

# A Primer on Special Assessments

January 18, 2022

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There is an old saying that the two dirtiest words in community associations are “special assessment”. Board meetings at which special assessments will be discussed and imposed are often the only well attended meetings throughout the year in many communities. The reason for this is simple: Tell people they have to pay a special assessment on top of their regular maintenance and they often have questions about the reason for the assessment and objections to the additional financial burden.

Many communities will be undertaking large repair and renovation projects in 2022 and passing special assessments to fund these projects, in whole or in part, is certainly going to be a consideration, particularly for communities who do not have adequate reserves or available lines of credit.

## **Can your board pass a special assessment?**

In order to pass a special assessment, your board must first discuss the substantive and procedural aspects with legal counsel. Your association attorney should be able to advise you whether your board has the authority to pass special assessments and clarify whether or not membership approval is needed.

The condominium and cooperative statutes provide general authority to assess but special assessment authority is typically set forth in an association’s governing documents. Usually, special assessments are levied by the Board, but some documents require membership approval for a special assessment regardless of its purpose or amount while other documents only require membership approval for special assessments over a certain amount or when used to fund discretionary improvement projects. It is critical that these determinations are made before the assessment is levied.

Not every special assessment is passed to fund a repair or renovation project. Often boards pass special assessments to fund operating deficits, replenish reserves, pay for insurance premiums or to address unanticipated expenses like a legal dispute.

## **What are the mechanics of passing a special assessment?**

If an association’s governing documents allow the board to approve a special assessment by a board vote alone, the board still must ensure that it is following the proper protocol to do so. Specifically, the notice for the board meeting at which the special assessment will be discussed and passed must be posted and mailed at least fourteen (14) days in advance of that meeting (and possibly longer

if the governing documents require more advance notice than the statutes require). That board meeting notice also must contain an agenda with a description of the purpose(s) for the special assessment and an estimated amount for the assessment. It is important that boards use the proper language to describe the purpose or purposes for the special assessment and how much they approximate it will be. For example, there is a difference between passing a special assessment to repay a loan that was obtained for a repair or renovation project and a special assessment which is being passed to fund that project directly. In addition, all costs associated with the project such as legal, engineering, permits, etc. should all be factored in to the special assessment if your board does not want to run the risk of having to pass a second special assessment. It is always advisable to build a contingency factor into the special assessment for potential cost overruns.

At the special assessment board meeting, the purposes for the assessment stated on the notice cannot be changed but the amount listed on that notice is only an estimate and sometimes does change after the directors discuss the assessment and hear input from the members. After the meeting, notice of the Board Resolution adopting the special assessment and setting forth the purpose(s), amount and payment terms must be sent out to all owners. It is important that boards and their managers, when calculating the allocation for the special assessment, not assume that the allocation is the same as that used for regular maintenance. Some governing documents allocate special assessments on a pro rata basis even though regular maintenance is allocated on a unit type or square footage basis and vice versa.

If a board fails to follow the substantive and procedural requirements when passing a special assessment, the Association will be unable to enforce the assessment if it is not paid and another properly noticed meeting will be required to ratify and readopt the assessment. The fallout from that kind of snafu can be significant but there is an ability to ratify an improperly passed special assessment. See *Wimbledon Townhouse Condo v. Wolfson* 510 So.2d 1106 (Fla.App. 4 Dist. 1987).

### **What are the different options for financing a project?**

For any large or unexpected expenditure, a board should evaluate the different available funding options. If a project cannot be fully funded via reserves, some communities decide to fund large projects with a combination of reserves, a loan and/or a special assessment. Naturally, several things need to line up for this to happen. First, the community must have reserves set aside for the specific project (e.g. roof replacement, painting, etc.) or a majority vote of the members is required to approve the use of reserve funds for another purpose.

Second, the board must have the authority under the documents to procure a loan and/or pass a special assessment. The advantage to obtaining a loan or using existing reserves is that your board has funds readily available to meet the contractual obligations on the project. A loan can be attractive to owners if the board gives them the option to pay in lump sum or to pay in installments, thereby reducing the risk of owner defaults.

