

## **CHAPTER 1**

# **STATE & FEDERAL LAWS**

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Every association is a corporation governed by a series of Florida Statutes and the Florida Administrative Code. Each association is also governed by a set of documents including the Declaration, Articles of Incorporation and the Bylaws.

### **CHAPTER 607 - General Corporation Act**

All corporations in the State of Florida are governed by the General Corporations Act. It is the comprehensive corporate law for Florida and it establishes the general powers which all corporations possess when organized in this state. It establishes the Board of Directors with their powers. It creates committees and provides for noticing and meeting procedures. It requires an annual filing with the state and the payment of fees or charter taxes.

### **CHAPTER 617 - Corporations Not-For-Profit**

All condominiums and the vast majority of associations are corporations that are created specifically under chapter 617, which are those that are created not-for-profit. Corporations not-for-profit can not distribute any part of the income to individual members, officers, or directors. Reasonable compensation can be paid if provided for under the documents.

Chapter 617 states what must be in the Articles of Incorporation: Corporate name, address, purpose of corporation, manner of electing directors, authority, range of corporate power, operating and managing corporate property, borrowing of funds, mortgaging of property, etc.

Each not-for-profit corporation must have a registered agent and a registered office in the State of Florida.

# **CHAPTER 718 - Condominiums**

**CONDOMINIUM** means individual ownership of a unit coupled with joint ownership of an undivided share of the common elements. Condominium ownership means:

- Exclusive (individual) ownership of a unit
- Joint ownership of the common elements
- Membership in the association

**Chapter 718 is divided into six parts.**

## **PART I – General Provisions**

Provisions for creation of a condominium and the day-to-day operations. This is the most used part.

## **PART II – Rights and Obligations of Developers**

Rights and obligations of the developer including maximum statutory warranties of three years from completion of building or one year from transition.

## **PART III – Rights and Obligations of Associations**

Covers transition, rights of the association to cancel agreements, establishes the content of maintenance and management agreements and provides for the prevailing party to get court costs and attorney fees.

## **PART IV – Special Types of Condominiums**

Describes special types of condominiums: leasehold estate, conversions and adding of phases.

## **PART V – Regulation and Disclosure Prior to Sale of Residential Condominiums**

Provides for regulation by the Division of Florida Condominiums, Timeshares and Mobile Homes. Mandates disclosure requirements, prospectus, and provides for a filing fee of \$20 per unit for developer for each unit offered to sell and \$4 per unit, annually, for association after turnover.

## **PART VI – Conversions to Condominiums**

Conversions from rental to condominium and protection for renters. Provides tenants the option to extend current rental agreements, and right of refusal to purchase their unit. Developer to establish reserve accounts for capital expenditures and deferred maintenance or give warranties or post a surety bond.

# **CHAPTER 719 - Cooperatives**

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**COOPERATIVE** means the cooperative owns the units and the common elements.  
Cooperative ownership means:

- Legal title of the unit is vested in the cooperative
- Ownership of the common elements is with the cooperative
- Membership in the association includes the right to use of individual unit

**Chapter 719 is divided into six parts.**

## **PART I - General Provisions**

Creates the cooperative and provides for rights and responsibilities of the association and its members. Halts statute of limitations until members gain control.

## **PART II - Rights and Obligations of Developers**

Developers rights and responsibilities (escrowing for taxes and special assessments, disclosure for purchase agreements) and warranties (usually three years and no longer than five).

## **PART III - Rights and Obligations of Associations**

Covers transition and rights and obligations of the association, including the right to cancel agreements and provides for prevailing party to get court costs and attorney fees.

## **PART IV - Special Types of Cooperatives**

Describes special types of cooperatives, leaseholds, conversions and adding of phases to an existing cooperative.

## **PART V - Regulation and Disclosure Prior to Sale of Residential Cooperatives**

Provides for regulation by the department of Florida Land Sales, Condominiums and Mobile Homes. Mandates disclosure requirements and annual fees.

## **PART VI - Conversions to Cooperatives**

Conversions from rental to cooperative and protection for renters. Developer to furnish warranties as if new and to establish reserves. In addition, developer to furnish statements as to soundness, etc. of existing structure to purchasers.

# **CHAPTER 720 – Mandatory Homeowners’ Associations**

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**Mandatory Homeowners’ Associations** are those where ownership means automatic membership in the association. Chapter 720 of Florida Statutes provides regulation for mandatory Homeowners’ Associations, which are created

\*by the developer

\*with the filing of the Declaration of Covenants, Conditions and Restrictions (CCR) with clerk of the court in the county in which the development is to be situated.

The homeowners association consists of:

- 1) Individual lots and/or residences
- 2) Governing Documents
- 3) Common Areas controlled by the association
- 4) Association to administer common areas and enforce documents.

The recorded CCRs grant membership in the association.

Covenants pass with the land – to subsequent purchasers.

The Statute regulates operations of HOA: 1) Board meetings are open to members; 2) set of records must be maintained and owners have right to inspect them; 3) establishes voting rights and process for election of directors.

Those covered under Chapters 718, 719, 721, and 723 are exempt from provisions of 720. Chapter 720 does not apply to a community composed of property primarily intended for commercial, industrial, or other nonresidential use.

**Chapter 720 is divided into three parts.**

## **Part I – General Provisions**

Almost all of the information normally used to manage a HOA is located in this part.

## **Part II – Disclosure Prior to the Sale of Residential Parcels**

Covers developer’s disclosure requirements.

## **Part III – Covenant Revitalization**

Provides guidance for reviving an association.

## **CHAPTER 721 – Time-Shares**

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**TIME SHARING ACT.** Encompasses a narrow scope of special condominiums, cooperatives, and other types of residential properties. Time-sharing is not permitted in condos or co-ops unless special provisions were provided in the declaration of condominium or the cooperative documents. The concept of time-sharing allows the owner to occupy a particular residential unit for a week or for other specific periods each year. The time-share period must be for less than one year. Other owners use the same unit for other time periods.

Specific standards for insurance, records keeping, exchange programs, and auditing of financial records are mandated. A purchaser, or their agent, shall have access to books and records within seven days of a written request. Copies of the final budget shall be filed with the division within 30 days after beginning of the fiscal year together with the number of periods of 7-day annual use available.

## **CHAPTER 723 –Mobile Homes**

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**MOBILE HOME ACT.** Governs the arrangements of residential living between the residents of a mobile home park and the park owner. The mobile home act allows for the creation of an association and under some circumstances, it may actually purchase the park from the owner. When they do, they have three choices:

- Form a condominium form of ownership under 718
- Form a cooperative form of ownership under 719
- Form an unregulated cooperative form of ownership with a mandatory homeowners association

The formation of the association requires written consent of not less than two-thirds of all of the mobile home owners.

The Act also gives renters a first right of refusal to purchase and provides for owners to continue to rent their unit after conversion. The association shall meet once each calendar year and that meeting shall be the annual meeting. The association has the power to make, levy and collect assessments.

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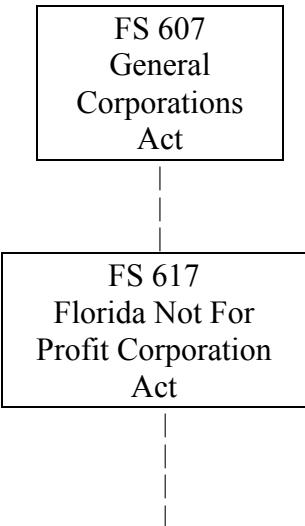
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<b>Now to recap what do we have?</b>	607	General Corporation Act
	617	Corporations Not-for Profit
	718	Condominiums
	719	Cooperatives
	720	Mandatory Homeowners' Association
	721	Time Shares
	723	Mobile Homes

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## **CORPORATION HEIRARCHY**



FS 718	FS 719	FS 720	FS 721
Condominium Act	Cooperative Act	Homeowners Assn	Vacation Plan and Timesharing Act

Note 1: Each layer of corporations is a subset of the one above. Florida Statute Chapter numbers increase in order.

Note 2: The Association Statute numbers 718 through 721 align alphabetically with the type of association (Condominium, Cooperative, Homeowner, and Time Share)

## **CHAPTER 468 - CAM**

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**COMMUNITY ASSOCIATION MANAGEMENT-** Community association management means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,000:

- Disbursement of funds
- Preparation of budgets and financial reports
- Assisting in the noticing or conducting meetings
- Determining the number of days required for statutory notices
- Determining amounts due to the Association
- Collecting amounts due to the association before the filing of a civil action
- Calculating the votes required for a quorum or to approve an amendment
- Completing forms related to the management of a community association that have been created by statute or by a state agency
- Drafting meeting notices and agendas
- Calculating and preparing certificates of assessment and estoppel certificates
- Responding to requests for certificates of assessment and estoppel certificates
- Negotiating monetary or performance terms of a contract subject to approval by an Association
- Drafting prearbitration demands
- Coordinating or performing maintenance for real or personal property and other related routine services involved in the operation of a community Association
- Complying with the association's governing documents and the requirements of law as necessary to perform such practices

Such managers are required to be licensed by the Department of Business and Professional Regulation. To be licensed, you must have a good moral character, pass an examination and, pay the necessary fees. A community association management firm responsible for the management of more than 10 units or a budget of \$100,000 or greater must be also licensed by DBPR. The firm license expires on September 30<sup>th</sup> of odd numbered years and shall be renewed every two years.

To renew the license, you must have the required number of hours of continuing education and pay the necessary fees. Renewal applications shall be submitted or before September 30 each even year. After September 30, that license becomes null and is expired. Twenty hours of continuing education are required for license renewal except for the initial renewal. The twenty hours shall include four hours legal update seminars, four hours on insurance/financial management topics, four hours on operation of physical property, four hours on human resources, and four other hours in any area.

The Division of Florida Land Sales, Condominiums and Mobile Homes exercises jurisdiction over the community manager licensing for the department. By law, the department sets the standards for application, examination, licensing and revocation of licenses.

A community association manager or a community Association management firm are deemed to act as agent on behalf of a community association as principal within the scope of authority authorized by a written contract or under this chapter. A community association manager and a community association management firm shall discharge duties performed on behalf of the association as authorized by this chapter loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.

A contract between a community association and a community association manager or a contract between a community association and a community association management firm may provide that the community association indemnifies and holds harmless the community Association manager and the community association management firm for ordinary negligence resulting from the manager or management firm's act or omission that is the result of an instruction or direction of the community association. Indemnification may not cover any act or omission that violates a criminal law; derives an improper personal benefit, either directly or indirectly; is grossly negligent; or is reckless, is in bad faith, is with malicious purpose, or is in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

#### ***ADMINISTRATIVE RULES***

**(61B - XX)**

All of the statutes provide for the Division of Florida Land Sales, Condominiums and Mobile Homes to promulgate Administrative Rules to assist in the responsibilities of each act.

718	Condominiums	61B - 21, 22, 23, 45, 50
719	Cooperatives	61B - 45, 50, 75 - 78
720	Mandatory Homeowners' Assoc.	61B - 80, 81
721	Time-Shares	61B - 37, 40
723	Mobile Homes	61B - 29, 30, 31, 32
468	Managers Licensing	61 - 20
514	Public Swimming Facilities	64E-9

Once a rule is promulgated, it is incorporated into the ***FLORIDA ADMINISTRATIVE CODE***.

## **PRIORITIES OF LAWS**

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There are many laws that govern community living and at times they do not always agree. In order of priority they are:

- Federal Constitution
- State Constitution
- Federal Statutes
- State Statutes
- Administrative Rules
- Local ordinances by counties and municipalities

There are also priorities among opinions and decisions by the courts. They are:

- Supreme Court of Florida
- Florida District Courts of Appeals
- Administrative decisions and interpretations by the Division of Florida Land Sales, Condominiums and Mobile Homes

## **FAIR HOUSING ACT**

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The Federal Fair Housing Act makes it unlawful to discriminate because of: race - color - national origin - sex - handicap - religion - familial status. Familial Status is defined as families with children under the age of 18. However, housing for older persons is exempt under certain provisions:

- Must be registered with the Florida Commission on Human Resources, and
- Must be intended for and solely occupied by persons 62 years or older, or,
- When occupancy is restricted to residents 55 years of age or older, Must be intended and operated for occupancy by at least one person 55 years or over per unit and at least 80 percent of the parcels are occupied by at least one person 55 years of age or over.

In addition to the Federal Fair Housing Act, Florida has its own fair housing act. Florida does not provide for the familial status.

For the purpose of the Fair Housing Act: Handicap is defined as a physical or mental impairment which substantially limits one or more of a person's major life activities.

## **AMERICANS WITH DISABILITIES ACT OF 1990**

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The purpose of the act is to provide a mandate for the elimination of discrimination of individuals with disabilities. Disability means a physical or mental impairment that substantially limits one or more of the major life activities of the person. Employer, under the act, means a person engaged in an industry affecting commerce, who has 15 or more employees. The act also covers discrimination in public accommodations, public transportation and telecommunications.

## **TAX WITHHOLDING REQUIREMENTS**

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The IRS requires all employers to withhold social security and Medicare taxes, income tax, and federal unemployment taxes from their employees. The IRS circular E, the Employers Tax Guide, is distributed to all employers who are registered with the IRS. This guide contains the directions for employers on how to withhold the payroll taxes from the employee's paycheck.

## **CHAPTER 2**

# **GOVERNING DOCUMENTS**

# **COVENANTS AND COVENANTS RUNNING WITH THE LAND**

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What is a covenant? It is a commitment, an agreement, a contract, or anything that grants a right or imposes a liability upon the property of an owner. Covenants are a part of mandatory homeowners' association and condominium living. When you purchase a parcel or a unit, you are automatically a member of the association and must pay your budgeted share of the common expense. The association may have restrictions placed on age of occupants, pets, or the number of people that can live in a unit. All of these restrictions are agreements, or commitments; or in short - covenants. When you purchase, you know that these covenants exist and will continue to exist for the life of the condominium or parcel and upon resale, the next owner inherits the same covenants. This is called running with the land.

## **DOCUMENTS THAT GOVERN COMMUNITY ASSOCIATIONS**

Authority: Chapter 718, F.S. Condominium

Chapter 719, F.S. Cooperative

Chapter 720, F.S. Homeowners' Association

Chapter 721, F.S. Timeshares

## **DEVELOPER**



## **COMMUNITY DOCUMENTS**

### **Declaration of Condominium Or**

### **Declaration of Covenants and Restrictions (CC&R)**

Recorded with the County Clerk of Court



### **Articles of Incorporation (Corporate Charter)**

Recorded with Department of Secretary of State

Included as Exhibit with Declaration filed with County Clerk



### **ByLaws: Formal Rules of the Association**

Recorded as Exhibit with Declaration filed with County Clerk



### **Board Rules & Regulations (Informal Rules)**

## **DECLARATION OF CONDOMINIUM**

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The covenants for a condominium are established when the Declaration of Condominium is filed. It is the document that sets forth the formal regulations for all of the property in a residential community. The restrictions and covenants grant easements and use rights of owners and their guests. They also outline the financial obligations of each owner and the rights which each owner has to take part in the affairs of the community.

The Condominium is established when the developer records the Declaration of Condominium with the county clerk in the county seat of the county in which the condominium is to be built. By law, the declaration must, to be valid, provide an identification of each unit by letter and number, the percentage of each owner's share of the condominium, voting rights, easements for ingress and egress, a survey, and a plot plan. The Declaration of Condominium must include the Articles of Incorporation and the By-Laws.

### **CONDITIONS, COVENANTS AND RESTRICTIONS (CC&Rs)**

Covenants are established in a mandatory homeowners association through a filing of Conditions, Covenants and Restrictions (CCRs) in the county along with Articles of Incorporation and By-Laws. CCRs often include architectural restrictions intended to control the appearance and architectural design within the subdivision.

Under Cooperative law, the co-op documents include the Articles of Incorporation and By-Laws, a definition of the grounds lease, the owner's share and membership in the co-op and title or right to use of a unit. The co-op is created when the Articles of Incorporation are filed with the state and when documents are recorded with the county.

## **ARTICLES OF INCORPORATION**

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### **Corporate Charter**

The Articles of Incorporation, also known as the Corporate Charter, are the documents that create the association and establish the entity responsible for maintenance and management. The entity is the association. They provide the framework for the organization of the association and define its membership and the voting rights of the members. The term Articles of Incorporation includes the original document creating the association and all amendments to it and any other documents which define the existing form, membership and responsibilities of the association. The Articles of Incorporation become effective when the charter has been executed and filed with the department of state of Florida by the developer.

