

## PROTECT YOUR ASSOCIATION'S ASSETS AGAINST FRAUD



By: Gregory W. Marler, Esq.  
gmarler@becker-poliakoff.com

Arguably, the most important function of a community association board of directors is to prudently administer the association's finances. It is quite common for a board of directors to rely on just one director or a property manager to take charge of financial operations. However, delegating the financial administration function to an individual, without also engaging in an appropriate level of oversight, can invite fraudulent conduct. Common fraud schemes involve fraudulent disbursements, misuse of association credit cards and business accounts, misappropriation of supplies, checks and petty cash, and even lucrative kickback arrangements. Importantly, lack of oversight that enables frauds to occur may constitute a breach of the directors' statutory standard of care.

### Duty of Care When Handling Association's Finances:

The Florida Not For Profit Corporation Act has long provided that a director shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances. This "standard of care" has been expressly added to the Florida Condominium Act effective October 1, 2008, although it has long applied to condominium associations, and all other incorporated associations, through the corporation statutes. The "standard of care" attempts to create an objective standard by which the directors' decisions and conduct will be judged. Obviously, if an association is the victim of fraud, it will not be sufficient for directors to deny



responsibility based upon the fact that they delegated the responsibility for financial administration to another; a prudent person serving on a board would not completely abdicate financial administration oversight. The board is ultimately responsible for all association functions and actions regardless if some or all functions have been delegated.

Despite the clear obligation of the board to monitor operations, a common theme in fraud cases is that the individual committing fraud was left alone with little or no oversight. Community associations that fall into this situation often do so because their boards are comprised of volunteer directors who are primarily involved in other activities. Community association directors are often either working men and women with families, or can be seasonal, Florida residents with distinct lives and activities in other states for several months during each year. Therefore, the ability of every director to engage in detailed and diligent oversight of the financial operations of a community association does not necessarily coincide with the actual level of involvement of volunteer directors. But there are some strategies and tools that can be used to assist directors in preventing fraud involving association finances.

These strategies and tools require an understanding of how fraud occurs.

A common and useful analysis of fraud involves the "fraud triangle." The "fraud triangle" identifies the three primary elements that can lead to fraud as

- 1.) Incentive/ Pressures;
- 2.) Attitude/ Rationalization; and
- 3.) Opportunity.

### Communication is Key:

By actively and genuinely communicating with fellow directors and professional managers, you can identify persons who might be inclined

*continued on page 2*

*If directors regularly communicate with one another and with managers, any feelings that might lead to the rationalization to commit fraud can often be identified and addressed through appropriate oversight in the future or by correcting any perceived injustice.*

*continued from page 1*

to rationalize fraud. A manager who feels underpaid or unfairly treated is more likely to commit fraud. A director who serves very ably but feels that his or her service and contributions to the community are not properly appreciated is more inclined to commit fraud. If directors regularly communicate with one another and with managers, any feelings that might lead to the rationalization to commit fraud can often be identified and addressed through appropriate oversight in the future or by correcting any perceived injustice.

#### **Eliminate Opportunities:**

The most fertile ground for preventing fraud is to eliminate opportunities. Unfortunately, the best, most obvious way to do this is to have several people involved in every, minute detail of association operations. For the reasons discussed above, such a level of involvement by multiple people is rarely practical and most often impossible. But some essential measures must be taken.

For example, the common practice of requiring two signatures on every check is essential. I understand that fidelity bonding, which is required by statute, is generally not available unless an association has a dual signature requirement for checks and internal controls to implement this requirement.

Another essential procedure to have in place is to have multiple persons involved in the review of bank statements, financial transactions records, and the preparation of financial statements. One of the most common examples of fraud involves the writing of a check in excess of the invoice amount, or fraudulently entering excessive amounts in the general ledger and writing

another check payable to himself to account for the excess. Both of these schemes require the perpetrator to destroy incorrect or voided checks or to make erroneous entries in the ledger. These practices can be prevented if multiple persons are involved in the day-to-day financial activities of the association, but that is often not possible.

#### **Investigate New Banking Services:**

Fortunately, new banking services have developed along with the internet to address this problem. I am aware that banks offer online account reconciliation service so that all checks, including voided checks or checks which were overpayments, can be viewed online. At least one bank offers a "Positive Pay" service which allows customers to upload checks it writes and then the bank can confirm that any check it receives for payment is consistent with what the customer advised was intended. These online services eliminate an opportunity for fraud because they create a permanent record that cannot be manipulated and because the potential perpetrator knows that at least one other set of eyes are monitoring the financial statements.

