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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## Ante UP

By: Kevin L. Edwards, Esq.

The practice of gambling in the form of penny-ante poker games and bingo seems to be a common occurrence these days in many condominium associations. Social committees often engage in these practices as a means to raise money. Therefore, board members need to be cognizant of the many restrictions placed upon an association when it participates in penny-ante poker and bingo.

Section 849.08, Florida Statutes, provides that whoever plays or engages in any game of cards, keno, roulette, or other game of chance, at any place, by any device whatsoever, for money or other things of value, shall be guilty of a misdemeanor of the second degree and are subject to criminal prosecution. There are, however, two (2) exceptions that relate to card games. Specifically, it is not a crime for a person to participate

in a "penny-ante" game of poker, pinochle, bridge, rummy, canasta, hearts, dominoes or mahjong, provided that the winnings of any player in a single round, hand or game do not exceed \$10.00 in value and that the penny-ante game is conducted pursuant to the following restrictions in accordance with the above statute:

- (a) The game must be conducted in or upon the residential premises owned or rented by a participant in a penny-ante game and occupied by such participant. Alternatively, the game must be conducted upon the common elements or common areas of a condominium, cooperative, mobile home park or residential subdivision of which a participant in the penny-ante game is a unit owner.

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## TIDBITS Did You Know

*Most condominium associations with older documents are unaware of the requirements of Section 718.112, Florida Statutes, with regard to the size of the board of directors:*

- The Statute provides that the bylaws must provide for the size of the board and, if the bylaws do not so provide, the board will be fixed at five members. Many of the older condominium documents set a range for the board, for example, not less than three nor more than nine. Bylaws typically go on to provide that the exact number will be determined at the time of election.
- These older bylaws were typically drafted at a time when nominations could be made from the floor and the size of the board could actually be determined at the annual meeting, well before the current procedural election format was created.
- Section 718.112 requires a fixed number for the board of directors and, accordingly, the Division of Land Sales has ruled that provisions in bylaws that set the number of board members at a range, with the exact number to be determined at the time of election, do not adequately state the size of the board with enough specificity to meet

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**Ante UP cont.**

- (b) A person may not receive any consideration or commission for allowing a penny-ante game to occur in his dwelling.
- (c) A person may not directly or indirectly charge admission or any other fee for participation in the penny-ante game.
- (d) A person may not solicit participants by means of advertising in any form, including the time and place of the game, or advertise that he/she will be a participant in the penny-ante game.
- (e) No one under the age of 18 may participate in a penny-ante game.

With regard to the conduct of bingo games to raise money for association purposes, Section 849.0931(4) specifically allows condominium associations to conduct bingo games. However, the statute sets forth guidelines by which the bingo games must be conducted. In order to "legally" conduct bingo games, the following criteria must be adhered to:

1. The net proceeds from the bingo games must be returned to the players in the form of prizes but the association can first deduct the actual business expenses for articles designed for and essential to the operation, conduct and playing of bingo. If there are any net proceeds still remaining after paying prizes and deducting expenses, the association has two options:

a) Donate the money to a charitable, nonprofit, or veterans' organization which is exempt from federal income tax under the provisions of Section 501(c) of the Internal Revenue Code; or

b) At the next scheduled day of play, conduct the bingo games without any charge to the players and continue to do so until the proceeds carried over from the previous days played have been exhausted.

2. There shall be no more than 3 jackpots on any one day of play, and no jackpot can exceed the amount of \$250.00.
3. Bingo cannot be played more than two days per week.
4. Each person involved in the conduct of the bingo game must be a resident of the condominium and a member of the association and may not be compensated in any way for operation of any such bingo game. In other words, only owners can conduct the bingo games, not tenants or guests. A caller in a bingo game cannot be a participant in that bingo game.
5. No one under eighteen years of age can play a bingo game or be involved in the conduct of a bingo game in any way.
6. The bingo games must be held on the common elements or property owned by the association.
7. Seats cannot be held or reserved by the association or anyone involved in conducting the bingo game for players not present, nor can any cards be set aside, held or reserved from one session to another for any player.

A first violation of the statute is a first-degree misdemeanor. A second or subsequent violation of the statute constitutes a third degree felony.

**TIDBITS cont.**

the requirements of the Statute and, therefore, the Statute will apply to fix the size of the Board at five.

- All condominium associations with older documents are encouraged to look at their bylaws with regard to the size of the board to make sure that the bylaws comply with the requirements of the Statute. Since the size of the Board is also addressed, in most cases, in the articles of incorporation, those choosing to amend their documents should take care to make sure that the articles of incorporation and bylaws are both amended to maintain consistency between the documents. In the event of a conflict between the articles of incorporation and the bylaws, the articles will control.