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## **BYLAWS**

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In the By-Laws you will find the policies for proxies, budget and financial procedures, qualifications and responsibilities of officers and directors, agenda and notice requirements for membership and directors meetings, transfer fees, fidelity bonds, recall, arbitration, etc. The By-Laws must provide for at least three officers: a president, a secretary, and a treasurer. The president and the secretary must be two different persons.

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- The Articles of Incorporation define the basic structure of the Association and its areas of responsibility.

**WHO**

- The Declaration of Condominium describes the condominium physically as to description of the property, description of the buildings and percentage of ownership.

**WHAT**

- The By-Laws establish the procedures for carrying out these responsibilities and clarify the day-to-day duties necessary to carry out the responsibilities of the association.

**HOW**

So, we have the **Articles of Incorporation**

which form the corporation (the association) and are filed with the state.

We have the **Declaration of Condominium**

which forms the condominium when it is recorded with the county along with the **By-Laws**

which tell us how to carry out the day-to-day operation of the condominium.

Remember, when the Declaration of Condominium is recorded with the county, copies of the Articles of Incorporation and the By-Laws must be attached to the Declaration of Condominium as Appendixes, so they are also recorded with the county. The words “records of the county”, “clerk of the court”, and “records of the clerk” can be used interchangeably.

## **RULES & REGULATIONS**

Within the Declaration of Condominium are usually found the “formal rules and regulations.” In addition there are “informal rules and regulations” which are usually not recorded. However, they can be recorded and when recorded are more enforceable. The rules and regulations passed by the Board of Directors are subordinate to all the other published association documents and are known as the “informal rules and regulations.”

All of the documents should be consistent with each other. If they must have an order of priority, then it would be:

- Declaration of Condominium
- Articles of Incorporation
- By-Laws
- Rules and Regulations

## **AMENDING THE DOCUMENTS**

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Each document must provide for procedures for amendment. If they do not, then they can only be made with the approval of all of the owners. Usually documents provide for the percentage of owners necessary to amend the document. If the documents provide for amendment but do not state the percentage necessary then two-thirds of the owners must agree to the amendment. What have we just said?

- If no proviso for amendment, then 100%
- If proviso made but percentage not stated, then 66 2/3%
- If proviso made and percentage stated, then that %

If an amendment is adopted, then it must be recorded in the county records. The amendment becomes effective after it has been adopted and recorded. For condos, the Association must mail or hand deliver to each owner notice of the adoption, the effective date and a copy of the amendment's text. For HOAs, within 30 days after recording an amendment to the governing documents, the association shall provide copies of the amendment to the members. If a copy of the proposed amendment was provided to the owners before the vote and no changes were made, the association only has to provide notice that the amendment was approved and the book and page of the recorded amendment.

If you amend the Articles of Incorporation, you need only file them with the Secretary of State. Actually, the Articles of Incorporation are the document most often amended. It is amended each year when you file the annual corporate report. In addition, it is amended each time you change your registered agent or your Board members.

When amending the documents you cannot merely refer to the section/article, but, you must underline all words being added and you must line through all words being eliminated. If the proposed amendment is extensive and the underlined/lined through method would be confusing, then you can state the proposed text in full with a preface "substantial rewording of section. See section \_\_\_\_\_ for present text".

If any amendment changes the proportionate share of the common expenses for any unit, then that amendment requires the ratification of all of the owners and all of the lenders of record. A joinder is required for ratification with the owners signing in front of two witnesses and a notary public. In short, you cannot change the percentage of ownership unless all of the owners agree to the change.

Prior to transition of control of an HOA, the right of the developer to amend the association's documents is subject to a test of reasonableness which prohibits the developer from making amendments that are arbitrary, capricious, in bad faith, destroy the general plan of development, prejudice the rights of existing nondeveloper members to use and enjoy the benefits of common property or materially shift economic burden from the developer to the existing nondeveloper members.

## **ADDITIONAL TERMS**

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**ASSOCIATION PROPERTY** refers to the real or personal property leased, owned or controlled by the association for the use of the members.

**CONDOMINIUM PARCEL** means a unit, together with the undivided share in the common elements appurtenant to the unit.

**A COMMON ELEMENT** is that property shared by all of the owners and members of the community. Common elements are the portions of the condominium property not included in the units. Examples are pools, parking lots, tennis courts, etc. The common elements and the percentage of ownership are found in the Declaration of Condominium. The common elements are owned by all of the owners. Since April 1, 1992, the percentage of ownership is expressed either by the square footage of the unit as a percentage of the total square footage in all of the units - or - as an equal fractional basis of all of the units.

**LIMITED COMMON ELEMENTS** are that portion of the property as set forth in the documents for the exclusive use of a particular unit or units. Examples are patios, balconies, storage lockers, assigned parking spaces, entryways, etc.

**APPURTEANCES** are accessory rights which are inherent in the ownership of property in a condominium. Examples are membership in the association, club memberships, other privileges, etc.

A **UNIT** is that part of the property reserved for the exclusive use of an owner. It may be land, improvements, or land and improvements. They will be set forth in the documents.

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## ALTERATIONS TO COMMON ELEMENTS

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Common Elements may be enlarged by an amendment to the Declaration of Condominium. The amendment must be made in accordance with the documents.

For condominiums or cooperatives, you cannot materially alter or substantially add to the common elements except in the manner provided for in the documents. If the documents provide for alterations or additions, but do not set forth the manner, then at least 75% (two-thirds for cooperatives) of the owners must approve the alteration or addition.

Each Condominium Board of Directors must adopt specifications for hurricane shutters. The installation, replacement or maintenance of hurricane shutters shall not be deemed a material alteration to the common elements.

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## RIGHTS, PRIVILEGES AND OBLIGATIONS OF DEVELOPERS

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The developer creates the association. When the developer initially files the documents of the association, he is required by law to file a Frequently Asked Questions and Answers Sheet. This informs buyers of voting rights, use restrictions, assessments, etc. The developer appoints the first Board of Directors, who has the same fiduciary obligations as an owner controlled board.

The developer-controlled board has the same obligations as any other board and must comply with the appropriate statutes: Such things as

- how to conduct owner and board meetings,
- execute contracts,
- maintain association records and insurance,
- preparation of financial reports and statements.

The developer-controlled board must comply with the same regulations for budgeting, and establishing and maintaining reserves (although the developer can waive reserves for the first two years).

The developer can amend the documents, while in control, without owner approval under certain conditions.

## **TRANSITION REQUIREMENTS**

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When the time comes for transition, the developer must relinquish control and the association must accept control. FS 718, 719, and 720 provide for specific time periods for transition from developer control as do most governing documents. The developer does not cease to be the developer and is responsible for many things including warranty and other obligations.

For homeowner associations, members other than the Developer are entitled to elect at least one member of the board if at least 50% of the parcels in all phases of the community which will ultimately be operated by the association have been conveyed to the members. Members other than the developer are entitled to elect at least a majority of the board of directors 3 months after 90 percent of the parcels in all phases of the community have been conveyed to the owners unless the documents provide for an earlier date.

In a condominium, when the owners have title to 15% of the units, they shall be entitled to elect no less than one-third of the directors. Usually, the initial board will have three members and when the owners have 15% of the units they will elect one member to the board and one of the developer members will resign.

Condominium unit owners other than the developer are entitled to elect not less than a majority of the board:

- Three years after 50 percent of the units have been conveyed to the owners, or
- Three months after 90 percent of the units have been conveyed to the owners, or

None of the units are being constructed or offered for sale by the developer, or seven years after recordation of the declaration.

The meeting to elect the owner directors must be called within 75 days from the above date.

The developer is entitled to elect at least one member of the board of administration of an association as long as he holds for sale at least 5 percent of the units/lots. In a condominium with more than 500 units, the developer only needs to hold 2 percent of the units for sale to be entitled to a seat on the board. When the Developer files a petition for bankruptcy; abandons his responsibility to maintain and complete the amenities or infrastructure; is losing title to the property through foreclosure or deed in lieu of foreclosure; or has a receiver appointed for the Developer, owners other than the Developer are entitled to elect a majority of the board of directors.

Within 90 days of when the members are entitled to elect a majority of the Board, the developer, at his expense, must turn over all of the property and official records to the association. These documents are spelled out in the appropriate act and also are usually found in the documents. For homeowner associations incorporated after December 31, 2007 and all condominium associations, the developer must provide the association with an audit of the association's funds from time of inception to date of turnover, at the developer's expense. The developer must also furnish the association building plans used in the construction of the building, warranties, a list of contractors, sub-contractors, and suppliers, a copy of the certificate of occupancy and all permits applicable to the properties. At condominium turnover, an architect's or engineer's turnover inspection report shall be turned over by the Developer attesting to the required maintenance, useful life, and replacement costs of certain common elements listed in the statute. Also, the new Board of Directors should evaluate any contracts entered into by the developer.

## **DISCLOSURE REQUIREMENTS**

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Starting with the initial sales program, the developer is required to keep the prospective buyer informed. They usually do this with a prospectus. They are required to have certain information in the prospectus. They are required to provide all buyers with the prospectus, copies of the documents, and a copy of the Frequently Asked Questions and Answers. In condos and co-ops the contract for sale must state that the buyer has been furnished with the prospectus, documents and the FAQA. Condo and Co-op buyers have a three-day grace period in which they may cancel the contract. The condos and co-ops are required to furnish resale buyers with the documents and FAQA sheet, however, they may charge for the actual cost of reproducing the documents.

## **RIGHTS, PRIVILEGES AND OBLIGATIONS OF UNIT OWNERS**

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Owners are granted exclusive rights of the use and possession of their units and of the use of the common elements. There are certain appurtenances that go with ownership: an undivided

share of the common elements, voting rights, membership, use of common elements, etc. Owners have the right of peaceful assembly, within the restrictions of the documents. All owners are guaranteed the right of due process. Owners are obligated to pay assessments. If an owner does not pay the assessments, then the association has lien rights.

Members of an association have the exclusive use of a particular unit. They also have the obligation to abide by the rules and regulations of the association. They have the obligation to pay their fair share of the expenses to run the association. If they are delinquent, a lien can be placed on their unit. They also have the right to use their unit without undue outside interference. They also must give the right to access for maintenance and repair in the case of emergencies. The owner must use their unit in such a manner as to not interfere with another owner's right to peaceable use of their unit. Occupancy is subject to the rules and regulations of the documents.

There are obvious benefits of being a member of an association and of course there are drawbacks. The governing body, the board of administration, the board of directors (the terms may be used interchangeably) must constantly face the responsibility of preserving the individual rights of owners, and the common plan of the community as a whole for the benefit of all of the owners. The rule is ***THE RIGHTS OF THE WHOLE SUPERSEDE THE RIGHTS OF THE FEW.***

## **RIGHT OF ACCESS TO UNITS**

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The Condominium Act provides each owner the exclusive possession of his or her unit. The association has the irrevocable right of access to each unit during reasonable hours. Association access is for maintenance, repair, or replacement of any common elements or any portion of a unit to be maintained by the association pursuant to the declaration. It may also be necessary to prevent damage to the common elements or to another unit or units.

Residents are entitled to access to any and all available licensed cable television service. Residents need only pay for the service and for any installation required. The charges must be agreed upon by the resident and the provider of the service.

Similar rights, privileges and obligations exist for co-op owners. Also co-op owners are subject to the same rights of entry as condo owners.

Abandoned Condominium Units – Regardless of what is provided in the condominium documents, an association (at the sole discretion of the board) may enter an abandoned unit to do the following:

- a. Inspect the unit and adjoining common elements;
- b. Make repairs to the unit or common elements serving the unit;
- c. Repair the unit if mold or deterioration is present;
- d. Turn on utilities for the unit; or

- e. Maintain, preserve, or protect the unit and adjoining common elements.

A unit is presumed abandoned if:

- a. the unit is the subject of a foreclosure action and no tenant appears to have resided in the unit for at least four (4) continuous weeks without prior written notice to the association; or
- b. no tenant appears to have resided in the unit for two (2) consecutive months without prior written notice to the association and the association is unable to contact the owner or determine the whereabouts of the owner after reasonable inquiry.

Except in an emergency, an association may not enter an abandoned unit until two (2) days notice has been mailed or hand delivered to the owner at the address of the owner per the association records.

Any expense incurred by the association for the above actions is chargeable to the unit owner as an assessment and is enforceable as a lien.

The association may petition the court to appoint a receiver to lease out an abandoned unit for the association's benefit to offset their expenses including assessments, late fees, interest, and attorney/receiver fees.

## **CHAPTER 3**

**MEETING & PROCEDURES**

**ASSOCIATION MEMBERSHIP**

**BOARD OF DIRECTORS**

# **MEETINGS AND PROCEDURES OF THE ASSOCIATION MEMBERSHIP AND THE BOARD OF DIRECTORS**

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Under 718, 719, and 720 all owners are members of the association. This means membership is an appurtenance to their ownership of a unit. It means when you buy a unit, you are a member of the association. You have certain rights and benefits along with certain responsibilities. There can be restrictions on the manner of exercising the right to vote as long as the restrictions are reasonable and fair. Meeting locations must accommodate handicapped persons if requested by an eligible handicapped owner.

## **ANNUAL OWNERS' MEETINGS**

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Each association must hold at least one meeting of the general membership each year. This is referred to as the annual owners' meeting. The date and time of the meeting is usually found in the by-laws. For condominiums, if the bylaws do not state a location for the annual meeting, it must be held within 45 miles of the condominium property.

The two purposes of the annual owners meeting are to:

- 1) elect directors for the coming year (to fill the expiring terms) and
- 2) review the affairs of the association.

## **SPECIAL OWNER'S MEETINGS**

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Special meetings of the membership may be required. If they are, they are for a **special purpose only**. The purpose of the meeting must be set forth in the notice for the meeting and only that subject will be discussed at the meeting. Usually the procedures for calling, noticing, and carrying out the meeting will be set forth in the by-laws. A Special Budget meeting is held to consider the budget.

## **MEETING NOTICES**

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General membership meetings, including Special Owner's Meetings, cannot be held without proper notice to all of the owners. A member can waive notice, but the waiver must be in writing and the authority to waive must be in the documents. The notice shall be mailed, hand delivered, or electronically transmitted at least 14 days prior to the meeting. Posting the notice on property 14 days prior to the meeting is required for condominiums. HOAs may adopt a procedure to conspicuously post or broadcast the notice on closed-circuit television in lieu of other notices. If broadcast notice is used in lieu of physically posting the notice, the

notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is required.

The notice for a meeting must contain the time, date, place and the purpose of the meeting. Examples are a regular board of directors meeting; an annual owners' meeting to elect directors and review the association's affairs; a special meeting to approve the budget, in which case a copy of the budget must also accompany the notice; a special meeting to approve a special assessment and the reason for the special assessment. If the special assessment is to be approved, then the notice of the assessment must include the amount, date of payment and date of delinquency. If amendments are to be voted on at the meeting, then copies of the amendments proposed must also accompany the notice of the meeting.

Notices for membership meetings for a homeowners' association will be provided as called for in the bylaws. If not specified in the bylaws, notice must be given not less than 14 days prior to the meeting.

Chapter 617 (corporation not-for-profit) instructs that notice be sent out at least ten days before the meeting and no longer than sixty days before the meeting.

Chapter 718, 719, and 723 require at least 14 days notice.

The most **stringent** prevails, so in a condominium, cooperative, or mobile home park, notice must be given at least 14 days and no longer than 60 days prior to the members meeting.

If the budget is to be considered at a meeting, then **14** days notice is required.

**Always check your documents** to be sure you are following the requirements in the documents as well. To ensure compliance with the law, it is a good idea to make sure that the post mark is at least one day before the minimum period and the receipt for hand delivery is at least one day before the minimum period. If the by-laws require a longer time, then the by-laws will prevail.

## **ELECTION NOTICES**

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For condominiums and cooperatives, the association shall mail, deliver, or electronically transmit, including published newsletters, a first notice of election to all owners not later than 60 days prior to the election. Because the election of directors for HOAs must be held with the annual meeting, the 14-day minimum notice applies.

**Remember, the most stringent always prevails.**

### **SUMMARY**

Special Assessment that is approved by Board of Directors	14 Days
Owners' Meeting	14 Days
Board of Directors Meeting	48 Hours
Budget Approval	14 Days
Condo/Co-op Election	60 Days

### **AFFADAVIT PROOF OF NOTICE**

The board must preserve proof of notice of meetings. This is usually done by an affidavit from the manager that states that all of the owners were notified by mail, at their last known address, of the meeting on a specific date, or delivered by hand delivery (which requires the unit owner to waive, in writing, the right to receive the notice by mail.) A certificate of mailing from the U.S. Post Office may also be used.

