



Association Cannot Suspend Services, Amenities

Delinquent owners annoy condo group

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Q: We have an owner in our condominium association who is several months behind in his fees. He currently has a tenant in his unit. The association pays the bill for his water, sewage, pool and other amenities. Do we as an association have the right to take any of these amenities away from the renter, and would it be possible to have the renter pay his monthly rent to the association until the delinquency is resolved? **J.Z. (via e-mail)**

A: Your frustration with this situation is understandable. Obviously, many associations are being adversely affected by non-paying unit owners. It certainly adds insult to injury when the board needs to scramble to find ways to cut expenses while non-paying owners or their tenants are making full use of the condominium property, quite literally at the expense of everyone else. However, as currently written, the Florida Condominium Act does not permit an association to suspend the use rights of any unit owner or tenant for non-payment of assessments, or for any reason for that matter. The Condominium Act contains provisions that plainly provide that the common elements, common areas and recreational facilities of a condominium shall be available to all unit owners, tenants and their invited guests for the use intended for such property.

You may recall from my recent column that a bill is pending in the current legislative session which would specifically permit a condominium association to suspend use rights in the common elements for non-payment of assessments. Just as with the current provisions in the Homeowners' Association Act, which does permit suspension of use rights and voting rights, appropriate provisions would need to be in the governing documents of the association in order to take advantage of these new statutory rights, if they are enacted. Under the proposed legislation, condominium associations could also suspend voting rights for members who are in arrears in excess of 90 days in their payment of assessments. Cutting off water and sewer service would not be permitted by the new law, if it is passed, and I do not believe that termination of utilities is permitted under the Homeowners' Association Act either.

As to your second question, it may be possible to establish the legal right to divert rent from a tenant to the association when the unit owner is in arrears. However, there are several "hoops" to jump through in order to accomplish this. At a bare minimum, it is my opinion that there must be a provision in the governing documents of the association which permits the association to demand that the tenant divert rent when the unit owner is in arrears. Even better would be a

provision in the declaration of condominium which requires all leases to be approved by the association and allows the association to prescribe a lease form or addendum form. Then, that lease form or addendum form could specifically include the right to divert rent from the tenant to the association. The association would be an actual party to the lease for the purpose of obtaining and enforcing this right to claim rent directly from the tenant. This additional step of requiring a lease form or lease addendum will bolster the association's position as it is then a direct, contractual party to the lease, and the rent diversion provisions are clear and expressly acknowledged and agreed to by all parties up front. The association's attorney should be involved in the process as there are various other laws which may need to be considered when considering this course of action, even if authorized by the governing documents.

Please also note that the Condominium Act provides that if you record a lien and file foreclosure, the association is entitled to ask the court to appoint a receiver to collect rents during the pendency of the foreclosure suit. The status of the unit's mortgage may impact this remedy. Again, the association's legal counsel should be consulted to determine on a case-by-case basis whether a receivership for the collection of rents is a viable option in dealing with any particular delinquent account.

Q: Can a condominium unit owner request financial information showing the salaries of association employees? **D.S. (via e-mail)**

A: The short answer to your question is yes. The Division of Florida Condominiums, Timeshares and Mobile Homes has adopted agency rules that require a condominium association to maintain accounting records in sufficient detail to permit determination of the revenues and expenses. "Accounting records" under the Division's rules include, among other things, payroll and personnel records of the association.

In the homeowners' association context, the answer is not as clear. There is a provision in Chapter 720 of the Florida Statutes, the Florida Homeowners' Association Act, prohibiting members or parcel owners from reviewing the "personnel records" of the association's employees. Whether or not salary information constitutes "personnel records" of the association's employees has yet to be determined by an appeals court.

Notwithstanding the above, it is important to note that certain employment records are confidential as a matter of law. For example, there are federal and state laws that only permit an employer to request an employee's consumer credit report for "employment purposes." There are also laws that require employers to keep information relating to an employee's drug screening and child support obligations confidential.

Q: I am involved with my homeowners' association. Our covenants prohibit "company logos" on vehicles. I have been told police vehicles are legally exempt from homeowners' associations covenants in Florida. Is this true? **S.S. (via e-mail)**

A: Your covenants appear to use a slightly different term than most governing documents. "Commercial vehicles" is the more commonly used term for the purposes of restrictive covenants.

Police vehicles and other authorized emergency vehicles are most likely exempt from restrictions prohibiting "commercial vehicles." To the extent vehicles with "company logos" are interpreted to be synonymous with "commercial vehicles", it is likely that authorized emergency vehicles are exempt from your Association's restrictions as well. The reasoning and logic for this conclusion may be obvious, but it lies in the fact that a "commercial vehicle" necessarily requires that the vehicle be used in some activity for economic gain. A police vehicle or other authorized emergency vehicle used to serve public purposes is not used in commerce or for financial profit.

A similar opinion was rendered by then Attorney General (now Governor) Charlie Crist in an Advisory Legal Opinion dated June 16, 2005. In that matter, the Town of Davie, Florida inquired whether a marked police vehicle is a commercial vehicle, because a homeowners' association had prohibited parking commercial vehicles within the community, except if the vehicle was stored in a closed garage. The Attorney General's opinion reviewed statutory definitions of "commercial"

vehicles and noted that one of the statutes which requires licensure for "commercial motor vehicles" specifically excludes vehicles that are owned by a governmental entity. In addition, the Attorney General noted that another statute defines "commercial vehicle" as "a vehicle that is owned or used by a business, corporation, association, partnership, or sole proprietorship or any other entity conducting business for a commercial purpose."

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.