SO NOW YOU'RE ON THE BOARD

BOARD CERTIFICATION PROGRAM FOR CONDOMINIUMS, COOPERATIVES AND HOMEOWNERS ASSOCIATIONS

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You've been elected to your board of directors. So, what now? What do you need to know to prepare for the job? What responsibilities come with the job? Are there laws which regulate the association's operations? What's the difference between a condominium and a condominium association? Here's an overview of community association law to help you operate and maintain a successful community.

INTRODUCTION:

The regulation and operations of community associations and common-interest communities are governed by a complex web of governing documents, local, state and federal laws, and rulings of the Appeals Courts and the Supreme Court of Florida. As a board member, it is very important to have at least a rudimentary understanding of the workings of community associations, to avoid incurring liability for your association and yourself.

All types of condominiums are governed by Chapter 718, Florida Statutes (the "Condominium Act"). Chapter 718 applies to residential condominiums, and to commercial condominiums, such as office parks, docks, and parking lots.

Cooperatives are governed by Chapter 719, Florida Statutes, (the "Cooperative Act") and Homeowner Associations are governed by Chapter 720, Florida Statutes. Timeshares are governed by Chapter 723, and if they are condominium timeshares, they are also governed by Chapter 718.

In addition, there are federal, state and local laws which cover pools, security services, elevators, fire safety, smoking, pest control, construction, satellite dishes, employees, and so on. Condominiums and Cooperatives are also governed by the Florida Administrative Code, which contains a series of rules which define and clarify the laws.

In addition to the printed laws and ordinances, associations are governed by Florida and Federal appellate court decisions. And, condominiums and cooperatives are subject to the decisions of the Division of Arbitration of the Florida Department of Business and Professional Regulation.

OVERVIEW:

Community Associations were created to govern property for condominiums, cooperatives and platted subdivisions. Timeshares may also be condominiums, with unit week owners, instead of unit owners. Associations might govern mobile home parks, dockominiums, office park condominiums, hotel condominiums, parking space condominiums, master associations, recreation associations, and so on.

The dwellings may be single family homes, manufactured housing, mid-rise or high-rise apartment building units, townhomes, villas, garden homes, and any combination of these. A single family home and the lot on which it is placed can be a condominium unit. There may be multiple buildings comprising one condominium, or each building may be its own condominium.

You cannot tell whether the community is a condominium, a cooperative, or a subdivision by looking at the housing stock. The only way to tell is by looking at the declaration or master form lease, the articles of incorporation and the by-laws of the association ("Governing Documents").

In a condominium, the purchaser receives a deed to his/her unit, and an undivided interest in the common elements of the condominium, shared with all other owners of units in that condominium. The condominium association does not own the common elements. However, it is possible for the association to own property. For example, if the unit owners buy out a recreation or amenities lease from the developer, the clubhouse and pool may be deeded to the association. Also, the association can hold title to individual units, if it forecloses for failure of the owner to pay assessments.

In a cooperative ("co-op"), all of the property, including the apartments, is owned by the corporation. Individuals who purchase in a co-op buy a share of stock or membership certificate, and sign a lease with the corporation which gives them the exclusive right to use a particular apartment or lot (in the case of a mobile home park which is a co-op).

In a homeowners' association, the members of the association own their respective homes and lots, and the association owns all of the common area, for the use and benefit of the members.

All common-interest communities have four characteristics:

1. Every owner becomes a member of the community association when he/she purchases a dwelling. This is known as mandatory membership. The membership is appurtenant to the unit or the home, and when the home is sold, the membership automatically terminates.

2. There are Governing Documents which are recorded in the Public Records of the County in which the home is located, and which are covenants which run

with the land and are binding on every owner and resident of the home, as well as on guests, invitees, contractors, family, and so on.

3. Under the Documents, the Association has the right to levy assessments, which are mandatory, and must be paid by each owner, to cover the costs of maintaining, repairing and replacing common property, and operating the Association. Common expenses will be defined in the Governing Documents and in the applicable statutes.

4. All owners share a property interest in the community, whether as a tenant in common or in property held by the association on their behalf.

OWNERSHIP AND THE ASSOCIATION:

Condominiums:

Condominiums are known as creatures of the law. That is, the legislature had to find a way to define ownership of a unit on the third floor, which consists of four exterior walls encompassing space which is not on the ground. As stated above, if the unit is in a condominium, each owner buys a unit and the undivided interest in the common elements of the condominium. The owner is a tenant in common with all the other owners of units in the condominium. The undivided interest in the common elements is called an appurtenance to the unit, and it is part of the bundle of ownership rights that comes with the fee simple ownership of the unit.

And, no interest in a common element or limited common element can be transferred separately from the title to the unit, with very limited exceptions. The Condominium Act provides that parking spaces may be transferred among unit owners, if the authority to do so in contained in the declaration of condominium. There is no such thing as title to a parking space or a boat slip or a storage unit. The space or slip or storage unit number may be shown on the deed, but a unit owner has no ownership interest in the space, slip or storage unit. He/she has an exclusive use right to the space, slip or storage unit, and the space, slip or storage unit are appurtenances to the unit, which transfer to the new buyer with title to the unit.

A unit and its boundaries are delineated in the declaration. Generally, the unit boundaries are the unfinished surfaces of the floor and ceiling, and the four perimeter walls of the individual unit. This means the plaster, paint and, popcorning; floor, wall and ceiling coverings of any kind, including tile, carpet, wood, mirrors, paint, wallpaper; and so on, are within the unit.

The common elements will consist of all of the condominium property outside of the boundaries of the unit itself. This may include the roads, a clubhouse, tennis courts, pool, seawall, entry gate or monument, the elevator, the roof, shuffleboard courts, maintenance sheds, condominium office, manager’s apartment, hallways, lobby, and so

on. The condominium is the physical plant, the building or buildings, the amenities and facilities and the land on which they are located.

The association is the corporation which operates the condominium, and is responsible, through the Board of Directors, to maintain, repair and replace the condominium property, and preserve the property values.

Cooperatives:

A cooperative is a corporation which owns all of the property. As stated above, an owner in a co-op owns a share of stock in the corporation. He/she does not own any of the property, including the unit in which he/she lives. With the share of stock, the shareholder or stockholder is given the exclusive right to use a particular unit or lot.

The occupancy arrangement is formalized with a lease agreement. When a co-op is sold, the lease is assigned to the new shareholder, and the stock is returned to the corporation, and a new share is issued to the buyer. There is one share per lot.

The association or corporation is responsible for maintenance, repair and replacement of the co-op property, and the shareholders are responsible for the interiors of their apartments or for the manufactured or mobile housing on a co-op lot.

In a mobile home co-op park, the shareholders generally own their homes, while the co-op holds title to the land on which the home is located.

Subdivision or Planned Unit Development:

In a subdivision, an individual owns his/her own home and the land on which it is built. The homeowners association owns the common property, including any and all amenities and facilities, for the use and benefit of the home owner. The common property is called “common area.”

There may be more than one layer of association which governs a dwelling. In addition to the condominium association, the cooperative corporation or the homeowners association, there may be a recreation association, a master association or a community development or special taxing district. The homeowner will be obligated to pay assessments to the other associations or districts as well. Each of the associations will have its particular obligations, and there may be some overlap of authority. For example, when a homeowners association has architectural control authority, a master association may also have the right to approve alterations or improvements to homes within the subdivision.

Community development (“CDD”) or special taxing districts (“STD”) are created by the county government, and instead of levying assessments, the CDD or STD will be supported by county taxes. The boards of a CDD and STD will be elected as part of the general elections within that county.

Each association operates through its board of directors. The association is not a democracy. Like the federal and state governments, it is a representative republic in which the members elect the board; the board operates the association and makes decisions about the maintenance, repair and replacement of the common property; and enforces the Governing Documents.

GOVERNING DOCUMENTS:

It is absolutely critical that you make sure every buyer has a complete set of the Governing Documents for his/her home, regardless of the type of community in which he/she is buying. Under the Law, the Associations are required to maintain sets of Documents which can be purchased by a buyer. Or, the Documents are available through the County Public Records.

If the transaction is a sale, you should be familiar with the provisions of the Documents which govern review and approvals of purchasers. If you are handling rentals, you will need to be familiar with rental restrictions, use restrictions, parking provisions, and language related to maintenance, repair and insurance obligations of units.

1. Condominiums -

A. Declaration of Condominium – This is the document which creates or "declares" the property as a condominium. It contains the rights and responsibilities language – who maintains what, who owns what, who insures what; as well as the legal description of the property governed by the association. It will include: definitions of terms; easement rights; detailed information on assessments; maintenance, repair and replacement obligations; procedural requirements for and limitations on alterations and improvements; board of directors authority regarding processing of sales and rentals; and its own amendment provision. It may also contain use restrictions, termination provisions, and information on amenities, boat slips, parking spaces, storage units, and so on.

B. Articles of Incorporation – This is the document which creates the association with the Florida Division of Corporations, as required by Florida Law. It should be a simple document, stating the date of incorporation, name and purpose of the association, initial officers and directors, indemnification of the board, and an amendment provision.

C. By-Laws – This is the procedural manual which governs the association's operations, including the number of directors, quorum requirements for meetings, notice requirements, powers and duties of directors, duties of the officers, and the like. Because the Condominium Act contains a great deal of procedural regulation of condominium operations, and because it can be changed by the legislature on an annual basis, there are usually conflicts between the original By-Laws and the current law. In those cases, the law will supersede the By-Laws language, and is deemed to be

automatically incorporated into the By-Laws. It is not necessary to amend the By-Laws every time the law changes, as the changes will apply any way.