## **QUORUM**

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You must have a quorum to have an official meeting. For condominiums and cooperatives, a quorum is a majority of the membership attending in person or by proxy, unless the bylaws specify a lower number. A quorum for a homeowners association is 30% unless a lower number is provided in the bylaws. For timeshares, a quorum is 15% of the voting interests.

A condominium election may be held if 20% of the ballots are returned. The election has nothing to do with the meeting.

A voting interest or consent right allocated to a unit or member which has been suspended by the association may not be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action under statutes or pursuant to the declaration, articles of incorporation, or bylaws.

## **VOTING CERTIFICATE**

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A voting certificate is an official part of the records of the association. It designates the one person that can exercise the right to vote for a unit. When the unit is owned by more than one person (in most documents, married couples are considered one person), then the owners must get together and decide who can cast that one vote. The last dated and properly executed voting certificate prevails. In the case of a corporation owning a unit, the voting certificate must be signed by the president and attested to by the secretary. A voting certificate does not expire. However, it may be superseded for a specific meeting by a properly executed proxy.

## **VOTING**

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Voting is the expression of the collective will of all of the members. There are five basic ways of voting:

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|---------------------|----------------|
| (1) general consent | (2) voice vote |
| (3) show of hands   | (4) roll call  |
| (5) ballot          |                |

In most cases, the vote can be decided by a majority of the votes cast. In the case of a tie, the motion is not carried and the vote fails. It must have a majority. Sometimes rules of parliamentary procedure require a 2/3 vote. Sometimes the documents require a specific vote, whether present or not, and then you may not be able to pass the motion until you can get more members present. Remember the most stringent prevails.

An association may suspend the voting rights of a member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent.

For condominiums, the voting interests of Association-owned units cannot be exercised or considered for any purpose, whether for a quorum, an election, or otherwise.

The chairperson must assure that all of the members understand the issue at hand, that it is presented fairly, the right method of voting is used, that anyone who wishes to express their opinion has the opportunity to do so, and that the vote is accurately counted and the results correctly conveyed to the members.

The chairperson decides the results when the vote is by general consent, show of hands, or by voice vote. If unsure, the chairperson calls for a vote by roll call or by ballot. The chairperson must communicate to the membership the results when the tabulation is completed.

Once the chairperson decides the results of a vote, the subject is closed and should not be discussed further. If the results of a vote are not clear, they can be voted again, but if the **chairperson decides the result, then that is final.** If a member is not satisfied with the results, they should move for reconsideration and the vote is taken whether to reconsider or not. Then, only if the vote is for reconsideration, should another vote be allowed. If the vote is by ballot and a member is not satisfied, then the proper motion is for a recount of the ballots. If the members vote for a recount, then and only then, is a recount made. Once a meeting is adjourned, a recount should never be allowed.

If a member wishes to challenge the results of an election or a voting after adjournment, the proper manner is to petition for a special meeting or to begin recall proceedings against a director or directors.

## PRESIDING AT MEETINGS

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At Board of Directors meetings, the president presides. At annual owners' meetings, a chairperson is elected by the members to preside over the meeting. They are responsible for assuring that voting is done correctly.

## BALLOTING

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Be very careful when you prepare ballots. For an election, the names must be in alphabetical order by last name, with the last name first followed by the first name and middle initial.

For condominiums, secret ballots are required. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than 40 days before a scheduled election. The association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote therein, together with a ballot which shall list all candidates. Upon request of a candidate, the association shall include an information sheet, no larger than 8 ½ inches by 11 inches, which must be furnished by the candidate not less than 35 days before the election. The association is not liable for the contents of the information sheets. No write-ins are allowed. No signatures or other marking are allowed on the ballots, other than the casting of votes, as required. Accompanying the ballot shall be an outer envelope addressed to the person or entity authorized to receive the ballots and a smaller inner envelope in which the ballot shall be placed. The exterior of the outer envelope shall indicate the name of the voter, and the unit or unit numbers being voted, and shall contain a signature space for the voter. Once the ballot is filled out, the voter shall place the completed ballot in the inner smaller envelope and seal the envelope. The inner envelope shall be placed within the outer larger envelope, and the outer envelope shall then be sealed. Each inner envelope shall contain only one ballot, but if a person is entitled to cast more than one ballot, the separate inner envelopes required may be enclosed within a single outer envelope. The voter shall sign the exterior of the outer envelope in the space provided for such signature. The envelope shall either be

mailed or hand delivered to the Association. Upon receipt by the Association, no ballot may be rescinded or changed.

If the ballot is for an amendment to the documents, be sure that the ballot is clear in the choice for approval or disapproval. A simple yes or no usually is sufficient. Avoid multiple-choice answers on ballots. Have a separate ballot for each topic or item to be voted on. Do not in any way suggest choices or indicate a suggested way of voting.

If there are errors in voting or improper procedures have been followed, then the chairperson should call for a re-vote. Since ballots have no identifying marks, the member causing the improper ballot can not be determined and a re-vote must be taken. For example, you have one hundred members and ninety are represented by proxy or in person. You receive ninety-five votes. The vote is improper and a re-vote must be taken.

## **ROBERT'S RULES OF ORDER**

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The purpose of all meetings is to carry out the business of the association. Meetings should be open and fair. Robert's Rules of Order is the universally accepted authority.

### ***PROCEDURE TO ADOPT A MOTION***

Motion is made, seconded and stated by the chairperson to the members present at a membership meeting before the debate can be started.

The presenter of the motion always talks last.

Debate is limited to a predetermined length of time, usually ten minutes.

Each member should be allowed to present his/her views.

No one should be allowed to talk twice without everyone else having a chance to talk first.

Debate is only on the specific subject of the motion on the table.

Debate must be respectful and not personal.

Any motion to close or limit debate must be approved by 2/3 of those present.

There is no debate after the votes have been counted and announced.

## **BOARD MEMBER ELECTION AND SELECTION**

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The by-laws will set forth the method of selection and election of directors. There are two methods: appointment and election.

**Appointments** are made by the developer initially and to replace directors on a developer controlled board.

**Appointments** can also be made by owner-controlled boards when directors resign or when they become ineligible for some reason, such as when the documents require that a director be a member and they sell their unit. Vacancies can and must be filled by appointment, even when a quorum of members on the board does not exist. If the Association fails to fill

vacancies on the Board, a unit owner may petition the circuit court for a receiver to be appointed to manage the affairs of the Association.

**Elections** are made by owners to initially seat directors after they gain control from the developer and to elect successors to directors when their term expires.

Directors are elected by ballot or by voting in person in a homeowners' association. Any member in a homeowner association may nominate himself as a candidate for the board at a meeting where the election is to be held. However, nominations from the floor are not required if the election process allows candidates to be nominated in advance of the meeting. In a condominium or a cooperative, the owners must vote by secret ballot. The ballot must be cast in advance of the meeting or at the meeting. The mailing of the ballots and the counting of the ballots is strictly controlled by statute. An election is not required unless more candidates are nominated than vacancies exist.

## **TRANSITION FROM DEVELOPER CONTROL**

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At first, the developer appoints the Board of Directors. As time passes and units are sold, the owners begin to take control of the board. Usually, the documents will call for the owners to have one-third of the seats on the board when they own 15% of the units. When the owners elect a member to the board, then one of the developer appointed members must resign. Eventually, the unit owners will gain a majority of members on the board and control of the association. When this happens, we have transition and the developer must pass control to the owners and the owners must accept control. The developer's responsibility does not end however, they still have certain responsibilities, such as; warranties, audits, passing of records, etc.

## **BOARD MEMBER ELIGIBILITY**

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Eligibility requirements for board members are set forth in the Articles of Incorporation and in the By-Laws. The General Corporate Law of Florida does not require directors to be members. If the bylaws say that all directors must be members, then they must be members. The officers do not have to be directors unless the bylaws so state. The general corporate law of Florida does not require that officers be directors or that directors be members of the association. This is usually set forth in the bylaws of the association. Most documents do require that directors be members. Most documents do not require that officers be directors. In a condominium association of more than ten units, co-owners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies. A person who more than 90 days delinquent in the payment of any monetary obligation due to the association or has been convicted of a felony and has not had his civil rights restored for at least five years as of the date of seeking election is ineligible for board membership.

If the bylaws permit, the designated voting representative of a corporation, partnership, or similar entity may be eligible to serve as a member of the board. However, if eligibility is contingent upon association membership, then the parcel may be effectively excluded from offering a candidate for the board since a corporation cannot sit as a member of the board of directors. The exception is a trust because the grantors or beneficiaries of the trust are considered members of the association.

Except for timeshare condominiums, within 90 days of being elected or appointed to the board, each new board member shall certify in writing to the secretary of the Association that he or she has read the Association's declaration of condominium/covenants, articles of incorporation, bylaws, and current written rules and policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the Association's members. In lieu of this written certification, within 90 days of election or appointment, the director may submit a certification of satisfactory completion of the education curriculum administered by a state approved condominium education provider within one year before or 90 days after the election/appointment. A director who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies. The board may temporarily fill the vacancy during the period of suspension. These certifications are valid and do not have to be resubmitted as long as the director serves without interruption. These certificates must be maintained by the Association for five years or for condominium for the duration of the director's term if longer than five years.

## **TERM OF BOARD MEMBERS**

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Unless the association's articles or bylaws provide for a different term, all directors serve for a one year period and their term will expire with the election of their successors at the next annual meeting. For condominiums, association board members may serve staggered terms of no more than two years if the bylaws or articles of incorporation permit. Also for condominiums, if the number of board members whose terms have expired exceeds the number of eligible members showing interest in or demonstrating an intention to run for the vacant positions, each such board member whose term has expired is eligible for reappointment to the board and need not stand for reelection.

The director's term begins right after the elections are over and the chairperson of the meeting has announced the results-they have agreed to serve when nominated.

## **NUMBER OF DIRECTORS**

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The number of directors is usually stated in the Articles of Incorporation and the By-Laws. Some older documents will state from three to seven, for example. When this is in a

homeowners association other than 718 or 719, then the number of directors for the coming year must be determined before the election. Under condo and co-op law, the elections are done by ballot, so the number must be decided before the election process. Therefore, the documents may have to be amended before the election process can begin.

If the documents do not state the number, in a homeowners association, there must be at least three directors. In a co-op or condo, there must be at least five, unless there are five or fewer units, in which case there must be three directors.

## **RESIGNATION OR REMOVAL OF DIRECTORS**

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Directors may be removed from office by three methods: voluntary, automatic, or by recall. A member may voluntarily resign for his or her own reasons. The resignation is effective upon receipt of the written notice to the Board, unless the notice specifies a different date.

The resignation may be automatic as a result of a change in circumstance - such as the sale of the unit or parcel when the documents require that to be a director you must be a member. For condominiums, a director or officer more than 90 days delinquent in the payment of regular assessments shall be deemed to have abandoned the office. A director or officer charged with a felony theft or embezzlement offense involving the association's funds or property shall be removed from office. The board shall fill the vacancy according general law until the end of the period of the suspension or the end of the director's term of office, whichever is first. If the charges are resolved without a finding of guilt or without acceptance of a plea of guilty or nolo contendere, the director or officer shall be reinstated for any remainder of his or her term of office. An association member who has such criminal charges pending may not be appointed or elected to a position as a director or officer.

Removal also may be by recall. If a recall is successful, then the recall becomes effective immediately and the director must return all association documents in their possession within 72 hours. Recall procedures are very exact and must be followed very carefully. The association's attorney should be consulted whenever recall is necessary.

If a recall is disputed by the board, the board must file with the division a petition for arbitration within five full business days. If the board fails to duly notice and hold the required board meeting after being served with a recall petition, or fails to file a petition for arbitration challenging the recall, the unit owner representative may file a petition for arbitration. The petition must be filed within sixty days after the expiration of the applicable five full business day period. A board member who has been recalled may file a petition for arbitration challenging the validity of the recall. The Division may not accept a petition for recall arbitration when there are sixty or fewer days until the scheduled reelection of the board members sought to be recalled or when sixty or fewer days have elapsed since the election of the board member(s) sought to be recalled.

An outgoing board or committee member must relinquish all official records and property of the association in his or her possession/control within five days after the election.

## **ASSOCIATION OFFICERS**

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The association acts through its officers and agents. The board sets the association's policies and the officers and agents carry out that policy. The officers and agents have a fiduciary duty to the members of the association. The Articles of Incorporation and the By-laws will set forth the officers of the association. If the documents do not set forth the officers, then each association must have as a minimum, a president, a secretary and a treasurer. The President and the Secretary must be two separate persons. Therefore, a corporation in Florida could have just two people as officers. Additional officers and agents may be elected as the board deems appropriate. The duties of the officers/agents are usually set forth in the bylaws.

## **ELECTION OF OFFICERS**

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The officers and agents are either elected or appointed. They are not usually elected by the members, but some older documents do require the members to elect the officers. The meeting at which the officers are elected is open to all of the members.

A majority vote of the directors is required to elect officers. The election of the officers usually takes place at the organizational meeting held shortly after the annual owners' meeting. The board may appoint officers rather than elect them. This usually occurs when the officers are not directors. Vacancies are usually filled by appointment with election at the next meeting of the board of directors after the vacancy occurs. Because the directors elect the officers, they can vote to change officers at any time.

## **ELIGIBILITY AND REMOVAL OF OFFICERS**

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Unless the documents require otherwise, an officer need not be a member of the association, a member of the board of directors, a property owner, or an employee of the association. Usually the President, Secretary and Treasurer are members of the association. The law of the state does not require this. One person can hold more than one office, except the President and the Secretary must be two different persons. Remember that the President usually signs all legal and important papers and the Secretary attests to the Presidents signature, so they must be two different persons.

Officers of the association serve at the board's pleasure and can be removed whenever the boards deems so, except where the documents require that the members elect the officers.

The removal of an officer can be done, with or without cause, if the board feels it is in the best interest of the association. Once a vacancy occurs, the board can fill the vacancy. If the

members elect officers, then the members must remove the officer and fill the vacancy. If the board elects officers, then the board may remove the officer and fill the vacancy.

## **BOARD OF DIRECTORS MEETINGS**

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The Board of Directors is the main decision making authority. At the annual meeting, the members elect directors and review the action of the Board of Directors for the past year and discuss future events in general terms. At the first meeting of the Board of Directors following the annual meeting, the Board of Directors elects officers for the board. They may or may not be directors - it depends on the documents of the association.

There were two general rules stated in that last paragraph:

- “Members elect directors - and - directors elect officers”
- “It depends on what the documents say”

A Board of Directors meeting can take place anywhere the board desires as long as the documents do not state otherwise. A meeting of the Board of Directors takes place anytime there is a quorum of the directors present and they have gathered for the purpose of discussing association business. Meetings may be either regular or special. They may be called by the chairperson or the president or per the governing documents.

All Board of Directors meetings are open meetings and any member of the association may attend. All meetings of committees or any other group assisting in association business are open meetings. Owners may not vote at board meeting but may address the board on all agenda items when recognized by the chair. However, board meetings and committee meetings with the association’s attorney with respect to proposed or pending litigation may exclude owners when the purpose of the meeting is to seek or render legal advice. The Board may hold a closed meeting without the Association’s attorney present for the purpose of discussing personnel matters.

A majority is a quorum for board meetings unless the documents state otherwise. A majority is required to meet and a majority of those present is required to take action - unless the documents state otherwise. Directors not present at a meeting may join in approval of the actions of the other directors, if they so desire, by signing the minutes of the meeting. This is called a joinder.

## **BOARD OF DIRECTORS MEETING NOTICES**

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There are two types of notices for Board of Directors meetings:

- (1) To the membership of the association as a whole
- (2) To the members of the Board of Directors

Notice to the directors of the board can be by first class mail, by hand delivery, or by telegram and include when and where the meeting will be held. Forty-eight hours notice is required, longer if the documents prevail. By-laws may dispense with a notice for regularly scheduled meetings. That is to say, notice may not be required if the board meets on the second Tuesday of each month at 3:00 p.m. in the Board of Directors room. The by-laws may state that the meeting notice can be waived for any director who says so in writing. Waiver of notice must be in writing or by actual attendance at the meeting. Notice and waivers are official records of the association.

