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## IT'S NOT EASY BEING LITTLE: ISSUES AFFECTING SMALL ASSOCIATIONS

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Members of large associations with 300 or more members might sometimes wish they lived in smaller, simpler communities where the budgets are not enormous, the volunteer board members do not find themselves performing the equivalent of a part-time job, or more, and the members do not sometimes feel as though their association is out of touch with their needs. But small associations of 50 members or less must deal with unique issues and difficulties that are equally challenging, often much more acute, and not at all easy to overcome.

Three challenges facing small associations can be generally categorized as administration issues, financial issues and social issues. The administration issues arise from the fact that there is a smaller pool of members to draw from to serve on the board and there are fewer management professionals willing to work with small associations. The financial issues are created due to the obvious fact that fewer members must bear the burden of association expenses, including some fixed expenses that are not always reduced just because the association is small. And the social issues concern the reality that interaction between all of the members in small associations tends to be much more frequent, personal, and therefore critical to the smooth administration and success of the community. To add to these challenges for small associations, these issues, and their solutions, are often interrelated.

### Administration Issues

A condominium or deed restricted community is operated, most often, by a not-for-profit corporation: the association. The

association is administered by an elected board of directors. It is not unusual in many communities, large and small, to find that there are not enough members willing to serve on the board. But the fact is that every association realistically needs at least five directors to serve on the board. This is because a board meeting occurs anytime a quorum of the board, most often defined as a majority, meets in person or over the telephone and discusses association business. While boards should always conduct important business in open meetings, as a practical matter, it is necessary for board members to communicate and interact outside of duly noticed board meetings. An odd number of directors is preferable in order to avoid deadlock, and while three directors can certainly, legally administer an association, important provisions of the Florida Condominium Act and the Florida Homeowners' Associations Act require most board meetings to be open to members. Therefore, anytime two members of a three member board meet and discuss association business, a board meeting is taking place which must be noticed and open to members. This is cumbersome and impractical. On a five-member board, two board members can meet outside of open board meetings and conduct necessary association business, as two board members do not constitute a quorum of such a board.

Because a five-member board is critical to the effective administration of any association, in small associations of 50 units or less, this requires at least 10% of the members to be willing to serve on the board. In an association of 20 or fewer members, at least 25% of the members must be willing to serve on the board. Such levels of interest in board service are rare, and it can be difficult for small associations to get a sufficient number of volunteers.

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One obvious solution to the reluctance of members to serve on a board is to hire a licensed community association manager to assist with the administration of the association. Delegating many of the board responsibilities to a good manager can greatly reduce the required time commitment of board members. But community association management contracts are typically priced based on the number of units in a community. It is not unusual to find that some community association managers are not interested in managing small associations because many of the duties of a manager, such as attending meetings, obtaining bids on service contracts, and preparing budgets and financial statements, are equally demanding and time consuming whether being performed for a small or large association. One solution to this problem for small associations may be to entice managers to manage the association by paying them a premium over and above the typical rate structure. But the increased cost may unreasonably increase the financial burden of the members.

Chapter 468, Florida Statutes, governs community association management, and requires certain managers to be licensed. The definition of "community association management" in the statute excludes management of an association of 50 units or less, so long as the association's annual budget does not exceed \$100,000. Therefore, certain small associations are permitted to hire an unlicensed person who is willing to provide management services, presumably at a reduced cost to market rates for licensed management services. However, as you can imagine, an association that hires an unlicensed manager must proceed very cautiously. Most likely, the only acceptable, unlicensed managers would be persons with significant business and financial experience and a proven track record of integrity. In most every case, it would not be wise to invest an unlicensed manager with all of the powers and responsibilities that an association would typically delegate to a licensed manager.

In summary, one solution to the administration issues facing small associations is to hire a manager, but that solution necessarily adversely affects the financial burden for the association.

