



## Question Arises When Board Member Resigns Her Seat

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**By Joe Adams**

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

**Q:** Our association's annual meeting is coming up in December. We have a seven member board, who serve two-year terms. Our board members' terms are alternated so that four are elected one year, three the following year, and so on. Three seats are up this year. One of our directors, who has a year and two months left on her term, just sold her home and resigned from the board. Since that seat was not open for election at the upcoming annual meeting, does the board fill that vacancy. If so, for how long. If not, how is the election for this seat handled at the annual meeting? **A.L. (via e-mail)**

**A:** It depends.

If your association is governed by the condominium law, it is first necessary to make sure that you have, since enactment of 2008 changes to the statute, "ratified" keeping two year terms for your board members. The ratification vote needed to be approved by a majority of the entire voting interests in the association (there is usually one voting interest per unit). If such a vote did not take place, and your bylaws pre-date the 2008 change to the statute, then your directors should only be elected for one year terms.

Assuming that a condominium association has properly provided for two-year terms, Section 718.112(2)(8) of the Florida Condominium Act states: "Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors ... Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled." The law does, however, permit the seat to be held open for election rather than appointment.

Therefore, unless the condominium association's bylaws provide otherwise, this vacancy would be filled by the board for the remainder of the unexpired term of the resigning board member (until December 2010). However, the board could decide to hold the seat open for election this year, which also would be legally permissible, but not the usual way of dealing with a situation like this.

If your association is governed by the Florida Homeowners Association Act, Chapter 720 of the Florida Statutes, or the Florida Cooperative Act, Chapter 719 of the Florida Statutes, the answer is a bit trickier. Neither the Homeowners Association Act nor the Cooperative Act directly address how

board vacancies are filled. Therefore, in the HOA and cooperative context, it has always been necessary to look to the provisions of Florida's Not-For-Profit Corporation law, Chapter 617 of the Florida Statutes.

For many years, Section 617.0809 of that law stated that board vacancies were filled by the remainder of the board for the unexpired term, easy enough to figure out. However, this law was changed effective October 1, 2009. Section 617.0809(3) now provides: "The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected."

The new law apparently applies to HOAs and cooperatives regardless of any provision in the bylaws to the contrary. I am not sure why the Legislature found it necessary or appropriate to make this change, but it did, and it is the law today for cooperative and homeowners' associations.

If your association is governed by Chapter 719 or Chapter 720, it would appear that the board can only fill the vacancy created by the director's resignation until the next annual meeting. Unfortunately, the law is not clear how that seat is to be filled at the next election. In my opinion, the most logical interpretation of the new law is that this seat would be elected at your annual meeting for a one-year term only, while the remaining three seats will be elected for two year terms.

This leads to the obvious conundrum of how to run such an election. Again, there is no guidance in the new law. There are probably a number of procedures that could be employed, and which

would be best guided by your association's attorney. It would seem that one option would be to have two separate balloting procedures, one for the two year seats, and one for the one year seat. This leads to several obvious questions, including whether someone could run for both a one year seat and a two year seat.

Another option, although not supported by any language in the statute, would be to give the three highest vote recipients the two year seats and the fourth place finisher the one year seat. This, of course, assumes that there are more candidates than there are open seats, which is often not the case.

Unfortunately, the lack of guidance in the law makes a cut and dry answer difficult, but like all challenges, solutions certainly exist.

**Q:** Our condominium association foreclosed on a unit. The unit had a large mortgage on it, but the mortgage holder did not attempt to stop the foreclosure or bid on it. The association has a purchaser lined up. Does the bank still have any rights? **L.H. (via e-mail)**

**A:** As a general matter, the association's assessment lien is almost always inferior to a purchase money first mortgage. Accordingly, if your association has foreclosed the delinquent unit owner, the mortgage still exists. Some associations rent units which they acquire through foreclosure, waiting for the bank to decide what to do. However, the foreclosure of the assessment lien does not "wipe out" the first mortgage, and it is still a valid lien on the property, absent unusual circumstances.

*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](mailto: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](http://www.becker-poliakoff.com).*