Preventing fraud requires diligent, consistent and frequent effort on the part of all community association board members. That level of involvement in the day-to-day financial activities of the association is not always consistent with the nature of volunteer directors. But the obligation of community association directors to take reasonable steps to prevent fraud is clear and cannot be avoided. Understanding and acting upon the three elements of fraud identified in the "fraud triangle" will help directors to meet their obligations and protect the association. ■



# EARTH DAY IS APRIL 22!

By: Lisa Magill, Esq.  
lmagill@becker-poliakoff.com

There are numerous events throughout the State of Florida to celebrate Earth Day, including many demonstrations of eco-friendly products and services to improve energy efficiency and sustainability efforts. Americans celebrated the first Earth Day in 1970 which led to the creation of the United States Environmental Protection Agency and the passage of the Clean Air, Clean Water, and Endangered Species acts.

Community Associations are slowly incorporating "green" building practices, largely to reduce energy expenses. Recent studies performed by the Florida Solar Energy Center (a research institute of the University of Central Florida) found that Floridians per-household energy consumption is among the highest in the United States, not surprisingly as a result of the hot and humid climate and density. Last year Governor Crist signed HB 7135 known as the Florida Energy Bill. That law provides the basis for a comprehensive energy policy in Florida, clarifies property tax exemptions and creates new tax credits and incentives associated with installation of energy efficient building components.

Community Associations (and their members) can and should take advantage of the cost-savings obtained through "green" retrofits. Moreover, associations must be cognizant of laws designed to provide homeowners with "green" savings. For example, Section 163.04, Florida Statutes specifically forbids enforcement of any deed restrictions or covenants prohibiting the installation of solar collectors, clotheslines or other energy devices based upon renewable resources. Section 720.3075, Florida Statutes likewise prohibits associations from enforcing any restrictions that would preclude a homeowner from installing xeriscape or Florida-Friendly landscape on his or her property. Boards of Condominium Associations, on the other hand, are specifically empowered to install solar collectors, clotheslines or other energy-efficient devices based upon renewable resources on the common elements or association property, without a vote of the owners, by Section 718.113(6), Florida Statutes.

We have compiled a brief sampling of the programs available to Floridians and expect to bring community association leaders more information on how to glean cost-savings from retrofits and building management practices designed to improve energy efficiency, reduce waste and conserve water.

## **Orange County - Solar Hot Water Rebate Program**

Orange County offers a \$200 rebate on newly installed solar hot water systems in the county.

<http://www.orangecountyfl.net/cms/DEPT/CEsrvc/epd/SolarWaterProgram.htm>



## **Lakeland Electric - Solar Water Heating Program**

Lakeland Electric, a municipal utility in Florida, offers solar-heated domestic hot water on a "pay-for-energy" basis. The utility owns and maintains the solar water heaters they install on participating customers' homes and bills them only for hot water delivered to the faucet. There is a waiting list for additional installations.

## **Orlando Utilities Commission - Pilot Solar Programs**

The Orlando Utilities Commission (OUC), through its Pilot Solar Program, purchases environmental attributes or renewable energy credits (RECs) from customers who install a photovoltaic (PV) and/or solar thermal energy system on their property. It also, in cooperation with the Orlando Federal Credit Union (OFCU), provides customers with low-interest loans for solar photovoltaic (PV) systems and solar water heating (SWH) systems.

[http://www.ouc.com/green/solar\\_pilots.htm](http://www.ouc.com/green/solar_pilots.htm)

## **Renewable Energy Property Tax Exemption**

Pursuant to Section 196.175, Florida Statutes, property owners may receive a tax exemption when a renewable energy source device is installed and operated. The exemption can save you the amount of the original cost of the device, including the installation cost. The exemption may apply for up to ten (10) years! Contact Taxpayer Services at the Florida Department of Revenue for more information.

## **Solar Energy System Incentives Program**

The Department of Environmental Protection (DEP), provides rebates to Florida residents, businesses, non-profits and public facilities that purchase and install new photovoltaic (PV) systems, solar water heating systems and solar thermal pool heaters. Unfortunately, the funding for this program is exhausted, although applications are still being accepted in the event funding becomes available.

