



LAW OFFICES

BECKER & POLIAKOFF, P.A.

Community Up-Date™

Vol. 102 NOVEMBER 2002

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

KINDER & GENTLER COVENANT ENFORCEMENT: TECHNIQUES FOR OBTAINING VOLUNTARY COMPLIANCE

On a quiet afternoon in April, 2000, the Board of the Ventana Lakes Property Owners Association, located in Peoria, Arizona, was having a meeting in the Yacht Club, when Richard Glassel, a former Association member, walked into the meeting, raised a pistol, and fired ten rounds from left to right at the Board of Directors seated at the front of the room. The Treasurer died of a gunshot wound to the head. Another owner, who was seated in the audience, was also fatally shot. At least three others were wounded in the attack. Mr. Glassel's truck contained hundreds of rounds of ammunition, and he carried two more handguns and an assault rifle when he walked into the room. Mr. Glassel was subdued by several members of the audience, one of whom was shot in the process.

During his occupancy of the unit, Mr. Glassel had a history of disputes with the Association; the most intense of which was over landscaping on his lot. However, in November 1999, the bank foreclosed on the Glassels, and they had moved away from the Community. At his arraignment, Mr. Glassel pled not guilty to two counts of first-degree murder and thirty counts of attempted first-degree murder. The Court has preliminarily ruled that he is mentally competent.

In this case, the Property Owners Association became the focus for Mr.

Glassel's anger and frustration with his life and himself. Clearly he had problems, which were unrelated to the level of landscaping maintenance at his condominium. But, how did the Association find itself in this predicament?

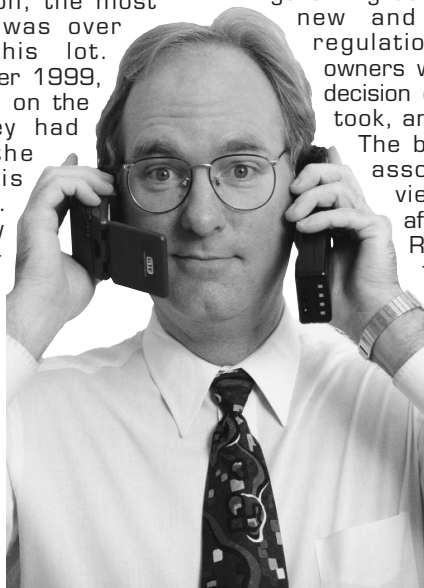
The old model of association governance was from the top down, with strict adherence to imposed restrictions. Every rule on the list began with the word "NO" and went on from there. Based on absolutes and generalizations, the old model arose from an inability to agree upon a vision for the community, and resulted in the perception that the members have no input in the governance of their homes. Community was defined as conformity, and business meant austerity.

The business of the boards included resolution of disputes among neighbors, enforcement of the governing documents, creation of new and more rules and regulations, responding to owners who questioned every decision or action the board took, and running meetings.

The boards in community associations have been viewed with the same affection as the Internal Revenue Service or the family dentist.

Governing documents written in the 1960's and 1970's no longer fit the lifestyle and legislative changes, which have taken us into the 21st Century. But, our boards are still

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TIDBITS

Did You Know ???

Some contracts call for automatic renewals. Therefore, the Association may be contractually obligated to a vendor or contractor for a long period of time unless it reviews its contracts on an annual basis to determine whether it has the power to terminate or prevent an automatic renewal. For example, say a Board entered into a contract with a laundry equipment company in 1993 and the contract had an initial term of five (5) years but contained two (2) renewal terms. The contract renewed in 1997 - does that mean the Association can cancel or terminate the agreement in 2003? Not necessarily - it depends on the language of the contract itself.

- ✓ Renewal terms at the option of the vendor do not generally give the association the opportunity to cancel or terminate before all the options have been exercised. Be wary of what seems like a reasonable term when the contract is being presented, because the options may create a much longer obligation.

