



Board May Think Need for Lights Outweighs Cost

Budget must include bad debt expense

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Q: I would like your opinion on the spending authority of my homeowners' association board. Like many associations, we have a number of owners who have not paid their assessments and are in foreclosure. This has clearly affected our budget because the board has increased assessments for next year. I went to the budget meeting and the reason for the increase was mainly due to concern about future, unpaid assessments. What I don't understand is that the board went ahead with its plan to invest several thousand dollars to replace holiday lighting and decorations for the two entrances to our community. The additional electric bill to our association for these holiday lights will be several hundred dollars. How can the board legally raise assessments against the owners when it is spending money on holiday decorations that are nice, but hardly necessary and not a smart use of money in these economic times? **E.S. (via e-mail)**

A: The legal analysis of your question focuses on whether or not spending association funds on holiday decorations is a proper common expense of the association. As you may know, a board of directors of a homeowners' association may only spend funds on expenses that are either expressly or impliedly established as common expenses by provisions in the governing documents of the association. Such provisions often vary, but always include authority for the association to

maintain and administer the common areas that it owns. Some governing documents include very broad provisions that the board may spend funds on any expense related to the "health, safety and welfare" of its members, and such a provision is often interpreted very broadly.

In the end, spending association funds on holiday decorations and lighting is similar to a board's decision to perform landscape maintenance and common area upkeep. There are different degrees of maintenance and upkeep that are within the discretion of the board but still result in the board meeting its legal and fiduciary duties to the association. Apparently, your board of directors believes that the expense of these holiday decorations, which may well have been part of the estimated budget for the current year, are appropriate and reasonable, even in these economic times. Just as a board may decide that new garden mulch, well-trimmed trees and shrubs, and well-kept plants and flowers are an important part of their work as a board to maintain the common areas, they apparently have also decided that the members enjoyment of the holiday decorations, and perhaps the reputation of your neighborhood in the larger community, outweigh the cost of the holiday decorations and lighting.

As for the general issue of budgeting and increasing assessments to account for potential bad

debt due to unpaid assessments, that is a common and recommended strategy for many associations. As you may know, putting together a budget is an exercise in estimating and making reasoned decisions. It is rare that the estimated budget results in collecting the exact amount of funds needed to pay all expenses. But any known expense, including bad debt expense, must be included in any budget.

Q: I live in a condominium with about one hundred units. Five of the units have been foreclosed upon and were purchased at the foreclosure sale by a corporation. All five of the units are leased. Are representatives of the corporation qualified to run for the board of directors? Since the corporation owns five units, would it be possible for the corporation to nominate five candidates? **H.R. (via e-mail)**

A: The Florida Condominium Act provides that in an association with more than ten units, co-owners of a unit may not serve as members of the board of directors at the same time. Condominium associations are also subject to Chapter 617 of the Florida Statutes, Florida's Not For Profit Corporation Act. This law provides that directors must be natural persons who are 18 years of age or older but are not required to be members of the corporation unless the articles or bylaws so provide. Chapter 617 also provides that if eligibility for the board of a condominium is limited to members, the grantor or beneficiary of a trust that owns a unit is deemed to be a member and eligible for the board provided that the beneficiary occupies the unit.

Neither the condominium statute nor the not for profit corporation statute directly address the eligibility of representatives of artificial entities, except trusts, to serve on a condominium board of directors. Although the prohibition against "co-owners" of a unit serving at the same time indicates an intent that only one person can represent a particular unit on the board, this provision of the law does not specifically apply to artificial entities.

The answer to your questions will depend on the specific provisions in your bylaws. If the bylaws

limit board eligibility to voting members, and require corporations to designate their voting member in a "voting certificate", then it is likely that the only representative from the corporation that would be eligible to serve would be the person named in the voting certificate. However, if board eligibility is not so limited in your bylaws, then there appears to be nothing to prohibit the corporation from nominating multiple candidates.

Q: I own a unit in a small condominium. Most of my neighbors are seasonal residents and do not participate in community affairs. We have failed to get a quorum at an annual meeting for several years. However, the existing board continues to serve. How can these board members continue to serve if we do not have a quorum at the annual meeting to hold an election? **D.E. (via e-mail)**

A: It is true that in order to convene and hold a meeting of the members, a quorum must be obtained. The Florida Condominium Act states that unless a lower number is provided in the bylaws, a quorum is a majority of the voting interests in the Association. However, despite the need to obtain a quorum to conduct business at a members meeting, there is no quorum requirement for director elections. Specifically, the Condominium Act states that only 20% of an association's voting interests need to cast a ballot in order to have a valid election of directors.

Therefore, your condominium association may not have a sufficient number of participants year-to-year for member meetings. However, it may have sufficient participants to hold an election of directors. Furthermore, even if 20% of the voting interests did not cast a ballot in an election, no election needs to be held if the number of vacancies to be filled on the board is equal to or exceeds the number of candidates running for election.

Finally, if no person is interested in running for the board when a vacancy occurs, then the director whose term expired is automatically reappointed to the board with no need for an election.

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.