

CAN ASSOCIATION BOARD MEMBERS HAVE PERSONAL LIABILITY FOR UNPAID PAYROLL TAXES?

"It is important that an Association Board monitor the management company when payroll tax responsibilities are delegated to ensure compliance."



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Membership on the Board of Directors of a Homeowners or Condominium Association (an "Association") could result in liability that most board members would not envision. Specifically, Board members might have personal liability for payroll taxes that are not collected or remitted to the Internal Revenue Service ("IRS"), and for payroll tax returns not filed with the IRS.



Personal Liability for Failure to Pay Payroll Tax

If an organization fails to remit payroll taxes to the government, the IRS has the authority to assess a 100% penalty against certain responsible persons within the organization. The IRS may seek collection from any person within the organization who is responsible for the collection, truthful accounting for, and payment of the trust fund taxes, and who willfully failed to remit the taxes to the government.¹

Who is a Responsible Person

Because neither the Internal Revenue Code ("IRC") nor the Treasury Regulations define who is considered a responsible person, the interpretation has been left up to the courts, which have taken a very broad view.² A responsible person has been described as an individual who:

- Possesses the effective power to pay the tax;³
- Exerts significant control over the company's finances or general decision-making;⁴ or
- Controls disbursements of funds and the priority of payments to creditors in preference of withholding obligations.⁵

The determinations above are made on a pure facts and circumstances analysis. Although the following factors have been held to be relevant in making a responsible person determination, no single factor will cause an individual to be classified as a responsible person. These factors include whether the individual:

- is an officer or member of the board of directors;
- owns shares or possesses an entrepreneurial stake in the company;
- is active in the management of day-to-day affairs of the company;
- has the ability to hire and fire employees;
- makes decisions regarding which, when, and in what order outstanding debts or taxes will be paid;
- exercises control over daily bank accounts and disbursement records; and
- has check-signing authority.⁶

In analyzing the facts and circumstances, the courts attempt to determine whether the person was connected closely enough

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"...if there are options for the use and materials, design, size, and location of the structure or improvement, then neither the association nor the ARC can restrict an owner's right to choose from one of these options."



HOA ARCHITECTURAL CONTROL, SECTION 720.3035 OF THE FLORIDA STATUTES

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Many Boards are asking whether or not their authority to approve or disapprove alterations in a homeowners' association have been eliminated as a result of Section 720.3035 which became effective on July 1, 2007. Although the new law does not eliminate an association's ability to regulate alterations to a lot, said authority must be specifically stated or reasonably inferred within the Declaration of Covenants and Restrictions.

The new law provides that the authority of a homeowner's association or Architectural Review Committee (ARC) to review and approve plans and specifications for the location, size, type or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall be permitted only to the extent that the authority is specifically stated or reasonably inferred as

to such location, size, type or appearance in the Declaration of Covenants or other published guidelines and standards as authorized by the Declaration of Covenants.

The term "reasonably inferred" means that the scope of the ARC's authority and ability to regulate the exterior appearance of the homes and lots can be fairly broad, but the application of the ARC's authority must be reasonably inferable from the express language of the Declaration. For example, if a Declaration provides that owners are responsible for painting the exterior of their homes, and that the association and/or the ARC has the authority to regulate exterior color, we could have reasonably inferred that the ARC has the ability to choose a pallet of colors from which an owner must pick the exterior color of his or her home. However, if the ARC does not have

the authority to regulate color, then it would be permissible under Section 720.3035 for the owner to choose the color of the exterior of their home.

The new law provides that, if there are options for the use and materials, design, size, and location of the structure or improvement, then neither the association nor the ARC can restrict an owner's right to choose from one of these options. For example, if the Declaration states that a member may

place a wooden fence in their yard, the ARC cannot restrict an owner's right to place a wooden fence in their yard, nor can the ARC require that all fences be made of PVC or wrought iron, without an amendment to the Declaration of Covenants and Restrictions.