### **Financial Issues**

It almost goes without saying that the most difficult issue to overcome for small associations stems from the fact that there are simply less members to pay the costs of operating the community. Fortunately, the amenities that are operated by a

small association are usually small as well, if they exist at all. In many cases, the small association may be part of a larger community which owns and operates substantial facilities such as a clubhouse, pool, tennis courts and golf course. But there are some fixed costs and financial requirements that can create an unusually heavy burden on small associations.

One such cost is unanticipated damages or repair costs. In certain circumstances, especially involving condominiums, damage from a hurricane or other casualty event, or unexpected repair costs, can be a common expense of the association charged to all members for which insurance proceeds are not payable. In many of these situations, often involving water leaks, the damaged property is in a localized area of the community affecting only a few members. In large associations, the common expense of such an event can be spread over hundreds of members, and is not likely to be a burden, but in a small association, each member's pro rata share of the common expense is usually significant and must be addressed with a special assessment over and above the regular, annual assessment.

Another critical financial issue for small associations arises when a member or two fails to pay assessments in a timely manner. Mathematically, it is easy to see

that two non-paying members in a 20 member community represent the loss of 10% of the community's revenue. In a community of 300 members, even 10 non-paying members barely registers and can be easily absorbed by the association, at least in the short term. The problem for small associations is compounded because legal action is often necessary to collect the unpaid assessments. While the costs and reasonable attorneys' fees spent by the association in collecting the assessments are generally recoverable from the non-paying member, the association must fund the collection effort initially, and that can create immediate cash flow problems for many small associations. Both this issue of non-payment, and the possibility of significant unanticipated expenses, highlight the need for small associations to maintain adequate surplus or reserve funds, and of course those funds come from the members.

In addition, certain insurance costs are essentially fixed costs that do not fluctuate precisely in accordance with the size of the association. Likewise, total legal and accounting costs are similar for large and small associations, or at the very least are not reduced for small associations in exact proportion to the size of the association. In the event litigation is necessary



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# REMEMBER – ANY MEMBER OF THE ASSOCIATION MAY SERVE ON THE BOARD

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Section 718.112(2)(d), Florida Statutes requires any unit owner desiring to become a member of the Board of Directors to furnish the association with written notice of such intent at least forty (40) days prior to the election. While the Statute prohibits any person who has been convicted of a felony by any court of record in the United States and who has not had his or her right to vote restored from serving, the prevailing view is that no other eligibility requirements are permitted. For Homeowners Association communities, Section 720.306(9), Florida Statutes specifically provides that all members of the association are eligible to serve on the Board and that any member may nominate themselves to become a candidate.

The Division of Florida Land Sales, Condominiums and Mobile Homes (the agency governing condominium and cooperative communities, but not homeowners associations) consistently rejects eligibility requirements. For example:

Residency requirements were rejected in the Hollywood Golf and Tennis Club Condominium Assn., Inc. (Case No. 96L-0189) Declaratory Statement. Thus, an association cannot prohibit a non-resident owner from serving on the board, even if that condition is imposed by the governing documents.

Good standing requirements were rejected in the Schultz v. LaCosta Beach Club Resort Condominium Assn., Inc. (Case No. 2003-08-3347) arbitration matter. Thus, the failure to pay assessments or maintenance fees does not preclude board service.

Co-owners of units may serve on the board. The Declaratory Statement issued William A. Grubbs, Sandpiper Village Condominium Assn., Inc. (BPR 2005-02777) rejected a bylaw provision prohibiting multiple owners of a single unit from serving simultaneously. Recently (June, 2007) a County Court Judge in Broward County, Florida ruled that any attempt by a condominium association to prohibit unit owners from serving on the board (so long as they meet the criteria in Section 718.112(2)(d), Florida Statutes) constitutes a violation of the law and refused to grant injunctive relief to the Association in the Lakewood Village Condominium Association, Inc. v.

