



## Condominium Law Q&A

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**Question** – I live in a gated community, which includes condominiums, townhouses and single family homes, where a total of 280 units pay quarterly required dues to a community service association. The owner/developer of this community is required to pay similar dues for all undeveloped land and unsold new units. Five members constitute the community service association board of directors. The chairman of the board is the owner/developer who appoints two other members. The remaining two members are volunteer residents of the community. Recently, community residents learned that the owner/developer is \$208,000 in arrears of service association dues, thereby making it extremely difficult for the association to meet accounts payable. The attorney for the association has stated that a lien cannot be placed on the owner/developer's property without authorization of the board of directors. Since the owner/developer controls the board of directors, any such legal action is obviously impossible. Should the owner/developer and his board appointees be required to abstain from voting on a decision which would benefit their personal interest? Does the Florida Condominium and Homeowner's Association Acts address this situation? What can affected residents do to resolve this problem?  
W.H.M. – Melbourne Beach

**Answer** – While neither the Condominium Act nor the Homeowners Association Act address this

specific question, neither Act sanctions a developer from paying its pro rata share of the common expenses except for the expressed period of time during which a maintenance guarantee is in effect and the developer is funding operating shortfalls. The courts have held that, when a developer controlled board refused to act in a timely fashion in placing liens against developer owned units which were delinquent in the payment of common expenses, the individual developer-designated board members were liable for the resulting damages under the theory of having breached their fiduciary duty to the unit owners. One of the non-developer-designated directors should make a motion to have the association's attorney initiate legal action against the developer. If the developer-designated directors vote no, or fail to abstain from voting due to a conflict of interest, the attorney should consider an action for breach of their fiduciary duty.

**Question** – Perhaps you could assist our Sarasota condo association with an answer to this question about material alterations and additions, which might also be of interest to other Florida associations: We are a mixed-use condominium with commercial and residential owners. Commercial owners occupy about 12 percent of the overall building, and the residential owners occupy the remainder. Some amenities such as the secure garage, the swimming pool, and the exercise room are not accessible or available to commercial owners, who also do not pay maintenance

assessments or reserves for those amenities. When it comes to material alterations of the common elements, we realize that 75 percent of the “total voting interests” must approve material alterations and additions per Chapter 718.113(2), Florida Statutes, (our declaration is silent on material alterations). What we’re not sure of is how to handle material alterations made to common element facilities that are unavailable to the commercial owners. Do commercial owners vote on those material alterations when we seek the approval of the Statute-mandated “75 percent of the total voting interests?” Or, do only residential owners vote on common element alterations that exclusively benefit

only the residential owners, while commercial owners would be excused from the vote (and the subsequent cost of the alterations if they are approved)? We have no problem with common element material alterations that benefit both commercial and residential owners. It’s the alterations that only benefit one segment of our population that need clarification. C.B., Sarasota

**Answer** – While the answer to your question will eventually turn on the exact wording of the condominium documents, based upon the information provided, I am of the opinion that the vote required is 75% of the residential unit owners.

*Gary A. Poliakoff is a founding principal of [Becker & Poliakoff, P.A.](#) and has served as its President since the inception of the Firm. He is on the Board of Governors of the Shepard Broad Law Center of Nova Southeastern University where he is an Adjunct Professor, teaching Condominium Law and Practice.*

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