



## Condominium Law Q&A

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By Gary A. Poliakoff

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**Question** – At the last annual homeowners association meeting, a vote was taken to construct a pavilion on homeowners association property, next to our community pool. Only 71 votes were recorded out of a community of 147 lots, less than ½ of lot owners. The vote was 36 to 35 in favor of the construction. Since a significant mandate was not recorded and the cost was prohibitive (approximately \$40,000 not including tables, chairs, increased insurance and taxes), the homeowners association board has decided to go ahead with construction of four gazebo type tiki huts on the property. The board justifies the construction of the huts as a “betterment,” although no homeowners association vote was taken, even with a significant change in concept from the original pavilion plan. Historically, the developer was to build a clubhouse on the property as described in his sales brochures and promotion. However, he reneged and previous homeowners association boards (which the developer controlled) refused to take legal action to force the issue. Two rarely utilized tables and benches now sit on the property. In the long run, the gazebo (tiki hut) concept would be almost as expensive as the previously planned pavilion, and utilization based on the current table and bench use would be nil. What is “betterment” in the eyes of the board will be an unjustified eyesore in the eyes of others. Can you offer any suggestions as to what action homeowners can take to stop and/or reconsider the unwarranted expenditure of community funds? R.C.R., Palm Coast

**Answer** – Early on in my legal career, I represented

12 unit owners who purchased units in a “tennis club” condominium, which, when completed, lacked a single tennis court. They were branded the “dirty dozen” after a movie which was popular at the time. The developer’s excuse for not building the advertised tennis courts was an alleged inability to get building permits due to inadequate set-backs from neighboring property. The case settled with the “dirty dozen” receiving compensation for their losses. Quite frankly, I am at a loss to understand how your developer could have advertised that your community was to have a clubhouse, yet never built same. The statute of limitations for misrepresentation and/or violation of unfair and deceptive trade practices is 4 years, and for breach of contract is 5 years, so perhaps there is still time to act? Whether or not your current board can build tiki huts instead of the pavilion which the members voted on depends on the language of the covenants, conditions and restrictions which should describe the extent and limits of the board’s authority, with or without member approval, to make improvements to the common areas. Assuming that the board hasn’t already signed contracts and committed association funds, a grand swell of protest from the members should be sufficient to put the project on hold while the question of a pavilion vs. tiki huts is debated.

**Question** – In a previous column, a reader asked whether reserve funds can be “pooled,” allowing, for example, paving reserves to be used for painting. You advised that reserve funds cannot be “pooled.” I wrote to the Condominium Ombudsman and his representative agreed with your implication that

funds from the paving reserve cannot be used for painting even if the “pooling” or “cash flow” method of accounting for reserves has been approved by a majority of the unit owners in the condominium. In “Budgets and Reserve Schedules, A Self Study Training Manual for Beginners,” published by the Department of Business and Professional Regulations, Division of Florida Land Sales, Condominiums and Mobile Homes, revised December 2003, “Pooled Reserves” is addressed on page 31. It states that Florida Administrative Rules 61B-22.003 and 61B-22.005 were amended in December 2002 to allow associations to establish “pooled” reserve accounts. It goes on to give an example that clearly states that “pooled reserve” funds can be used for any item specified in the “pooled reserve.” Now, I am totally confused. Please help. T.W., Pompano Beach

**Answer** – Statutory reserves can be commingled into a single account for investment purposes. However, an accounting must be maintained which reflects how much of the pooled monies is from which reserve account, and these monies, absent the

prior approval of the unit owners, can only be used for the designated purpose. Interest earned on the pooled reserves can be used for any purpose, including placement in the general operating funds, or allocated to a particular reserve account as opposed to another. For example, lets assume the board has established statutory reserves for re-paving, re-painting, and surface repaving, along with the other components, for which the cost of replacement exceeds \$10,000. For purposes of this example, lets assume that the portion of the reserves allocated for re-roofing, re-paving, and re-painting are \$50,000 each, for a total of \$150,000. Let’s further assume that the monies are pooled and invested in a C.D. earning 10% per annum, such that the re-roofing, re-paving, and re-painting, portion earns \$15,000. Forgetting for a moment the question of taxes on the interest earned, the board can allocate the \$5,000 in interest to each of the reserve categories, \$15,000 to one to the exclusion of the other, or the entire \$15,000 to refurbishment of the lobby, should it elect to do so.

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