D. Rules and Regulations – Promulgated by the Board of Directors, to clarify and define provisions of the Governing Documents, and to regulate use of the property.

2. Cooperatives –

A. Proprietary or Master Lease – This document fills the function of the condominium declaration for a co-op.

B. Articles of Incorporation which create the corporation.

C. By-Laws

D. Rules and Regulations

3. Homeowners Association –

A. Declaration of Covenants, Conditions and Restrictions which has the same function as the declaration of condominium.

B. Articles of Incorporation

C. By-Laws

D. Rules and Regulations.

If the property is a condominium, it is also important to know whether it is new construction or has been converted from a previously existing apartment building. A conversion has very different developer warranties and financial reporting requirements than those for a new building. A conversion is likely to be an older building, and the buyers may have inherited structural, electrical, or plumbing problems, which are not immediately obvious, but can lead to costly repairs in the future.

4. Access to Official Records –

The Official Records of each association are set forth in the applicable law governing condominiums, cooperatives and homeowners associations. These Records are available for inspection and copying by association members, subject to the board's right to make rules regarding frequency, time, location, notice and manner of inspections and copying. Failure to produce Official Records in a timely fashion can result in penalties to the Association.

Official Records - 718.111(12), 719.104(2), and 720.303(4), F.S. –

Florida law requires condominiums to maintain the official records of the association within the state for at least 7 years.

- The records of the association must be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium property is located within 5 working days after receipt of written request by the board or its designee.
- In an HOA, the records must be made available within 10 business days after receipt of a written request.
- Inspection
- An association's official records must be available for inspection by unit owners or their authorized representative at all reasonable times.
- An association may comply with this requirement by maintaining a copy of the official records on the condominium association property and making them available for inspection or copying.

Copies

- Unit owners have the right to make or obtain copies of official records.
- The association may adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspection and copying.
- Associations must maintain an adequate number of copies of the declaration of condominium, articles of incorporation, bylaws, rules, all amendments to those documents, the frequently asked question and answer sheet and the year-end financial information.
- HOA's: Associations must maintain an adequate number of copies of the recorded governing documents.
- The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month.
- The association <u>may</u> impose fees to cover the costs of providing copies of the official records, including the costs of copying and the costs required for personnel to retrieve and copy the records if the time spent retrieving and copying the records exceeds one-half hour and if the personnel costs do not exceed $20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages. The association may charge up to 25 cents per page for copies made on the association's photocopier.

Homeowner's Associations Copies
720.303(5)(c), F.S.

If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside duplicating service and may charge

the actual cost of copying, as supported by the vendor invoice. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective

An association must allow a member or his/her authorized representative to use a portable device, such as a smartphone, tablet, portable scanner, or other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association providing a copy of such records. The association may not charge a member or his/her authorized representative for the use of a portable device.

Denial of Access

- If a condominium or cooperative association fails to provide requested records within ten working days after receipt of a written request, the unit owner may be entitled to damages.
- The failure of the board to allow inspection of books and records constitutes a dispute for which a unit owner may either file a complaint with the Division or petition the Division for mandatory nonbinding arbitration.
- HOA's: The Division does not have jurisdiction to arbitrate HOA disputes.

The Official Records of an Association must include:

- Copies of the plans, permits, warranties and other items provided by the developer.
- HOA's: Copies of any plans, specifications, permits, and warranties related to improvements constructed on the common areas or other property that the association is obligated to maintain, repair, or replace.
- Copies of the recorded declaration for each condominium, articles of incorporation, bylaws and any amendments to them and the current rules of the association.
- Minutes of all association, board and unit owner meetings, all of which must be kept for at least seven years.
- A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, telephone numbers, if known, and email addresses and fax numbers of those owners who have consented to receiving communications by these means.
- HOA's: A roster of all members and their mailing addresses and parcel identifications, and electronic mailing addresses and the numbers designated by members for receiving notice by electronic transmission.
- Current insurance policies.
- HOA's: All association insurance policies, or a copy thereof, which must be retained for at least 7 years.
- Current copy of any management agreement, lease or other contract for the benefit of the members.
- Bills of sale or transfer for all property owned by the association.

- Accounting records for the association and separate accounting records for each condominium the association operates, for a minimum of seven years, including but not limited to:
    - Itemized records of all receipts and expenditures;
    - Current statement of account for each unit owner including the unit owner's name, the due date and amount of each assessment, the amount paid on the account and the balance due.
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- All audits, reviews, accounting statements and financial reports of the association.
- HOA's: Statute also mentions tax returns and any other records that identify, measure, record, or communicate financial information.
- All contracts for work to be performed, including bids for work to be performed.
- Ballots, sign-in sheets, voting proxies and all other papers relating to voting by unit owners. These items must be kept for one year from the date of the election, vote or meeting to which the document relates.
- All rental records when the association is acting as a rental agent.
- Current *Frequently Asked Questions and Answers* sheet.
- Other documents related to the operation of the association. The following are examples:
    - Correspondence and other written communication from the Division;
    - Invoices for purchases made by the association;
    - Copies of all insurance records;
    - Audio and video recordings made by the board or a committee of the board at least until the minutes of the meeting recorded are approved.
- A copy of the inspection report 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:
    - Roof; Structure;
    - Fireproofing and fire protection systems;
    - Elevators;
    - Heating and cooling systems;
    - Plumbing; Electrical systems;
    - Swimming pool or spa and equipment;
    - Seawalls;
    - Pavement and parking areas;
    - Drainage systems;
    - Painting;
    - Irrigation systems.

Records which are <u>NOT</u> Available for Inspection by Owners:

- Records prepared by or at the direction of an association attorney which reflect legal conclusions, strategies or legal theories and which were prepared for civil or criminal litigation or adversarial administrative proceedings until the conclusion of those proceedings.
- Certain information obtained by an association in connection with the approval of the lease, sale or some other form of transfer of a unit.
- Personnel records of the association or management company employees, including but not limited to, disciplinary, payroll, health, and insurance records. The term personnel records does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.
- Medical records of unit owners.
- Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements.
- Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and telephone number of each parcel owner.
- However, an owner may exclude his or her telephone number from the directory by so requesting in writing to the association.
- Record not Available for Inspection by Owners continued…
- Any electronic security measure that is used by the association to safeguard data, including passwords.
- The software and operating system used by the association which allows manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Association Records – Liability
718.111(12)(c)5 and 720.303(5)(c), F.S.

The association is not liable for the inadvertent disclosure of information that is protected under this section if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association. This is a possible arbitration issue.

ASSOCIATION OPERATIONS; THE BOARD ELECTION PROCESS:

The Governing Documents and the Statutes all provide that the business of the association is to be conducted by the board of directors.

Election Process –

The board is elected by the members, on an annual basis, in conjunction with the association's annual meeting. For condominiums and co-ops, elections are governed by the law. For a homeowners' association, the elections are governed by the provisions of the Governing Documents.

Qualifications of directors are found in the association by-laws, and possibly in the articles of incorporation. Most associations require a director to be a record title holder of some interest in the unit or home.

A person who holds a power of attorney has limited rights. If the power is specifically set forth in the power of attorney, the person may attend and speak at board meetings, and with a proxy to him or herself, attend and speak at unit owner meetings. A person holding a power of attorney cannot vote in the election, but can vote for other matters through the proxy. A person to whom a power of attorney is given cannot run for the board.

Both the Condominium and the Cooperative Acts provide that the first notice of election and annual meeting goes out at least 60 days prior to the date of the annual meeting. The owners have 20 days in which to return their Notice of Intent to be a Candidate to the Association Office.

Between the 40th and the 35th day prior to the date of the annual meeting, the Association may accept resumes and information sheets about candidates, no longer than one side of an 8-1/2 x 11" sheet of paper.

Then, the Association prepares the ballot containing the candidates' names, in alphabetical order, with the last name first, and sends out the second notice of election and annual meeting package (which includes the notice, a form of proxy, the ballot for election of directors, and an inner and outer envelope for returning the election ballots), at least fourteen (14) days prior to the date of the meeting. All ballots for the election of Directors are returned to the Association sealed in an inner envelope, which is then sealed in an outer envelope. The outer envelope must be signed by the unit owner or shareholder.

The Election occurs prior to the beginning of the Annual Meeting, but, by motion from the membership, tallying of votes can continue while the business of the Meeting is conducted. Any owner who wishes to watch the opening of envelopes and the tallying of the votes is permitted to do so, under the Law.

There is no quorum requirement for the election. However, in order to have a valid election, at least 20% of the ballots must be returned. Once the ballot has been received by the association, it cannot be rescinded.

There are no proxies used for the election of Directors. Proxies are used to establish a quorum at the Annual Meeting, and for any voting that is not related to the election of Directors. Proxies are revocable up to the time of the meeting.

It is possible that a ballot for the election of the directors will be invalid, which would mean it cannot be counted. Ballots (and the inner and outer envelopes in which they arrived) that are invalid must be set aside, and marked "Invalid" or "Disregarded." The reason for invalidation must be written on the outside of the envelope. All envelopes and ballots, including those which have been disqualified, must be kept as part of the Official Records of the Association for a period of one year from the date of the annual meeting and election. According to the Division Rules and the Condominium Act, **any of the following events will result in an invalid ballot:**

a. If the owner voted for more candidates than there are seats to be filled.

