



Legislation Affects Requirement For Consent of Mortgage Holder

Mortgagee has little interest in routine matters

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Today's column continues our review of laws adopted during the 2007 regular session of the Florida Legislature, applicable to condominium associations and homeowners' associations (see *Most new HOA laws an adaptation of condo regulations*, August 2, 2007 and *Detailed architectural guidelines favored*, September 6 2007). Today, we will focus on changes found in Senate Bill 902 applicable to condominium associations.

From time to time, many condominium associations desire to amend the provisions of their condominium documents (declaration of condominium, articles of incorporation, and bylaws) to address issues ranging from the date of the annual meeting to pet regulations.

Since Florida's first condominium statute was written in 1964, the law has always let the condominium documents themselves set the procedures and percentage vote required for amendments. Accordingly, there is no "standard" amendment procedure found in condominium documents, they tend to follow the forms a particular developer's attorney uses.

One provision found in the amendment clause of many condominium documents, particularly those drawn up in the 1970's and 1980's, requires every

bank, institution, or other entity or individual holding mortgages on units in a condominium to consent to any proposed amendment. As a practical matter, a mortgage holder (known in the law as a "mortgagee") has little interest in most aspects of day-to-day condominium governance, such as the date of the annual meeting, or the pet regulation.

Obtaining mortgagee approval when amending condominium documents is an expensive proposition for condominium associations, since most attorneys will want to have title searches conducted against each unit to determine which units are mortgaged, and the identity of the mortgagee. Simply asking the unit owners to identify their mortgagee is far from fool-proof, since many people take out a mortgage from "Bank A", the bank then "sells" the mortgage on the "secondary market", but Bank A continues to "service" the mortgage. As far as the owner knows, "Bank A" is still the unit's mortgagee, while the true mortgagee may be some large institution in a faraway state.

Until 1992, the Florida condominium law did not regulate mortgagee approval of amendments to condominium documents, and many older condominium communities are still saddled with

the requirement that all amendments be approved by mortgagees. For condominiums created after 1992, the law does limit the subjects for which mortgagee approval of amendments can be required, but the 1992 law was broad, if not vague.

The 2007 amendments to Chapter 718 of the Florida Statutes ("Florida Condominium Act") drastically changes the rules regarding mortgagee approval of amendments to condominium documents. Among the highlights of the new law are the following:

- As to any mortgage recorded on or after October 1, 2007, any provision in the declaration, articles of incorporation, or bylaws that requires the consent or joinder of some or all mortgagees is enforceable only as to certain matters, including, but not limited to, amendments that adversely affect the priority of the mortgagee's lien, the mortgagee's rights to foreclose its lien, or that otherwise materially affect the rights or interests of the mortgagees.
- As to any mortgage recorded before October 1, 2007, any existing provisions in the condominium documents requiring mortgagee consent shall be enforceable. Unfortunately, this provision from the 2007 law creates potential conflict with the 1992 law.
- The new law includes a method for identifying the holders of outstanding mortgages and providing them with notice of the proposed amendments.

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- After the notice is sent to the mortgagees as required under the new statute, any mortgagee who fails to respond within sixty (60) days after the date of mailing shall be deemed to have consented to the amendment. This is a significant change.
- For amendments requiring mortgagee consent on or after October 1, 2007, any amendment adopted without the required consent of a mortgagee is voidable only by a mortgagee who was entitled to notice and an opportunity to consent. This means that a unit owner who does not like a proposed amendment cannot use lack of mortgagee approval as a basis for attacking the amendment.
- The new law sets a five-year statute of limitations for actions to void an amendment based on lack of mortgagee consent.

In the next installment of this column, we will complete our review of S.B. 902, with a focus on miscellaneous procedures now required for homeowners' associations, including year-end auditing deadlines, and new obligations for developers of communities governed by homeowners' associations.