

Revamped Amendments a Disservice to Public

Voice Your Opinion Before Senate Meeting

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By **Joe Adams**

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Once snickered at as the mecca for swamp-land deals and other cons, Florida has made great strides over the past several decades to protect its consumers against unscrupulous operators. Every so often, the State hits a major bump in the road, like the widespread fraud and corruption affiliated with rebuilding after Hurricane Andrew. In general, the Legislature has made it a priority to address such abuses and correct them to the extent a law can ever do so.

Unfortunately, with what many Tallahassee insiders call one of the best orchestrated legislative initiatives of the year, there is a move afoot to turn back the hands of time.

House Bill 1755 and Senate Bill 1286 originally started as a proposal that would require pre-lawsuit notice when a homeowner (not just condos and HOA's, all residential homeowners) claim construction defects in their home or condo property. The proposal involves a procedure that permits the contractor to inspect the allegedly defective area, and offer to fix it or pay for the problem. So far, so good.

The intrigue enters with subsequent amendments to these bills, which were not the focus of the original sponsors. These amendments take away valuable rights, and attempt to "politicize" the process governing the remedy of construction deficiencies, to the benefit of the party responsible for the defective workmanship. Among the most onerous provisos of the proposed law are the following:

Workmanship Standards: In what can only be described as a brazen proposal, the law would provide that compliance with the applicable building code automatically means that the home was constructed in a workmanlike fashion, and in accordance with

industry standards of good construction practices. If a contractor building your home runs out of red roof tiles, finishes the roof with blue tiles, and leaves hardened roof mud dripping off the building, as long as the roof complies with the building code, it is also "workmanlike." The absurdity of this concept is obvious.

Condominium and HOA Claims: The proposed law would require some type of majority or super-majority vote to bring an action against a developer or contractor for defective construction, whether original construction, or repair work (painting, roofing, concrete restoration, etc.). Setting aside the fact that many associations have trouble even getting quorums, this law appears specifically aimed at the "divide and conquer" theory of liability avoidance. No one likes lawsuits, and they should rightfully be a matter of last resort. However, this aspect of the bill (in addition to being arguably unconstitutional), treats condominiums and homeowners' associations like second-class citizens, certainly different than any other corporate board in the state. This is perhaps ironic since association boards are specifically charged with fiduciary responsibility in the applicable governing statutes.

Eliminating an Association's Attorney-Client Privilege: Again, on the apparent assumption that association boards are incapable of intelligently evaluating information to make their decisions, the proposal would require the association's lawyer to send every unit owner a letter outlining what the defects are (you would think this is an engineer's job), the chances of winning the case, the pros and cons of the case, etc. This would have the effect of abrogating one of the longest-standing privileges recognized in the law, that between the attorney and the client. Will devel-

opers and contractors now keep a unit so that they can get the inside scoop on your lawyer's plans? Will lawyers, for fear of liability arising from these letters, weasel-word them to the point where they become meaningless? Again, who is this helping?

To his substantial credit, Fort Myers Representative Jeff Kottkamp (the House sponsor of the original bill), when apprised of these concerns, ensured that the House Bill was amended at its second Committee stop and these onerous requirements were stripped out of the House Bill. However, it seems likely that the proponents of these requirements will mount another effort at amending these anti-consumer clauses back on to the House version.

On the Senate side, SB 1286 is being heard in the Senate Judiciary Committee, tomorrow (Monday, April 14, 2003) at 11:00 a.m. The names and e-mail addresses of the Committee Members are Senator Dave Aronberg, aronberg.dave.web@flsenate.gov; Senator Skip Campbell, campbell.walter.web@flsenate.gov; Senator Lisa Carlton, carlton.lisa.web@flsenate.gov; Senator Charlie Clary, clary.charlie.web@flsenate.gov; Senator Alex Diaz de la Portilla, portilla.alex.web@flsenate.gov; Senator