Furthermore, unless otherwise specifically stated in the Declaration of Covenants or other published guidelines and standards authorized by the Declaration of Covenants, each parcel shall be deemed to have only one front for purposes of

determining the required front setback, even if the parcel is bounded by a roadway or other easement on more than one side. When the Declaration of Covenants or other published guidelines and standards authorized by the Declaration of Covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any Architectural Review Committee (ARC) shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards. For example, if setbacks are not clearly set forth in the Declaration, then the association cannot create setbacks for the installation of improvements to the lot. The association, however, can require that the setbacks comply with any county or municipal setback limitations.



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This new law, as is the case with many new laws, is subject to interpretation until there is a precedent to guide us by the courts. However, a homeowner's association or ARC should not rely on undefined, unwritten, unpublished architectural control guidelines. Rather, the homeowner's association and ARC should be conservative and use the guidelines and standards that are published in the Declaration of Covenants or in a separate document, i.e., Rules and Regulations, if and only if one is permitted by the Declaration. A rule of thumb is if either the association or the ARC do not have the authority clearly provided in the Declaration or more specific ARC standards in writing to the extent that those standards address location, type, color, design, etc. and are permitted under the Declaration, the association should be cautious when approving or disapproving alterations to a lot.

The association should be aware that if the association or the ARC unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the Declaration

of Covenants or other published guidelines and standards authorized by the Declaration of Covenants, the adversely affected parcel owners shall be entitled to recover damage caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the Declaration of Covenants or the published guidelines and standards authorized by the Declaration of Covenants.

Whenever a homeowner's association or ARC is in doubt as to whether or not they should approve or disapprove a modification to a lot, they should seek assistance from legal counsel to determine whether or not said authority is implied in the Declaration. Furthermore, if your association would like assistance reviewing the Declaration, or other published guidelines or standards authorized by the Declaration to determine whether any amendments are necessary based on this new law, please contact your association attorney for guidance. ■



720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

- (1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall be permitted only to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- (2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- (3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.
- (4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- (5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

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with the business to prevent the nonpayment of tax from occurring.⁷ The involvement by directors in the day-to-day activities of the organization has been found to be determinative in organization directors being responsible persons.⁸

Who is Not a Responsible Person

Courts have held, with respect to directors, that there had never been a case where an outside director of a publicly held corporation had been held to be a responsible person who: 1) neither signed nor had authority to sign checks, 2) did not participate in the day-to-day fiscal management of the corporation, 3) did not control the payroll, 4) did not determine which creditors would be paid, and 5) did not own a significant fraction of the company's voting stock.⁹

Although it was an important factor that the director was the most important individual in the business affairs of the company, that in and of itself was not sufficient to make him a responsible person. The crucial inquiry was whether the director held the substantive power to compel or prohibit the allocation of corporate funds with respect to the trust fund taxes. Given that no evidence was provided that such director had exercised control of the collection, accounting for, and payment of the trust fund taxes, the court ruled that he was not a responsible person.

Effect of Delegation to Management Company

Association Boards generally delegate the responsibility of payroll taxes to management companies. Generally the belief would be that such delegation of responsibilities would alleviate the Board members from the possibility of having personal liability, however, this is not necessarily the case.

Courts have held that if an individual had sufficient authority in the organization such that the tax delinquency could have been avoided, delegation of responsibility to collect and remit the tax will not relieve an otherwise responsible person of liability.¹⁰



IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is contained in this document. ■

In one case, the chairman of the board of directors of a not-for-profit organization attempted to avoid responsible person classification by claiming to have delegated it to others. The authority to oversee the preparation of tax returns, the keeping of records, the payment of wages, and the withholding and payment of taxes rested with the board, the duties were delegated to the executive director and the accountant. The court ruled that the law does not permit individuals to delegate their authority to another person and blindly trust that the duties will be carried out.¹¹

In such situations where the Association Board delegates payroll tax responsibility to a management company, it is important that the Board verify that the management company is abiding by its responsibilities.