**ERRATA**

In our May 2003, issue of the *Community Up-Date*, we erroneously identified a case note as *M.J. Gentry vs. Casa Del Sol Condominium Association, Inc.*, Case No. 02-5687 (Scheurerman/Summary Final Order/Feb. 6, 2003), under the heading of "Election Procedures Must Be Strictly Followed." The contents of this case note actually referred to the arbitration case of *Gosselin v. Sand Castle Condominium Association, Inc.*, Case No. 02-5465 (Coln/Amended Final Order/Feb. 19, 2003). We apologize for any inconvenience.



## TRANSACTION In Homeowners' Associations CAN BE TAXING

By: E. Austin White, Esq.

Typically, the declaration of restrictive covenants governing a homeowners' association will contain a provision whereby the developer is obligated to convey the common areas of the community to the association on or before the time control of the association is turned over from the developer to the association's members ("transition"). In fact, Chapter 720, Florida Statutes, the Florida Homeowners' Association Act, provides that, for homeowners' associations which were created after 1995, the developer is required, at the developer's expense, to deliver all deeds to common property owned by the association within ninety (90) days after the time the members are entitled to elect at least a majority of the board of directors of the association.

However, it is important that, at the time of transition, each homeowners' association determine whether or not ad valorem taxes have been paid by the developer on the common areas to be conveyed to the association. In Florida, each county assesses real property for ad valorem taxes. In that regard, "ad valorem" is a Latin phrase meaning "according to value." Thus, an ad valorem tax is a tax imposed on real property based on the value of that property. More specifically, an ad valorem tax is a tax levied on real property in proportion to its value, as determined by assessment or appraisal.

The tax is calculated by multiplying the taxable value of the real property by the millage rate. The taxable value is determined by the County Property Appraiser's office based on various factors including, but not limited to, fair market value, geographic location, and the use of the property. This task is monitored by the Florida Department of Revenue, which establishes rules and regulations that must be adhered to by the various County Property Appraisers' offices. The millage rate is determined by dividing the approved taxing district budget for the tax year by the taxable value. The millage rate is translated as a rate per \$1,000.00 of taxable value.

For example, if the millage rate is 2.00 (.002 x \$1,000.00), a taxable value of \$10,000.00 of real property would require the payment of \$20.00 in ad valorem taxes. A mill is 1/10th of one percent (1%).

Ad valorem real property taxes are due for the calendar year beginning January 1st and ending December 31st. Taxes become payable on November 1st of that year, and are due on January 1st of the following year, and become delinquent on April 1st of the following year. Accordingly, the record owner of the property, the taxpayer, has five (5) months in which to pay the tax before it becomes delinquent.

Florida law prohibits the separate taxation of condominium common elements. The legal theory is that the value of the common amenities (for example, the clubhouse, swimming pool, tennis courts, roadways, etc.) are already included in the value of the individual units, and separate taxation of those items would constitute unlawful double taxation.

The law for homeowners associations is slightly different. Common areas in communities governed by homeowners' associations are not specifically exempt from ad valorem taxation by law in the same manner as condominium common elements. However, Florida's Attorney General has opined that common areas in homeowners' associations should not be separately taxed if the value of the use rights in the common areas is included in the value of the homes. Accordingly, in many homeowners' association-operated communities where development has been completed, the County Property Appraiser will assess the common areas owned by the association at an adjusted rate, or at zero valuation.

However, what happens if a developer, through inadvertence or otherwise, fails to convey the common areas in a homeowners' association-operated community to the association following transition? More than one association has been surprised to learn that its common areas were being sold at public auction for

unpaid taxes, when the association had never even received a tax bill for the property. This occurred because the ad valorem tax bill is sent to the owner of the property, the developer, who may no longer have any interest in paying taxes on the property, particularly if the development has been built out, and the developer is no longer involved in the development of the homeowners' association-operated community.

Further, if the common areas in a homeowners' association-operated community are still owned by the developer, the County Property Appraiser may assess the property at a higher taxable value than if it were owned by the association. The association could then be faced with a delinquent tax bill on property assessed at a higher value than it would have been, had it been owned by the association.