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Regardless of what happens at Monday's Committee Hearing, this fight is far from over. I spend enough time in Tallahassee to know that our local legislators do like to hear from their constituents, and do pay strong heed to their word. Whether you are for or against, your voice counts, and you have the right to be heard. The local delegation can be contacted as follows, Senator Dave Aronberg (Fort Myers), aronberg.dave.web@flsenate.gov; Representative Mike Davis (Naples), Davis.mike@myfloridahouse.com; Representative J. Dudley Goodlette (Naples), Goodlette.Dudley@myfloridahouse.com; Representative Carole Green (Fort Myers), Green.carole@leg.state.fl.us; Representative Lindsay Harrington (Punta Gorda), Harrington.Lindsay@myfloridahouse.com; Representative Jeffery D. Kottkamp (Fort Myers), Kottkamp.jeff@myfloridahouse.com; Representative Bruce Kyle (Fort Myers), Kyle.bruc@leg.state.fl.us; Senator Burt Saunders (Naples), Saunders.burt.web@flsenate.gov. ☺

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Fines First Way to Enforce Rules

Collection Procedures Vary; Amounts Limited

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Today, I'll try to catch up on responding to the many interesting questions I received from readers of the column. Keep those e-mails coming!

QUESTION: Our association has various rules. Some are contained in our recorded documents, some are made by the Board. In general, we have a friendly community, and most people go along with the rules for the sake of harmony. However, we have a couple of people who feel that the rules are made to be broken, or applied to everyone else except them. Ironically, these are the same people who complain most loudly when someone else breaks a rule. How do we enforce our rules? C.S. (via e-mail)

ANSWER: Your question, as applied to an association, is akin to "what is the meaning of life." There is no simple nor singular answer, and a book could (and probably should) be written on the subject).

Assuming that the rule was properly enacted or adopted (and there are many dynamics on that issue) and that there are no defenses to its enforcement (the most traditional being selective enforcement and "estoppel"), there are two methods of enforcing covenants and restrictions applicable to an association.

Fining is the first method, very effective in some situations and largely worthless in others. Depending upon the governance scheme (condominium or HOA), slightly different procedural concepts apply, and in both cases the governing documents must provide the authority for the fine. There are limits on the permissible amount of a fine, and on the procedures for collecting it. In condominiums, the law specifically provides that a fine cannot be collected through a lien. For HOA's, a fine could be collected through a lien if so provided in the covenants. If lien and foreclosure is not available, small claims court is the only method of collection.

The second primary enforcement tool is litigation. Although litigation should always be used as a last resort, and only after having given the offending party written notice and opportunity to stop breaking the rule, it is sometimes the board's only choice. In condominiums, non-binding arbitration is often required before court action can be taken. For HOA's, there is no arbitration program.

In both condominium and HOA legal actions to enforce covenants and rules (including arbitration), the prevailing party is typically entitled to recover their attorneys fees from the non-prevailing party. This can be a substantial "sting" for your rule-breakers.

The best way to adhere compliance to the rules is through communication and education. Having an up-to-date set of understandable regulations, which are periodically reinforced with the owners, is your best bet.

QUESTION: I have a question that is very perplexing to me. As a new member to our condominium board, I have been told that petitions from unit owners do not need to be taken seriously. What should be done with petitions, shouldn't the board listen to owners? C.R. (via e-mail)

ANSWER: There are two answers to your question, the "political" answer and the "legal" answer.

Politically, petitions are the owners' means of formally presenting some opinion or wish to the board. If owners have gone to the trouble of seeking the board's consideration of an item through the petition process,

then I believe that the board should give the owners the courtesy of formally addressing the item at a meeting of the board.

On the legal side of the equation, the board's responsibilities depend upon the form of the petition, what is being asked for, and the provisions of the governing documents. In some cases, the board may be required

to call a special members' meeting, and take an owner vote on a particular question. Again, depending upon the interplay between the facts and the documents, the vote may be binding or non-binding on the board.

In summary, I do not think that petitions should be "ignored," although what you should do or must do will need to be looked at on a case by case basis. ⚖️

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