Willfulness

As discussed above, the responsible person must willfully fail to remit the taxes to the Government. This sounds like a high standard, however, the willfulness criterion has been described as a "voluntary, conscious and intentional decision to prefer other creditors over the Government".¹² Willfulness in this context requires only that the responsible person knew that the organization was required to pay withholding taxes and that company funds were being used for other purposes.¹³ The

IRS is not required to establish that the person deliberately sought to defraud the Government.¹⁴

Conclusion

The members of an Association Board might have personal liability for the penalties for unpaid payroll taxes. It is important that an Association Board monitor the management company when payroll tax responsibilities are delegated to ensure compliance. In the event an Association Board discovers that the Association is delinquent in its payroll tax obligations, it is important for the Board to be proactive and work towards being 100% compliant. ■

¹ IRC section 6672(a)

² The CPA Journal, *Volunteers and Their Responsibilities for Trust Fund Taxes*, July 2007

³ *Howard v. U.S.*, 83-2 USTC para. 9528 (CA-5, 1983)

⁴ *Hochstein v. U.S.*, 90-1 USTC para. 50,205 (CA-2, 1990)

⁵ *Gephart*, 87-1 USTC para. 9319 (CA-6, 1987)

⁶ *Thomas v. U.S.*, 94-2 USTC para. 50,607 (CA-7, 1994)

⁷ *Bowlen v. U.S.*, 92-1 USTC para. 50,098 (CA-7, 1992)

⁸ *Carter v. U.S.*, 89-2 USTC para. 9446 (S.D. N.Y., 1989)

⁹ *Godfrey v. U.S.*, 84-2 USTC para. 9974 (CA-FC, 1984)

¹⁰ *Thomsen v. U.S.*, 89-2 USTC para. 9575 (CA-1, 1989)

¹¹ *Wright v. U.S.* [96-1 USTC para. 50,114 (E.D. N.Y., 1996)]

¹² *Burden v. U.S.*, 73-2 USTC para. 9547 (CA-10, 1973)

¹³ e.g., *U.S. v. Rem*, 94-2 USTC para. 50,357 (CA-2, 1994)

¹⁴ *Thomas v. U.S.*, 94-2 USTC para. 50,607 (CA-7, 1994)

“Quorum requirements are generally found in an organization’s bylaws. Simply reviewing bylaws alone, however, may not provide the correct answer to quorum questions when dealing with Florida condominium and homeowner associations.”



QUORUM REQUIREMENTS EXPLAINED

A quorum is the minimum number of people who must be present at a meeting in order for the attendees to conduct business. It therefore stands to reason that the meeting chairperson’s first priority should be to determine whether quorum requirements have been met. It is the presiding officer’s responsibility to know the quorum requirements and to be certain that they are satisfied before conducting business.

Quorum requirements are generally found in an organization’s bylaws. Simply reviewing bylaws alone, however, may not provide the correct answer to quorum questions when dealing with Florida condominium and homeowner associations. This is because certain provisions of Florida law sometimes “trump” the quorum provisions of the bylaws. Fla. Stat. 718.112 (2)(b)1, for example, fixes the quorum requirement for a condominium association owner’s meeting at a majority of the voting interests, unless the bylaws provide for a lower number. Thus, the quorum requirements for a condominium association owner’s meeting can never be greater than a majority, though they can be less, if the bylaws so provide.

Quorum requirements for a homeowner association members meeting are even less strenuous. Fla. Stat. 720.306(1)(a) fixes the requirement at thirty (30%) percent of the voting interests, unless the bylaws provide for a lower number. Regardless of what the bylaws provide, the quorum for such a meeting can never be greater than thirty (30%) percent of the voting interests.

As to board meetings, there are no Florida statutes that supersede the quorum requirements of an association’s bylaws. Quorums for association board meetings, whether condominium or homeowner, are governed by the bylaws. If the bylaws are silent on the subject, Fla. Stat. 617.0824 fixes the quorum requirement at a majority.

In determining whether a quorum is present for a condominium association owners meeting, both general and limited proxies should be counted. (Fla. Stat. 718.112 (2)(b)2) As to homeowner association membership meetings, members have a statutory right to attend meetings by proxy (Fla. Stat. 720.306(8)) and therefore general proxies must be counted to determine if a quorum is present. While limited proxies are not specifically mentioned in Chapter 720, it is this writer’s opinion

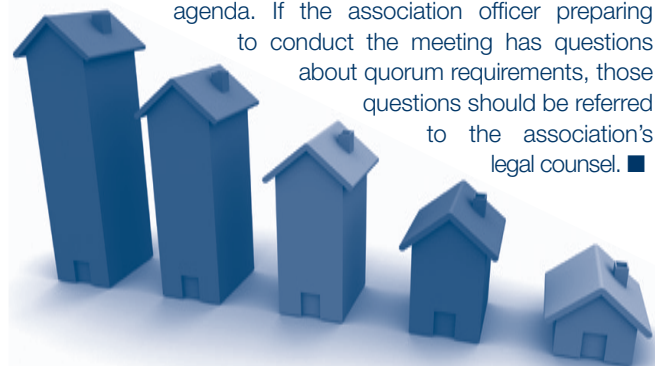
that they should also be counted for purposes of determining a quorum.