<http://www.dep.state.fl.us/energy/energyact/solar.htm>

## **Florida Power and Light - Energy Efficiency Rebates**

Florida Power and Light offers incentives for upgrades to HVAC systems, building envelopes, water heating, refrigeration or lighting systems with energy-efficient equipment. In addition to these incentives, FPL also offers a free Energy Evaluation and a custom incentive that rewards energy-saving innovations. ■

# A ROSE BY ANY OTHER NAME: THE DISPARATE TREATMENT OF CONDOMINIUMS AND COOPERATIVES REGARDING HOMESTEAD RIGHTS — PART II

By: Lance D. Clouse, Esq.  
lclouse@becker-poliakoff.com

In Part I we addressed constitutional provisions relating to homestead tax exemption and regulation of devise and descent in both condominiums and cooperatives. In this part, we analyze the applicability of Florida constitutional homestead protection against forced sale, particularly as it relates to cooperatives, and then provide some examples.

The Fifth District Court of Appeal, in determining whether a cooperative unit could be subject to forced sale, concluded that “an owner of a co-op may qualify as an ‘owner’ of a ‘residence’ under article X, section 4(a)(1) of the Florida Constitution.” *Southern Walls, Inc. v. Stilwell Corporation*, 810 So.2d 566, 572 (Fla. 5th DCA 2002). Thus, the *Southern Walls* court held that the Constitutional homestead exemption from forced sale applies to “any beneficial interest in land.” Thus, the owner of a cooperative apartment was entitled to the Constitutional exemption against forced sale in this case.

In contrast, the Third District Court of Appeal, in *Phillips v. Hirshon*, 958 So.2d 425 (Fla. 3d DCA 2007) concluded that cooperative units are not entitled to homestead protection in both the devise and descent context and in the forced sale context.

Due to the conflict between the Districts on the issue of homestead protection against forced sale, the Third District certified the question to the Florida Supreme Court for guidance as to whether Article X, Section 4, of the Constitution, can be interpreted one way in the devise and descent context and another way in the forced sale context. Unfortunately, the Florida Supreme Court declined to accept jurisdiction to review the *Levine v. Hirshon*, 980 So.2d 1053 (Fla. 2008) case. Therefore, the issue as to whether cooperative units qualify for homestead protection against forced sale is still unresolved by the Supreme Court and differs depending upon the jurisdiction.

Going back to the Smiths and the Joneses, let us explore what the practical effect would be by the differences in treatment for homestead purposes.

Example No.1: both the Smiths and the Joneses each applied for the homestead tax exemption for their units to reduce their property taxes. Did they both qualify? Yes, both the Smiths’ condominium unit and the Jones’ cooperative unit are entitled to the homestead tax exemption. So far, so good.

Example No.2: Mr. Smith and Mr. Jones, being lifelong friends, are both riding in a car together to the store, when suddenly a dog runs into the street. Mr. Smith swerves to miss the dog

but crashes into a light post, killing them instantly. Before their deaths, Mr. Smith and Mr. Jones each had changed their wills to devise their “homestead” units to the charity of their choice. What happens with Mr. Smith’s condominium unit? The court would hold that the will provision is in conflict with the Florida Constitution regulating homestead rights in the devise and descent context and, therefore, is invalid. The result: Mrs. Smith will have a life estate in the condominium with the remainder interest going to the Smith’s minor child. On the other hand, what happens to the cooperative unit? Since the courts have held that the cooperative unit does not qualify for the homestead rights relating to devise and descent, Mr. Jones’ devise of the cooperative unit to the charity is upheld and Mrs. Jones and her son are not entitled to claim homestead protection.

Example No.3: Mr. Smith and Mr. Jones are business partners who run into financial trouble and cannot meet their business obligations. Mr. Ramirez, a supplier for their business, sues and wins a judgment against Mr. Smith and Mr. Jones personally. Mr. Ramirez attempts to enforce his judgment by seeking to have both Mr. Smith’s condominium unit and Mr. Jones cooperative unit sold to satisfy the judgment. Since the condominium unit qualifies for homestead protection against forced sale, the Smiths’ unit cannot be sold to satisfy the judgment. However, for the Jones’ cooperative unit, the answer is unclear. In the Fifth District Court of Appeal, the court will most likely hold that the Jones’ cooperative unit is protected from forced sale. In the Third District, however, the court would most likely find that the Jones’ unit is not protected against forced sale and would allow Mr. Ramirez to force the sale to enforce his judgment. The result in one of the other Districts in which the issue has not been addressed would depend upon whether or not the court finds that the *Wartels* decision is controlling.

