



## Condominium Law Q&A

December 8, 2009

By Gary A. Poliakoff

gpoliakoff@becker-poliakoff.com

Tel: 954.987.7550

Fax: 954-985.4176

**Columnist Note:** Florida's Third District Court of Appeal has derailed the efforts of shared ownership communities to compel foreclosing lenders to expedite their unit foreclosures or pay common expenses. The story is repeated tens of thousands of times a day. Unit owners who are current in their maintenance payments, and have not defaulted on their mortgages, are being forced to pick up the bad debt of unit owners who are not paying their common expenses and lenders which are not taking title to units being foreclosed to avoid the financial consequences of becoming a "unit owner." The stories are replete with unit owners living for years in units without having to pay assessments or mortgage payments. In some cases, the units are being rented with the delinquent unit owners collecting rent but not paying common expenses. Community association bankruptcies are on the increase, and services are being curtailed. A few courageous trial courts have tried to help by ordering receivers to collect rent from defaulting unit owners, and use the proceeds to pay assessments, and to compel lenders to expedite their foreclosure actions. One court ordered a foreclosing lender to "diligently proceed with the (instant) pending foreclosure action within 30 days or pay monthly maintenance fees." Regrettably, Florida's Third District Court of Appeal, relying upon another decision, reversed the trial court's order, noting that courts of equity have no right or power under the law of Florida to issue an order, which it considers to be in the best interest of "social justice" at the particular moment, without

regard to established law. Sounds like a wake up call for the Florida Legislature to address the crisis, which threatens to undermine the financial viability of the State's shared ownership communities that house close to 5 million Floridians.

**Question** - Our homeowners association oversees the common elements in a large gated community. We have over 20 sub-associations and diverse housing types. Common elements vary from sub-association to sub-association, depending on what the builder at the time set up in their documents. In some cases, for example, the master association is responsible for roadway maintenance; in others, the sub-association has the perpetual maintenance. There is much frustration about lack of parity with matters such as the roadway maintenance, or landscape maintenance, or irrigation maintenance that dates back to the original documents of each sub-association. The master board would like there to be parity, and charges each unit owner the same amount regardless of these anomalies. They are struggling with whether to take on these maintenance tasks on property not deeded to them. Have you seen this worked out in other places, where what seems fair and equitable would not follow the association documents, deeds, and perpetual maintenance provisions on the community plats? What can the master Association do or not do? C.A., City unknown

**Answer** - The underlying covenants, conditions and restrictions (CC&Rs) of the community mandate the scope and limits of the master association's authority. Those CC&Rs can be amended as long as the requisite vote is obtained. The problem, and it is one I have dealt with hundreds of times, is that neighborhoods, which are not carrying their fair share of the costs of maintaining shared amenities, including entry gates and roadways, are difficult to persuade that it is in their interest to establish parity throughout the community. This all comes down to poor drafting by the developer, and its attorney, when the master plan was established. Had it been done correctly from the beginning, it wouldn't be an issue now.

**Question** - A "pseudo lawyer" and former director of our association advised me that Florida Condo Law permits the president of the board of directors

to have access to a \$500.00 discretionary fund for his use. That sounded outlandish to me. I searched Chapter 718 as well as the Florida Administrative Code, and found no such animal. Is it true? B.C., West Palm Beach

**Answer** - It is said that there are two ways to become admitted to practice law in Florida. The first is to graduate from an accredited law school and pass the bar exam. The second is to buy a condominium. Sounds like the director in question took the second route. No, there is nothing in the Condominium Act, the Homeowner's Association Act or the Co-Operative Act that creates a \$500 discretionary fund for the use of the board president.

*Gary A. Poliakoff is a founding principal of Becker & Poliakoff, P.A. 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.*

*Mr. Poliakoff is co-author of Florida Condominium Law and Practice, The Florida Bar Continuing Legal Education, 1982, and author of a national treatise, The Law of Condominium Operations, West Group, 1988. Mr. Poliakoff can be contacted by emailing [gpoliakoff@becker-poliakoff.com](mailto:gpoliakoff@becker-poliakoff.com).*