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ENFORCEMENT...*continued from page 1*

asked to enforce those documents. We have gradually moved away from a mini-democracy model, to the detriment of the community association concept and to the delight of the public press. Traditional covenant enforcement is defined by demands, hearings, fining and court action.

There are more than 205,000 community associations in the United States, with more than 40 million residents in 16.4 million housing units. New community associations are being built every day. Fortunately for us all, a new model is emerging. The new model is based on participation by the residents/owners, full disclosure and discourse, and enrollment of the community members in the process as well as the outcome. The new model includes a return to knowing and caring about your neighbors and sharing recreational activities within the community.

Under the new model, it is time to move to a mentality which places people values over property values and to find a creative synthesis of opposing viewpoints; creating mutual respect between owners and board members. When there is a problem, we must find the best and most equitable solution, instead of throwing another rule at it.

A proper introduction to the community's rules and regulations and a swift response to any questions or concerns expressed by a resident may help to head off enforcement down the road. Every community should have a formalized orientation program, like the old "Welcome Wagon" concept.

Invite the new owner(s) to the next community function or meeting, and assign someone to be his or her host to greet the resident and introduce him or her around to other residents. Personal contact can dispel feelings of alienation.

Review the rules and regulations and the governing documents. Do they need to be updated, amended to reflect lifestyle changes within the community? Is the language clear and concise? Will a resident know what is expected by reading it? If a rule is not being enforced, is it time to remove it from the list? Are rules being uniformly and consistently enforced in a timely fashion? Is the rule or restriction reasonable? Avoid lists of violations. The really creative problem resident will immediately find the loophole.

If there is a problem, review the options for solving it, and determine

whether, in fact, a new rule is the best way to address the problem. In some instances, the problem really only involves one owner, and it would be better to pursue enforcement against the one owner, rather than create a new rule which would impact everyone. In other cases, the language at issue should be changed, rather than enforced. If your documents prohibit any vehicles other than passenger sedans, and your community parking areas are filled with SUV's and minivans, it would be time for amendments to the restrictions.

Fiduciary duty still involves enforcement, but in a context of lifestyle and reality checks. Prophylactic procedures include enrollment of the association members in the rule adoption and amendment process, before the changes are voted upon. Use town or informational meetings as an opportunity for owners to raise issues and concerns, and sometimes to blow off steam. Report on the good news, the contributions of the residents, the accomplishments of the board, and the achievements of the community. Disarm a dissident by acknowledging him when he has a good point, or praising him when he raises a question which leads to a better way of doing something in the community.

Review the procedures for bringing a violation to the board's attention. The procedures should be in writing and published to the residents. A complaint should be in writing, and signed by the witness, before the board takes any further action. The board will need to determine if the matter is within the scope of the association's authority to enforce in the first place, which may require the assistance of the association attorney. When a violation is reported, it must be verified. Accusing the wrong resident creates plenty of bad feelings and anger, as well as the impression that the board is biased. Once verified, informal contact is often successful in obtaining voluntary compliance.

Uniform, consistent enforcement is critical to enforceability. When the board or the community association manager brings an enforcement matter to the attorney, it is critical for the attorney to evaluate the enforceability of the provision being violated, before moving forward. Failure to timely enforce, selective enforcement, and ambiguous language may give rise to defenses to the board's ability to enforce.

Make use of internal hearing process options within the community, giving heed to documentary or statutory requirements of due process and

TIDBITS**Did You Know ???***continued from page 1*

- ✓ The financial report shall be based upon the association's total revenues as follows:
- ✓ Automatic renewals in contracts should be avoided unless the contract allows the association to terminate without cause at any time upon written notice.
- ✓ Automatic renewals in contracts are typically found in most service agreements such as laundry equipment contracts, elevator contracts, management agreements, cable television contracts, etc.
- ✓ Automatic renewals often contain provisions that will allow either party to terminate or cancel upon a certain amount of notice but the method is often so convoluted (i.e., notice of termination must be given at least 90 days prior to the end of any three year period) that most associations fail to give timely notice of cancellation and remain bound to the contract for successive periods of time.
- ✓ An annual review of all current contracts is important for new board members as well as managers.

regulation of fining authority. It is important to keep in mind that the goal is to obtain compliance, not to prove the board is right.