Once real estate taxes become delinquent, there is a legal process by which the property for which the taxes have not been paid is auctioned off in the form of the sale of tax certificates, in order to temporarily satisfy the tax obligation for the property. In that regard, the county will first advertise the delinquency to the public. Thereafter, investors will investigate the properties and bid on the tax certificates. The investor who bids the lowest interest percentage purchases the tax certificate, and the overdue tax begins to incur interest at that rate. In order to satisfy the tax lien, the property owner must pay the face value of the tax certificate and all accrued interest. If the tax certificate is not redeemed within two (2) years, the person who purchased the tax certificate at auction may "force" a sale of the property to collect on his or her investment in the tax certificate.

Furthermore, it is imperative that each association determine whether taxes have been paid by the developer on those common areas prior to deeding same to the association. At transition, the association must identify the common areas and insure that the developer has deeded or will deed all of the common areas to the association.

# CASENOTES

## To COMPENSATE Or Not To COMPENSATE

From time to time, a question arises about whether directors or officers of a community association can be compensated for their services. This issue was recently addressed in the case of *Basch v. Hopson, Taddeo and Garden-Aire Village Condominium Association, Inc.*, 27 Fla. L. Weekly D2555, (Fla 4th DCA), decided in November 2002.

An owner filed suit against his condominium association, the association president and vice president, contesting compensation which was being paid to the officers by the association.

The bylaws of the association described the duties of the President and the Vice President. The bylaws also required that any compensation to be paid to officers "shall be fixed by the members at their annual meeting."

Mr. Basch alleged that the owners had never voted to pay the officers, and that they should not have been paid, as the payment was not in accordance with procedural requirements in the bylaws. He asked that the amounts paid be reimbursed to the association, and that an

injunction be issued to prevent any further payments from being made.

The association and the president responded that the compensation was not for work performed in their capacity as an officer or director but, instead, was for services unrelated to their duties as officers or directors. They asked that the Court grant a motion for summary judgement, as there were no genuine issues of material fact, since the compensation was for services outside of the scope of the duties described in the bylaws for the offices which were held. The trial court issued a Final Summary Judgement in favor of the officers and the association. Mr. Basch appealed the result.

The Court of Appeal reversed the ruling for two reasons. In the trial court case, the first claim was that the additional compensation was not authorized by the unit's owners, as required by the bylaws. Although the association and the officers stated they were entitled to be paid, they did not provide any documentation of authority which would have allowed them to pay officers compensation beyond any which had been previously set by the membership. The association and the officers also claimed that

their services were above and beyond the scope of their duties as set forth in the bylaws, but the Appellate Court found that there was no description of any such services, so there was nothing in the Court Record which supported the defense. Accordingly, the trial court decision was reversed.

According to the state statutes, which apply to all community associations, payment of an officer or director can only be made if it is authorized by the bylaws and, then, only if the procedural requirements for approval of the compensation have been met. Some bylaws will allow compensation by vote of the board, and other bylaws may require approval by a percentage of the membership at a members' meeting. Most bylaws provide that no compensation is to be paid to officers or directors, and do not contain any procedures for approval of compensation. In those cases, officers and directors cannot be paid for services related to their elected positions. Individuals can be paid for business services, separate and apart from their duties as an officer or director, but any such arrangement should be thoroughly documented, and disclosed to the board and to the membership.

## Surrender the KEYS

In the case of *Costa del Sol Condominium Association, Inc. v. Morrell*, Case No. 02-5011 (October 14, 2002), the Declaration of Condominium for Costa del Sol Condominium provided that "the Association shall have the right to have keys to all units and in the event that an owner installs a new or additional lock or locks on the front or entrance door to a unit, the owner shall furnish the Association with a key to all said locks within forty-eight (48) hours after the new lock or locks are installed."

Pursuant to Section 718.111(5), Florida Statutes, a condominium association has the irrevocable right of access to each unit during reasonable hours, when necessary

for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.

Frances Morrell, a unit owner in Costa del Sol Condominium, refused to provide the Association with a key to his unit arguing, among other things, that he had a right to know how the keys are stored, under what conditions the keys will be used, and who will be allowed to have access to or use of the keys. However, the arbitrator held that the issue of whether or not the Association will access the unit in a manner that meets Mr. Morrell's requirements did not excuse

his failure to provide the Association access to his unit as required by the Condominium Act and the Declaration of Condominium. Mr. Morrell's defense of fear of damage to or loss of property and distrust of the Association were denied.

In conclusion, the association's right of access to the units is sufficient to support a requirement in the governing documents that unit owners must provide keys to their units to the association. A unit owner may not refuse to comply with this requirement on the basis that he or she does not trust the association or is not comfortable with the procedures of the association concerning the storage or use of such keys.