A system of noticing for Board of Directors meetings should be instituted so that the membership as a whole is informed of the meetings of the board. You do not have to mail a notice to all of the members of the association. A notice on the bulletin board will suffice and it should be posted continuously and conspicuously for at least two days (48 hours) before the meeting. Check your documents to see if they are more stringent on notice requirements. Remember, the most stringent prevails.

An agenda must accompany the notice. Items not on the agenda should not be discussed except in an emergency. Emergency items may be discussed if a majority plus one of the directors approve. Any item discussed must be an item on the agenda of the next meeting and ratified at that meeting.

If 20 percent of the voting interests petition the Board to address an item of business, it must within 60 days place the item on the agenda at either its next regular board meeting or at a special meeting.

## **VOTING AT BOARD OF DIRECTORS MEETINGS**

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The president must vote on all issues, and so must all other directors. A director who is present at a meeting of its board at which action is taken shall be presumed to have assented to the action taken unless he or she votes against such action or abstains from voting. For HOAs, the director may abstain only if they have a conflict of interest and they must state the conflict of interest. For condominiums, a director who abstains from voting on any action shall be presumed to have taken no position in regard to the action.

The president usually votes last, so as not to influence the voting. The actual voting of all directors must be recorded in the minutes.

In any association under 607 and 617, a director can participate in a board meeting by telephone as long as there is a speaker phone in the meeting place and all of the other directors and the members in the audience can hear both sides of the conversation. It is not necessary that the telephone director hear all of the comments from the audience. The telephone director counts for a quorum and a majority for voting.

Members of the association do not have any authority to act for the association. Members may attend all board and committee meetings except for closed meetings. Owners may not vote at board meetings but have the right to speak at Board meetings with reference to all designated items.

Directors cannot vote by proxy. They cannot vote by secret ballot unless voting for officers. The vote of all directors must be recorded in the minutes, except the vote for officers.

Members of the board may use email as a means of communication but may not cast a vote on an association matter via email.

## **PROXIES**

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Most by-laws and the general corporate law (607) of Florida allow proxies. FS 718, 719, 720, 721 and 723 have special requirements for proxies. General proxies are usually good only for establishing a quorum. A limited proxy is similar to an absentee ballot and is used to direct the proxy to vote in a specific way or for a specific person or persons.

Condominiums & Cooperatives – General and limited proxies may be used to establish a quorum and are good for only 90 days after the date of first meeting for which it was given. Unit owners generally may not vote by general proxy. Proxies may not be used for electing the board. Limited proxies shall be used

- 1) to waive or reduce reserves
- 2) to waive the financial reporting requirements
- 3) to amend the declaration, articles, or bylaws
- 4) to vote for any other matter that 718/719 requires or permits a vote of the owners
- 5) in a form substantially conforming to the limited proxy form adopted by the division.

Homeowner Associations (720) – To be valid, a proxy must be dated, must state the date, time, and place of the meeting for which it is given, and must be signed and dated by the authorized person executing the proxy. Proxies are good for only 90 days after the date of first meeting for which it was given. There is no restriction on using a proxy for elections.

Timeshares (721) – Allow proxies.

Mobile Homes (723) - Provision shall be made in the bylaws for definition and use of proxy. Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a

period longer than 120 days after the date of the first meeting for which it was given. Every proxy shall be revocable at any time at the pleasure of the member executing it.

There is no limit on the number of proxies that one person can hold as long as the by-laws of the association do not place a limit. Proxies can be revoked at any time prior to the meeting by the signing of a later one and canceling the first or by the signer just showing up at the meeting. A proxy holder can substitute another person for himself if the proxy so states and the by-laws do not prohibit. Unless the bylaws so prohibit, the holder of the proxy does not have to be a member of the association.

## **RECORDS OF THE ASSOCIATION**

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Each community association must maintain a roster of members. It contains the name of the member, current address, current telephone number and the property owned (unit number).

All records of all meetings should be in a written form and any other form must be reduced to writing in 30 days. The board is the custodian of all official records and the official records must be open for inspection by any member during reasonable hours.

Records must be maintained in the office of the association or with an officer of the association. They must be maintained within the state.

Records must be made available to a unit owner within 5 working days for condominiums/co-ops and 10 working days for HOAs of receipt of a written request. Failure to do so within 10 days of receipt of the request will entitle the owner to \$50/day for 10 days. Records must be made available in the county of the association or within 45 miles of the association property. Records must be open for inspection by the members or their representative at reasonable times with the exception of

- documents protected by lawyer-client privilege;
- documents pertaining to the lease, sale or transfer of a unit;
- disciplinary, payroll, health, insurance and personnel records of the association's and management company employees; social security, driver's license or credit card numbers, email addresses, emergency contact information or medical records of unit owners;  
(Owners may consent in writing to the release of personal identifying information such as e-mail and other mailing addresses. Written employment agreement with an employee or management company or financial records that indicate the compensation paid to these entities are accessible to owners.)
- association's electronic or security data including passwords, software and operating systems.

An association may print and distribute to owners a directory containing the name, parcel address and telephone numbers of each parcel owner. However, an owner may exclude his or her telephone numbers from the directory by so requesting in writing to the association.

The right to inspect includes the right to copy. For condominiums, a reasonable charge can be made for copies. HOAs may charge the owner for the costs of retrieving and copying the records if: (1) the time spent retrieving and copying the records exceeds one-half hour; (2) the personnel costs do not exceed \$20 per hour; and (3) the copies made exceed 25 pages. HOAs may charge 25 cents per page for copies made on the association's copier. If the association does not have a photocopier where the records are kept or if the records requested exceed 25 pages, the association may have the copies made by an outside service and may charge the actual cost of copying as supported by the vendor invoice. Associations may offer to make the records available either electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request.

An association shall allow a member or his/her authorized representative to use a portable device, such as a smartphone, tablet, or portable scanner to make an electronic copy of the official records. The association may not charge for the use of such a device.

All official records of the association must be maintained for 7 years. The three exceptions are the voting records of elections which must be maintained for one year; HOA/Co-op bids must be kept for one year; and Board certifications must be kept for five years or the duration of the director's term if longer than five years.

## **COPIES OF DOCUMENTS**

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The association is also required to have available copies of the Frequently Asked Questions and Answers, The Articles of Incorporation, the Declaration of Condominium, The ByLaws, The Rules and Regulations and any other documents of the association. A reasonable charge can be made for copies.

The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the property or the association other than an estoppel and may charge a fee not to exceed \$150 plus reasonable copying and attorney costs.

## **CHAPTER 4**

# **COMMUNITY ASSOCIATION BUDGET AND FINANCIAL AFFAIRS**

# **COMMUNITY ASSOCIATION BUDGET AND FINANCIAL AFFAIRS**

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## **What is a budget?**

A budget is an estimate of the operational expenses for the coming year.  
It is based on actual expenses of previous years, with a + or - factor for the coming year.  
It provides a preview of the coming year's expenses.  
It is prepared each year for the next year's twelve-month period.  
It is the basis for figuring and allocating the individual owners share of the money needed to operate.  
When the budget is approved, the required annual contribution is also set for each unit.  
A separate budget and set of books must be maintained for each condominium.

The expenses must be listed by account and classification and they must be scheduled on a monthly and an annual basis.

Condominiums created after April 1, 1992 must allocate shares of common elements either by square footage of the unit vs. square footage of all units or on an equal basis for all units. Prior to that date, there was a third method that was a combination of the two.

Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property. They also include the costs of carrying out the powers and duties of the association as well as reasonable transportation services, insurance for directors and officers, security, and bad debt, etc.

The cost of a master antenna or cable franchise may be a common expense if the Declaration of Condominium allows, or if in the contract with the cable company.

When publishing the budget, a supplemental sheet explaining the basis for the line items can be helpful.

If there are limited common elements that are funded only by the units having use of them, a separate schedule must be provided for that limited common element.

## **Non-Recurring Expenses**

A separate budget must be made for the reserves for deferred maintenance and capital expenses.

The Condominium Act requires a reserve account for:

- all items of capital expenditure or deferred maintenance greater than \$10,000;
- roofing replacement;
- pavement resurfacing;
- building painting;
- any other item that the Board of Directors deems appropriate.

For HOAs, an association is deemed to have provided for reserve accounts if the reserve accounts have been initially established by the developer or if the membership of the association affirmatively elects to provide for reserves. If the reserve accounts are established by the developer, the budget must designate the components for which the reserve accounts may be used.

The amount to be collected for each reserve account, annually, is determined by using the estimated replacement cost divided by the estimated useful life of the item.

\$\$\$\$ estimated replacement cost	\$500,000 (roof replacement)
	» » Reserve \$25,000/yr.
Estimated useful life	20 years (life expectancy)

The reserve budget is an integral part of the year's fiscal budget. The reserve budget must be recalculated annually to allow for inflation, improvements, interest earned, etc. The association, by a majority vote of the members present at the meeting to approve the budget, or the annual owners' meeting, may vote to waive the collection of monies for reserves or reduce any amounts to be collected, if they so desire. This must be done each year if they do not want to collect the full amount for reserves. For condominiums, proxies relating to the waiving or reducing the funding of reserves or using existing reserve funds for purposes other than those for which the reserves were intended shall contain the following statement in capitalized, bold letters in a font size larger than any other used on the face of the proxy, "WAIVING OF RESERVES, IN WHOLE OR IN PART, OR ALLOWING ALTERNATIVE USES OF EXISTING RESERVES MAY RESULT IN UNIT OWNER LIABILITY FOR PAYMENT OF UNANTICIPATED SPECIAL ASSESSMENTS REGARDING THOSE ITEMS."

The reserves must be funded in the same frequency as assessments are due from the owners. Interest earned on the reserve funds must remain with the reserve fund. Reserve funds and operating funds must be calculated and tracked separately. They may be commingled for investment purposes only.

The Reserve Budget must contain the following information, regardless of whether funding of the reserves has been waived or not:

- Beginning balance of each reserve item
- Amount added during the year
- Amount expended during the year
- Ending balance of each reserve item
- How reserves were estimated, date of estimation, policy of interest earned, whether reserves were waived or not
- Info on developer reserve accounts, if applicable

Reserve funds should be used for the purposes stated in the budget. That is; roofing for roofing, paving for paving, etc. They should not be used for any other purposes without a vote of approval from the whole membership. In condominiums and cooperatives, a vote is required by law. The vote must be in advance of the expenditure of the funds.

## **ADOPTING THE BUDGET**

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Your documents will establish whether the budgets are adopted by the members as a whole or by the Board of Directors. Most state that the Board of Directors will set the budget for the coming year. In any case, the notice for the meeting at which the budget is to be approved must be given to all owners. They must be notified at least 14 days prior to the meeting. Notice must be by mail or personal delivery (requires a receipt for receiving the notice).

You can then certify (affidavit) that all were notified by mail or personal delivery. If the budget is to be approved by the Board of Directors, then the notice must give the time and place for the meeting and invite all owners to attend. The notice must include a copy of the proposed budget. Multi-phased condominiums must have separate budgets for each condominium and for the master association. A quorum is sufficient to consider the budget and a majority of the board members present is sufficient to approve the budget.

## **AMENDING THE BUDGET**

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If the budget exceeds 115% of the previous year's assessments, excluding reasonable reserves for repair or replacement, anticipated expenses which the Board does not expect to be incurred on a regular/annual basis, or betterments to the property, 10% of the voting members may petition the board to reconsider it. The petition must be received within 21 days of the adoption of the budget. The board must call a special meeting within 60 days to reconsider the budget. At least 14 days notice must be given to the membership before the meeting to reconsider the budget. At the meeting, there must be a quorum of the owners present in order to approve the revised budget. If a quorum does not approve the new budget or if a quorum is not present, the originally submitted and approved budget remains the budget.

## **ASSESSMENTS**

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The Board of Directors, in nearly all cases, is given the authority to approve the budget. The declaration will set forth the formula for allocating the share of expenses and the schedule for payments. Once the expenses are known for the coming year, and the income other than assessments is subtracted and any surplus is subtracted, then the remainder is the total assessments required to meet the budget. When the amount of assessments is determined for each unit, the Board of Directors must determine the payment schedule. In condominiums and cooperatives, the law requires that assessments be collected in advance and at least quarterly.

Under the condominium act, all owners must be assessed the same percentages as their ownership in the common elements. For cooperatives, the assessments are set forth in the documents. The percentage of ownership in the common elements is set by the developer at the time the community documents are recorded. Once assigned, it is a vested right, and cannot be changed or amended without the consent of all of the owners.

## **SPECIAL ASSESSMENTS**

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A need for a special assessment may arise when the expenses are more than anticipated, a reserve is more than anticipated, or the expense is earlier than anticipated. Unless the documents state otherwise, the Board of Directors can approve a special assessment. The Board must post a notice conspicuously and continuously for at least 14 days in advance of the meeting to consider a special assessment. They must also notify all owners at least 14 days in advance of the meeting to consider the special assessment and state the nature, estimated cost and description of the special assessment. The Board must establish specific due dates for the assessment or the assessment installments. The Board must also identify the date at which the assessment is delinquent. The payment procedures should be in a resolution or in the minutes of the Board meeting.

A good practice is to state the due date and the delinquent date in the notice sent to all of the members of the special assessment. Usually, the notice to consider a special assessment is mailed to all of the owners with an explanation for the need for the additional funds. The notice will state the time, date, and place of meeting. Once the special assessment is approved, a second notice is sent out to all of the owners stating that the special assessment has been approved and setting forth the dates that payment(s) is due and the date that they are considered delinquent. Technically, the reason for the special assessment does not have to be stated in the second notice as it was set forth in the original notice.

Any excess special assessment funds may be returned to the owners as well as applied to the next year's assessments or transferred to the reserves.

Prior to turnover of an HOA, the board controlled by the developer may not levy a special assessment unless approved by a majority of parcel owners other than the developer.

## **ASSESSMENT RESPONSIBILITY**

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Just like in a mortgage on your home, the property in a condominium serves as collateral for funds due. The owner is liable for all assessments coming due while he or she is owner of the unit. When a condominium/lot is sold, the buyer becomes liable, jointly and severally, with the seller for all unpaid assessments for common expenses prior to the sale.

Liability for assessments cannot be waived by waiver of the use or the enjoyment of either the unit or the common elements. If the documents so provide, and if an owner is delinquent, the assessments on that unit may be accelerated. Also, if the documents so provide, a delinquent owner can be denied the right to lease their unit.

If the documents provide, interest may be charged on delinquent assessments. If not stated otherwise, 18% may be charged. Also, a late fee of \$25.00 or 5% may be charged, whichever is greater, if the documents so provide.

## **RENTAL COLLECTIONS**

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If a unit or parcel is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the Association may make a written demand that the tenant pay to the Association the subsequent rental payments and continue to make such payments until all monetary obligations of the unit owner related to the unit have been paid in full. The tenant must pay the monetary obligation to the association until the Association has been paid in full and releases the tenant or the tenant discontinues tenancy of the unit. The Association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association. The Association shall, upon request, provide the tenant with written receipts for payments made. A tenant who acts in good faith in response to a written demand from an association is immune from any claim from the unit owner.

- If the tenant prepaid rent to the unit owner before receiving the written demand from the association, the tenant shall receive credit for the prepaid rent for the applicable period and must make any subsequent rental payments to the association to be credited against the monetary obligations of the unit owner to the association.
- The tenant is not liable for increases in the amount of the monetary obligations due unless the tenant is notified in writing of the increase at least 10 days before the date the rent is due. The tenant shall be given a credit against rents due to the parcel owner in the amount of assessments paid to the Association
- An Association may evict a tenant who fails to pay a monetary obligation.
- The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association.

## **LIENS/FORECLOSURES**

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A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. The term “previous” owner does not include an association that acquires title to a delinquent property through foreclosure or deed in lieu of foreclosure. This means the present parcel owner’s liability for unpaid assessments is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property. An association has a lien on the unit for all unpaid assessments and evidences its claim for a delinquent assessment by having the association attorney file a “claim of lien” with the clerk of the county court. A proper claim of lien must state the legal description and owner of the property, the name and address of the association, the amount and date when the assessment became due, and it must be signed by an officer or agent of the association with the formality of a deed prior to recording. A written notice at least 45 days for homeowner associations and 30 days for condominium and cooperative associations prior to filing a claim of lien must be given. This written notice must be sent via registered/certified mail, return receipt requested and by first-class mail to the address listed in the association records and to the parcel address.

The claim of lien is effective from the time of its recording for a period of one year for condominiums and coops and five years for HOAs and timeshares.

The board can foreclose on the lien in the same manner that one would on a mortgage. The board must give written notice of its intention to foreclose at least 30 days for condominiums and 45 days for homeowner associations in advance of filing the lawsuit. If this notice is not given, fees and costs cannot be recovered.

