



S.B. 902 Addresses Architectural Control, Reserve Funding

Fort Myers The News-Press, November 01, 2007

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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; Detailed architectural guidelines favored, September 6 2007 and Legislation affects requirements for consent of mortgage holder, October 4, 2007). Today, we will focus on miscellaneous changes found in Senate Bill 902 applicable to homeowners' associations.

As discussed in previous installments, the main features of S.B. 902 focus on architectural control issues in homeowners' associations and reserve funding in HOAs. Additionally, S.B. 902 (which generally became effective July 1, 2007), addressed a number of miscellaneous issues regarding homeowners' associations, the highlights of which are as follows:

- **Revitalization Of Covenants Extinguished By MRTA:** The new law expands the definition of "homeowners' association" in terms of procedures available to "revitalize" covenants and restrictions that have been extinguished by Florida's Marketable Record Title Act, which can extinguish covenants and restrictions after a period of

30 years. The revitalization process is now available for homeowners' associations which are empowered to enforce covenants and restrictions, in addition to mandatory membership associations governed by Chapter 720 of the Florida Statutes.

- **Application Of "Sunshine" Laws To Architectural Committees And Committees Entitled To Spend Money:** S.B. 902 states that all provisions of the subsection of the statute dealing with HOA board meetings apply to meetings of any committee or similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions. Although the pre-existing law also contained a similar proviso, it is now clear that all architectural committees and committees empowered to spend association funds are subject to all procedural requirements applicable to the board of directors.
- **Lender Questionnaires:** Chapter 720 has been amended to include a proviso similar to a clause found in the Florida Condominium Act dealing with so called "lender questionnaires." This typically

involves a lending institution asking for information about a particular community. The new law provides that an association is not obligated to provide such additional information (associations are obligated to provide assessment status information under certain circumstances). If the association does provide additional information, it may levy a fee not to exceed \$150.00 (plus any attorney's fees incurred by the association). Unfortunately, the new HOA law does not contain the exculpatory language found in the condominium statute, providing that the association is immune from liability as long as it responds to information requests in good faith.

- **Recovery Of Attorney's Fees In HOA Litigation:** Chapter 720 now provides that a member prevailing in an action between the Association and the member, in addition to recovering his or her own attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied to finance the litigation. Stated otherwise, if a member of an HOA sues the association and wins, they have not "sued themselves."
- **Year-End Financial Reporting:** Like condominiums, homeowners' associations are required to provide a year-end financial report to their members, or at least provide notice that a copy of the report is available free of charge. As with condominiums, associations with annual revenues exceeding \$400,000.00 must provide an audit. Associations with revenues in the \$200,000.00 - \$400,000.00 range must provide a review. Associations in the \$100,000.00 - \$200,000.00 range must provide a compilation. Associations with receipts of less than \$100,000.00, or which operate less than 50 parcels, may provide a report of cash receipts and expenditures. Under the previous law, this report had to be furnished or made available within 60 days of the end of the fiscal year. The new

law now provides an outside deadline of 120 days from the close of the fiscal year, or such other date as may be provided in the bylaws. There is also a stricter time-line for the board to actually contract for the preparation of the required report, which is presumably intended to ensure that it is available to the members in a timely fashion.

- **Turnover Audit:** One of the major differences between condominium associations and homeowners associations involves the requirement that the community developer, at its expense, provide an audit of the handling of the association's finances from the beginning of the association's operation, through the date of transition of control of the board of directors (commonly referred to as "turnover"). The condominium law has required, for at least a couple of decades, that the developer provide a turnover audit within 90 days of the transition of a condominium association. There has never been a parallel requirement in the law for homeowners' associations, now there is. The new law applies to any association incorporated after December 31, 2007. The new law will require the HOA developer, as is the case in condominiums, to supply a turnover audit within 90 days of the transition date.
- **Developer Guarantees Of Common Expenses:** As with the turnover audit, the law for homeowners' associations has been generally conformed to the condominium laws regarding a developer's ability to excuse itself from the payment of assessments on developer inventory units, so long as the developer "guarantees" the funding of any deficits incurred during the guarantee period. Chapter 720 now contains detailed guidelines regarding the establishment of guarantees and the calculation of financial obligations arising thereunder.
- **Pre-Suit Mediation:** The law for homeowners' associations was amended

several years ago to require mediation of most internal disputes prior to the initiation of court litigation. The mandatory mediation program was being administered through the Department of Business and Professional Regulation, which otherwise does not regulate homeowners' associations (and which does not collect any annual fee from homeowners' associations). The new law takes the DBPR out of the mediation process, and provides a more stream-line process. Under the new law, the "aggrieved" party must provide the "responding" party with a list of acceptable

mediators. If the parties do not agree to mediation promptly, the case may proceed to court. If either party (association or parcel owner) fails to cooperate in the mediation process, they are barred from recovering their attorney's fees in subsequent litigation, even if they prevail.

This completes our review of S.B. 902. In the next installment of this column, we will review S.B. 1844, with a focus on substantial changes in how delinquent assessments are collected in the homeowners' association context.

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.

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