Fighting for the principal of the thing can be an expensive and time-consuming proposition. If compliance is not voluntary, try Alternative Dispute Resolution alternatives such as mediation or arbitration. When individuals participate in the forging of a solution, even if they are not thrilled with the result, they are more likely to comply with it.

Ultimately, filing the lawsuit and going to court should be the last resort, reserved for the most recalcitrant cases which do not yield to reason and common sense.

ALTERNATE DISPUTE RESOLUTION IN FLORIDA

Human conflict has been around as long as humans have existed. Historically, disputes have been resolved in favor of the person with the largest club or gun. In our modern society, disputes are not usually resolved by clubs or guns (and when they are, society takes a dim view of it). Instead, the accepted alternative to physical resolution of most disputes has been litigation. Litigants have often discovered that this process can be just as painful in its own way as being clubbed or shot. Because of the unpleasant side effects of traditional dispute resolution, society continually seeks alternative methods which provide for a resolution of disagreements without destroying the parties personally or financially. Additionally, these types of dispute resolution can help to ease the burden of an already crowded court system. Two of the methods being used today are mediation and arbitration.

While alternative dispute resolution is also encouraged for homeowners' associations, there is no current statutory provision mandating it. The primary method of condominium and cooperative alternative dispute resolution is mandatory, non-binding arbitration. The Condominium Act clearly outlines those disputes which must first be subjected to arbitration. The Cooperative Act provides for alternative dispute resolution in accordance with s. 718.1255, Florida Statutes. These disputes:

- Involve the authority of the board of directors under Chapter 718 or the governing documents to:
 - Require any owner to take any action or not take any action regarding that owner's unit or its appurtenances
 - Alter or add to the common elements
- Involve the failure by the board of directors when required by Chapter 718 or the governing documents to:
 - Properly conduct elections
 - Give adequate notice of meetings or other actions
 - Properly conduct meetings
 - Allow inspection of books and records.

All disputes in these areas must first be submitted to non-binding arbitration through the Division of Florida Land Sales, Condominiums and Mobile Homes (Division) prior to filing a civil lawsuit. Disputes which involve title to a unit or

common elements, interpretation or enforcement of a warranty, levy or collection of a fee or assessment, eviction of a tenant or alleged breaches of fiduciary duty by a director or directors are not appropriate for the statutory arbitration process. These disputes must be litigated unless the parties jointly agree to independent, third-party mediation and/or arbitration.

The arbitration process is initiated by filing a petition with the Division and paying a filing fee in the amount of \$50.00. In addition to containing jurisdictional statements, factual statements, legal statements and a request for relief, the petition must also state, and have attached to it, proof that the petitioner gave the respondents advance written notice of the specific nature of the dispute, a demand for corrective action, a reasonable opportunity to comply and notice of petitioner's intent to file an arbitration petition. Once the Division determines that the petition meets the statutory requirements and that it has jurisdiction, a copy of the petition is served by the Division on all respondents.

Before or after filing of the respondent's answer to the petition, any party may request that the arbitrator refer the case to mediation. If all parties agree, the case must be referred to mediation. Even without agreement, the arbitrator may refer the case to mediation. If the mediation is unsuccessful and the mediator declares an impasse, the arbitration proceeding terminates unless the parties agree in writing to continue with it. If there is no such agreement, the arbitrator enters an order of dismissal and either party may file a suit in the circuit court for judicial determination of the issues.

If there are no disputed issues of material fact, the arbitrator will generally make a decision based upon the pleadings and exhibits on file and the appropriate law. If there are disputed material facts, a hearing will be held. At this hearing, the parties will be given

the opportunity to present evidence supporting their position through witnesses and exhibits. The parties may be represented by legal counsel but there is no requirement for such representation.