PLEASE NOTE: An owner may vote for one candidate for each vacant seat. An owner may also vote for less than the number of candidates to fill all seats. For example: casting only one vote on a ballot (known as "bullet voting") is legal and valid. The one vote on the ballot would be counted.

b. If the outer envelope is not signed, or does not show the address of the unit.

c. If the outer envelope is missing.

d. If there is more than one ballot in the same inner envelope.

PLEASE NOTE:

i. The Association cannot require a person to sign his/her ballot. But, if a person does sign it, it will NOT invalidate the ballot. An owner can voluntarily waive his/her right to a secret ballot. The ballot would be eligible to be counted.

ii. Also, the Association cannot require a person to sign his/her inner envelope, but a voluntary signature by an owner will NOT invalidate the ballot.

iii. Even though the Law does not permit individuals to be elected as "write-in candidates," a ballot is NOT invalid if there is a write-in candidate on it. Disregard the write-in candidate (do not count it), but count the votes for any other candidates indicated, if the ballot is otherwise in compliance with the Law.

In the event of a tie for the last seat, there will have to be run-off election, which requires a special meeting of the members, 14 days' advanced notice, a ballot showing only the two candidates who are tied for the position, and using the two envelope system to cast the votes.

If a vacancy occurs between elections, the board may appoint someone to fill it, unless a different procedure is called for the by Governing Documents. The board is not obligated to appoint someone who previously ran for the board, or the next highest vote getter, etc.

Open Meetings –

Under the law for all types of community associations, all actions taken and decisions made by the board must be made at a duly-called meeting of the board at which a quorum of directors is present, and which is open for the attendance of the members who wish to do so.

The exception to this rule is that the board may meet with the association's legal counsel to discuss possible or pending litigation, in a closed executive session.

Competitive Bids –

When the association is considering a contract for goods or services, it is required to obtain competitive bids under certain circumstances. In condominiums and co-ops, if the cost of the work is in excess of five percent (5%) of the total budget, including reserves, then competitive bids are required. For homeowners' associations, if the work exceeds ten percent (10%) of the annual budget , including reserves, then competitive bids are required.

There is no law which requires that an association obtain three (3) bids. "Competitive bids" means more than one.

In case of emergency, or if there is only one reasonable vendor within the geographic area, the association can dispense with the bid process.

MAINTENANCE, REPAIR AND REPLACEMENT:

The boundaries of the unit or the home will be defined in the Governing Documents. So will the scope of each owner's responsibility to maintain, repair and replace his/her unit.

Generally, condominium unit owners and shareholders in a co-op are responsible for everything from the surface of the four perimeter walls inward, and from the unfinished ceiling down and the unfinished surface of the floor up. Generally, the condominium unit owner is responsible to maintain, repair and replace all unit doors, windows, glass, and screens; appliances; floors and floor surfaces; all interior surfaces; floor, wall and ceiling coverings; and plumbing and electric within the unit; as well as all furnishings, fixtures and personal belongings. They will also be responsible to repair and replace their air conditioning equipment, wherever it is located.

Owners of homes within a homeowners association are responsible for their entire homes and the lots on which the home is built. However, the Documents will provide

information on whether the Association takes care of the lawn and landscaping, and any portion of the exterior of the home, such as painting or roof repair.

If an owner fails to maintain his/her home, as required by the Documents, the association has the ability to bring legal action to enforce the requirement. In some cases, the association has the ability to do the work, and charge it back to the homeowner or unit owner.

Alterations and improvements are another concern for units and homes governed by community associations. The Governing Documents generally address procedures for obtaining the approval necessary for alterations or improvements to the units/homes and the common elements or common areas. There is often a percentage of membership approval required for changes to the common property, and sometimes for changes to the exterior of the unit as well. Or there may be a dollar amount over which the board will have to have membership approval of some kind.

A homeowners' association is likely to have architectural control over all exterior changes, with notice requirements and other language requiring copies of plans, as well as specifications regarding particular types of changes (color of the home, setback requirements, prohibitions against storage sheds, and so on).

For condominiums, if the Governing Documents have no language addressing material alterations and improvements, the approval of 75% of the members will be required. In co-op's, if the Documents are silent, 2/3rds of the shareholders must approve alterations and improvements. As mentioned previously, Documents for homeowners' associations have provisions which address the issue.

INSURANCE AND WHO PAYS FOR UNIT DAMAGE:

One of the biggest hazards of living in a multi-family residential community involves water damage from another unit or from plumbing or windows, from wind-driven rain or from rising waters.

The Laws do not require individual owners of a condominium unit to have insurance to cover his/her unit. However, the Documents can require that owners carry insurance for their units. For co-ops and homeowners associations, the Governing Documents may provide for mandatory coverage of apartments and homes. If there is a mortgage lender involved, the bank will require the owner to maintain such insurance.

Under the Condominium Law, the association insures windows, regardless of who is responsible to maintain and repair them under the Governing Documents. So, if the owner wants to replace his/her unit windows, and the Documents provide that owners are responsible to maintain the windows, it will be that owner's obligation to pay for the replacement. Also, the new windows will have to match the other windows in the condominium, or meet association specifications. However, in the event of replacement of the windows due to catastrophic loss, such as a hurricane or a fire, the replacement

would be the association's obligation, and the association's insurance will cover it. Any deductible for such a project would be a common expense, payable by all owners in their pro rata shares.

The question of who is responsible to repair a condominium unit when it is damaged by water intrusion from another unit or the common elements will be answered depending upon the source of the leak, and whether there was negligence on the part of the association in dealing with repairs for which it is obligated. Unit to unit damage is generally apportioned to each unit's own insurance coverage. The condominium association may be responsible for the interior drywall within the unit, depending upon the circumstances. Section 718.111(11)(b), Florida Statutes, provides that the Association is required to insure property within the units as initially installed, which has been held to include interior partition wall drywall.

Absentee owners are often reluctant to spend the money on insurance for a second or seasonal home or unit. They are "self-insuring" their units.

ASSESSMENTS, BUDGETS, AND RESERVES:

Assessments are levied pursuant to the annual association budget, and are required to be sufficient to cover all known or anticipated expenses for the coming year. They may be due monthly, quarterly or annually, depending on whether the community is a condominium, a cooperative, or a subdivision. The board of directors is responsible for controlling and disbursing all association funds, and for the fiscal planning for the operations of the association.

Annually, prior to the end of the fiscal year, the board of directors or the budget committee put together the budget, which is then formally adopted by the board at a duly-called meeting. Notice of the Board meeting at which the budget will be considered and adopted must be mailed or hand-delivered to all owners at least 14 days before the date of the board meeting, with a copy of the proposed budget. The notice must also be posted for at least 14 days. Note: The Governing Documents may require a 21-day or 30-day notice, in which case, the longer notice period will apply. For homeowner associations, the association must either provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. For condominiums and cooperatives, a copy of the proposed budget must be included with the 14 day notice of the budget meeting.

If a condominium association governs more than one condominium, the board of directors must create a budget for each condominium, and a budget for the association expenses which are common to all condominiums it governs. The association may commingle the funds of the condominiums, as long as the accounting records are maintained separately for each condominium.

It is illegal to commingle the funds of more than one association in the same bank account.

The budget must include all known or anticipated regular, recurring expenses for the coming fiscal year, including assessments, DBPR fees, insurance, and so on Expenses must include, if applicable:

- Administration expense;
- Management fees;
- Maintenance;
- Rent for recreational and other commonly used facilities;
- Taxes upon association property;
- Taxes upon leased areas;
- Security provisions.

The budget must show the beginning and ending dates for the period covered by the budget, the total expenses, including reserves on at least an annual basis; and the assessments per unit, according to the percentage of ownership set forth in the governing documents.
In addition, condominium and cooperative budgets must include calculated reserves for roofing, paving and painting, as well as for any capital improvement which will cost in excess of $10,000 to maintain or repair over the life of the improvement.

- For condominium budgets, if assessments are greater than 115% of the previous year's assessments, unit owners may be entitled to consider an alternative budget.
- The calculation:
  - From the total budget assessment, subtract those portions that result from:
    - Reserves;
    - Expenses not anticipated to be incurred on a regular or annual basis;
    - Betterments to the condominium property.
- If the net assessments are still more than 115% of the corresponding net assessments from the previous year, then the process is as follows:
  - 10% of the unit owners may apply to the board for a unit owners' meeting to consider an alternative budget within 21 days after adoption of the annual budget.
  - The meeting must be held within 60 days after the adoption of the budget.
  - At least 14 days prior to the meeting, the board shall hand deliver or mail to each unit owner a notice of the meeting.
  - A majority of the voting interests may vote to approve an alternative budget proposed by either the board or the membership of the association. Failure to achieve the needed vote results in implementation of the board's adopted budget.

For homeowners associations, if the developer's initial budgets included reserves, then the association's budget must include the reserve calculations. This type of reserve is

referred to as mandatory (must be calculated and disclosed as part of the proposed budget process). The budget can be increased as necessary to cover the required expenses. For condominiums and cooperatives, if the budget increase is more than 15% over the prior year, owners may have rights to submit an alternative budget. The alternate budget would still have to cover all necessary expenses, and have to be adopted by a majority of the total voting interests, in order to go into effect.