The first mortgage holder’s liability for past due assessments is limited to the lesser of one percent of the original mortgage amount or 12 months assessments. An association, or its successor or assignee, that acquires title to a unit/lot through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney’s fees and costs that came due before the association’s acquisition of title in favor of any other Association.

In the case of mortgage foreclosure, the association may request an order for the mortgagee to show cause why a final judgment should not be issued. This gives the association to get stalled bank foreclosures moving.

Once the delinquent unit owner brings the account current, a satisfaction of lien must be filed to clear the title records.

## **GUARANTEEING THE BUDGET**

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In a condominium or cooperative, the developer is controlled by specific statutes and is entitled to special exemptions from the payment of assessments **only** if they guarantee to each purchaser that common expenses will not be increased. The developer must pay the expenses incurred that are not covered by the unit owners' payments during the period that they guarantee the budget. The guarantee period must be stated in the documents and have a beginning and an ending date. The developer can not use any other income such as vending, amenities, start-up funds, interest, etc. to offset expenses. The guarantee must be authorized by the documents or by agreement with a majority of the owners. If the developer does not create a budget guarantee in the association documents, dues are collected on all developer owned units from the date of creation, or of certificate of occupancy, until the date the developer sells the unit.

## **CHAPTER 4 – APPENDIX 1**

### **TURNOVER REQUIREMENTS PER FS 718**

At the time that unit owners other than the developer elect a majority of the members of the board of administration of an association, the developer shall relinquish control of the association, and the unit owners shall accept control. Simultaneously, or for the purposes of paragraph (c) not more than 90 days thereafter, the developer shall deliver to the association, at the developer's expense, all property of the unit owners and of the association which is held or controlled by the developer, including, but not limited to, the following items, if applicable, as to each condominium operated by the association:

- (a) 1. The original or a photocopy of the recorded declaration of condominium and all amendments thereto. If a photocopy is provided, it shall be certified by affidavit of the developer or an officer or agent of the developer as being a complete copy of the actual recorded declaration.  
2. A certified copy of the articles of incorporation of the association or, if the association was created prior to the effective date of this act and it is not incorporated, copies of the documents creating the association.  
3. A copy of the bylaws.  
4. The minute books, including all minutes, and other books and records of the association, if any.  
5. Any house rules and regulations which have been promulgated.
- (b) Resignations of officers and members of the board of administration who are required to resign because the developer is required to relinquish control of the association.
- (c) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation, by an independent certified public accountant. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Florida Board of Accountancy, pursuant to chapter 473. The accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records to determine that the developer was charged and paid the proper amounts of assessments.
- (d) Association funds or control thereof.
- (e) All tangible personal property that is property of the association, which is represented by the developer to be part of the common elements or which is ostensibly part of the common elements, and an inventory of that property.
- (f) A copy of the plans and specifications utilized in the construction or remodeling of improvements and the supplying of equipment to the condominium and in the construction and installation of all mechanical components serving the improvements and the site with a certificate in affidavit form of the developer or the developer's agent or an architect or

engineer authorized to practice in this state that such plans and specifications represent, to the best of his or her knowledge and belief, the actual plans and specifications utilized in the construction and improvement of the condominium property and for the construction and installation of the mechanical components serving the improvements. If the condominium property has been declared a condominium more than 3 years after the completion of construction or remodeling of the improvements, the requirements of this paragraph do not apply.

(g) A list of the names and addresses, of which the developer had knowledge at any time in the development of the condominium, of all contractors, subcontractors, and suppliers utilized in the construction or remodeling of the improvements and in the landscaping of the condominium or association property.

(h) Insurance policies.

(i) Copies of any certificates of occupancy which may have been issued for the condominium property.

(j) Any other permits applicable to the condominium property which have been issued by governmental bodies and are in force or were issued within 1 year prior to the date the unit owners other than the developer take control of the association.

(k) All written warranties of the contractor, subcontractors, suppliers, and manufacturers, if any, that are still effective.

(l) A roster of unit owners and their addresses and telephone numbers, if known, as shown on the developer's records.

(m) Leases of the common elements and other leases to which the association is a party.

(n) Employment contracts or service contracts in which the association is one of the contracting parties or service contracts in which the association or the unit owners have an obligation or responsibility, directly or indirectly, to pay some or all of the fee or charge of the person or persons performing the service.

(o) All other contracts to which the association is a party.

(p) A report included in the official records, under seal of an architect or engineer authorized to practice in this state, attesting to required maintenance, useful life, and replacement costs of the following applicable common elements comprising a turnover inspection report:

1. Roof
2. Structure
3. Fireproofing and fire protection systems
4. Elevators
5. Heating and cooling systems
6. Plumbing
7. Electrical systems
8. Swimming pool or spa and equipment
9. Seawalls
10. Pavement and parking areas
11. Drainage systems
12. Painting
13. Irrigation systems

## **CHAPTER 4 – APPENDIX 2**

### **TURNOVER REQUIREMENTS PER FS 720**

At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

- a. All deeds to common property owned by the association.
- b. The original of the association's declarations of covenants and restrictions.
- c. A certified copy of the articles of incorporation of the association.
- d. A copy of the bylaws.
- e. The minute books, including all minutes.
- f. The books and records of the association.
- g. Policies, rules, and regulations, if any, which have been adopted.
- h. Resignations of directors who are required to resign because the developer is required to relinquish control of the association.
- i. The financial records of the association from the date of incorporation through the date of turnover.
- j. All association funds and control thereof.
- k. All tangible property of the association.
- l. A copy of all contracts which may be in force with the association as one of the parties.
- m. A list of the names and addresses and telephone numbers of all contractors, subcontractors, or others in the current employ of the association.
- n. Any and all insurance policies in effect.
- o. Any permits issued to the association by governmental entities.
- p. Any and all warranties in effect.
- q. A roster of current homeowners and their addresses and telephone numbers and section and lot numbers.
- r. Employment and service contracts in effect.
- s. All other contracts in effect to which the association is a party.
- t. The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine that the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2007.

## **CHAPTER 5**

## **FINANCIALS**

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# **FINANCIALS**

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Financial statements for condominiums and cooperatives shall prepared on the accrual basis using fund accounting.

Accrual accounting records revenue when earned or billed (as opposed to when received) and expense when incurred or acquired (as opposed to when paid).

Fund reporting is a form of financial reporting that separates the major areas of an organization's financial activities. For community associations these usually are the operating fund, replacement reserves fund, and any other major area of revenue and expense.

## **BALANCE SHEET**

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In accordance with fund accounting, a separate balance sheet should be used to reflect operating versus reserve funds. Each balance sheet reflects association assets, liabilities and fund balances. Assets will always equal Liabilities and Fund Balances.

### ***ASSETS***

Assets are anything owned that has monetary value. Association assets typically include:

- bank accounts
- petty cash
- investments
- assessments owed the association (accounts receivable)
- utility deposits
- prepaid expenses (insurance premiums)
- furniture, fixtures and equipment
- real property

### ***LIABILITIES***

A liability is that which is owed to another. Association liabilities typically include:

- invoices not yet paid (accounts payable)
- assessment fees received before their due date (unearned/prepaid assessments)
- long term debt
- deferred revenue
- reserve obligations

### ***FUND BALANCE***

On a balance sheet the total fund balance is the difference between the assets and liabilities. Also known as equity, it shows the worth of the association at a given date.

# **OPERATING INCOME & EXPENSE**

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Along with the balance sheet, the operating income and expense reports give the association a measure of the per month and year-to-date performance, typically compared to the budget.

## ***INCOME***

Income line items identify the monies earned. In an association, revenue sources typically include:

- regular assessment dues
- special assessments
- late fees, and other fees
- interest earned

Associations may also earn revenue from vending and rental activity.

## ***EXPENSES***

Expenses are the cost of goods and services used to operate and maintain the community association.

Expense line items called for in the condominium statute include:

- administration
- bad debt
- management fees
- maintenance
- rent for recreational and other commonly used facilities
- taxes on association property
- taxes upon leased areas
- insurance
- security provisions
- other expenses
- operating capital
- reserves
- fees payable to the Division

## **SURPLUS/LOSS**

### ***Excess Income over Expense - Surplus***

The amount of money left after deducting expenses from revenues is commonly called an operating/common surplus. Unit Owners have an undivided share in the common surplus. The rights to the common surplus remain in the association.

Any excess common surplus may be:

1. Applied to the next year's budget to reduce assessments;
2. Applied to reserves.

### ***Excess Expense over Income – Deficit/Loss***

The excess of expenses over revenues is called the operating deficit or loss for the given period and is usually indicated with a minus sign or parenthesis in a report.

### ***Variance***

Variance is the difference between two numbers. In an Income and Expense statement, the variance is the difference between the budged revenue or expense and the actual revenue or expense.

## **ACCOUNTS RECEIVABLE**

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### ***INDIVIDUAL UNIT ACCOUNTING***

The Board of Directors should keep a separate account for each unit of the condominium of the assessments due and collected. The accounts are a part of the permanent records of the condominium and should state the name and address of the owners of the unit, the amount of each assessment, the date it came due, the amounts paid and the balance which remains unpaid. This list should be filed by unit number not by owners name. A good practice is to use the same account for a unit and change the name of the owner as it sells to keep a running balance for the individual unit. Remember, that owners are jointly and severally liable for assessments due on a unit when ownership changes.

In condominiums and cooperatives the Board must be prepared to deliver a certificate stating the status of all assessments affecting a unit within 15 days after a request by an owner or mortgage holder. Any person including the mortgage holder or purchaser, but not the owner, may rely on the certificate and is protected by its content and may presume it to be accurate.

## **ANNUAL FINANCIAL REPORTS**

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The Board provides by mail or personal delivery each year a complete financial report of the actual receipts and expenditures of the association for the previous twelve months. The report will show the receipts by account and classification. A summary of all transactions in the reserve accounts will also be shown. The reserve report must show the starting balance for the year, the amount added, the amount spent, and the ending balance of each account.

Within 90 days after the end of the fiscal year or annually on the date provided in the bylaws, associations shall prepare and complete or contract for the preparation and completion of a financial report for the preceding year. Within 21 days after receiving but not more than 120 days after the end of the fiscal year, the association shall mail to each owner a copy of the report or a notice that a copy is available to all owners without charge.

All ancillary operations, not directly related to the operation of the condominium, must have separate accounting records. Examples are rental programs, golf courses, laundry rooms, vending machines, convenience markets, unit maintenance, etc.

## **AUDITED FINANCIAL STATEMENTS**

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An association with annual revenues less than \$150,000 or fewer than 50 parcels/units is required to prepare a report of cash receipts and expenditures. All other associations are required to complete a financial statement as listed below unless a majority of the members meet and waive the requirement. The waiving of this financial reporting requirement cannot be for more than three consecutive years.

Time shares must have an audit each year. A copy of the audit is forwarded to each officer and owners are advised that copies of the audit are available for inspection upon request.

The requirements are a compiled, reviewed, or audited statement depends upon the amount of the annual revenues.

<b>Compiled:</b>	\$150,000.00 to less than \$300,000.00
<b>Reviewed:</b>	\$300,000.00 to less than \$500,000.00
<b>Audited:</b>	\$500,000.00 or more

If the documents require a higher degree of auditing, the documents will prevail.

The developer, at transition, must provide an audit from inception to turnover at the developer's expense.

Fund accounting is required when the association has more than one fund. Operating and Reserves are two funds. Each fund must have its own statement. Operating Fund Financial Statements include:

- Accountants or Auditors report
- Balance Sheet
- Statement of Revenues and Expenses
- Statement of changes in fund balances
- Statement of cash flows
- Notes to financial statement

Reserve Fund Financial Statements include:

- Balance at beginning of the year for each account
- Amount added to each account during the year
- Amount expended from each account during the year
- Balance at end of the year for each amount
- Manner estimated, date of estimate, policy concerning interest, whether reserves were waived or not

## **INCOME TAX RETURNS**

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All community associations whether organized for profit or not-for-profit must file an annual income tax return with the Internal Revenue Service. Federal tax returns, or extensions, are due 75 days after the end of the fiscal year. Normally, this is March 15th. Associations should consult an accountant for advice as to the best reporting method. This is always good advice. When in doubt, consult an expert in that field.

The tax liability of the association may be reduced if the association adopts a “rollover resolution” at the annual membership meeting. The manager is urged to contact the association’s accountant for help with the wording of the resolution.

## **REAL ESTATE TAXES**

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An association holding title to real property may get an annual real estate bill from the county tax collector and is liable for this tax. In condominiums the real estate taxes are assessed against the individual owners and are not assessed against the association as a whole. In a condominium the association will not be responsible for real estate taxes, unless it has purchased additional real property in the association’s name. Remember, in a condominium that the association owns nothing. The owners own all the property.

## **ANNUAL CORPORATE REPORT**

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Each community association must file an annual report with the Florida Department of State between January 1 and May 1 of each year. This is the annual corporate report. It must state the corporate name, the address of the principal office of the association, the corporate federal tax identification number and name and address of each officer and director as of December 31 of the immediate year prior. A check must accompany the report in the amount of \$61.25. The name of the registered agent is also on this report and can be changed at this time or any other time that the associations desires to during the year. If the report is not filed by May 1, the association technically ceases to exist and cannot sue or take legal action in the courts and cannot be awarded attorney or court costs in any legal action. They can however be sued.

## **ANNUAL FEES**

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All condominiums and cooperatives must file an annual report by January 1<sup>st</sup> with the Division of Florida Condominiums, Timeshares, and Mobile Homes for the purpose of remitting and annual fee required by the statutes. This fee is \$4.00 for each unit. If the fee is not paid by March 1, then a 10% penalty can be assessed and the association is prohibited from maintaining or defending any action in the courts.

When paying the annual fee the association must provide a permanent mailing address. A post office box is acceptable. A management company address for the association address is not acceptable.

A time share must remit \$2.00 for each seven days of annual use availability in each time share unit within the time share plan.

## **HOA REPORTING TO DBPR**

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Every CAM, or the association when there is no CAM, shall report to DBPR by November 22, 2013, the name of the association, the FEIN number, the mailing and physical address, the number of parcels, and the total amount of revenues and expenses from the annual budget of the association. This reporting requirement will expire on July 1, 2016 unless reenacted by the Legislature.

## **CHAPTER 6**

# **RISK MANAGEMENT**

## RISK MANAGEMENT

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Protecting the association from loss is essential to good management. Prior to purchasing insurance to protect the association from financial loss, a survey of risk exposure should be made to establish needs.

1. Identify exposures to loss
  - a. Property
  - b. Liability
  - c. Loss of income
  - d. Personnel loss
2. Examine alternative techniques
3. Select the best techniques
4. Implement
5. Monitor

**LOSS FREQUENCY** Consider the types of exposure in reference to loss frequency. If the event is likely to occur often, it is probably not insurable. Frequent, low cost risks should be controlled by other methods.

**LOSS SEVERITY** The expected dollar loss of a financially adverse event. Each association has different levels of severity it deems acceptable. An uninsured catastrophic loss could put the association out of business. Associations located in catastrophe-prone areas should develop “worst case” scenarios similar to those of profit businesses.

## RISK CONTROL

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Five techniques of risk control:

- Exposure avoidance
- Loss Prevention
- Loss reduction
- Segregation of exposures
- Contractual transfer for risk control

### ***Exposure Avoidance***

Eliminates the chance of loss by either abandoning the activity - i.e. closing the swimming pool - or never undertaking an activity - refusing to construct the pool. For most associations, exposure avoidance is not feasible.

### ***Loss Prevention***

Activities designed to reduce the frequency of a particular loss or likelihood of loss.

- New employee training programs
- Use of back support belt, safety glasses, or gloves where determined necessary
- Safety inspections of the property
- Review of a newsletter before it is distributed

In the above examples, exposure has not been avoided, but the number of possible incidents has been reduced. Employee safety programs are the most important loss prevention techniques for reducing the number of on-site work injuries.

### ***Loss Reduction***

Loss reduction activities are designed to reduce the severity of a loss. An emergency evacuation plan implemented just prior to or during a loss is an excellent example. It should also include the protection of undamaged property after a loss.

Associations faced with severe weather threats, such as hurricanes, usually have sophisticated loss reduction programs. These programs are often referred to as disaster plans. Each property manager creates a Hurricane Procedure customized to the property, and reviews it annually with staff to assure that all employees know their role before, during, and after a hurricane.

