



Condo Association Rules Don't Allow Voting by E-mail

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Q: I am currently a condominium association board member. Our board has five members. Our president and management company continually do business and vote on issues via e-mail. We recently had a situation where our insurance was due and at the last meeting it was decided that it would be voted on by e-mail whether to finance it or not. Obtaining the insurance was not the issue that I had, it was how it was voted. We also recently had a plumbing leak where the decision to have the problem taken care of was voted on by e-mail. I contacted the Department of Business and Professional Regulation and asked these questions. They stated that nothing could be voted on by e-mail. Is this correct? **C.A. (via e-mail)**

A: Yes, the DBPR's position is, in my opinion, correct. The reason is that voting on association matters must take place at a duly-noticed board meeting, open to observation by owners, with a limited exception for attorney-client privileged matters. The "open meeting" requirements, codified under Chapters 718, 719 and 720 (governing condominium associations, cooperative associations and homeowners' associations respectively) serve to provide owners the opportunity to participate in the discussion leading up to the vote, and to observe the vote itself. Holding a vote by e-mail does not generally give owners a chance to participate nor observe, and flies in the face of the open meeting requirement.

That said, I am aware of no prohibition against board members and/or the association manager discussing or debating association business by e-mail. But the actual vote on the item must take place in an open meeting. In my opinion, at least in most cases, such e-mails will constitute official records of the association, subject to owner inspection. However one DBPR arbitrator recently ruled that e-mails existing on the personal computers of individual directors are not official records of a condominium association.

I have heard it argued that where a quorum of the board debates association business by e-mail, a board "meeting" is being held. Obviously, where a quorum of the board is gathering in person, by telephone conference, or in some other type of "real time" setting (for example, a "chat room" setting), a board meeting is being held. However, I am not of the opinion that discussions or debates by e-mail constitute board meetings because the board is not gathering in "real time" such that they can contemporaneously hear one another's comments and respond. However, I am not aware of any court ruling or administrative agency decision clarifying this point, one way or the other. It is an area where the law should be clarified by the Legislature.

There is no doubt e-mail is a helpful tool in our daily lives. However, it should not be used to

subvert the transparency which is supposed to be part of a community association's decision-making process.

Q: I am president of a condominium association. The board of directors wants to "pool" (i.e., fund on a cash flow basis) our reserve funds which have historically been calculated and funded on a straight-line basis. I am confused by a previous article on this subject which states at one place that the Florida Division of Condominiums supports the board's authority to present pooled reserved funding to the members even when straight-line reserved funding has been used in the past. Another statement in that article is that the approval of a majority of those members present at a duly noticed meeting of the association is necessary in order to make the switch from straight-line reserved funding to pooled reserved funding. Therefore, my question is, can the board of directors decide on switching from straight-line reserve funding to the cash flow method, or must the owners approve the switch? **D.C. (via e-mail)**

A: The Florida Condominium Act has long required reserve funding to be included in the annual budget of a condominium association. Reserve funding is required for roofing, painting, and paving, and any other deferred maintenance or capital expenditure items that will cost more than \$10,000.00. Deferred maintenance refers to items that require maintenance less frequently than annually, such as painting, or swimming pool refurbishing. Capital expenditures are expenses to replace items with a useful life greater than a year, such as a pool heater or air conditioner that serves the common elements. Importantly, once reserve funds are collected and designated for a particular purpose, they cannot be used for any other purpose without approval of a majority of the members at a duly noticed meeting of the association where a quorum is present. So the reserve funds are restricted and effectively held in trust by the board.

The statute also permits associations to reduce or completely waive the amount of reserve funding from year to year. But just as with the restriction on the use of reserve funds described above, any

reduction or waiver of reserve funding requires that a majority of the members who are present at a duly noticed meeting of the association where a quorum is present must approve the reduction or waiver of reserve funding each year.

Prior to December, 2002, reserve funds were required to be funded based on a straight-line funding method. With straight-line funding, items or categories of property are identified and separate reserve accounts are set up for each item or category. For expensive items with long useful lives, such as roofs, associations using the straight-line method often have substantial funds tied up in a restricted account. Those funds cannot be used for other purposes without member approval. Prior to the administrative rules that allow cash flow method reserve funding, many associations believed these substantial, restricted reserve accounts to be an ineffective and imprudent money management practice. Therefore, on an annual basis, those associations would take a member vote to both allow the association to use all reserve funds for any capital expense or deferred maintenance expense, and to reduce the full reserve funding requirement. These associations were effectively "pooling" reserves, but needed to conduct annual member voting to achieve that result.

In response to this practice of effectively pooling reserves, the Division of Condominiums enacted administrative rules in December, 2002 to allow associations to fund and maintain reserve funds using the cash flow method. All of the same capital expenditure and deferred maintenance items must first be identified, and the anticipated date of replacement or repair and anticipated cost must be calculated and included in the budget. But because the reserve fund is held in a pool and all funds are available for any reserve fund items without the need for annual member approval, the cash flow method of reserve funding results in a lower annual contribution requirement than the straight-line method.

In 2002, when the cash flow funding administrative rules were adopted, there was an

initial question whether associations that had already established and maintained straight-line reserve funds could switch to the cash flow method and contribute existing funds to a reserve pool. The first statement you cited above simply confirms that the Division of Condominiums will allow associations to switch from straight-line reserved funding to cash flow funding and the board is allowed to propose that to the members. The second statement you cited above confirms that a majority of the members at a duly noticed

meeting must approve the switch if existing funds that were accumulated under the straight-line method of funding are to be put in the "pool." Member approval is required not because the association is switching funding methodologies, but because the statute still restricts the use of reserve funds to the items listed on the reserve account, and some funds previously designated for a very specific item under the straight-line method will now be available and can be used for some other purposes under the cash flow method.

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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