



## Electricity For Condos Exempt From Sales Tax

**Associations must meet several state requirements, first of which is exclusive use of the power.**

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**Q:** Where can I find information on Section 12A-1.053 of the Florida Administrative Code, which provides an exemption for sales tax on electric power or energy used in common areas of condominiums, cooperatives and homeowners associations? **C.G. (via e-mail)**

**A:** You have correctly identified the Florida Administrative Code provision that permits an electric utility to not collect and remit sales tax on electric power when that power is sold to and used by cooperatives, condominiums, and certain other residential facilities, which would include homeowners associations. In order to apply the exemption, the utility provider must have written documentation on file establishing the customer's entitlement to the exemption. You should contact the customer service department of your electric energy provider to obtain their required forms.

Because electric power used by community associations for common use facilities is, in many ways, a quasi-governmental function, the statutes and regulations exempt those costs from the collection of sales tax. There are several requirements that an association must meet in order to confirm eligibility for this sales tax exemption. First, it is essential that 100% of the energy that is used and exempt from sales tax be exclusively

used by the co-owners/members of the association. None of the energy may be used in any activity which sells or rents a commodity or provides a service for a fee. For example, if a homeowners' association operates public or semi-private facilities, then the electric power used in that facility will not be eligible for the exemption. Additionally, each point of service must be separately metered and billed. It is not acceptable to make calculations or allocate the percentage of exempt and non-exempt uses that run through a single meter. A responsible legal entity must also be established as the customer to whom the utility provider can render its bills and receive payment for the electric service. This requirement is easily met by community associations that are formed as Florida not-for-profit corporations. In the case of homeowners' associations, it is required that association membership be mandatory for all owners within the community.

FPL has a packet of information and forms for a community association to obtain exempt status under the regulation, and even a form to recoup previously paid sales tax for electric energy that was rightfully entitled to the exemption. The FPL materials point out that the Florida Department of Revenue has concluded that electrical power used by a residential condominium or homeowners'

association relating to the operation of a water or sewage system do not qualify for the exemption. In addition, the State of Florida has previously ruled that non-energy charges on street lights (including common use facilities), and residential outdoor lights are subject to sales tax. Such non-energy charges include relamping, and pole and light rental.

In summary, if your association meets the several requirements described above, and an appropriate representative of your association executes an exemption form required by the electric utility, then your association can be exempt from paying sales tax on electric power used for the benefit of your members.

**Q:** If our bylaws state that our yearly financial report must be audited by a certified accountant, can our board disregard this because we are a small development? **G.L. (via e-mail)**

**A:** This is a question that comes up occasionally in both the condominium and homeowners' association settings. The minimum financial reporting requirements for both condominium and homeowners' associations are set out in the statutes that govern each type of community. In a condominium setting, the Florida Condominium Act provides that an association that has total annual revenues that are less than \$100,000.00 shall prepare a report of cash receipts and expenditures, and that any association that operates less than fifty units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures. If an association's total annual revenues are \$100,000.00 or more but less than \$200,000.00, it shall prepare a compiled financial statement; if its total annual revenues are at least \$200,000.00 but less than \$400,000.00, it shall prepare a reviewed financial statement; and if its total annual revenues are \$400,000.00 or more it shall prepare an audited financial statement.

You may be aware that if approved by a majority of the voting interests present at a properly called meeting of the association, the association can

“waive” a higher financial reporting requirement to a lower requirement (for example, vote to prepare a report of cash receipts and expenditures in lieu of an audited financial statement). Such a 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.

The Florida Homeowners' Association Act contains similar provisions. The types of financial reports, and the amount of total annual revenues which trigger the type of report which must be prepared, are the same as those referenced in the Condominium Act. There is a similar provision in the Homeowners' Association Act stating that an association in a community of fewer than fifty parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures. A homeowners' association also has the ability to “waive down” to a lower financial reporting requirement if approved by a majority of the voting interests present at a properly called meeting of the association. Note that the Homeowners' Association Act does not specifically require that the vote to “waive down” to a lower financial reporting requirement be conducted prior to the end of the fiscal year or that the vote is only effective for the fiscal year in which the vote is taken.

Regardless of whether you live in a condominium or homeowners' association, you must look not only at the statutory requirements, but also at any financial reporting requirements that appear in the condominium or governing documents. The financial reporting requirements contained in the statutes set forth the minimum requirements, and the condominium or governing documents can provide for stricter financial reporting requirements than the statutes. If your bylaws specifically require an audit by a certified accountant each year then that is the standard the association should comply with. You should also check your documents to determine whether, like the referenced statutes, there is an ability to vote to “waive down” from the audit requirement to a lesser financial reporting requirement. Conducting an audit each year can be a costly endeavor, and

associations with such requirements in their condominium or governing documents may wish to amend those provisions to be consistent with the statutes which allow greater flexibility, and more options, for associations.

**Q:** We have a five member condominium association board. We have a manager who reports to the president and/or vice-president. Two board members have concerns about the manager's performance and the president assured us that the whole board would have input into the manager's performance review. But we now learn that the review has already happened without our input. What is the proper way to address our concerns?

**L.J. (via e-mail)**

**A:** The issue of authorizing certain board members or officers to take action on behalf of an association can be handled in several different ways. Some boards grant the president or committees broad authority to hire and fire, or to negotiate and enter into contracts, or to prepare and deliver performance reviews. On the other end of the spectrum, some boards insist that every decision be considered and voted upon by the entire board. Probably the most efficient method of administering the association is probably somewhere in between, with the level of board

involvement being determined by the significance, often measured in cost, of the particular action being taken. One thing that is certain is that each and every board member is responsible for actions taken by the association. Therefore, board members should insist that they have a voice in association matters and, at the very least, have the opportunity to record a "no" vote on the record regarding any action taken by the association with which the board member does not agree.

In your case, it appears that one or more directors took action without board input. If a majority of the board agrees with your view, then that majority certainly has the ability to either restrict the president's authority to handle such matters alone in the future, or to remove the president and replace him with someone who will follow the wishes of the majority of the board. My general advice to board members, including those who might take action or enter into agreements on their own, without board involvement or support is to think twice. Why risk taking an action that is later found to be beyond your authority as a director or officer? Involving the whole board in important association matters is one easy way to help insulate against claims of personal liability against a director.

*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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