Beracha, (Case No. COWE 07-006293) litigation. The Judge in that case has reportedly requested the Fourth District to review the ruling; and

Term limits were rejected by the Division in the Declaratory Statement recently issued in Case No. DS 2007-03 involving the Cloister Beach Towers Association, Inc.

While the issue has not been fully explored in the Homeowners Association context, the analysis is similar. However, there is a distinction between ownership and membership in a homeowners association context. Section 720.301(10), Florida Statutes defines the term “member” as including, but not limited to, a parcel owner or an association representing parcel owners and includes any person or entity obligated by the governing documents to pay assessments or an amenity fee, requiring analysis of the governing documents to determine whether all parcel owners are considered members and therefore eligible to serve on the Board of Directors. ■



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*"Many people think that, for all projects, big or small, three (3) bids are required. This is not true."*

## COMPETITIVE BIDDING REQUIREMENTS

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If your Association has to replace the roof, or paint the buildings, or enter into a contract for some type of work, the Board/Manager is probably going to obtain several bids. How many bids are "enough"? The exact number of bids will depend on the work to be done, the area in which you live, the number of people/companies who do the needed work, etc.

Many people think that, for all projects, big or small, three (3) bids are required. This is not true.

For condominium and cooperative associations, Chapters 718 and 719, Florida Statutes, require that, if a contract for products and services requires payment in an amount which, in total, exceeds five percent (5%) of the Association's budget, including reserves, the Association must obtain "competitive bids for the materials, equipment, or services." (Section 718.3026(1), Section 719.3026(1), Florida Statutes) (emphasis supplied)

Homeowners' associations are required to obtain competitive bids if the contract requires payment that exceeds ten percent (10%) of the Association's annual budget, including reserves. (Section 720.3055(1), Florida Statutes)

The Statutes require "competitive" bids, which means more than one, but not necessarily three. The number of bids obtained for each contract will depend upon many factors, as described above.

None of these statutory provisions require the Association to accept the lowest bid. And, in most situations, the "Business Judgment Rule" will protect the Board's decision regarding selection of a contractor.

The requirement to obtain competitive bids is waived in emergency situations; in situations where the Association's selected contractor is the only source of supply within the

county serving the association; for contracts executed prior to January 1, 1992 and renewals thereof (for homeowners associations, contracts executed before October 1, 2004); and for contracts with Association employees, attorneys, accountants, architects, community association managers, timeshare management firms, engineers, and landscape architects.

It is also important to note that some Associations have competitive bidding requirements in their Governing Documents. These Associations may, but are not required to, operate under the provisions in their documents, as long as those provisions are not less stringent than the statutory provisions.

When your Association is preparing to do a project, don't forget about the competitive bidding requirements. ■





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to enforce the covenants against a member or to address some defect in the property, the litigation process and costs incurred are the same regardless of the size of the association. Similarly, the cost of maintaining ledgers, financial statements and preparing audits are not reduced in direct correlation to the size of an association. In part to address the accounting and financial reporting burden that small associations must bear, both the Condominium Act and the Homeowners' Associations Act do permit associations with less than 50 units or parcels to prepare only a report of cash receipts and expenditures, without regard to the association's annual revenues, in lieu of more comprehensive, otherwise required reports.

To be sure, persons who purchase homes in small associations must be aware, hopefully in advance of purchasing their home, that their pro rata share of the financial requirements of the association is almost always going to exceed the burden on members in similar homes in larger communities.

### **Social Issues**

Another critical fact that members of a small association must recognize is that the ability to get along and function well with other members, and the need to fulfill their responsibilities, are absolute requirements to maintain a well-run association.

To address the administration issues, members must be willing to serve the association. It is much easier for substantial

numbers of members in a large association to “lie low” and not affect the association's operation. Member apathy in a small association can be devastating, either because of the absence of volunteers to diligently administer the association or because only one or two members may dominate the board, which, in some cases, can be to the detriment of the association.