Clearly, this disparity in treatment of cooperative units versus condominium units should be addressed by the Legislature. Unless and until that happens, current and prospective cooperative unit owners should consult with an attorney to carefully consider his or her asset protection and estate planning goals. ■

*The issue as to whether cooperative units qualify for homestead protection against forced sale is still unresolved by the Supreme Court and differs depending upon the jurisdiction.*



## TAX & ESTATE PLANNING

# ESTATE AND INCAPACITY PLANNING TOOLS EVERY BOARD OF A COMMUNITY ASSOCIATION SHOULD UNDERSTAND



By: Andrew Berger, Esq.  
 aberger@becker-poliakoff.com

The financial crisis has impacted almost everyone. Associations are struggling particularly hard and it is critical for Associations to be in a position to protect income stream in the event a unit owner passes away, becomes ill or incapacitated or is placed in a nursing home. In order to accomplish this, each member of the Board of Directors should be familiar with, and make the members aware of, certain estate and incapacitation planning tools and issues. Additionally, the Board may wish to regulate transfers by will or gift, a right not often provided for in typical Association governing documents.

### 1. Transfers of a Unit for Estate Planning Purposes.

The potential for conflict and litigation is particularly present when an Association challenges an owner's desire to transfer ownership of a unit by will or gift to a family member or to a trust for estate planning purposes. In one recent case, although an Association's governing documents required Association approval of a "purchase" or "sale" of property, the governing documents did not regulate gifts. The court rejected the Association's argument that the language in the governing documents should be interpreted to include the transfers of gifts, holding that if a restriction in a covenant is ambiguous, the covenant is to be construed against the Association. Therefore,

if an Association wishes to regulate the non-sale transfer of a unit, such as a gift between family members for estate planning purposes, this must be expressly stated in the Association's governing documents.

**2. Durable Power of Attorney.** A durable power of attorney is a lifetime document that allows the principal to designate a representative, known as an "attorney in fact," to step into the shoes of the principal and perform certain actions should he or she become ill, incapacitated or otherwise unable to manage his or her affairs. Without a power of attorney, the principal's spouse or other loved one(s) would have to endure the delay and expense of seeking approval from the court to carry out needed financial transactions. With a power of attorney in place, for example, the attorney in fact could pay any assessments and/or dues owed to an Association immediately upon the incapacitation of the principal.

**3. Revocable Trust.** A revocable living trust is often the central instrument in planning for disability and death and may offer the most comprehensive, cost-effective, and flexible planning tool available to administer an estate. Such trusts are often referred to as will substitutes in that they dispose of assets held in the trust at death without the need for probate administration, which can be time-consuming and costly. In addition, revocable trusts play an important role in disability planning because they can provide a mechanism for the management of assets if the owner becomes incapacitated, without the need for a

*continued on page 6*



continued from page 5

conservator to be appointed to manage the assets. In this way, planning that incorporates the use of a revocable trust not only benefits the grantor and his or her heirs, but also an Association in that its income stream is not disrupted by probate, in the event of death, or the need for a conservator to be appointed to manage financial affairs, in the event of incapacitation.

**4. Legal Form of Ownership.** The legal form in which title to property is held is extremely important because it indicates how the property will pass upon the death of an owner and who is responsible for upkeep of the property and payment of taxes, maintenance, insurance and other costs of ownership. Joint ownership of property is sometimes suggested as a useful tool in disability planning under the theory that the competent joint tenant can manage the property during the incapacity of the other joint tenant. The three basic forms of co-ownership are as follows:

**a. Tenants in Common.** A tenancy in common is one in which each tenant owns an undivided fractional share of the entire property. Each tenant has the right to deal with his or her share and to dispose of that share without the knowledge or consent of the other tenants. Tenants in common do not have rights of survivorship; upon the death of a tenant in common, his or her share passes by will or intestacy like any other individually owned property.

**b. Joint Tenancy.** A joint tenancy is one in which each joint tenant owns the entire property subject to a right of survivorship in the other tenants and the rights of the other tenants. All joint tenants have equal rights, and each joint tenant shares a non-exclusive right of possession with the other tenants. When one joint tenant dies, the property passes immediately to the surviving joint tenants by right of survivorship, i.e., by operation of law, not by will or intestacy.

**c. Tenancy by the Entirety.** A tenancy by the entirety is a joint tenancy between husband and wife that exists only during marriage and terminates upon divorce. Neither spouse acting alone can terminate the tenancy or convey the property. As in a joint tenancy, the property subject to a tenancy by the entirety passes by right of survivorship, i.e., by operation of law, to the surviving spouse immediately upon the death of the other spouse.

For additional information on this or any other tax and estate planning issue, please contact Andrew Berger, 954-364-6074 or [aberger@becker-poliakoff.com](mailto:aberger@becker-poliakoff.com). ■



*The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.*