The installation of sprinklers is another example of loss reduction. The exposure to fire has not been avoided, and the frequency of fire losses has not been reduced. The extent of destruction, however, has been reduced. No other loss control method has the dramatic impact of sprinkler installation. The National Fire Protection Association has no records of a fire killing more than two people in a building with fully equipped sprinkler systems.

### ***Segregation of Exposures***

- Separation - Dispersal of an activity or asset over several locations. For example, the use of several banks or storage facilities.
- Duplication - The use of back up techniques such as the daily storage of computer data or the inventory to maintain equipment component spare parts.

### ***Contractual transfer for risk control***

Instead of an association bearing the legal and financial responsibility, the entity to which the transfer is made now holds the responsibility. For instance, the association transfers the responsibility for landscaping and grounds pesticides use to a landscaping company by contract when engaging a professional outside contractor to do that work.

## RISK FINANCING

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**RISK RETENTION** Sometimes referred to as self insurance.

1. Current expensing of loss - Every association utilizes this method for small losses and unexpected expenses. It places the cost of a loss in the current year's expenses. Examples are losses below the insurance deductible, the insurance deductible for a covered loss, or a small uninsured loss.
2. Use of reserve funding to expense a loss - Repair or replacement of common elements which improve the value of the structure may be expensed to a line item designated for the maintenance of such capital items. Due to the high windstorm deductibles prevalent in coastal Florida, some associations may choose to create a reserve fund specifically for insurance deductible expenses which the association would have to cover prior to insurance coverage for a wind loss.
3. Borrowing for losses is considered a form of retention because the debt has to be repaid out of association income, and represents a depletion of association financial resources.

**RISK TRANSFER** Contractual transfer for risk financing. Unlike contractual transfer for risk control, which transfers both legal and financial responsibility, this type of transfer involves a transferee who only promises to assume certain financial obligations.

The most common non-insurance transfer of this type is an indemnification and a hold harmless agreement, often found in formal contracts between the associations and contractors. Transfer to a commercial insurer is the most common risk financing technique. The board of directors is charged by most association documents to buy sufficient insurance to cover the adverse financial consequences of a given exposure to loss.

## INVESTING ASSOCIATION FUNDS

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When investing the association's funds, the board must be aware at all times that they have a fiduciary duty to the members of the association. They must keep in mind the three basic requirements for investing the association's moneys.

**SAFETY**

**LIQUIDITY**

**RETURN**

Above all safety is the most important, then liquidity, then return. Sure the board must try to get the greatest return on the money that is possible, but at all times safety is the most important. The money must be able to be used when the time comes so liquidity is important but still second to safety.

Remember, the higher the return usually means the riskier the investment.

## **CERTIFICATES OF INSURANCE**

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The certificate of insurance must state the name of the insured, the name of the insurance company, the type of coverage and the amount of coverage. To protect the association from claims, a certificate should be required to demonstrate that each company allowed to do work on the property does maintain adequate general liability and workers compensation insurance.

Unit mortgage holders routinely require the condominium association to furnish a certificate of insurance to demonstrate that adequate property insurance is being maintained in the name of the condominium association.

## **CLAIMS ADMINISTRATION**

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**Reporting Requirements** - Every insurance contract has its own requirements for filing claims. These requirements must be adhered to, or coverage could either be voided or become voidable. Normal steps include:

- Protect life and property from further damage.
- Always keep detailed and accurate records. Take pictures if possible, and have any witnesses write down an account of what happened as soon as possible.
- Tell the truth. Both insurer and insured are bound by principles of "good faith"

**MONITORING THE CLAIMS PROCESS** Property losses are reported with few qualms. There is coverage or there isn't, and there is usually no doubt there has been a loss. Liability claims present special difficulties. It is sometimes difficult to determine the seriousness of the accident, whether there was negligence, and whether the association is responsible.

Claims may require the filing of formal proofs of loss. These formal documents hinge on accurate record keeping and are like sworn statements.

Insurance claims are usually settled with the assistance of a claims adjuster. There are three types of adjusters:

- Large insurers often use employees of the insurance company, whose costs are borne by the insurer.
- Independent adjusters are independent contractors employed by insurance companies to help settle losses, either when all employee adjusters are busy or when the loss is technical in nature.
- The public adjuster represents the insured and is not compensated by the insurer. They must be compensated by the insured (the association.) A public adjuster's fee is typically a percentage of the settlement. A public adjuster is typically called in when the claim is complex, or is being contested.

## **CHAPTER 7**

# **INSURANCE**

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# **INSURANCE**

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The Board of Directors is responsible for protecting the assets of the association. They must consider the insurable interest of the association. They should:

- Review the documents
- Review any state or local statutes
- Use prudent business judgment
- Review any lending institution requirements

Once the insurable risks are defined, they need to seek the advice of an expert, an insurance agent who deals in condominium insurance in the State of Florida.

**OFFICIAL RECORDS** Insurance policies are part of the official records of the association and must be available for inspection by association members. Members may make copies. A reasonable charge may be made for copies.

**DEPARTMENT OF FINANCIAL SERVICES** regulates insurance companies and their policies in the State of Florida.

**HOMEOWNERS POLICY (HO-6)** is the individual owner's policy which protects the personal property of the owner and liability for occupants while in the individual unit. It may also cover living expenses while the unit is uninhabitable. It may also provide special loss coverage to provide for losses not covered by the association's policies, such as special assessments for insurance shortfalls. Policies for condominiums must contain a provision stating that coverage afforded by such policy is excess coverage over the amount recoverable under any other policy covering the same property. These policies must also include special assessment coverage of no less than \$2,000 per occurrence with a deductible of no more than \$250 per direct property loss.

**RESPONSIBILITIES** Unit owners are responsible for the cost of reconstruction of any portions of the condominium property for which he or she is required to carry property insurance or for which he or she is responsible for per the documents. If the association undertakes this reconstruction, the costs are chargeable to the owner and enforceable as an assessment. In the absence of an insurable event, the association OR the unit owners shall be responsible for the reconstruction, repair, or replacement, as determined by the provisions of the declaration or bylaws.

**DEDUCTIBLES** are the amount paid by either the owner or the association for losses before the insurance company begins to pay for losses. Deductibles may be paid from the reserves or by special assessment if necessary. The association with large deductibles might consider establishing a "reserve for insurance" to cover deductibles. The board has to seriously consider whether to increase the deductible in order to decrease the premium.

Windstorm and Hail deductibles are usually high in order to make the premiums reasonable. Windstorm deductibles are usually two to ten percent. This percentage is the value of the insured property not the loss. For example, for a \$1,000,000 building with a 3% deductible, the deductible would be \$30,000 before any claim is paid out.

**HANDLING INSURANCE CLAIMS** It is advisable to take pictures of the area of work on major contracts prior to the work commencing. If a claim is contemplated, contact your insurance agent and acquaint him with the facts as you know them at that time. Take steps to prevent further damage and take pictures of the damage. If damages are substantial, contact you attorney. Seek the advice of experts in the field.

**INSURANCE APPRAISALS** An insurance appraisal is a professional study that itemizes the costs to reconstruct a building or structure. These reports are used to determine the amount of insurance required. These reports are not to be confused with property value appraisals which would include a valuation for location, land, view, etc. Many companies provide these reports at reasonable fees. Citizens insurance requires a current appraisal before it will issue a policy and then one every twelve months. Condominiums are required to have an insurance appraisal every 36 months.

## **TYPES OF PROPERTY INSURANCE**

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**ASSOCIATION FIRE AND CASUALTY** covers common property. In Florida condominiums and cooperatives, it covers all portions of the condominium property as originally installed including any material alterations approved by the owners. It does not include personal property of the owners in their units. The amount of coverage must be based on the "replacement cost" per the insurance appraisal.

Every hazard insurance policy for a condominium building must provide coverage for:

- a. All portions of the condominium property located outside the units;
- b. Property inside the units as such property was initially installed;
- c. All portions of the condominium property for which the declaration of condominium requires coverage by the association;
- d. All policies written after January 1, 2009 must include coverage for air conditioning and heating equipment.

Excluded in the above coverage are:

- a. all floor, wall, and ceiling coverings;
- b. electric fixtures, appliances;
- c. water heaters, water filters;
- d. built-in cabinets and countertops;
- e. window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components.

### **TYPES OF COVERAGE - NAMED AND ALL RISK**

The “named peril” covers all risks specifically named in the policy: fire, theft, etc. Occurrences not specified or named are not covered. The two types of named peril policies are known as “Basic Perils” and “Broad Perils”. The “all risk” covers anything not specifically excluded by the policy. The “all risk” policy form is known as “Special Perils”. Most policies in the state of Florida exclude flood, and many coastal community policies also exclude wind. When excluded, these can be purchased separately.

**EXCLUSIONS** are those risks specifically not covered in policies. Usual exclusions are flood, earthquake, nuclear damage, war, intentional acts, neglect, and vermin. Coverage for some excluded items is available under separate policies (such as earthquake and flood), but may not be available for others (such as war and intentional acts).

**REPLACEMENT COST** is called for in many association documents. The board must insure the property for the total cost to replace without consideration for depreciation and at current or predicted future costs.

## **OTHER PROPERTY COVERAGES**

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**FLOOD INSURANCE** is usually obtained from the National Flood Insurance Program. To qualify, the municipality or county must be accepted in the program. Associations and individual owners may then obtain flood insurance through their agents. Because the flood program is a nationally administered program, it does not comply with the Florida Condominium law and the flood insurance policy provides coverage on unit wall coverings, built-in cabinets, and appliances.

**WINDSTORM INSURANCE** is usually obtained through Citizens Property Insurance Corporation. It provides windstorm and hail coverage to eligible areas of the state. As a state administered program, it will follow the parameters established in the condominium statute in providing coverage, unless the association documents prevail. Associations that have more than 25 percent transient rentals are not eligible for coverage by Citizens. A transient rental is any unit that rents for less than 30 days more than three times a year.

**ORDINANCE OR BUILDING LAW** Following an insured loss to property, this coverage pays for construction expenses incurred because of building laws. Coverages included are increased cost of construction and code compliance, increased cost of demolition, and loss of value.

## **LIABILITY COVERAGE**

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**LIABILITY COVERAGE** protects against losses which occur on the common property, or injury held to be caused by the association.

A typical association policy provides a \$1,000,000 per occurrence coverage for the following:

- Advertising injury - Liability protection for allegations of libel, slander, misappropriation of another's advertising ideas, and infringement of copyright, title or slogan.
- Personal Injury - Liability for injury to reputation that does not involve written or published statements.
- Bodily Injury - This is the so-called "slip and fall" protection. Provides coverage for physical injury, sickness, or disease.
- Property Damage - Liability for damage to someone else's property - or for the loss of use of that property.

In providing these coverages, it also covers costs of defending against a lawsuit. The association policy also has an aggregate coverage level, usually one million or two million. Once the aggregate level of compensation for claims has been reached in a given policy year, the insurance is exhausted and no further coverage is available.

***EXCLUSIONS - Generally this includes such items as liability for cars, boats, and aircraft; liability for dispensing alcoholic beverages; injuries to employees, damage to property in the care of the association; demolition operations, etc.***

***DIRECTORS AND OFFICERS INSURANCE*** - Provides liability coverage for wrongful acts by the association, the board, officers, and certain other volunteers, such as committee members. Coverage is typically written for \$1,000,000 and above. D&O coverage does not cover fraud, ignorance of the law or lack of due caution.

The Board of Directors has a fiduciary relationship with the members of the homeowners association. They must act in good faith and in the best interest of the members. When acting in the scope of their authority, they must exercise due care and diligence. Board members must give proper time and effort to their position and cannot be excused from their improper action on grounds of ignorance or inexperience. Officers must avoid contact which will result in personal or private gain from their position.

Wrongful acts – Negligent acts, omissions or breaches of duty, or errors relating to the operation of the association.

There are two types of D & O insurance. Claims Made and Occurrence. Claims Made covers any claim made while the insurance is in effect. Occurrence covers action that occurs only when the policy is in effect.

No officer or director may solicit or acquire anything of value from any vendors or agents of other companies or organizations that could in any way be considered a gift or bribe for soliciting business or favors.

### ***FIDELITY BONDING***

Provides coverage for loss of association funds or property from theft. All persons who control or disburse funds of the association plus the president, secretary and the treasurer to be bonded at the association's expense. The amount of the bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time. HOAs may waive this requirement annually by a majority of the voting interests at a properly called meeting of the association. Associations should also consider adding coverage for computer fraud and funds transfer by third parties.

### ***OTHER LIABILITY COVERAGE***

The association can purchase riders or additional polices for:

- Umbrella Policies - A policy which provides excess liability protection over the existing liability policies purchased by the association. The umbrella policy is only used when other insurance is exhausted, and increases the general aggregate limit by the amounts purchased, typically in one million increments. Umbrella coverage is usually less expensive than purchasing like amounts on the liability or D&O policies.
- Employment Practices Liability - Employee claims against an employer for such things as wrongful discharge and sexual harassment and sexual discrimination.

In order to properly evaluate all insurance coverage decisions, seek the advice of your insurance agent and your attorney. The board of directors, and the manager, must take all steps necessary to protect the assets of the association.

***SUBROGATION*** is the right of an insurer to collect from a third party, usually the owner.

***WIND MITIGATION:*** A wind mitigation inspection should be considered for all condominiums as well as buildings belonging to an HOA. Insurance credits are available based on the construction of the building. The inspection should be conducted by a licensed contractor or engineer or by a State-approved entity.

## WORKMAN'S COMPENSATION INSURANCE

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Employers can comply with the law:

- By obtaining worker's compensation insurance through an insurance agency of their choice. Notice of compliance must be posted in a conspicuous place on the property.
- By qualifying as a self-insurer through the division. They must fulfill the required financial bonding and show a net worth of at least \$250,000.
- By joining a self-insurers fund.

Students, part time employees and family members count as employees. Owners and partners are not counted as employees. They must work full time and give notice to the division of worker's compensation and they may elect to be covered under the policy.

Corporate officers who perform services for payment, either full or part time are considered employees. They may be exempt by giving notice to the division of worker's compensation.

Worker Compensation Coverage for non-employees - Protects the association from claims against the association by individuals not covered under standard worker comp coverages.

Workers compensation should be recommended for all condo associations whether they have employees or not. Florida law requires workers compensation coverage if the association employs 4 or more employees. Worker compensation provides coverage – both medical and disability – for an employee who sustains a job-related injury. Associations should also consider volunteer coverage endorsement if there is substantial volunteer labor provided by association members.

Casual employees are those whose work is completed in less than 10 days and total labor cost is under \$100. This type of employee is generally not included.

General contractors are liable for payment of compensation to all subcontractors. They are not liable to employees of the subcontractor, unless coverage is specifically provided as an endorsement to the policy.

Penalties for not complying with the required insurance:

- May be fined \$100 per day for each day not in compliance. Could be assessed a penalty of up to twice the amount it should have paid for coverage for up to three years based on payroll. The minimum fine is \$1,000. May be forced to stop conducting business.
- Injured employee or their legal representative in case of death, may sue the employer.
- May be required to pay compensation if injured employee (or legal representative) elects to claim compensation instead of suing.

If a minor is injured while employer is in violation of any provision of the child labor law, the employer could be liable for double compensation.

A report of injury must be filed with employer's insurance company and with the division of worker's compensation within 7 days of learning of the injury, even if the employee does not lose time from work. The penalty for failure to report is the employer is subject to a civil penalty not to exceed \$100 for each failure or refusal.

Compensation is determined by applying a hazard rate (set by the state insurance commission, according to the type of business insured) to the amount of the employer's annual payroll. Employees cannot be assessed for any part of the premium.

Injuries covered are accidental injuries and occupational diseases or infections that result from such injuries or death. If the injury was primarily caused by intoxication of the employee, or by their willful intention to injure or kill himself or another, no compensation will be paid. If an employee refuses to wear a safety device, or failed to follow a safety rule, compensation may be reduced by 25%.

Workers Compensation will not be increased if a handicapped worker is injured. If the employer is aware of their handicap at the time of the injury, there is a special disability fund which will pay the additional cost created by the disabilities.

Employers are responsible for medical care, medicines, crutches, artificial limbs and other apparatus.

If an employer fails to provide medical care, the injured employee (with the approval of the division of worker's compensation) may secure treatment at the expense of the employer.

Compensation is paid after the first 7 days of disability. If the disability exceeds 14 days, compensation is then allowed from the beginning of the disability. Medical benefits are allowed from the time of the injury. The first installment of compensation is due on the 14th day after the employer learns of the injury or death and payments may be paid either weekly or bi-weekly thereafter.

