BECKER & POLIAKOFF
WWW.BECKER-POLIAKOFF.COM
BP@BECKER-POLIAKOFF.COM

Most New HOA Laws an Adaptation of Condo Regulations

Fort Myers The News-Press, August 2, 2007

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Over the past decade, a debate has raged in the legislative halls of Tallahassee, and amongst other affected parties, regarding the extent to which homeowners associations should be regulated by state statute and administrative agencies.

By contrast, condominiums have been heavily regulated in Florida for well over 40 years. Homeowners' associations, on the other hand, were not subject to any type of specific state law until 1992. Rather, HOA's were largely left to their own governing documents and generic statutes applicable to not-for-profit corporations, when seeking guidance on how to run the association.

In the 15 years since homeowners' associations have had their own statute, there has been substantial debate about whether application of principles from the condominium laws would make life in the HOA better, or worse. As one might imagine, opinions on this topic vary widely, and seem most tied to an individual's opinions about the role of government in the day to day conduct of neighborhood affairs.

The result has been that many proposed new HOA laws are considered, while few are actually adopted. Those which are enacted appear as an effort to find what works well on the condominium side, and adopt it to homeowners associations.

A new state law which became effective July 1, 2007, Senate Bill 902, appears to follow that trend. In today's column, and the next couple of installments, we will take a look at how SB 902 effects the operations of homeowners associations. We will also look at SB 1844, a fairly significant change to the law regarding collection of delinquent assessments in HOAs.

For condo dwellers, SB 902 also addresses the role of mortgage holders in amending condominium documents. Also, we will take a look at SB 314, a somewhat controversial new law for condominiums that deals with termination of condominiums (the removal of the property from the condominium form of ownership) due to obsolescence, economic waste and by voluntary agreement among the unit owners in the condominium.

Let's get started with a look at SB 902 and the new law for homeowners associations addressing reserves.

Like most laws, there is some room for interpretation, but it does appear that the Legislature intended for homeowners associations, like their condominium counterparts, to be required to keep reserves in certain circumstances. Basically, there are two ways where the HOA can become subject to the new law. First, if the developer included reserve funding in the budgets that were adopted under developer control of the association, the new law applies. Secondly, if a majority of the entire voting interests (there is typically one "voting interest" per home, lot, or parcel) vote to "opt-in" to the statute, the new law will apply. It is important to note that the vote to opt-in is a majority of the entire voting interests, not simply a majority of those who vote.

Where the new law applies, the association's annual budget must include reserves for capital expenditure and deferred maintenance for items which the association is obligated to maintain. The reserves are computed based upon a formula which takes into account the estimated useful life and replacement cost of the reserve item, which is how the formula is established for condominiums as well. Like condominiums, the HOA reserve funding formula may either be on a "straight line" or "pooled" basis. The new statute, Section 720.303(6) of the Florida Homeowners Association Act, contains detailed provisions regarding the manner in which the reserve accounts are to be calculated.

For associations subject to the new law, once the reserves have been established, the funds cannot be used for another purpose unless a vote of the parcel owners is taken. The required vote is a majority vote at a meeting at which a quorum is present, commonly called a "majority of a quorum", which is a lower threshold than the required vote to opt-in the statute. As in the case of condominiums, interest accruing on reserve accounts can likewise only be used for reserve expenditures, unless a majority of a quorum vote to use reserves for a non-scheduled purpose.

For homeowners associations that are not subject to the new law, and choose not to opt-in, the "old law" applies. Basically, the "old law" is that your governing documents will control, and absent restrictive language in the governing documents, the board will typically have leeway in the establishment of reserve accounts, as well as the expenditure of those funds. However, it is important to note that Section 720.303(6)(c) of the Homeowners Association Act requires any HOA that is not subject to the new law to include a bold-faced disclaimer with each year's annual financial report, notifying owners of their right to opt-in to the statute, and that the failure to follow the new law presents a heightened likelihood of special assessments.