What if a condominium unit is being foreclosed so that there is no official representative for that unit? Can such a unit be disregarded for the purpose of calculating quorum requirements? The case of *Chateau DeVille Condominium Assoc., Inc. v. Mikhail*, 583 So.2d 358 (Fla. 5th DCA 1991) holds no. If the unit exists, it must be counted. The same logic would likely apply in cases where a homeowner association member’s right to vote has been suspended for nonpayment of assessments. *Mikhail* suggests that it is the unit itself which must be counted, regardless of whether the unit owner is entitled to cast a vote.

Must quorum requirements be satisfied in order for a condominium association to hold board elections? Fla. Stat. 718.112(2)(d)(3) provides that there is no quorum requirement for election of board members. However, at least twenty (20%) percent of eligible voters must cast a ballot in order for the election to be valid.

It is important to remember that a quorum must be present throughout the meeting. If attendees leave during the course of a meeting so that a quorum is no longer present, the meeting should be either suspended until other members can be summoned or adjourned until a later date.

Any action taken at a meeting at which a quorum is not present is null and void. It is vital that the presiding officer note the presence of a quorum at the meeting’s outset and have it recorded in the minutes before proceeding with the agenda. If the association officer preparing to conduct the meeting has questions about quorum requirements, those questions should be referred to the association’s legal counsel. ■



LIFE SAFETY REMINDER

FIRE SPRINKLER RETROFIT REQUIRED BY 2014

The Florida Fire Prevention Code requires retrofitting of fire sprinklers in high rise buildings that are more than 75 feet in height by the year 2014. However, condominium and cooperative associations may “opt out” of the retrofitting requirement with respect to the units pursuant to Section 718.112(2)L, and Section 719.1055(6), Florida Statutes respectively. These Statutes contain detailed procedures summarized as follows:

Notwithstanding anything contained in the Florida Statutes or any other codes, ordinances or rules regarding fire prevention, a condominium or cooperative association is not obligated to retrofit the units with a fire sprinkler system if the unit owners have voted to forego such retrofitting by the affirmative vote of two-thirds (2/3rds) of all voting interests. However, said associations cannot vote to forego the retrofitting of the common areas, meaning the enclosed hallways, corridors, lobbies, stairwells or entryways.

A vote to forego retrofitting may be obtained at a membership meeting or by execution of a written consent by the member.

The vote shall be effective upon recording of a certificate attesting to such vote in the public records of the county where the condominium or cooperative is located.

Within thirty (30) days after the opt out vote, the results shall be mailed, hand delivered or electronically transmitted to all unit owners and maintained in the official records of the association.

After such notice is provided to each owner a copy shall be provided by the current owner to any new owner prior to closing and shall be provided to renters prior to signing a lease.

The association must also notify the Division of Florida Land Sales, Condominiums and Mobile Homes by completing forms provided by the Division.



Although the above-referenced law allows condominium and cooperative associations to opt out of the fire sprinkler retrofitting requirement, each association must consider that life safety codes are obviously designed to save lives. Although the cost of retrofitting may be great, each association must balance the cost savings against the life safety issues. ■

Editor's note: A legislative proposal to extend the date for compliance with retrofitting requirements until the year 2025 was vetoed after the 2006 session and another proposal to extend the date for compliance until 2020 died on the calendar in 2007. This issue is not addressed in any proposed legislation this session.

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ADDED BENEFIT

We will email to all Board Members for whom we have an email address plus we will email to as many other people the Board would like to include.

ACTION NEEDED

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The Form must be complete in order to start receiving the newsletter electronically. If you are already receiving it electronically, you do not need to complete the form.

Questions?

Contact your Association's Attorney