If payments are not made within 14 days after they are due, there shall be added to such installment an amount equal to 10% thereof, unless the employer has filed notice to contest the right to compensation, or unless the delay is excused by the division of worker's compensation on the ground that it was due to conditions over which the employer had no control.

## **CHAPTER 8**

**PROPERTY MAINTENANCE**

**STATUTES AND CODES**

## **CHAPTER 493 - SECURITY GUARDS**

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Any security officers hired through a security agency must have a Class D license as well as the security agency. A board should be assured that any security agency that they are considering for a contract has the proper licenses. Copies of the licenses should be attached to any contract proposal.

Associations that hire unarmed guards as employees of the association must be sure that the guards are registered with the State of Florida. Licensure is not required. Registration is required. This class of guards is known as proprietary security guards. Licensed security guards and registered proprietary officers are not law enforcement officers and do not have police powers regarding arrest or use of force. Licensed security guards must be in uniform while performing their duties and must have at least one patch on their uniform that identifies the licensed agency for which they work. They must also have an identification card in their possession. Only security officers with both Class D and G licenses may carry firearms.

The Department of Agriculture and Consumer Services regulates the security profession and has authority over both licensed and unlicensed persons and business engaged in private security activities.

## **CHAPTER 509 – PUBLIC LODGING**

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Community Associations fall under Chapter 509 if they hold themselves out to the public as a **transitory, for profit**, sleeping or housekeeping operation. Any business that advertises or lets it be known that guests will be accommodated for a period of less than 30 days and be provided sleeping and/or housekeeping units comes under the statute and must be licensed. A condominium association which owns four or less vacation rentals or timeshare units does not fall under Chapter 509. The Division of Hotels and Restaurants of DBPR must inspect each licensed public lodging establishment at least biannually, except for transient and nontransient apartments, which shall be inspected annually.

The operator of a public lodging establishment may remove any guest for controlled substance possession, intoxication, lewd behavior, brawling, or disturbing the peace.

## **CHAPTER 399 - ELEVATORS**

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Florida statute 399 pertains to elevators. When you have an elevator in Florida then you must comply with the codes. The elevator owner is responsible for the safe operation, proper maintenance, and inspection and correction of code deficiencies of the elevator. The responsibilities of the elevator owner may be assigned by lease. A statement verifying the existence and performance of each service maintenance contract must be filed at least annually with the division. DBPR will adapt a fee schedule for renewal of certificates of operation. This fee goes into the Hotel and Restaurant Trust fund. If there is a change in

maintenance companies then the bureau must be notified of the change at least 30 days prior to the date of the change.

The Bureau of Elevator Inspection works for the Division of Hotels and Restaurants, which is a part of the Department of Business and Professional Regulation. All elevators must be inspected annually by a certified elevator inspector. The bureau will determine if your elevator is safe and if it is being maintained correctly.

Your elevator must be ready for the handicapped. It must have a support rail on at least one wall and no rough edges.

The certificate of operation must be posted in a conspicuous location on the elevator and must be framed with a transparent cover. The certificate of operation must state no smoking. You may see the question on the test - what is the one thing that all elevators have in common. And the answer may well be in some format or other that the words "no smoking" appear in the elevator.

The Division has the authority to suspend the operation of an elevator for safety reasons. If you have an accident in your elevator and someone is hurt or killed, you must file a report of that accident within five days on their form. The fine for not reporting is up to \$1000.

Each building of six stories or more in height must be keyed to operate in fire emergency situations with one master key. This requirement has been delayed until replacement/major modifications.

Per FS718, each condominium building that is at least 75 feet high must have at least one public elevator capable of operating on an alternative power source for emergency purposes. This power source must be made available for a specified number of hours each day over a 5-day period following a natural or manmade disaster or other emergency that disrupts power. The association can "opt out" of this requirement with an affirmative vote of the majority of the unit owners.

## **CHAPTER 482 - PEST CONTROL**

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The Department of Agriculture and Consumer Services also controls pest control. If you plan to do it in-house, it is okay to spray your grounds yourself as long as you do not fumigate. It is also all right for the owner of a unit to spray their own unit. But, if it is someone other than the owner, that person must be licensed by the state. Association employees may perform pest control in the common areas but not in an owner's unit.

If you plan to fumigate then you must have a license whether it be the common elements or in a private unit. Fumigation is to bomb or to enclose and then gas or what is usual is to tent or seal off and totally go after a unit or a building. If you are going to do more than spray your grounds for weeds, you need to get a licensed, insured pest control company.

## **CHAPTER 514/FAC 64E-9 - SWIMMING POOLS**

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The Department of Health, Division of Environmental Health and the County Health Departments oversee swimming pools in the State of Florida. All public pools come under their domain. A public pool is one in which admission is gained through the fact of being at an establishment whether or not a fee is charged. A condominium or a co-op pool available to guests at that condo or co-op falls under the DOH.

The DOH administers the program through the County Department of Public Health. An annual license is required, with the fee based upon the size of the pool in gallons. The reason for the licensing is to ensure safe and sanitary pools. You can have an exemption to the licensing if the pool serves no more than 32 units and is not a public pool. If there are less than 32 units and it is a non-rental project, you can apply for an exemption. The exemption is not automatic, the co-op or condo must apply for the exemption. The exemption does not exclude water quality.

All pools initially must submit plans to the department before they will issue a building permit. The pool will be inspected by the department, and then an operating permit will be issued. Licenses for public pools must be renewed each year and will be inspected before the renewal permit is issued. They will be inspected periodically during the year. The renewal will be prior to July 1 and the fee must be paid no later than June 15 each year. The quality of the water will be monitored closely from the water supplied by the local utility to the maintenance of the water quality by the association.

All pools must be lighted if they are to be used at night (defined as one half hour before sunset to one half hour after sunrise) and the lighting must provide adequate light so that all portions of the bottom are visible without glare.

In a minimum of 1" letters, the following rules must be posted and legible from the pool deck: The pool deck is defined as within four feet of the pool curb.

- a. No food, drink, glass or animals in pool or pool deck.
- b. No glass or animals in fenced pool area (or 50 feet from unfenced pool).
- c. Bathing Load: \_\_\_\_\_ persons.
- d. Pool hours: \_\_\_\_\_ a.m. to \_\_\_\_\_ p.m.
- e. Shower before entering
- f. For new or modified pools submitted for plan approval application on or after the effective date of this rule, their posted sign shall add: Do not swallow the pool water.

Pools with heaters shall have a maximum water temperature of 104 degrees F. Pools of 200 square feet or greater shall have "NO DIVING", in four inch letters included on the rules.

Showers must be readily available and all bathers must shower before entering the pool. The bathing load must be posted as well as the hours of operation. If attendants are present, they must be first aid and lifesaving qualified.

You must have at least one shepherds hook with a 16 foot pole and at least one 18 inch lifesaving ring with sufficient rope to reach all of the pool area. If the pool is over 50 feet in length, you must have two hooks and two rings, one each on both long sides of the pool. Safety equipment shall be mounted in a conspicuous place and be readily available for use.

The pH of the pool water must be maintained at 7.2 to 7.8. The free active chlorine must be at least one part per million.

Each pool/spa drain grate/cover must restrict the velocity of water through the grate/cover to no greater than 1.5 feet per second.

Pool covers and solar blankets shall only be used during times when the pool is closed. Unless the pool cover or solar blanket is secured around the entire perimeter and is designed to support a live load of an adult person, the pool area shall be inaccessible to unauthorized individuals during the times of cover or blanket use.

## **CHAPTER 715 - TOWING VEHICLES**

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The owner or lessee of real property, or any person authorized by the owner or lessee, which person may be the designated representative of the condominium association if the real property is a condominium, may cause any vehicle or vessel parked on such property without his permission to be removed by a person regularly engaged in the business of towing vehicles or vessels, without liability for the costs of removal, transportation, or storage or damages caused by such removal, transportation, or storage.

Prior to towing or removing any vehicle or vessel from private property, the following notice requirements must be met:

- a. The notice must be prominently placed at each driveway access or curb cut allowing vehicular access to the property, within 5 feet from the public right-of-way. If there are no curbs or access barriers, the signs must be placed not less than one sign for each 25 feet of frontage.
- b. The notice must clearly indicate, in not less than 2-inch high, light-reflective letters on a contrasting background that unauthorized vehicles will be towed away at the owner's expense. The words "tow-away-zone" must be included on the sign in not less than 4-inch letters.
- c. The notice must provide the name and current telephone number of the person or firm towing the vehicles.
- d. The sign structure containing the required notices must be permanently installed with the words "tow-away-zone" not less than 3 feet and not more than 6 feet above ground level and must be continuously maintained on the property for not less than 24 hours prior to the towing or removal of vehicles.

Any towed vehicle must be stored at a site within 10 miles in any county of more than 500,000 and within 15 miles in any county of less than 500,000 population. A person in the process of towing a vehicle must stop when a person seeks the return of the vehicle. The

vehicle must be returned upon payment of a reasonable service fee of not more than one-half of the posted rate for the towing. A receipt must be given to the person redeeming the vehicle.

## **PROPERTY MAINTENANCE REQUIREMENTS**

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The association is responsible for maintaining the common property of the association. The common property is defined in the documents. The Board of Directors is responsible for the care and the maintenance of the property for the association. When the board fails to properly perform their duties, an individual owner has the right to act against the board for failure to do so. If an individual owner intentionally or negligently damages the common property, the association has the right to bring an action against the owner to recover damages.

## **CONTRACT AND BIDDING REQUIREMENTS**

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Contracts or transactions between an association and any of its directors or any corporation or entity in which a director has an interest, must be approved by two-thirds of the directors of the association and entered into the minutes of the meeting. At the next owner meeting, this contract must be disclosed to the members who may cancel the contract with a majority vote.

Condos and Co-ops with more than 10 units must obtain competitive bids if the contract exceeds 5% of the association's total annual budget including reserves. Condos or co-ops with 10 or less units may opt out this requirement if approved by two-thirds of the owners. The association is not required to accept the lowest bid.

If a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by an HOA that exceeds 10 percent of the budget, including reserves, the HOA must get competitive bids. However, the HOA is not required to accept the lowest bid.

Competitive bids are not required if the business entity with which the Association desires to enter into a contract is the only source of supply within the county serving the association.

Contracts with employees of the association and contracts with attorneys, accountants, architects, community association managers, timeshare management firm, engineers, or landscaping architecture services are not subject to the bidding process.

Also, if there is an emergency or if there is only one supplier available for the needed contract, then bidding is not required.

All contracts for services and all contracts for purchase, lease or rental of materials for more than one year must be in writing. Any management or maintenance contract with a condominium association must specifically identify the services, the obligations and the

responsibilities of management. The agreement must specify the cost of each service, the frequency to be performed, and the number of persons who will be employed to provide the service. If there is any relationship between the developer and management, then that relationship must be disclosed.

Any contract made by the developer prior to transition must be fair and reasonable. Any contract made by the developer prior to transition may be canceled by 75% of the voting interests of the association.

The Board of Directors should review the documents prior to entering into a contract. The documents usually give the association the right to enter into contracts and the documents usually define the parameters of the contracts.

**BID SPECIFICATIONS** Once the association decides to contract for specific services, a written set of specifications should be drawn up. These specifications should clearly specify what will be done, by whom, when, where, time limitations, materials to be used, and how payment will be made.

**CERTIFICATE OF INSURANCE** Certificates of insurance should be provided directly from the contractor's insurance company. The dates of coverage and the level of general liability and workers compensation coverage should be evaluated in order to establish that the contractor is carrying insurance as called for in the bid specifications.

**CONTRACTS** may be for service, specific repair needs, or preventive maintenance. Many contracts require technical and professional assistance from individuals such as architects, lawyers or engineer and consulting firms. The contract should contain the full legal names of all parties to the agreement, with names and addresses included. The contract will set forth all terms and requirements of both parties, with complete and thorough specification that outline exactly what is to be done. It may include a legal description in addition to street address, and should contain insurance responsibilities and liabilities of both parties. Basic terms for change orders should be established and understood.

**PERFORMANCE BONDS** should be considered on construction contracts. A performance bond will pay for any additional work to finish the job, should a contractor fail to complete in accordance with the terms of the contract. A "payment on labor and materials bond" assures that a contractor will pay for labor and materials used in the performance of the job and protects the association from mechanics liens.

**STATE AND LOCAL LICENSES** Specialty licenses are required for most contractors involved in construction. Specialty licensees must pay a fee to be state registered, and meet the county occupational board requirements. They provide the local county with their workers comp and general insurance information, and can perform work as subcontractors without a general or building contractor's license. Buildings contractors, general contractors, residential contractors, roofers, and underground utility contractors must be registered, and are required to be state certified. They must pass state testing to determine competence. A general contractor has unlimited contracting ability. A residential contractor can build two-

story, residential structures only. A building contractor can build structures up to three stories, and some commercial. Occupational licenses may be required by local municipalities.

**BUILDING PERMITS** are issued by the county in which the work is being done. In order to pull a building permit the contractor must hold a license, unless the work is being performed by the owner of the property. The association should be familiar with the local requirements and be sure to pull a permit when one is required. In Walton County a permit is required on any construction over 400 square feet in size. In the city of Destin any construction over \$100 in value may require a permit, and involve several hearings. Knowing the local requirements can allow the manager to give the board of directors guidance on the time frame necessary to comply with the law.

**CONSTRUCTION LIEN LAW** State statute 713, the Construction Lien Law, provides a method by which a contractor, subcontractor, laborer, building material supplier, architect, landscape architect, interior designer, engineer, or land surveyor may claim a lien on real property on which they have done work or to which they have furnished materials. 713.13 requires that local government offices issuing permits provide information stating that the right, title and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law.

When a contractor performs work on or supplies materials for a condominium or cooperative, etc., as a sub-contractor or supplier - and the contractor does not pay him for their work or materials, then they can place a lien on the property. They cannot place the lien on the common elements, but when the work is done with the permission of the association, they can place a lien against each owner for their share of the work. Each owner can then relieve the lien on their parcel if they so desire. If an owner pays, then the contractor must relieve that owner from their lien.

It is slightly different for time-shares. The contractor must prove that every owner of that unit had knowledge of the work that was to be performed. If the owner did not expressly consent to the work, then they cannot be liened.

**CONSTRUCTION LIEN** A lien is a charge or encumbrance on real property that must be satisfied by the property owner to ensure clear title. If a court finds a claim of lien valid, the owner's property may be seized and sold to satisfy the lien if it is not voluntarily paid.

**NOTICE OF COMMENCEMENT** This notice is filed with the clerk of circuit court in the county where the work will be performed, and informs all concerned that improvements will be made to real property in accordance with Section 713 of the Florida Statutes. It includes the legal description of the property, name and address of the owner, name and address of the general contractor, financing information, and persons within the state of Florida designated the owner, upon whom notices or other documents may be served, and to whom a copy of the lienor's notice can be sent. A notarized statement that the Notice of Commencement has

been filed for recording along with a copy of the notice must be posted prior to the start of any construction in excess of \$2,500. If a performance bond is to be posted, it should be attached to the Notice of Commencement.

**RELEASE OF LIEN** The property owner or association can protect themselves from threat of lien by obtaining written statements stating that the supplier of materials used and work performed releases the property owner. This should be obtained before making payments to the contractor. If the contract calls for draws before the work is completed, a partial release of lien can be obtained. Prior to making final payment the contractor should issue an affidavit that specifies all unpaid parties who performed labor, services, or provided material to the property. Each party should provide a release of lien before final payment is made.

**WARRANTY** Successful completion of a capital improvement job should include expressly stated warranties on the work performed. Warranties can be implied or express and can cover both products and services. Warranties for products can come from both the contractor and the manufacturer. As part of the contract bid warranty specifications, the association should ask for all service manuals on installed equipment, and copies of warranties from the manufacturer as well as any contract warranties for parts materials, or labor. All warranties should be in writing. Terms and specifics on how repairs are to be handled should be included.

**DEVELOPER WARRANTY** As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, the developer will provide a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

## **CHAPTER 9**

### **GENERAL MANAGEMENT INFORMATION**

## **DUTIES OF DIRECTORS AND OFFICERS**

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The duties of each officer of the Board of Directors are set forth in the by-laws of the association. The Board of Directors sets forth the policies of the association and management carries out that policy.