Mandatory Reserves –

Straight Line Method Formula
The formula for using the straight line method is:

- Anticipated replacement/deferred maintenance cost
  less Anticipated beginning balance in reserve fund
  = Remaining reserves needed
- Remaining reserves needed divided by Remaining life (# years)
  = Amount needed in current year to fully fund

Pooled Reserves
Defined - This means that an association may have a single source of funds to pay for multiple categories of reserve expenses.
For example, if an association establishes a pooled reserve account for roof replacement, building painting and pavement resurfacing, funds may be drawn from this account to pay for any of the three items.
Prior to the change in the rules associations were required to maintain separate accounts for each of these items and approval from the membership would be required in order to use funds from one category to pay for another.

Pooled Method Formula
The amount of the contribution to the pooled reserve account shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect,

plus The projected annual cash inflows over the remaining estimated useful lives of all of the assets that make up the reserve pool is

= or > the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis.

- Pooled Method Formula, continued…
- The ending reserve fund balance must never go below zero;
- The reserve funding formula shall not include any type of balloon payments;
- Reserve funding must be calculated out over the remaining useful life of the asset with the longest useful life.

Note: Projected cost **<u>may</u>** be determined by incorporating a calculation for expected interest and inflation.

- Interest
  718.112(2)(f)3., F.S.

- Must remain in reserve accounts.
- Association may establish policy regarding allocation of interest among reserve accounts.

Condominium and cooperative reserves (and reserves established by a homeowners' association developer or required by vote of the homeowners' association membership) are calculated according to a formula based upon the estimated useful life of the improvement, the remaining useful life, and estimated replacement cost or deferred maintenance cost for the improvement. For example, if the roof is good for 12 years, and the cost to replace it would be $144,000, divide $144,000 by 12 years, and fully funded reserves would require that $12,000 per year be accrued for the roof reserve. Then, the $12,000 is divided by 12 months, and the association would fund $1,000 per month. If the reserves are funded, the monthly amounts would then be pro-rated among all units and homes in the same percentage as the assessments are allocated.

For the reserves described above, the board has the ability to fully fund the reserves each year, without the approval of the members. Reserve funds must be collected deposited in the reserve account with the same frequency as assessments are collected. If the board does not want to fully fund the reserve accounts, the members can vote to waive all or some of the funding for the coming year. It requires a membership meeting at which a quorum is present, and the approval of a majority of the votes cast. The vote must be taken anew for each fiscal year, and must occur before the new fiscal year begins. Condominium associations cannot waive the year-end financial reporting requirements for more than three consecutive years.

For homeowners associations which did not have developer established reserves, reserves can be set up and funded as the board sees fit, and changes can be made regarding the reserves, without a vote of the membership. These would be non-mandatory reserves.

Once monies are put in the mandatory reserves, they can be used for the designated purpose by the board, from time to time as needed. If the board wishes to use funds in the mandatory reserves for a different purpose, the board will have to call a membership meeting, establish a quorum by proxy and/or in person, and then a majority of the votes cast will have to approve the change of use.

For mandatory reserves, proxy questions relating to waiving or reducing the funding of reserves or using existing reserve funds for purposes other than purposes for which the reserves were intended must include the following statement in capitalized, bold letters in a font size larger than any other used on the face of the proxy ballot:

> 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.

In a homeowners' association, if there are no reserves, the following language must appear in each year-end financial report:

> THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, UPON OBTAINING THE APPROVAL OF A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION BY VOTE OF THE MEMBERS AT A MEETING OR BY WRITTEN CONSENT.

If the homeowners' association Board has established the reserves, but the reserves were not established by the developer, the following language must appear in each year-end financial report:

> THE BUDGET OF THE ASSOCIATION PROVIDES FOR LIMITED VOLUNTARY DEFERRED EXPENDITURE ACCOUNTS, INCLUDING CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE, SUBJECT TO LIMITS ON FUNDING CONTAINED IN OUR GOVERNING DOCUMENTS. BECAUSE THE OWNERS HAVE NOT ELECTED TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, THESE FUNDS ARE NOT SUBJECT TO THE RESTRICTIONS ON USE OF SUCH FUNDS SET FORTH IN THAT STATUTE, NOR ARE RESERVES CALCULATED IN ACCORDANCE WITH THAT STATUTE.

Interest earned in reserves deposit accounts must be kept with the reserves, and allocated pro rata by reserve category.

Reserves can also be accrued using the "pooled" method, under the Florida Administrative Code, Section 61B.-22.005.

This method provides collection of reserve funds using a cash flow "pooling" method, which requires creating a spreadsheet on which every category of reserves is listed down the left side, and the years of estimated useful life are spread out across the top. The spreadsheet is extended as far out in to the future as the longest estimated remaining useful life for any improvement.

The pooling of reserves still involves calculation of the amount to repair or replace and the estimated remaining useful life, and the funding amount required each year is "equally" spread over the number of years remaining. However, full funding for "pooled reserves" is reflected by the total amount for all of the categories taken together for each year, reflected at the bottom of that year's column on the spreadsheet.

With pooled reserves, the total monies represented in the year's column on the spreadsheet make up a "pot" of money. The Board can use any or all of the monies in the pot for any of the categories listed on the spreadsheet as part of the pooled reserves, regardless of the balance shown on the balance sheet for that particular reserve category. This would not require any vote of the membership.

Under the Law, if an association has traditional, non-pooled reserves, these can be changed to cash flow pooled reserves if approved at a one-time membership vote. If the vote is taken, the association could continue to maintain non-pooled, mandatory, allocated reserve accounts, but the accounts would have to be kept separate from pooled reserve funds, and used only for the purposes for which they were collected, etc.

Or, the association can merge the allocated reserve accounts into the pooled reserves through the vote of the members.

An important difference between the two types of reserves accrual is that staying with allocated, line item "non-pooled" Reserves keeps control of changes to the use of collected Reserve funds in the hands of the membership, rather than at the discretion of a Board, in any given year.

YEAR-END FINANCIAL REPORTS

The following levels of Year-end Financial Reports are required for all condominium and homeowners' associations:

1. An association with total annual revenues of $150,000 or more, up to $299,999, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $300,000, but less than $499,999, shall prepare reviewed financial statements.

3. An association with total annual revenues of $500,000 or more shall prepare audited financial statements.

An association with total annual revenues of less than $150,000 shall prepare a report of cash receipts and expenditures.

The required level of reporting can be reduced to a lower level at a membership meeting, at which a quorum is present, in person or by proxy, and upon approval of a majority of the votes which are cast. The meeting must be held before the end of the fiscal year, and is only good for the year in which it is taken, or can be applied for the following fiscal year.

An association in a community of fewer than 50 units or parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures

in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

A cooperative association is required to prepare a report of receipts and expenditures for the previous 12 months, within 60 days of the end of the fiscal or calendar year, including reserves. A copy of the financial statements must be delivered to the owners within 90 days following the end of the reporting year.

Financial Reporting

The report covers the association's prior fiscal year. This may be a calendar year, January 1 to December 31, or it may be some other fiscal period, such as October 1, to September 30.
Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of a financial report for the preceding fiscal year.

Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner.

What are Annual Revenues?

Annual revenues include but are not limited to the following:

- Member Assessments, (Regular and Special);
- Interest;
- Income, (Rental, Laundry, Ancillary Operations, Etc.);
- Insurance proceeds;
- Fees and Fines Collected.

Annual Expenses

Expenses may include but are not limited to:

- Fees to the Division
- Costs for security;
- Professional and management fees and expenses;
- Taxes;
- Costs for recreation facilities;
- Refuse collection;
- Utility services;
- Lawn care;
- Building maintenance and repair;
- Insurance costs;

- Administration and salary expenses.

Report of Cash Receipts and Disbursements

This is a report of the prior year's financial activities prepared on a cash basis.

- Cash basis - Reporting of receipts and expenditures as they actually occurred. This is similar to your check book, in that it shows cash coming in, (deposits) and cash going out (expenses).

The following reserve disclosures shall be made regardless of whether reserves have been waived for the fiscal period covered by the financial report:

- The beginning balance in each reserve account;
- The amount of assessments and additions to each reserve account;
- The amount expended or removed from each reserve account;
- The ending balance in each reserve account;
- The amount of annual funding required to fully fund each reserve;
- The manner by which reserve items were estimated;
- The date the estimates were last made;
- The association's policies for allocating reserve fund interest;
- Whether reserves have been waived for the period;
- The specific purpose or purposes of any special assessments to unit owners and the amount of each special assessment and the disposition of the funds collected.

For a multi-condominium the following disclosures are required:

- The receipts and expenditures directly associated with specific condominiums; and
- The receipts and expenditures of the association that are not directly associated with specific condominiums.
- Financial Statements

This is a report of the prior year's financial activities prepared on the accrual basis using fund accounting in accordance with generally accepted accounting principles, (GAAP).

- Accrual basis - Reporting of receipts and expenditures as they were earned or obligated.
- GAAP - financial accounting and reporting assumptions, standards, and practices that a business firm must use in preparing external financial statements.

There are three levels of financial statements. They are as follows:

- **Audit** – Fifty (50) or more units and annual revenues of $500,000 and above;
- **Review** – Fifty (50) or more units and annual revenues of $300,000 and less than $500,000;
- **Compilation** – Fifty (50) or more units and annual revenues of $150,000 and less than $300,000.

