

Amendments Address Legal Issues

Bill Gives Right to Sue to Individual Homes

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Today is the fourth part of a series regarding the 2003 Florida legislative session. In our first installment, we looked at the defeat of efforts to eliminate licensure of community association managers. The following week's column involved a discussion of the new "flag law" for condominiums. Last week, we took a look at disclosure laws applicable to homeowners associations. Today, we will look at amendments to the homeowners association statute.

CS/SB 1410/CS/HB 861 was originally filed at the behest of legislators from the Tampa/St. Petersburg area, who apparently had a constituent community with some type of developer problem. Like many of Florida's community association laws, addressing a single community's legal problems through legislation is like dropping an atomic bomb to kill a mosquito, whether you hit the target or not, the fall-out is always felt by others.

The Bill originally started as an effort to confer "standing" (right to sue) on homeowners' associations, for matters of "common interest" within the community. Curiously, the law mirrors provisions of the condominium statute which were declared unconstitutional by the Florida Supreme Court in 1977.

Since Florida's courts have already held that an HOA has standing regarding common areas it owns, it is unclear what the new law adds to the mix. The apparent intent is to confer standing over the condition of individual homes, probably a positive step in and of itself.

Late during the legislative process, the anti-association forces and their lobbyists got their hooks into the law by adding that an HOA, prior to initiating litigation in which it will seek more than one hundred thousand dollars, must obtain affirmative approval of a majority of the voting interests at a

meeting. For associations which already had standing, this appears to be a step backwards, and is particularly problematic in a "notice pleading" state like Florida, where a party does not have to specify the amount of claimed damages at the beginning of a case. Further, the reference to the majority vote "at a meeting" is ambiguous as to whether the required standard is a majority of all voting interests (but they have to vote at a meeting) or the "majority of the quorum" standard. I think the latter interpretation was the "intent," although it may be up to the courts to solve that issue.

Another late-filed amendment to the Bill also involves Chapter 720, the statute applicable to homeowners' associations. This amendment is definitely helpful for HOA's. The current law provides that amendments to declarations of covenants (sometimes called deeds of restrictions) may not affect "vested rights," unless all affected parcel owners join in the amendment. The problem is that no one knows what "vested rights" are, they are not defined in the statute, nor in any case law involving HOA's.

The amendment to Section 720.306(1)(c) of the HOA law eliminates the "vested rights" standard, and incorporates the condominium concept of "appurtenances," although not by that name. The new proviso states that amendments which materially and adversely alter the proportionate voting interests appurtenant to a parcel, or which increase the proportion or percentage by which a parcel shares in the common expenses, are the types of amendments which requires approval of all parcel owners.

Another late-filed amendment to this Bill added substantial (and helpful) revisions to Florida's Marketable Record Title Act (MRTA) which will be covered in next week's column.

At press time, this Bill had not been acted upon by the Governor, and like all laws reported on thus far, is subject to veto by the Governor. I would, however, consider a veto unlikely and predict that this law will become effective on the specified date, July 1, 2003.

Now on to reader mail.

QUESTION: This year, with the soaring cost of insurance, we were caught short of funds in our operating budget for the new year. We bit the bullet and raised our quarterly fees, but it will take a year before we get caught up. In the mean time, we have reserve funds sitting in a checking account. We are waiting for interest rates to rise before putting the reserve money into a Certificate of Deposit. Can we borrow our own money? H.D. (via e-mail)

ANSWER: It depends. If your community is a condominium association, reserve funds cannot be used for non-scheduled purposes unless a vote of the unit owners is taken, and the Board is given permission by a majority to use the money for the non-scheduled purpose.

Some associations take a “standing vote” every year, and if your association has taken such a vote, then no additional permission would be necessary.

For homeowners’ associations, the law is not as strict, and the Board would have the authority to “borrow” from the reserve funds, to meet operating expenses, unless the governing documents impose some limit on the Board’s right to use reserve funds.

QUESTION: In one of your recent columns, you indicated that associations cannot assess “tenant surcharges.” You also indicated that the maximum fee an association could charge was \$100.00, and then only in connection with the tenant’s approval. Our Club (Master Association) charges a fee of \$150.00. Is this legal? J.B. (via e-mail)

ANSWER: I would suspect that your Master Association is not a condominium association, but rather a homeowner’s association. The \$100.00 limit only applies in the condominium setting. In HOA’s, the governing documents can specify a higher fee structure. ⚖️

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.