Most financing used to fund association construction projects starts out as a line of credit during the construction phase with the association paying interest only either as a budget line item or as a special assessment. When the project is completed, the line of credit converts to an amortizing loan. At that point, since

the total project cost is known and each owner's share is set, owners may be given the option to pay their share in full, which is then used to reduce the principal, or pay in installments with interest that coincides with the interest accruing on the loan. Many boards decide to impose a "due on sale" clause meaning the balance of special assessment installments would be due in full when a unit is sold. However, there are pros and cons to such a clause. Operationally, reducing the debt every time a unit sells is a good thing. However, if a unit is foreclosed by a first mortgage holder, the "due on sale" clause may be used to wipe out the remaining installments due from that unit, meaning the balance becomes an obligation of the rest of the members, even those who prepaid. The solution requires careful wording of when the "due on sale" clause applies.

### **What is the best way to handle multi-year special assessments?**

With multi-year assessments, numerous units may sell while the special assessment is pending. Every time a unit is being sold an estoppel certificate must be produced at the request of an owner or a lender or the lender's agent. If a unit is not in collection, that estoppel certificate will be filled out by the manager or a board member. Confirming the existence of one or more special assessments is an essential part of the disclosure to a buyer who requests an estoppel certificate.

If a project is upcoming but an assessment has not yet been levied the estoppel certificate is not required to disclose special assessments that are planned but not yet adopted. If you undertake to make a representation to a prospective buyer, it must be accurate so check with association counsel on the wording of your estoppel certificate.

### **Get it right the first time!**

Cost overruns, lowball estimates and even a change in the board can all result in having to revisit a special assessment. If the Board has to pass an additional special assessment, there are different ways to handle the situation. The second special assessment could subsume the first one or there could be two concurrent special assessments. However, in terms of the psychological impact on your members and the bookkeeping burden on your manager, it is best to err on the conservative side at the outset as it is preferable to cancel the final installment rather than be forced to levy additional assessments.

### **How do you handle the challenges to collecting a special assessment?**

Unfortunately, there will be people subject to large special assessments who are simply unable to pay for them. Association members on fixed incomes and others who have not budgeted for unexpected large special assessments may have very limited options when it comes to borrowing money to pay a special assessment. For people who want to pay but need more time, reasonable payment plans can be utilized but a board must offer that option only after discussing with association counsel how to best structure the plan and when it should be used.

Funding reserves is the best insurance policy against future large special assessments for repair and maintenance projects. This is why the Florida Legislature has mandated bold disclaimer language on the voting materials for reserve funding votes. At a minimum, the association's operating budget must include an accurate reserve schedule so that the owners can see for themselves the financial projections showing the major expenses on the horizon. The 2022

Legislative Session may result in legislation removing the right of association members to continue waiving or reducing reserves. Having fully funded reserves should reduce both the need for financing and special assessments.

Sometimes owners who don't want a special assessment think they can stop the special assessment by recalling the board who passed it. However, installing new directors who will rescind the special assessment may prove even costlier particularly if the prior board has signed repair contracts. Moreover, if the special assessment's purpose is to maintain or repair the common property, the maintenance or repair is not optional and therefore neither is the expense.

### **What if there is money left over?**

In the fortunate event that there are special assessment funds remaining after the purpose for which the assessment was collected is completed, that overage is considered to be common surplus. The board has two options with regard to those funds: issue a refund to the owners in the same shares by which the assessment was paid or apply the common surplus to future assessments. If a unit owner has paid a special assessment in full but sells the unit, he or she is not entitled to a share of the common surplus. Common surplus runs with unit ownership so the current owner would be entitled to his or her share of the common surplus should the association choose to issue a refund.

Special assessments are never going to be popular but if boards, managers and members better understand how to undertake proper fiscal planning for projects, the frustrations related to special assessments may be reduced if not avoided.