



Unit Owner Has Right to Records

Board member has that authority, too

Fort Myers The News-Press, June 28, 2009

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Q: This is my first year on our condominium association's board. I am the vice president. I have requested from our management company, at least four times, copies of the 2008 financial statements and tax returns. The management company says "we will send it over", but I never seem to get it. What recourse do I have as a board member and unit owner? **P.M. (via e-mail)**

A: There are two different levels to your question. First, regardless of your position as a board member and vice president, you are a unit owner in your condominium and have certain rights. Section 718.111(12) of Florida's Condominium Act states that every unit owner has the right to inspect all "official records" of the association, which would include last year's financial statements and tax returns. Unit owners are entitled to access to official records by making a written request to the association. The association has five working days from receipt of a written request to make the records available for inspection. After ten working days, a rebuttable presumption arises that the association has wrongfully withheld access to official records.

If an association does not honor a unit owner's records access rights, the association is exposed to statutory damages of \$50.00 per day, up to a maximum of \$500.00. Also, the unit owner who is

denied records access rights has the ability to file legal action against the association, and would be entitled to recover their attorney's fees if it was determined that access to records was wrongfully withheld.

Setting aside your rights as a unit owner, you also occupy a fiduciary position due to your status as a board member and the association's vice president. Therefore, you should have unfettered access to the association's financial records, and the role of your management company is to support you in discharging your duty. There is obviously some breakdown in communications here. I would recommend that you bring this issue up before your board, with your management company representative present, to determine why there is a perceived lack of cooperation between the managers and the board.

Q: Our homeowner's association has taken over operation from our developer. We have dismissed the services of the management company. The new board wishes to place some liens on the property of homeowners who are well past due in paying their assessments. Is there any legal reason why we cannot do this? There is nothing mentioned in the Florida Statutes about who can place liens, only how to do it. **M.T. (via e-mail)**

A: Even if you had retained the relationship with your management company (or hired a new one), your managers could not prepare liens on your behalf. In 1996, Florida's Supreme Court issued a ruling, in response to a petition filed by a Florida community association manager, as to what actions by a manager would or would not constitute the unauthorized practice of law. The court specifically ruled that preparation of a claim of lien on behalf of an association constitutes unlicensed practice of law and is therefore an improper function for a community association.

As to board members preparing liens, the law is a bit fuzzier. It is well established in the law that a person can act as their own attorney. You can write your own will, or represent yourself in court, not to say that doing so is a good idea.

However, when a member of a corporation's board is acting on behalf of the corporation, it is not the same thing as representing yourself. In my opinion, a board member's preparation of liens is probably the unlicensed practice of law (and is certainly so if they are paid), although I have been advised that the Florida Bar does not presently take an aggressive enforcement position on this issue. While there are certainly cases where it makes sense for the association to economize on the use of legal counsel (for example, I often recommend in certain types of small claims court cases that an association represent itself), preparing liens is not an area where I would skimp.

If your association retains an attorney to prepare claims of lien, your attorney should have a fixed fee schedule for the performance of this service, so you will know what your financial obligations will be. More importantly, pursuant to Florida law, the attorney's fees which you incur in the preparation of the claim of lien are recoverable from the property owner, and at least in theory, ultimately cost the association nothing. However, that does not always prove to be true in this economic climate, particularly if your association's lien is wiped out by a superior mortgage. In the homeowner's association context, a foreclosing

mortgage holder is typically only liable for the payment of twelve months of unpaid maintenance assessments due from the previous owner, or one percent of the original mortgage debt, whichever is less.

These are historically challenging times for associations. Delinquencies are at an epidemic level, as reported in the media nearly every day. There is no one-size-fits-all collections strategy that will work for every association. Individual factors (the percentage of delinquencies, how many owners owe more on their mortgages than their property is now worth, and whether there are rental occupants in delinquent units), all play a part in deciding how to best ensure (or at least try to ensure) that everyone pays their fair share. In my opinion, your board would be ill advised to try to navigate these waters without the assistance of legal counsel who is experienced in this area of the law.

Q: I would like to know when it is allowed by law for a condominium association to appoint a non-owner to the board. We had our board meeting last February. There were enough unit owners who ran, and four were elected. One of those people later resigned. The board then appointed a non-owner to the board. Is this legal?
D.D. (via e-mail)

A: Absent a contrary provision in the association's bylaws, which would be very unusual, vacancies on the board of directors are filled by the remaining members of the board. Unless the bylaws provide otherwise, the board fills the vacancy for the remaining term of the person who resigned.

There is no requirement in the law that members of condominium association boards be unit owners. If your bylaws require that a board member be a unit owner, then that provision would apply. Accordingly, absent a provision in your bylaws limiting service on the board to unit owners, your board had the right to appoint a non-owner to fill the vacant seat.

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.