Audit –

- Performed by a Florida Licensed CPA.
- Examination of original source documents.
- Independent verification of balance sheet accounts.
- Performance of substantive tests.
- Independent assurance that statements are in accordance with GAAP.

Review

- Performed by a Florida Licensed CPA.
- Some analytical procedures and inquiries.
- Limited assurance that statements are accurate.
-

Compilation

- Florida Licensed CPA not required.
- Production of statements from association records.
- No assurance of the accuracy of the statements.
- Financial Statement Components

The financial statements must contain the following components:

- Accountant's or Auditor's Report;
- Balance Sheet;
- Statement of Revenues and Expenses;
- Statement of Changes in Fund Balances;
- Statement of Cash Flows;
- Notes to Financial Statements;
- Reserve Disclosure.

Year-end Disclosure

- For each reserve account:
  - Beginning balance;
  - Additions;
  - Deductions;
  - Ending balance;
  - The amount required to fully fund each item (*This does not apply when using the pooled method*);
  - The manner by which reserve items were estimated, the date the estimates were last made, and whether reserves have been waived for the period covered by the financial statements.

    Statement of policy regarding the allocation of interest. For example:
    - Distributed equally among reserve accounts;
    - All interest assigned to one reserve account;
    - Allocated proportionately among reserve accounts;
  - The method by which income and expenses were allocated to the unit owners;

- The specific purpose or purposes of any special assessments to unit owners and the amount of each special assessment and the disposition of the funds collected;
- The amount of revenues and expenses related to limited common elements shall be disclosed when the association maintains the limited common elements and the expense is apportioned to those unit owners entitled to the exclusive use of the limited common elements.

Multicondominium association's disclosures:

- Multicondominium associations may present the financial statements on a combined basis as long as the financial statements, notes, or supplementary information disclose the revenues, expenses, and changes in fund balance for each condominium, and the association, as applicable.
- The financial statements, notes, or supplementary information shall also disclose the revenues and expenses of the association that are not directly associated with specified condominiums, and the method used to allocate such expenses to the condominiums or units, as applicable.
- The reserve disclosures required by this rule shall be presented separately for each condominium and for any association reserves not specifically identified with individual condominiums.

GAAP and GAAS

- **GAAP** - financial accounting and reporting assumptions, standards, and practices that a business firm must use in preparing external financial statements.
- **GAAS** - auditing standards established by the American Institute of Certified Public Accountants.
- Providing a Lower Level of Year-end Report
- Majority vote of the voting interests present or by limited proxy at a properly called meeting of the association.
- Must be taken before the end of the fiscal year.
- Applies to the current fiscal year, except the approval may also be effective for the following fiscal year.
- Providing a Lower Level of Year-end Report continued…
- Financial reporting requirement may not be waived for more than 3 consecutive years.
- Developer may cast his/her votes only for the first 2 fiscal years.
- Any audit or review prepared prior to turnover of control of the association shall be paid for by the developer.

An association cannot waive the requirement to prepare some kind of year-end financial report.

In addition to the budgetary assessments, boards have the power to levy special assessments to cover unanticipated or non-recurring expenses. The board has the same remedies available to collect special assessments.

The community association laws provide that the board of directors can require a renter to pay his/her rent directly to the association, if the owner becomes delinquent during the term of the lease.

USE RESTRICTIONS:

Use restrictions may be contained in the declaration (or master lease) and/or in the association by-laws. In addition, there may be board-made rules and regulations, and policies and procedures which will govern use and occupancy of the units and homes.

There are some differences between the restrictions contained in the declaration, lease or by-laws and those set forth in a set of rules and regulations.

a. Use restrictions in the declaration have a presumption of validity because: the law requires disclosure of the declaration's restrictions to all buyers of units and homes, giving the new owner notice of the limitations of his/her use of the property; and any changes to the declaration require advance notice, a membership vote, approval by a certain percentage of the members, and recordation of any change in the county public records. (Beachwood v. Poor, 448 So.2d 1143 (Fla. 4th DCA 1984)

b. Also, use restrictions contained in the declaration are not subject to a reasonableness standard, although they cannot be against public policy or in violation of any law.

c. Restrictions in the declaration or lease cannot be arbitrary in their application. For example, you cannot adopt a provision which provides that ground floor units can have two cars, and second floor units are limited to one car. (Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla. 4th DCA 1975)

What can be handled with a rule, and what requires an amendment to the Governing Documents?

If the use restriction is contained in the declaration or the by-laws, it can only be changed through the amendment process, with a vote and approval of the requisite percentage of association members.

Rule-Making –

First, it is necessary to determine the scope of the board's rule-making authority. This will be contained in the Governing Documents. The question is whether board of directors has the authority to adopt and amend rules and regulations for both units and the remainder of the property outside of the units. The law contains requirements for notice to members if the rule relates to use of the home, as opposed to the common property. There may be other restrictions contained in the Documents. There are still a few Documents around which require membership vote on rules, as well

1. Under Florida Case Law, rules cannot be drafted which will change in any way a right which is expressly set forth in the Declaration of Condominium, the Articles of Incorporation, or the By-Laws, nor can a rule contradict a right which is "reasonably inferable" from any of those Documents.

In other words, a rule cannot change the actual language of any of the Governing Documents, and cannot take away a right which is either specifically granted or not prohibited by the Documents. The only way to change a right is to adopt an amendment to the Governing Documents, at a duly-called meeting of the membership, by approval of the number of members necessary to amend.

2. Rules cannot conflict with any laws.

3. Rules can clarify rights, provide definitions of terms, expand and amplify Documentary provisions, and can be promulgated in follow-up to express language in certain provisions of the Documents which provide for the Board to make rules regarding a particular use or procedure.

4. Under the Condominium Act, if the Board is making a rule regarding the use of a unit (i.e., a rule regarding guest occupancy of a unit) then the Board must send out notice to all of the owners, at least fourteen days in advance of the Board Meeting at which the rule will be discussed and adopted, even though the membership is not voting on the rule. (Rules regarding common elements do not require the fourteen-day notice, but only the forty-eight hour posted notice as for any other board meeting.)

5. Rules must be duly-adopted at a meeting of the Board of Directors at which a quorum is present, and once the rule has been approved, a copy of the actual rule language must be sent to every owner, before enforcement of the rule can begin.

It is always a good idea to have a workshop for the members to attend, to get their input and involve them in the process. According to psychological studies, people are more likely to comply with rules if they have had a chance to express their opinions and feelings about them, even if they don't actually like the rule once it has been adopted.

Also, rules do not have to be recorded, unless the original set of rules was recorded. Once the rules are recorded, any and all changes to those rules must also be recorded.

6. In addition, enforcement of the new rules is only possible for violations which occur after the time the rule has been adopted. That is, any condition which exists in violation of the rule at the time the rule is adopted is considered to be "grandfathered" and must be allowed to continue to exist.

As an example, in the case of a violation of a guest restriction, when a guest arrives after the new rules are adopted, it is a new circumstance, and the guest occupancy will be

subject to new regulations, regardless of the number or frequency of previous guest visits to a particular unit.

As another example, the Board could adopt a specific rule which allowed window shades, which showed from the outside of the building, to be white, but no other color, and that would be a reasonable rule. However, anyone who had window shades which were a different color at the time the rule went in to effect, would have to be allowed to keep the shades, until they were replaced. At that time, the white shades could be required. (This is the concept of "grandfathering.")

7. Rules must be reasonably related to a need or a problem within the community. It must be related to a legitimate objective or power which is reserved to the association. And, it should relate to the health, happiness and enjoyment of life of the members. (Hidden Harbour Estates, Inc. v. Norman)

8. Rules must apply to all owners/members, and must be uniformly, timely and consistently enforced against all residents within the Community.

9. Is a rule the best way to deal with the problem, or is the problem related to only one particular owner, tenant or guest in one unit? If the answer is that the problem is not general or wide-spread, the remedies provided in the Documents or the law should be investigated, rather than using rule-making to control the behavior. It is too easy to "punish the good guys" as rules often have unintended consequences, once adopted.

10. Is there already a rule or a Document provision which addresses the issue? If so, does it need to be modified?

11. As mentioned above, sometimes, an amendment to the Documents will be called for, and sometimes, rules and restrictions have outlived their usefulness, or do not reflect lifestyle changes over the years.

For example, there may be a "no trucks" restriction in the declaration, but the parking lot is full of SUV's and pick-up trucks. Documents and Rules should be reviewed periodically, and up-dated or purged as appropriate.

12. If a rule is too broad, or too vague, an owner or a resident cannot determine what exactly is expected of him/her. Those types of rules may be found unenforceable if they are challenged. Also, the board has to be able to monitor behavior, verify the violation, and enforce the rule for it to be valid.

For example, a high rise community of seniors passed a rule which prohibited the flushing of toilets between the hours of 10 p.m. and 7 a.m. How in the world would they be able to determine who had flushed the toilet, etc.? This rule would not be enforceable.

13. If a rule is too narrow, or attempts to be too comprehensive, it will create loopholes, as it is impossible for the Board to think of every possible contingency. Accordingly, it is

best to avoid lists of do's and don'ts. There will always be something you neither thought of nor imagined. And, no one will read a 35-page rule book.

14. Rules cannot create two or more classes of owners. The rules must apply to every owner and resident at the Condominium. Accordingly, rules made for "special interest" groups or rules which only apply to new owners would be invalid and unenforceable.

