



Director Quits Prior To Election

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Q: I live in a condominium where the board of directors is composed of seven board members, serving two year staggered terms. The election of directors occurs every January. If a director resigns prior to the election, can the board appoint a replacement board member or can the open seat be filled at the election? **T.G. (via e-mail)**

A: The answer depends on the language in your bylaws. The Condominium Act provides that unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of the term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures in the Condominium Act must be followed. In addition, unless otherwise provided in the bylaws, a board member appointed or elected fills the vacancy for the remainder of the unexpired term of the seat being filled.

Most condominium documents provide that a vacancy caused by the resignation of a board member is filled by the remaining board of directors. Most condominium documents also provide that the appointed board member fills the seat for the remainder of the unexpired term of the seat being filled. For example, if a board member was elected to your board in January of 2006 for a two-year term and resigned in May of 2006, his/her

board appointed successor would fill the seat until the election held in January of 2008, notwithstanding the election in January of 2007. On the other hand, there are some documents that require that the appointed board member fills the seat only until the next election. Under the same facts above, the board appointed successor in that case would fill the seat only until January of 2007, at which time, the seat would be open for election.

This is certainly an area that can cause confusion, but such confusion can be avoided with an updated and well-written set of bylaws.

Q: I live in a large community that has a master homeowners' association and nine "sub-associations" within the community. All of the associations share and use the same clubhouse facility. Due to budget meetings, annual meetings and holiday parties, demand for reserving the clubhouse meeting rooms and facilities is high. Our sub-association was unable to secure any one of our first four choices for dates and times for using the clubhouse facilities because they were already reserved by other associations or members. Moreover, it appears that one association and member have secured several of the preferred dates and times. Is there some law or right to give all members in associations a fair chance to use the clubhouse facilities equally? **J.M. (via e-mail)**

A: The officers and directors of the association that owns and operates the community clubhouse

have a fiduciary relationship and obligations to all of the members of the association. Implied within those fiduciary obligations is a duty of fair and equal treatment for all members of the association. In addition, there may be language contained within the governing documents of the association that addresses this issue and sets out requirements or procedures for reserving the clubhouse facilities. In many cases, such provisions will be found in the rules and regulations governing the association. In any event, I encourage you to communicate with the association board and inquire about the procedure, if any, that they have in place for reserving the clubhouse.

While there are no specific statutory provisions nor case law that I am aware of on this point, I believe it is reasonable to request that the board acknowledge the high demand for the clubhouse, and put some procedure in place that gives all associations and members wishing to reserve the clubhouse facilities an equal and fair opportunity to have use of the clubhouse facilities on their preferred dates.

Related to your question, it is my advice that the association require any member or sub-association using the clubhouse facilities to sign an agreement as to the terms and conditions of such use. It is permissible for the association to charge a fee for the exclusive use of the facility or a portion of the facility, and it is appropriate and advisable for the association to collect a security deposit in the event the clubhouse or furnishings are damaged. In this regard, the member who is renting the clubhouse facility should be required to take part in a pre-use inspection followed by a post-use inspection so that any pre-existing damage can be identified and any new damage can be properly attributed to the appropriate renter. In addition, it is advisable for an association to obtain an indemnification and release of liability from the renter in the event of injury to any of the attendees, or damage to their property.

Finally, the clubhouse rental agreement should set forth specific rules and restrictions concerning issues such as the movement of furniture, the use of decorations, the consumption of alcoholic beverages, and the expectations for returning the

facility in the same condition as it was provided to the renter.

Q: Our condominium association has recently had to deal with unit owners who are not paying their assessments on time. We generally work with unit owners who cannot always make payments on time, but who will eventually pay, even if it is a month or two after the due date. However, more and more owners are falling behind on their payments and our association is having to increase our collection efforts. We would like to know how much interest we can charge on past due assessments. **S.G. (via e-mail)**

A: Your association is one of many associations dealing with the sharp increase in collections and foreclosures throughout Florida.

As you may know, the Florida Condominium Act provides that each unit owner is liable for all assessments which come due while he or she is the unit owner, regardless of how his or her title has been acquired. A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. Further, the liability for assessments may not be avoided by waiver of the use or enjoyment of any common element or by abandonment of the unit for which the assessments are made. The Condominium Act further provides that assessments and installments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The interest rate applied is eighteen percent per annum, unless some other rate is specified. Therefore, you need to check your documents to determine the applicable interest rate assessed against delinquent payments.

You might also be interested to know that if the declaration or bylaws so provide, the association can charge an administrative late fee in addition to the interest, in an amount not to exceed the greater of \$25.00 or 5 percent of each installment of the assessment for each delinquent installment that the payment is late.

The Condominium Act also provides that any payment received by the association must be

applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. Make sure the person or entity handling your association's collections is following this statutory provision.

You indicate that the association "works" with unit owners who fall behind in their payments. While being neighborly is laudable, take caution

here, as allowing leniency for one unit owner and not others may give rise to "selective enforcement" claims down the road. The safer practice is to adopt a collections policy that is drafted to comply with the provisions of your association's condominium documents, and applicable Florida law, and follow that procedure with all accounts. The association's attorney can assist with drafting that policy.

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.