In the next installment we will continue with the review of SB 902, with a focus on architectural control and review issues in homeowners' associations.

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.

must repair the damaged lawn within thirty days. Is this type of notice adequate under the law? Also, what action might the association take against me if I elect to wait and see if the grass grows back by itself, as opposed to buying new sod? R.Z. (via e-mail)

A. A declaration of covenants governing a homeowners' association can be viewed as a contract between the owners and the association, and between all owners. Any rights and obligations concerning notice, or an opportunity to correct an alleged violation, should be set forth in your association's governing documents. Regardless of the provisions in the documents, it is my opinion that associations would be prudent, at a minimum, to send all notices via first class and certified mail to the owner at the property address, as well as to any other address of record that has been provided to the association. By taking steps to provide actual notice to the owner, the association improves its position should an enforcement action be necessary in the future, as the association can show that it took all reasonable steps to address the covenant violation, and that the owner actually received the notice, prior to taking formal, legal action.

If the association does determine to take legal action and/or impose sanctions upon the owner, additional notice will be required. To enforce a covenant violation, the association has two choices. First, the association can file a court action seeking an order to compel compliance with the covenants. The court action would also seek to recover reasonable costs and attorney fees incurred by the association in bringing the action, should the association prevail. However, you may know that prior to a homeowners' association filing a court action concerning a covenant enforcement dispute, it is necessary for the association to offer to participate in mediation.

Prior to July 1, 2007, an association was required to file a mediation petition with the Division of Florida Land Sales, Condominiums and Mobile Homes, have a mediator appointed, and conduct a mediation in accordance with division procedures. However, effective July 1, 2007, the Florida Homeowners' Association Act has been amended to provide a more streamlined procedure for completing pre-suit mediation. Specifically, the association must serve a demand for pre-suit mediation on the homeowner by sending it certified mail to the owner's address of record in the association's files. The notice must state the nature of the dispute and list five certified mediators from which the homeowner may choose to conduct the mediation. The homeowner then has twenty days to respond and select one of the five mediators. Failure to respond within twenty days will allow the association to proceed directly to court. If one of the mediators is selected by the homeowner, the mediation must be completed within ninety days. If the mediation fails to resolve the matter, either party is free to file a court action at that time.

Alternatively, if the association's governing documents provide the authority to levy a fine or suspend use rights, the association may elect to fine a homeowner who is violating the covenants, or may elect to suspend the homeowners use rights to common areas or recreational facilities. In such a case, actual notice of the hearing to impose such sanctions must be given at least fourteen days prior to the hearing. There are a number of other procedural requirements that must also be filed in order to properly levy a fine or suspend use rights.

In summary, it appears that your association intended to put you on notice of the alleged violation and to require you to fix the problem. If the association wishes to pursue other action against you, there are other notices that will have to be given as discussed above. My advice is that you communicate with the association and advise them of your intentions and seek their consent and cooperation with your plan to repair the dead patches of grass.

Q: I have read a number of your articles regarding the Florida Condominium Act. Do you know off hand if, under Florida law, a condominium association can deny a lease application based on a condominium owner's unpaid fines versus an unpaid assessment? Many thanks for your thoughts. S.G. (via e-mail)

A: The Florida Condominium Act specifically addresses the issue of denying lease approval based upon an unpaid assessment. The Condominium Act states that if the association is authorized by the declaration or by-laws to approve or disapprove a proposed lease of a unit, the grounds for disapproval may include, but are not limited to, a unit owner being delinquent in the payment of an assessment at the time approval is sought.

Therefore, if your association's declaration or by-laws authorize the association to approve or disapprove a proposed lease, the Condominium Act specifically provides that the lease can be disapproved if the owner is delinquent in the payment of an assessment when the approval is sought.

There is no statutory authority, however, to deny a lease application based upon an unpaid fine. Accordingly, you would then need to review the association's declaration of condominium to determine if such authority was contained in that document. If not, I believe it would be improper to deny a lease based upon an unpaid fine.

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.*