Basically, substantive rights and express language of the Documents would have to be addressed through the amendment process. Clarification of Documentary language, regulation of behavior, definition of terms used in the Documents, and the like can be addressed through the rule-making process. For example, rules which regulate guest occupancy of a unit can be adopted, without an amendment to the Declaration being necessary. But, restrictions on leasing would require an amendment approved by the membership, as provided in the Declaration of Condominium.

Policies and Procedures –

Boards also have the authority to adopt policies and procedures regarding the operation of the association. Generally, policies address procedural rights, rather than use restrictions.

Examples of policies would include:

a. policies which regulate member participation in board and membership meetings; and

b. policies which regulate the right of a member to have access to the Official Records of the association.

There are also laws which regulate some aspects of member participation and access to Official Records, which will affect the scope of any board-made policies and procedures.

Both rules and policies should be maintained in a separate binder or book, rather than in the Minute Book, for ready and easy reference, and to enable copies to be made for new buyers and/or renters, as required. And, copies of adopted policies should also be distributed to the members, from time to time, and whenever there are changes or additions to the last set.

Types of Restrictions –

Restrictions in the Governing Documents, and the rules and regulations, may include restrictions on types or number of pets permitted, or even prohibitions against having pets.

There may be guest restrictions, limits on the number of people who can reside in the unit/home, and single-family occupancy requirements. All of these restrictions affect who can reside in the unit or home.

There may also be parking restrictions, including: limit on the number of cars which can be parked on the premises, types of vehicles which can be parked (i.e., no motorcycles or trucks).

Rental restrictions may include: number of rentals per year; minimum or maximum length of rentals; review and approval of all rentals by the Board of Directors, prior to occupancy.

Every occupant of a dwelling is bound by the restrictions, including owners, renters, guests, and contractors who are doing work in the dwelling. If a renter or a guest fails to comply with the documentary restrictions, the association can take legal action to have the renter or guest removed from the unit, and terminate the lease for a rental.

Review and Approval of Sales and Rentals –

The screening and approval of prospective owners and renters is a complex and involved process. Although the authority to screen and approve is granted to an association board in the association's governing documents, the language can be fairly vague and general, without specific guidelines. The task is further complicated by the fact that there are some statutory requirements, and some court cases which would have an impact on the ability to disapprove. In light of developments in the law governing occupancy of housing, there are potential dangers inherent in the exercise of these rights by the association and ample opportunity to run afoul of the Federal housing and discrimination laws.

The applicant screening procedure is an important aspect of community living. Many condominium and co-op community associations have provisions in their documents giving the association board the right to screen and approve or disapprove prospective purchasers, renters, occupants or other transfers. These provisions may also include the right to charge a screening or transfer fee to cover the costs of a background investigation.

The Florida Condominium and Cooperative Acts provide that the association documents must contain the authority to approve or disapprove transfers and conveyances and the right to charge a fee in connection with this process, before the screening process can be initiated. For a homeowners' association, the community's governing documents may include or be amended to include a review and approval procedure.

Why have a background check and the screening interview? As a board member, each director has a "fiduciary responsibility," a legal position of trust, to protect the welfare and wellbeing of the residents in the association community, as well as to protect the property values. No director may act in any manner which would endanger the health and welfare of the residents. Therefore, a screening committee and board which accept an application and a screening fee, but do not diligently act to check out new residents, may have

breached their fiduciary responsibilities. In addition, the screening interview is a perfect opportunity to acquaint a prospective resident with the Documents and any occupant responsibilities or restrictions on rights and use of the property.

What are appropriate procedures and what limitations are there on board actions? The board of directors should establish basic guidelines for its screening committee to follow when reviewing resale and rental applications. The board and/or the committee should uniformly review all applicants using the same procedures, considerations and treatment to avoid claims of discrimination.

The screening committee must be fully aware of the Federal and State Laws and any amendments thereof, which prohibit discrimination in housing. Also, they must be aware that many counties have local ordinances which also prohibit discrimination because of someone's political affiliation or type of employment. Discrimination is not always a clear-cut matter. Basically, it comes down to allowing some to have benefits that others are not afforded preferential treatment.

Every association should have a comprehensive application form available. The application should include: family composition (who will be residing in the home), prior residence history, financial and character references. The application may include a brief listing of the requirements for applying to purchase or rent, and a summary of the major use restrictions in the association documents. A set of the current rules and regulations should be attached, and applicants should sign this application form, as a receipt that they have received the rules and as evidence they have completed the application. There must also be affirmative language disclosing that there will be a background check, and that the applicant agrees to it.

The application must be fully completed. If the application is incomplete or the screening fee is not included, it would be returned immediately to the applicant, and the sale or rental should not be processed.

The association documents usually include the time frame by which approval or disapproval of a transaction must be completed. These days are calendar days, which include holidays and weekends. If the documents are silent on the number of days, more than 30 calendar days may be deemed unreasonable.

Keep in mind that the association’s background check would not be disclosed to the owner of the home/unit, or to the realtor for the transaction. The owner of the home should authorize a separate background check for any prospective tenant. It is a good idea to use a professional investigative company to perform the background check, since they will have the time, expertise, experience, training, techniques, reference materials and resources to information necessary to effectively screen applicants. They can also, in effect, provide a legal buffer between you and the applicant similar to a relationship between a bank or retailer and a credit bureau.

In the State of Florida, such companies must either be licensed private investigative agencies or operate under the sanctions of the federal fair credit reporting act. Under the Federal fair debt and credit reporting laws, anyone can operate such a business without any experience or knowledge; however, training and experience are required to obtain a private investigator's license; therefore, when seeking the services of an investigative agency, look for a company which has both. The fair debt and credit laws mandate a contract with specific statements regarding legitimate requests for information and confidentiality of report information.

If you are conducting a background check on behalf of the association, without using an outside agency, look carefully at the information you are receiving, watch out for the following pitfalls:

1. Landlords - Do you know if, in fact, the person to whom you are speaking is the landlord or someone covering for the applicant? The current landlord may even lie to you to get rid of the applicant.

2. Has the applicant lived anywhere other than places he listed on the application? if he did, you may not be able to trace real residential behavior.

3. Banks - Most banks will not give private individuals financial information. However, they may cooperate with licensed investigative agencies.

4. Employers - Is the applicant really employed there? Is it a legitimate business? I know of one case in which the applicant wrote that he was the vice president of a company, when he was actually a janitor.

5. Character references - How do they know the applicants, for how long, why are they moving, children, pets, etc., etc. Are they related to the applicant in some way. Be careful not to ask any questions prohibited by the Federal or State Laws.

6. Credit report - An association is not permitted to require a credit report for a rental situation, since there is no credit/creditor relationship between the applicant and the association. The owner remains responsible for all outstanding financial obligations due to the association. In a purchase transaction, if the buyer is getting a mortgage through a financial institution, he/she is already going through a thorough financial review; therefore, the association would usually be hard pressed to reject an applicant on the basis of a credit report.

In Florida, in order for a board of directors to have the ability to review and approve sales and rentals of units within a community, the Documents must provide that the association has a right of first refusal. This means that the association would have to find an alternate buyer or renter, under the same terms and conditions as those set forth in the original deal, in order to be able to turn down an applicant, with some very narrow exceptions.

There are a few, very specific grounds for association disapproval of prospective buyers and/or tenants. That is, under the Statutes and the Florida Case Law, there are certain situations under which the Association can disapprove of a prospective applicant, without having to exercise a right of first refusal (i.e., without having to provide an alternate applicant). If you are considering turning down an applicant, it is important to consult with your Association Attorney before doing so.

It is illegal to discriminate based upon race, religion, sex, national origin, color, creed, familial status or handicap. Other than that, there are other limitations on the right to disapprove, set forth in the Case Law. Some of the grounds for disapproval will not obligate the association to purchase or find an alternate purchaser or renter for the apartment. What goods and furnishings a person chooses to move in to an apartment is not the business of the Association and is not grounds for disapproval.

The board of directors has the ability to incorporate the grounds for disapproval into the board-made Rules, and the language would not have to be an amendment to the Documents.

If an owner does not get approval for the prospective sale, or otherwise fails to comply with the documentary and policy requirements for processing a sale of an apartment, the association can bring legal action to set aside the sale

If the owner does not get approval for the rental, or the renter is disapproved by the board, but the owner moves the person in anyway, the association can bring legal action against the owner to force the removal of the unapproved occupant.

For condominiums and cooperatives, the association has a right of access to the units in case of emergency, or for matters related to maintenance, repair or replacement of the common property. For example, a tenant cannot refuse access to the unit if the board needs to investigate a leak, or a source of noise or nuisance smells, etc. Access must be during reasonable times, and should be arranged in advance (except in case of emergency).

Senior Housing Occupancy and Fair Housing Laws –

Communities may be designated as housing for older persons, so that there must be at least one person 55 years of age or older in each dwelling, and no children under the age of 18 may be permanent occupants.

1. The Federal Fair Housing Amendments Act of 1988 and the Housing for Older Persons Act of 1995 were initially adopted, and then supplemented by the Rules adopted by the U.S. Department of Housing and Urban Development (HUD).

To qualify as housing for older persons, it was necessary to have a minimum of 80% of the units/homes occupied by at least one person who is 55 or over. In addition,

it was and still is necessary to hold the community out to the general public as “housing for older persons.”

As long as the Community qualifies as senior housing, no children under the age of 18 are permitted to permanently occupy any unit. (Even if one person who occupies the unit is over 55, children under 18 cannot be permanent residents.)