The arbitration decision must be presented to the respective parties in writing. This decision is final in cases where the parties have agreed to be bound by the decision of the arbitrator or if a complaint for a trial de novo (a legal proceeding anew) is not filed in the circuit court within thirty (30) days. Once an arbitration decision becomes final, it may be enforced in court. The right to a trial de novo entitles a party to seek a judicial determination of the dispute. This is not an appeal of the arbitrator's decision. It is, instead, a litigation of the dispute from the beginning. It is initiated by the filing of a complaint in the circuit court where the condominium or cooperative is located. The remainder of the proceedings must be conducted in conformity with the Florida Rules of Civil Procedure and do require legal representation.

The prevailing party in an arbitration proceeding must be awarded the costs of the arbitration and reasonable attorney's fees as determined by the arbitrator. The party who files a complaint in the circuit court must pay the other party's arbitration costs, court costs and reasonable attorney's fees unless the judgment in the circuit court is more favorable to the filing party than the arbitration decision. If the decision is more favorable, the filing party will be awarded court costs and reasonable attorney's fees.

While disputes remain an inevitable part of our society, we must devise methods for resolving them. Arbitration and mediation are viable alternatives to potentially abrasive and costly lawsuits. They serve the added purpose of reducing the burgeoning circuit court caseload.





CASENOTES

A DOUBLE WHAMMY LIEN

In the case of *George v. Beach Club Villas Condominium Association*, 2002 WL 31662719 (Fla. 3 DCA), the community association was hit with a double whammy on two special assessments, the first for mansard repairs and the second for roof repairs.

In 1997, the City of North Miami Beach warned Beach Club Villas that it would be fined if the roof mansards were not repaired. The roof mansards were covered with cedar shingles which were over 25 years old. Upon investigation, the Association determined that it would be half the cost to replace the cedar shingles with terracotta tile. The Board of Directors then passed a special assessment for the mansard repair consisting of replacing the single shingles with terracotta tiles.

A unit owner felt that the Directors did not have authority to replace the cedar shingles with terracotta tile and, hence, refused to pay the special assessment. The Association then filed a claim of lien on the unit owner's property and commenced foreclosure proceedings. During the foreclosure proceeding, the Association voted and passed a second special assessment for roof repairs. The unit owner failed to pay the second special assessment. At the beginning of trial, the Association announced that it would be seeking judgment for both special assessments.

The unit owner defended against the first special assessment for mansard repairs claiming that the change from cedar shingles to terracotta tile was a material alteration requiring unit owner approval. The Association argued that the work was necessary to maintain the common elements. The Court noted that simply because necessary work for maintenance may also constitute alterations or improvements does not nullify the Board's authority to do so without a unit owner vote. The Court recognized

that it was a proper course of action to replace the cedar shingles. However, the Court disagreed that the change from cedar shingle to terracotta tile was necessary for the maintenance and replacement of the cedar shingles. Accordingly, a unit owner vote was required.

As for the second special assessment for roof repairs, the unit owner argued that the initial claim of lien for non-payment of the special assessment of the mansard work did not cover the second special assessment for roof repairs. The Court recognized that § 718.116(5)(b), Florida Statutes, specifically states that a claim of lien shall secure all unpaid assessments which are due and which may accrue subsequent to the recording of the lien and prior to the entry of the certificate of title. However, the Appellate court found that this statute conflicted with the Florida Rules of Civil Procedure which require a party to give their opponent notice of what issues are going to be tried. Here, the claim of lien which the Association sought to foreclose was only for the special assessment relating to the mansards. In fact, the complaint had been filed prior to the passing of the second special assessment. The court noted that this was a different situation than when a community association is foreclosing on a claim of lien for failure to pay monthly assessments and several months have accrued since the filing of the complaint. Rather, this is a case where there were separate special assessments made for separate matters, to which unit owners may have different defenses. In fact, the Court noted that the two special assessments could be considered distinct claims or contracts for which separate claims of liens may be necessary. Accordingly, the Appellate Court found that, at a minimum, the Association should have amended its complaint to state that it would be seeking a claim under this second special assessment. As a result, the Association was denied relief for the second special assessment, as well.

CASENOTES