The Board of Directors has a **FIDUCIARY** responsibility to the community to administer the association in the best possible way and to protect the assets of the community. The Board of Directors has met that responsibility when they have relied upon the advice of an expert in that area, one who has had special training and education in the area of concern. Whether that be a lawyer for legal advice, an engineer for material and mechanical advice, a utility company for special advice such as electrical or plumbing, etc. When it comes to an interpretation of the law, the Board of Directors is well advised to seek the opinion of a specialist in the field concerned.

An officer, director or agent 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, and in a manner he or she reasonably believes to be in the interests of the association. An officer may be held civilly liable for damages if such officer fails to perform or breaches his duties and such failure or breach constitutes a violation of criminal law; is one from which the officer derives an improper personal benefit; or constitutes recklessness or an act or omission in bad faith, with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

### ***CONFLICT OF INTEREST***

If the association enters into a contract or other transaction with any of its directors or a corporation, firm, or other entity in which an association director is also a director or officer or is financially interested, the board must:

1. Comply with the requirements of FS 617.0832 (involves the disclosure of the relationship or interest that the board member has with the entity with which the association is considering contracting).
2. Enter the disclosures required by FS 617.0832 into the written minutes of the meeting.
3. Approve the contract or other transaction by the affirmative vote of two-thirds of the directors present.
4. At the next regular or special meeting of the members, disclose the existence of the contract or other transaction to the members. Upon a motion of any member, the contract or transaction shall be brought up for a vote and may be cancelled by a majority vote of the members present. If the members cancel the contract, the association is only liable for the reasonable value of goods and services provided up to the time of cancellation and is not liable for any termination fee, liquidated damages or other penalty for such cancellation.

### ***ANTI-KICK BACK PROVISION***

An officer, director or manager may not solicit, offer to accept, or accept any good or service of value for which consideration has not been provided for his or her benefit or for the benefit of a member of his or her immediate family from any person providing or proposing to provide goods or services to the association. However, an officer, director or manager may accept food to be consumed at a business meeting. If an HOA board finds a violation of this provision, the board shall immediately remove the officer or director from office. For condominiums, the officer, director or manager is subject to a civil penalty from DBPR.

### ***COMPENSATION FOR SERVICES***

Unless otherwise provided in the bylaws, Association officers and directors shall serve without compensation. Normally, the documents do not allow compensation. However, Directors/Officers can be reimbursed for any duties that they perform that are not a part of their duties as an officer and for out of pocket expenses.

### ***REGISTERED AGENT***

The registered agent is filed with the Department of State at the time of inception of the corporation and can be changed at any time the association deems appropriate merely by filing written notice with the Department of State. The address of the registered agent must be a street address. No post office box. Legal papers, by law, cannot be served on a post office box. A new registered agent must sign the change, acknowledging that they are accepting the position and the responsibilities. The registered agent is the one who receives all legal notices on behalf of the association.

### ***COMMITTEES***

All Boards of Directors have the power to appoint committees. Usually the duties of the committees are set forth when they are appointed and it is usually in writing. The documents in some cases set forth the powers of the committees. Committees are to assist the board. Committees are usually limited to fact-finding, information gathering, and making recommendations to the board.

Meetings of a committee to take final action on behalf of the board or to make recommendations to the board regarding the association's budget must fully comply with the notice requirements for board meetings including notice or waiver of notice to committee members and posting of the notice at least 48 hours in advance of the meeting for the benefit of members. Meetings of committees that do not take final action on behalf of the board or do not make budget recommendations may be exempted from these requirements when the bylaws permit.

### ***WHO IS THE ASSOCIATION?***

The association is the members of the association. The association owns everything. The association elects a Board of Directors to act for the association. The board has the responsibility to maintain the property for the association. The association through its Board of Directors sets forth the policies of the association. Management carries out the policies of the association.

### ***THE MANAGER AND MANAGEMENT***

There are three forms of management. They are, in the order most used, hire a management company, hire a manager, and self-management.

If the association hires a manager of a management firm, then they need a management agreement. The agreement or contract must specify what the obligations and responsibilities are of the manager. The cost of each service, the frequency that it is to be done, the number of persons employed to provide the service, and the contract must set forth any relationship between management and the developer. If the above are not set forth, then the contract cannot be enforced.

The association is responsible for maintaining the common elements in as good a state of repair as possible. If they do not, then an owner can bring suit against the association, the Board of Directors, for not properly doing their duties. Also the association can sue an owner if they damage the common elements.

The board sets forth policy and management carries out that policy. In short management is the agent of the principle which is the Board of Directors. The agent is responsible for carrying out the directives of the principle. Management must see that everything the board directs is carried out, but no more. They must not exceed their authority.

The Florida Administrative Code is very specific as to the duties and responsibilities of the licensed association manager. The code states that a manager shall not knowingly misrepresent facts, shall undertake to perform only those community management services which they can reasonably expect to complete with professional competence, shall exercise due professional care in the performance of community association management services, and shall not permit others to carry out on his or her behalf, either with or without compensation, acts which, if carried out by the licensee or registrant would place him in violation of Florida Statutes. A licensee or registrant shall be deemed responsible by the division for the actions of all persons who perform community association management related functions under their supervision and direction.

**The Board of Directors sets forth policy for the association.**

**Management carries out that policy.**

**Management never sets policy.**

**The Board of Directors never carries out that policy.**

## **OWNER'S WRITTEN COMPLAINTS**

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Under 718 and 719, when the board receives a written complaint by certified mail from an owner, they must respond to that complaint within 30 days. Failure to do so precludes the association from recovering attorney's fees in any subsequent litigation.

The board may make a substantive reply:

- 1) Notify the complainant that the advice of an attorney has been requested. If a legal opinion is requested, the board must give the complainant a substantive reply within 60 days of receipt of the complaint.
- 2) Notify the complainant that the advice of the bureau has been requested. If the board asks the advice of the bureau, within 10 days of that advice, the board must make a substantive reply to the complainant based upon the bureau's advice.

## **INDEPENDENT CONTRACTOR VS EMPLOYEE STATUS**

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The small business employer often does not understand the difference between an employee and an independent contractor. The determination is primarily based upon the extent that the person receiving the services has the right to direct and control the service. In other words, an employer usually retains the right to tell how and when a service shall be done. An independent contractor usually retains the right to tell how and when a service shall be done.

The IRS has a 20-factor control test that they use for determining the difference. The greater the degree of control, based on these factors, the more likely the individual will be considered an employee.

## **EASEMENTS**

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Easements initially established for a property are often set out in the declaration. The board has the authority to grant, modify or move easements as long as they are on common elements and do not affect an individual owners rights, without the consent of the owners. It cannot impair the rights of individual owners when exercising this authority. What does this say? It says when it does not harm specifically an individual and is in the best interest of the owners as a whole, then, they can grant, modify or move easements.

## **SOLAR DEVICES, CLOTHESLINES AND OTHER ENERGY DEVICES**

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Per Florida Statute 163.04, a deed restriction, covenant, declaration or similar binding agreement may not prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels. This does not apply to patio railings. The Association may determine the specific location where solar collectors may be installed as long as such determination does not impair the effective operation of the solar collectors. Per FS 718.113, a condominium board, without any vote of the owners, may install solar collectors, clotheslines, or other energy-efficient devices in the common elements or association property for the benefit of the unit owners.

## **PURCHASE OF REAL PROPERTY**

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Under the general corporate law 607, community associations have the right to buy, sell, or lease real property. Under the condo and co-op laws 718 and 719, condos and co-ops have the specific authority to acquire title and to hold for the use of the association, real property. The documents of a particular association may put some restrictions on what types of property can be bought and sold or leased.

## **RULES AND REGULATIONS**

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Associations may impose rules and regulations on the use of the common elements. But they may not charge a fee for the use of the common elements, unless the documents specifically allow the fee. If the association desired to place a charge on the use of the common elements then a majority vote of the association membership is required. If the documents so provide, they can charge for the exclusive use of a common element by an individual if the charges are to offset the expenses of that common element only for that individual. What would be an example? Say, an elevator that services only one floor, like a penthouse, and only that floor and only that unit or units. Then if so provided for that limited common element, the expenses of that elevator could be charged to that unit or units.

### ***REASONABLENESS AND FAIRNESS***

When developing rules and regulations, the Board of Directors must use the rule of "STANDARD OF REASONABLENESS AND FAIRNESS". Rules and Regulations may not be arbitrary or discriminatory and their application must be fair and uniform among the owners and members.

It is a fine line between the rights of an owner and the rights of the community as a whole. Planned community living requires sometimes that the rights of individuals must yield to the rights of the group as a whole. Enforcement must be based upon fairness, reasonableness, uniformity and consistency.

When a violation occurs you must first notify the offender and try to get a voluntary compliance. The board must treat everyone equally. There should never be any special groups or individuals. If the board has knowledge of a violation and does not take steps to correct it, then it is increasingly harder in the future to correct violations. Once a violation is known, the steps should be taken immediately to correct the violation. If not done, and then later steps are taken, then it is impossible to correct in a court of law. This is known as **EQUITABLE ESTOPPEL**.

## **FINES AND PENALTIES**

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The Association may levy reasonable fines or suspend, for a reasonable period of time, the right of the unit owner or his guests/tenants to use the common elements, common facilities or any other Association property for failure to comply with any provision of the declaration, bylaws or reasonable rules. However, the association may not impair the right of the owner or tenant to have vehicular and pedestrian ingress or egress from the parcel, including, but not limited to, the right to park. A fine may be levied on the basis of each day of a continuing violation with a single notice for a hearing. The fine may not exceed \$100 per violation or \$1,000 in the aggregate. A fine may not become a lien against a condominium unit or owner. For HOAs, fines less than \$1,000 may not become a lien against the lot or owner.

A fine or suspension may not be imposed unless the Association first provides at least 14 days' written notice and an opportunity for a hearing to the unit owner or his guests/tenants. For condominiums, the hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household.

For HOAs, the hearing committee must be three members who are not directors, officers, Association employees, or the spouse, parent, child, brother or sister of a director, officer or employee. For condominiums, the hearing committee may not be Board members nor persons residing in a Board member's household. If the committee does not agree, the fine or suspension may not be imposed. For HOAs, if a fine or suspension is imposed, the Association must provide written notice of such fine or suspension by mail or hand delivery to the parcel owner and, if applicable, to any tenant, licensee, or invitee of the parcel owner.

If an owner is more than 90 days delinquent in paying a monetary obligation due to the Association, the Association may suspend the right of the unit owner or the owner's occupant to use the common elements, common facilities, or any other Association property until the monetary obligation is paid in full. This authority does not apply to limited common elements intended for use by that unit only, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.

The Association may suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the Association which is more than 90 days delinquent. A voting interest or consent right allocated to a unit or member which has been suspended by the Association may not be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action required by statute or the declaration, articles of incorporation, or bylaws. The suspension ends upon full payment of all obligations currently due or overdue the association.

If time share owners are 60 days delinquent, then after 30 days written notice, they can be denied the use of the units and the facilities. This includes owners, lessees, guests, etc. The notice and hearing requirements mentioned above do not apply for sanctions imposed for delinquencies. Associations must approve suspensions for delinquencies at a properly noticed board meeting.

## **ASSOCIATION EMERGENCY POWERS**

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Upon declaration of a state of emergency by the Governor of Florida in the locale where the association is located, the Board may, but is not required to, exercise certain powers in response to damage caused by the emergency.

- Conduct Board and Membership meeting with notice given as is practicable
- Cancel and reschedule any association meeting
- Designate assistant officer who are not directors
- Relocate the association's principal office
- Enter into agreements with counties/municipalities for debris removal
- Implement a disaster plan which may include shutting down elevators, electricity, water, sewer or security systems
- Require evacuation of association property and, upon the advice of professionals, determine any portion of the property is unavailable for entry
- Contract, on behalf of unit owners, for items or services for which the owners are otherwise individually responsible for but which are necessary to prevent further damage to the association property
- Levy special assessments without a vote of the owners
- Without owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association when the operating funds are insufficient
- The above powers are limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the parcel owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

## **RIGHT OF FIRST REFUSAL**

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Some documents restrict the right of sale or lease of individual units and require the approval of the Board of Directors prior to the transfer. This is usually called the right of first refusal. It is enforceable by Florida courts as long as it is for a lawful purpose and reasonable and clearly expressed in the documents. If the approval rights are expressly permitted in the documents, and a fee is authorized, then a transfer fee of up to \$100 can be charged under the condominium statute. A security deposit for rentals can also be charged for protection against damages to the common elements so long as the deposit does not exceed one month's rent.

**TRANSFER FEES** No charge shall be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant. However, if the lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge shall be made.

## **ALTERNATIVE DISPUTE RESOLUTION**

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The division of Florida Land Sales, Condominiums, and Mobil Homes has the right to enforce compliance with the condo, co-op, time share and mobile home laws. They can also act as the arbitrator in disputes. They can enforce the compliance with the individual documents. They do enforce compliance with individual rules and regulations.

Alternate dispute resolution has made progress in reducing court docket and trials and in offering a more efficient, cost-effective option to litigation. Unit owners are frequently at a disadvantage when litigating against an association. Specifically, a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his or her own financial resources to satisfy the costs of litigation against the association. The Legislature found that the courts are becoming overcrowded with condominium and other disputes, and further finds that alternative dispute resolution has been making progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to court litigation. However, the Legislature also finds that alternative dispute resolution should not be used as a mechanism to encourage the filing of frivolous or nuisance suits.

All by-laws must provide for a provision for arbitration. If they do not, statute law of Florida does and the division can be called upon to arbitrate disputes.

### **CONDOMINIUMS**

For condominiums, the term "dispute" means any disagreement between two or more parties that involves:

- (a) The authority of the board of directors to:
  - 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
  - 2. Alter or add to a common area or element.
- (b) The failure of a governing body, when required by Florida statute or an association document, to:
  - 1. Properly conduct elections.
  - 2. Give adequate notice of meetings or other actions.
  - 3. Properly conduct meetings.
  - 4. Allow inspection of books and records.

"Dispute" does not include any disagreement that primarily involves:

- a. title to any unit or common element;
- b. the interpretation or enforcement of any warranty;
- c. the levy of a fee or assessment, or the collection of an assessment levied against a party;
- d. the eviction or other removal of a tenant from a unit;
- e. alleged breaches of fiduciary duty by one or more directors; or
- f. claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.

Prior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration. The petition must be accompanied by a filing fee in the amount of \$50. Filing fees collected under this section must be used to defray the expenses of the alternative dispute resolution program.

The petition must recite, and have attached thereto, supporting proof that the petitioner gave the respondents:

- 1. Advance written notice of the specific nature of the dispute;
- 2. A demand for relief, and a reasonable opportunity to comply or to provide the relief; and
- 3. Notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

Failure to include the allegations or proof of compliance with these prerequisites requires dismissal of the petition without prejudice.

All full-time arbitrators employed by DBPR must be a member in good standing of The Florida Bar.

### **HOMEOWNER ASSOCIATIONS**

For homeowner associations, certain disputes shall be the subject of a demand for presuit mediation before the dispute is filed with the court. These include:

- a. disputes between the association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes;
- b. disputes regarding amendments to the association documents;
- c. disputes regarding meetings of the board and committees appointed by the board;
- d. membership meetings not including election meetings; and
- e. access to the official records of the association

Neither election disputes nor recall disputes are eligible for pre-suit mediation; these disputes shall be arbitrated by the department.

A mediator or arbitrator shall be authorized to conduct mediation or arbitration only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, per the Florida Supreme Court.

### **OMBUDSMAN**

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The Office of the Condominium Ombudsman was created within the division of Florida Condominiums. The governor appoints the ombudsman who must be an attorney admitted to practice before the Florida Supreme Court. He/she will act as liaison between the division, unit owners, boards of directors, board members, community association managers, and other affected parties. His other powers include:

- a. Monitor and review procedures and disputes concerning condominium elections or meetings. Fifteen percent of the total voting interests in a condominium association, or six unit owners, whichever is greater, may petition the ombudsman to appoint an election monitor to attend the annual meeting of the unit owners and conduct the election of directors. All costs associated with this monitoring process shall be paid by the association;
- b. Make recommendations to the Division for changes in rules and procedures for filing, investigation, and resolution of complaints filed by unit owners, associations, and managers;
- c. Provide resources to assist members of boards of directors and officers of associations to carry out their powers and duties;
- d. Encourage and facilitate voluntary meetings with and between unit owners, boards of directors, board members, community association managers, and other affected parties when the meetings may assist in resolving a dispute within a community association before a person submits a dispute for a formal or administrative remedy;
- e. Assist with the resolution of disputes between unit owners and the association or between unit owners when the dispute is not within the jurisdiction of the Division to resolve.