2. Any person over the age of 18 can purchase and/or own a unit. The Laws affect OCCUPANCY, not ownership. That is, a person under the age of 55 years can buy or inherit a unit, but he/she cannot become a permanent occupant until he/she is 55, or has another person who is 55 or over living with him/her. If a unit is rented, then there must be at least one tenant permanently occupying the unit who is 55 years of age or older.

3. When there is no one permanently living in the unit, the restriction does not apply to temporary visits or occasional occupancy, as long as the unit is not the permanent residence of the individual who is under 55.

4. To document that the community is housing for older persons, the board must conduct a census, and obtain a copy of proof of age from at least one person 55 or over in each unit/home.

Once a community has met the initial requirements of Senior Housing Laws (having at least 80% of the units occupied by at least one person 55 or over), it continues to be necessary to keep and update proof of age for each unit, and to strictly enforce the provisions of the Governing Documents, regarding occupancy in compliance with the Senior Housing Laws.

5. Following the adoption of the initial Federal and State Laws in 1988 and in 1994, the Federal and State Courts and enforcing agencies have continued to interpret the senior housing requirements. Today, in order to maintain Senior Housing status, it is necessary that 100% of all “new” occupancy include at least one person who is 55 or over. If a board allows new occupancy without at least one person 55 or older in residence, the association is not holding itself out to the general public as housing for older persons.

6. Under the current law, there are only two exceptions to the 100% of new occupancies by at least one person 55 or over: 1) surviving spouses who are under 55; and 2) heirs **who are already in residence** at the time of the death or removal of the over-55 individual. In other words, the exceptions are very narrowly defined, and limited.

The 20% margin is NOT intended to be used for “arm’s length sales” for occupancy by any person of any age, according to the Code of Federal Regulations, HUD Rules, 24 CFR Chapter 1, Section 100.304(c)(2).

In 24 CFR Ch. 1 (4-1-92 Edition), on Page 903 (Subchapter A., Appendix I), the text reads "Further, the Department does not believe that the proposed rule can fairly be characterized as establishing a 20 percent "set-aside" for persons under 55 years of age." Further down on Page 903, the text provides:

> For example, this requirement would preclude an owner or manage from marketing 80 percent of the units for persons 55 years of age or older and marketing the remaining 20 percent in a radically different way (e.g., young adults) The policies and procedures for the housing facility as a whole must demonstrate an intent to provide housing for persons 55 years of age or older. In essence, this means that the housing in question must in its marketing to the public and in its internal operations, hold itself out as housing for persons aged 55 or older.

The Arbitration Department of the Department of Business and Professional Regulation, which has jurisdiction over Condominium and Cooperative Associations in Florida, adopted this interpretation of the use of the 20% margin in the case of Cummings v. Seagate Towers Condominium Association, Inc., among other decisions.

Accommodation for Handicap and the Federal Laws; Alterations to Common Property –

There are two different laws which govern the accommodation and modification of common property within associations for handicap accessibility: 1) the Americans With Disabilities Act ("ADA"), and 2) The Fair Housing Amendments Act of 1988 ("FHAA").

1. The ADA was created to address handicap accessibility to **public and government buildings**, including educational institutions, courts, day care centers, stores, offices, and hotels/public accommodations. The ADA is found in Title 42 of the United States Code, ("U.S.C.A."), Chapter 126. The cases which interpret and apply the ADA all involve a governmental entity or agency, or a hotel, a store, a university, and other public services and locations. The ADA also applies to country clubs, golf courses and tennis clubs which have public memberships, and to beauty shops, restaurants, convenience stores, medical and professional offices.

If a community's common elements or areas include these kinds of facilities, and if the facilities are intended and operated specifically for use by consumers and the general public, beyond the resident population and its guests within the community, then certain portions of the property would be subject to the ADA requirements for accommodations for handicapped persons. All modifications required to be made under the ADA are made at the expense of the property owner, and not the expense of the person requesting the handicap accessibility. These would include handicap-accessible bathrooms, ramps for entry into the building, parking exclusively reserved for handicapped drivers, and so on.

Most of the communities are residential property. They are not a commercial apartment or rental complex. And, they are **not** a public facility. (The fact that someone may invite an outside guest to join him/her at the Clubhouse does not qualify it as a public facility.) Accordingly, the ADA would **NOT** apply to either the Community or its property.

Note: a clubhouse which is open to the public for private parties and functions, or advertised bingo or card games could fall under the ADA, and require all modifications under the Act.

2. Community associations are governed by the FHAA, under which the association must allow an owner or resident to make reasonable modifications to the common elements to accommodate handicap (mental or physical), this time **at the expense of the individual requesting the modification.**

The FHAA defines the term "disabled" as follows regarding accommodations for handicap:

> DEFINITION OF 'DISABLED'
> Under federal law an individual is disabled if he/she has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.
>
> The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction, and alcoholism. This definition doesn't include any individual who is a drug addict and is currently using illegal drugs, or an alcoholic who poses a direct threat to property or safety because of alcohol use.

Based upon the Joint Statement issued by the U.S. Department of Housing and Urban Development and the Department of Justice, the association has the ability to request some limited additional information to document the existence of a handicap which meets the conditions of the State and Federal Law. Consult with the association's attorney if an owner or resident has requested a modification for a handicap.

3. The FHAA also applies when a resident in a "no pet" building asks for permission to have a dog or cat as an accommodation for a handicap. Such "prescription pets" would be subject to a similar analysis as described above.

If a modification to the common property is necessary to accommodate a handicapped person, under the FHAA, the modification would NOT be considered to be a material alteration, and would not require membership or board approval. The modification would have to be stable and sturdy, have the necessary permits for construction, and it

could not create a dangerous condition for others using the property, in order to be proper and legal.

If a “prescription pet” is required to be permitted on the property, that does NOT create selective enforcement, nor does it prevent the board from otherwise enforcing the “no pet” restrictions in the Governing Documents for the other residents, in the future. It is NOT necessary to republish the Documents or otherwise take action to reestablish the board’s right to enforce.

Regulation of Satellite Dishes, Over the Air Reception Devices –

Some of the older communities in Florida have Documents which prohibit television antennae or satellite dishes. As of 1996, those blanket restrictions are no longer enforceable.

The Telecommunications Act of 1996 was adopted by the United States Congress, and provides that an owner may install a satellite dish **less than one meter (39 inches) in diameter**, subject to rules and regulations promulgated by the Federal Communications Commission (“FCC”).

Under the FCC Rules, the installation of a satellite dish is only permitted on property which is owned by or under the exclusive use or control of that individual. The ownership in question refers to private ownership, and does not apply to common elements or condominium property. This would include the right to place a small dish within a unit, or on a balcony which is attached to a unit, because the owner has the right of exclusive use or control over that area.

However, the right ends at the balcony railing or at the imaginary plane created by the outermost boundaries. The railing and the space beyond the railing or above the “ceiling” are outside of the owner’s use rights. Likewise, the roof, the exterior building walls, the Common grounds, parking areas, etc. are all **off limits**, since these areas, which are outside of the unit, are either owned in undivided interest by all of the shareholders in the Condominium or are outside of the exclusive use or control of an individual owner.

The provisions of the Act and the FCC Rules have been tested and interpreted thousands of times, in the Federal Courts and the State Courts, as well as Agency Action by the FCC, and the Arbitration Division of the Department of Business and Professional Regulation.

Under the current Law and the FCC Rules, an association would have to permit an individual to install a **satellite dish less than one meter in diameter** on his/her condominium or co-op balcony, but the dish could not be outside of the balcony dimensions, (i.e., cannot extend outside of the plane of the balcony railings).

The owner does not automatically have the right to drill through the Common Elements walls to run wiring, and under the Case Law, is not entitled to mount a dish on common

exterior building walls or roofs, or penetrate the building walls in any way, or exceed the ceiling height, etc.

Under the Law, and under the Florida Arbitration Decisions, the FCC Administrative Rulings and Federal Court Cases, an owner cannot place a dish on the roof of the Condominium Building, as that area is part of the Common Elements, and is owned in undivided interest by all of the owners of units in the Condominium. It is NOT property over which the owner or the occupants of a unit have exclusive use or control, nor is it property of which the unit owner is the sole owner. Likewise, the grass, parking spaces, and all other areas of the common elements are off limits to owners for satellite dishes.

Subject to the limitations set forth below, a homeowners'' association board has rights to limit where a satellite dish is installed.

The FCC Rules give an association board a certain amount of control over the installations which are permitted. Under the current Law and the Rules, the board has the full authority, and the weight of the law behind it, to prohibit the installation of satellite dishes anywhere on the common elements, as mentioned above. This is true even though some owners cannot receive the signals if their units do not face the southwest quadrant where the satellite is located. If unit balcony exposure prevents signal reception, the board would not provide an alternate site for placement of the dish.

Basically, the Law does not permit the association to require "approval" of satellite dishes. But, under the Law, the board can adopt formal regulations regarding the installation, placement and color of the dish, within certain limitations. Consult with the association attorney for further guidance on this topic.

The Federal courts and the FCC have ruled that there is no "first amendment" right involved in having a satellite dish. In fact, the applicable constitutional clause is that which prohibits the taking of private property without just compensation. Owners who want to install antennas on common elements are actually trespassing on property owned by other persons.