Moreover, because of the financial effects of a member failing to pay assessments in a timely manner, or failing to follow the covenants and restrictions which leads to enforcement action and litigation, members of small associations must value and respect their association, their neighbors, and must meet their responsibilities to the community to a greater degree than members of a large association.

### **Conclusion**

Small community associations may appear to be less complex and more manageable than large associations, but small associations have their own unique issues that are no less difficult to overcome. In the end, the best solution to meet the challenges of any community association, large or small, is for members to recognize their indispensable roles in serving the community, meeting their obligations and respecting the structure and objectives of the community that they chose to make their home. ■

## **DID YOU KNOW?**

The Firm has a website where you can check the status of all pending matters in collections or foreclosure. If you haven't visited [www.bpcollections.com](http://www.bpcollections.com) please contact your community association attorney or the collection/foreclosure paralegal(s) handling the cases to obtain your password for the site.

The Firm's website includes a collection of articles written by the Firm's attorneys. Past issues of Community Updates

are also included (from January 2001 to the present). Click on “Publications” on the right upper hand corner of the main page of [www.becker-poliakoff.com](http://www.becker-poliakoff.com).

Web Casts are a new feature on the Firm's website, click on “Events & Video” to the left of “Publications” and choose “Web Casts” from the menu on the left hand side to see a collection of short videos pertaining to Community Association issues. These will be updated or replaced from time to time so please log on in the future to view different videos and features. ■



## SELF HELP NOT HELPFUL – PARTON V. PALOMINO LAKES PROPERTY OWNERS ASSOCIATION, INC.

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While the legal process may seem slow and to involve a significant amount of paperwork, this case shows what can happen if owners and directors decide to take enforcement matters into their own hands.

The Partons owned a lot within the Palomino Lakes Community, subject to the governance by the Palomino Lakes Property Owners Association, Inc. The governing documents prohibited mobile homes. The Partons decided to install a modular home and attempted to have it delivered to the homesite. Four (4) owners, (three [3] of which were members of the board of directors of the association) blocked the delivery by blockading the entrance to the subdivision. This happened on three (3) separate occasions.

As a result, the Partons filed suit against these owners and the Association and immediately obtained injunctive relief, as the Court apparently agreed that the modular home to be permanently attached to a concrete slab, was not a mobile home. The Partons amended their complaint to add counts for damages based upon tortious interference with contract and civil conspiracy. A jury awarded the Partons \$5,000.00 in compensatory damages and further awarded punitive damages against Larry Vinson in the amount of \$60,000.00, Ila Vinson in the amount of \$40,000.00 and against Linda Drielbelbis in the amount of \$50,000.00! The Court also awarded the Partons prevailing party attorney's fees and costs.

The Partons actually appealed from the Final Order, primarily on two grounds claiming:

1. The compensatory damage award should not be divided as an award of \$1,250 against each individual defendant. Instead, the individual defendants should be jointly and severally liable for the compensatory damages; and
2. The award of attorney's fees didn't explain how the Court calculated the fees and why they were reduced for the work associated with the tort claims. Moreover, the Partons claimed that all the individual defendants should be jointly and severally liable for the fee award.

The Court agreed with both contentions and instructed the trial court to revise the judgment to reflect that all four (4) individual defendants were responsible (jointly and severally) for both the compensatory damage award of \$5,000.00 and the attorney fee award for that portion of the work was likewise the responsibility of all of them, jointly and severally.

Having those portions of the judgment reflect joint and several liability enables the Partons to collect the entire sum from one or less than all defendants, leaving those payors responsible for seeking contribution from the other defendants.

The extreme personal liability in this case could have easily been avoided by consultation with legal counsel when the problem first arose. Proper interpretation of the deed restrictions, as well as counseling regarding the procedures by which to enforce the deed restrictions is crucial to successful association operations. The reported decision doesn't explain how the board members were held personally liable, but resorting to self-help under these circumstances was clearly wrong, resulting in an undesirable outcome. ■

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