing a community.

The first potential "pitfall", as you refer to it, would be fining or suspending use rights where the governing documents do not expressly authorize the board to do so. The Homeowners' Association Act requires that the ability to levy fines or suspend use rights be contained in the governing documents (i.e., the recorded declaration of covenants, articles of incorporation, or the bylaws). If such authority is contained in the governing documents, the association can suspend, for a reasonable period of time, the rights of a member or a member's tenants, guests, or invitees, or both, to use common areas and facilities (although vehicular and pedestrian ingress to and egress from a parcel, including the right to park, cannot be impaired), and may levy reasonable fines not to exceed \$100.00 per violation against any member or tenant, guest, or invitee. Fines can be levied on the basis of each day of a continuing violation, except a fine cannot exceed \$1,000.00 in the

aggregate unless otherwise provided in the governing documents. Also, fines cannot become a lien against a parcel.

Another potential “pitfall” would include not meeting due process requirements. In other words, an association must provide notice and opportunity to be heard before levying fines or suspending use rights. This requires notice of at least 14 days to the person sought to be fined or suspended. A single notice is all that is required. An opportunity for a hearing before a committee of at least three members appointed by the board is also required. Committee members may not be officers, directors, or employees of the Association, nor the spouse, parent, child, brother or sister of an officer, director, or employee of the association. Only if the committee approves the proposed fine or suspension by a majority vote may the action be carried out.

A third potential “pitfall” may occur where litigation is filed to collect a fine. Although the association is entitled to collect its reasonable attorney’s fees and costs from the owner if the association prevails in the lawsuit, this is a two-edged sword and if the owner prevails he or she is entitled to collect his or her attorney’s fees and costs from the association.

The bottom line with fining or suspending use rights is to comply with the specific requirements of the Florida Homeowner’s Association Act. Many associations fall short of these requirements and find themselves with members who have clearly violated the governing documents or association rules, but where fines or suspensions might not be enforceable because the association failed to comply with the statutory requirements to levy fines or suspend use rights.

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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