From time to time, over-zealous salespersons have advised buyers that it is not possible for the association to stop the installation. This information is not correct, and the court cases and FCC rulings have clearly held that associations definitely have the right to regulate satellite dishes, along the lines set forth above.

ENFORCEMENT OF AND REMEDIES FOR VIOLATIONS:

Chapters 718, 719 and 720 of the Florida Statutes all address the enforcement of the association Governing Documents. In addition, there are provisions for enforcement in those Governing Documents.

Pre-Litigation Procedures –

Boards should adopt policies related to enforcement procedures.

a. There should be a board-made rule requiring notice of a violation to be in writing, signed by the complainant, and showing his/her unit number or street address. This can be kept confidential. Ultimately, however, any one with direct information about a violation could be called upon to testify later, if enforcement through legal action becomes necessary.

b. Once the violation has been verified, a letter should be sent to the owner of the unit or the home, addressing the violation, asking for compliance, and setting a time limit by which compliance is expected. The notice should also include a phone number for someone to contact about the violation.

c. Some associations send a second notice, advising that further failure to comply will result in legal action.

d. Ultimately, the matter is referred to the association's legal counsel, for handling. The attorney should start with a demand letter.

Arbitration and Access to Court –

If voluntary compliance cannot be achieved, the association would take further action. For condominiums and co-ops, the statutes provide for mandatory non-binding arbitration of any disputes related to the authority of the board to:

a. require a unit owner to take action or not take action involving the owner's unit or appurtenances there; and the common area; and

b. common area

Arbitration is also required for any issue related to the failure of the association to:

a. properly conduct elections;

b. give adequate notice of meetings or other action;

c. properly conduct association and board meetings; and

d. allow access to and inspection of Official Records of the association.

Condominiums and co-ops have direct access to the courts for all other types of disputes, including those related to tenants, title to the unit or common elements, warranty issues, collection of assessments and foreclosure.

Generally, homeowners' associations can enforce their Documents in court with a couple of exceptions. Section 720.311, Florida Statutes, applies to all homeowners associations in Florida. It provides that recall disputes and disputes related to elections in homeowners associations must be submitted to the Department of Business and

Professional Regulation for mandatory binding arbitration.

Then, Section 720.311(2)(a), Florida Statutes, provides:

> 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, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be filed with the department for mandatory mediation before the dispute is filed in court. Mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-order mediation. . . . **(note:** The department being referred to is the Department of Business and Professional Regulation**)**

That Section contains other instructions and limitations on the dispute resolution process. In the case of a conflict between the Law and the Documents, the Florida Statutes take precedence over any provision of the Governing Documents.

However, before getting to the court, a homeowners'' association is required to participate in pre-suit mediation.

a. Under Section 720.311, Florida Statutes, the party who wishes to bring the law suit must first send a form letter, which is set forth in the law, by certified mail and regular mail with a demand for pre-suit mediation.

b. The letter would include the names of five certified mediators, from which the responding party may choose.

c. The mediation must take place within ninety days of the offer to mediate.

d. The responding party must respond to the demand within twenty days from the date of the letter, or the aggrieved party may move ahead with the lawsuit in court.

e. If the responding party fails or refuses to participate in the mediation process, he/she/it may not recover attorneys' fees or costs in the subsequent litigation.

All of the Statutes which regulate community associations provide for a right to collect prevailing party attorneys' fees and costs as the winner of the lawsuit or arbitration.

Fining –

Another enforcement remedy available to associations is the use of monetary fines for violations of the Documents. State Law highly regulates the fining process for all types of associations.

First, the right to fine must be contained in either the declaration or the by-laws of the association. Without that enabling language in either document, an association will not be able to levy any fines. It would be necessary for an amendment to be adopted before any fining could occur.

Once the authority to fine exists, and before an association board can levy a fine, there are a number of steps which must be following:

1. Upon receipt of notice of an alleged violation, the board must verify that there is something in the Documents which is being violated.

2. The next step is to verify that the violation actually occurred.

3. The association must give the unit owner or renter notice of the violation, and the opportunity to cure. The notice must include the fact that he/she is entitled to request a Hearing, before an independent fining committee (i.e., not Board Members). He/she would then have 14 days in which to request the Hearing.

4. If he/she does not request a hearing, or if the hearing is held and the committee determines he/she is in violation, then the committee would recommend to the board that it levy the fine. And, then the board can levy the fine. The fine becomes effective only at that point. The board can determine that it does not wish to levy a fine, if a fine is recommended by the committee. However, if the committee recommends no fine, the board does not have the authority to override it.

Under the Law, the maximum fine an association can levy is $100.00 per violation. The law provides that each day the violation continues (after the fine has been levied) is a new violation, up to a maximum of $1,000.00 (in a homeowners association, the total may be higher if provided for in the Documents). The board cannot levy the fine until the entire due process procedure has been completed (notice, chance to cure, opportunity to have a hearing, recommendation to the board, and levying of fine by the board).

Fining has some limitations, as a means of enforcement of the Documents. Because of the statutory requirements, the fining process is cumbersome, time consuming and administratively daunting, as the board must find a group of owners who are willing to sit on the enforcement committee. Fines are not a particularly effective deterrent for individuals who make a habit of or condone violations involving their units, because fines do not require the owner to fix the problem, or restore the alteration, or stop doing something, etc. For example, a person in violation of the “no pet “ provisions could pay the fine, but not be required to remove the dog.

And, under the Law, a condominium or cooperative association cannot lien to collect the fine, so the board would have to go to Small Claims Court and try to recover the fine. Homeowners associations can lien for a fine which is $1,000 or higher. Although a

financial penalty is sometimes a good incentive to encourage an owner to control the use of his/her unit or the common elements, , because it is so difficult to collect, and because it does not achieve the association's goal of getting compliance, it has limited use.

Failure to Enforce; Loss of Right to Enforce; Republication –

From time to time, you will find that boards of directors have not fully enforced all provisions of the Governing Documents. Generally, under the Florida Case Law, if the association has not enforced the Documents in the past, the board loses its right to enforce against those types of violations in the future.

When prior boards have not uniformly enforced the Governing Documents, the problem is that there are defenses available to any owner or other resident against whom the current board attempts to enforce restrictions at this time, which would considerably weaken the association's ability to pursue a case, and in some cases prevent the board from enforcing at all.

Under the Governing Documents and the Law, the association has the authority and ability to enforce the Documents and regulate the use of the common property, but, board action must be consistently taken, in a timely manner, and Documents must be uniformly enforced for everyone.

Under the Florida Case Law, the current Board is not able to start enforcement action against owners who have violated the Documents, if there has not been enforcement in the past. (Chattel Shipping and Investments, Inc. v. Brickell Place Condominium Association, 481 So.2d 29 (Fla. 3d DCA 1986))

On the other hand, if the Board has uniformly enforced a particular provision of the Documents, then the Board can continue to do so, and that specific enforcement action would not be lost. That is, failure to enforce a particular provision does not prevent the Board from enforcing another provision if the second provision has been enforced over time.

RE-ESTABLISHING RIGHT TO ENFORCE

There is a way to re-establish the enforceability and application of the Documents. To accomplish this purpose, the board must "republish" the Governing Documents, which can be done without a vote of the membership. (Chattel Shipping and Investments, Inc. v. Brickell Place Condominium Association) If you need assistance to re-establish the Documents, consult with the association's attorney.

OWNERS' RIGHTS AND RESPONSIBILITIES:

Even though the board is in charge of the community, owners have a number of rights and responsibilities which are set forth in the Governing Documents and the Law.

Owners have the ability to elect the board of directors; to vote to approve amendments to the Governing Documents; and to approve material alterations of the common property by the association. Owners have the right to inspect all Official Records of the association, including the financial records and information on any owners who have not paid their assessments; and to attend meetings of the board and of the membership. They also have the right to use the common property for the purposes for which the property is intended. The owners have the obligation to maintain their homes, to comply with the requirements of the Governing Documents, including the rules and regulations, and to pay their assessments.

When an owner has a renter in his/her unit or home, the owner has the responsibility to pay the assessments to protect the renter's rights of quiet enjoyment. Community associations are permitted to suspend rights to use the common area when an owner owes assessments for more than 90 days.

RENTERS' RIGHTS AND RESPONSIBILITIES:

Most of the time, the renter "stands in the shoes of the owner" and has all of the rights to use the home and the common property, including the clubhouse, pool, parking spaces, and so on. Renters must abide by the Governing Documents, including the screening and approval process, if any.

If a renter violates the Governing Documents, he/she is subject to enforcement, and so is the owner of the unit. As the agent for the owner, you might also be named in an enforcement action, so it is in your best interest and in the best interest of your client to keep renters on the straight and narrow.

Renters do not have the right to attend either board or membership meetings, as those are private corporate meetings open only to members or shareholders. Renters also have no right to vote in any association matters. If a renter has a problem, he/she is required to contact the owner or the owner's agent (the realtor). Renters should not be contacting the association manager or the board of directors.

CONCLUSION:

As a board member, you have a duty to be familiar with the workings of your community association, and the contents of its Documents, as well as the laws which govern it. And, as a director, you must be constantly up to date on any developments which impact on how you do your job. Serving on the board is an opportunity to help create a healthy community, and preserve your property values. Be sure the lines of communication are open. Get help from professionals when you need it. Keep your sense of humor.

There are classes and publications available to association board members. Remember that the laws change on a regular basis. It is important to stay current with those changes, to protect the association, its members, and yourself.