



Condo Owner Wants to Force Repairs to Amenities

Developer-appointed board unresponsive

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Q: My fellow condo owners and I are becoming increasingly frustrated with the condition of our pool, fitness room and other amenities. The pool filter pump has been broken for some time and the fitness room air conditioner also is broken. These maintenance issues render these amenities virtually useless. What can we do to force the association to correct these problems quickly? The main problem is that the developer still controls the association and so the developer-appointed board members are not responsive to our demands. Is there any way we can force the developer to turn over control of the association since they do not appear interested in properly maintaining these common elements. **T.H.**
(via e-mail)

A: First, as a legal matter, the fact that the association is still under developer control is of no legal consequence regarding the maintenance issues you described. The pre-turnover association is the same legal entity as the post-turnover association, and has all of the same obligations to maintain the common elements. However, because the pre-turnover association is administered by a board of directors made up of developer-appointed directors, and because the unit owners do not have the ability to recall those directors or vote them out of office, the pre-turnover association is very

different than a unit-owner controlled association from a practical perspective.

Unit owners are not able to force turnover of control of the association due to developer performance issues. You may recall from one of my recent columns, that the Florida Condominium Act provides times and triggering events for when the developer must permit the non-developer unit owners to hold a majority of the board of director positions (“When Must Developer Turn Over Association Control?”, May 24, 2009).

Individual association members do not have authority to directly contract to have these items fixed or to take action themselves. However, the unit owners do have legal standing to demand that the association board fulfills its obligations as set forth in the condominium documents and the law. The Florida Condominium Act clearly states that the association shall maintain common elements. I would also suspect that the board’s duties, as set forth in your condominium documents, require the association to maintain the common elements for the use and benefit of the owners. Any unit owner could certainly file a legal action to compel the association to meet its legal and fiduciary obligations. Pursuant to the Condominium Act, any breach of fiduciary duty by a developer-appointed board member will also be attributable

to the developer entity itself. While proving a breach of fiduciary duty is not always easy and depends on the specific facts of each case, this liability may be enough to encourage the developer to address your maintenance concerns.

If the pool pump or the fitness room air conditioner, or any other amenities are still under warranty, the association board should diligently pursue any recourse through those warranties. Failure to do so clearly is adverse to the interests of the association and could possibly form the basis of a breach of fiduciary duty claim against the board.

Q: If a management company comes to present their proposal to our board, does that meeting have to be open to all residents? Also, can the board vote to contract with a management company without a vote by all owners? **D.R. (via e-mail)**

A: As is known by most everyone who has anything to do with Florida condominiums, the law requires that “meetings” of the board be open for all unit owners to observe, subject to certain exceptions involving the attorney-client privilege. Further, unit owners must be permitted to speak at board meetings with reference to designated agenda items.

The most commonly accepted definition of a “meeting” of the board is any gathering of a quorum of the board where association business is conducted. Your inquiry suggests that a quorum of the board will be present for the management company’s presentation. Therefore, if association business is being conducted, then the meeting must be open.

In my opinion, it is fairly clear that listening to a management company’s proposal is “conducting business.” It is well established that votes do not need to be taken in order for business to be conducted. Therefore, if a quorum of the board will be listening to the management company’s proposal, the meeting should be duly posted and open to unit owner observation and statements.

The question of whether a unit owner vote is required to hire a management company is not addressed in the law. This will be addressed in your condominium documents; the declaration of condominium, articles of incorporation, or bylaws. With rare exceptions, the condominium documents will confer adequate authority upon the board of directors to hire a management company, without a unit owner vote.

One caveat is in order. Some condominium documents, particularly those which govern older communities, limit the amount of assessment increases unless some level of unit owner approval is obtained. The law does not impose limitations on assessment increases (but does provide a petition/review process if assessments exceed the previous year’s by more than 115 percent). If your association’s documents limit the board’s authority to increase assessments above a certain amount without a unit owner vote, you would likely need a vote to hire a management company if payment of their fee would take you over the limit. I also strongly encourage associations whose documents contain assessment increase limits to eliminate them. Recent history has shown, particularly in the area of insurance increases, that these “spending caps” do not work well, and often cause needed maintenance to suffer, which can be detrimental to property values.

If your association does hire a management company, please note that the Florida Condominium Act requires that the contract be in writing, and contain certain terms. I also recommend that a management contract be terminable by either the association or the management company, with or without cause, upon reasonable notice (such as thirty or sixty days).

Q: I recently attended a condominium law seminar. A case was discussed about the need for a unit owner vote when the association changed the color of condominium buildings. What was the holding in that case? **R.P. (via e-mail)**

A: I believe the case you are referring to is *Islandia Condominium Association, Inc. v. Vermut*. The case was decided in 1987 by Florida's Fourth District Court of Appeal, and applies to condominiums.

The Islandia condominium development consisted of 47 buildings, laid out in clusters, grouped by color. There were approximately seven different color groups, with each group of buildings having matching trim and roofs.

The board decided that for the sake of uniformity, all the buildings would be painted in the same color scheme, light brown. The declaration of condominium for this community required a two-

thirds vote of the unit owners for material alterations or substantial additions to the common elements.

The appeals court ruled that under the facts of this case, the change of color was a material alteration or substantial addition to the common elements, and thus required a two-thirds vote. The court ordered that a vote be taken of all owners as required in order to obtain approval of the color change. If there was not approval by two-thirds of the owners, then the association was ordered by the court to repaint all of the buildings to their original color scheme.

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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