



New Mediation Rules in Effect For Associations

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Fort Myers The News-Press, February 28, 2008

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Q: We are residents in a homeowners' association and read your recent article referencing mediation to resolve homeowners' association disputes. Would you please briefly provide us with the steps for mediation. What are the costs and who pays those costs? Is the mediation conducted by the State in Tallahassee? Where can I obtain a copy of the statute? **W.M. (via e-mail)**

A: New presuit mediation requirements for homeowners associations were adopted effective July 1, 2007. The new law amends the petition for mediation provisions contained within §720.311, Florida Statutes, which requires mandatory mediation for certain disputes (e.g. covenant enforcement, use or changes to common areas, etc.) between a homeowners' association and a member before the dispute can be filed in court.

The highlights of this new law include that the aggrieved party no longer has to file a petition for mediation with the Division of Land Sales, Condominiums and Mobile Homes in Tallahassee. Instead, an aggrieved party must now serve upon the responding party a written offer to participate in presuit mediation. The form of the written offer is contained in the statute and should be strictly adhered to. The written offer, which must be sent via certified and regular first class mail, informs

the responding party of the dispute and offers presuit mediation as an avenue to resolve the dispute. The aggrieved party suggests the use of one of five certified mediators to mediate the dispute. The responding party is given the option of selecting one or more of the five certified mediators. If the responding party agrees to attend mediation with one or more of the five suggested mediators, the mediation must be scheduled within 90 days, unless extended by mutual written agreement.

Both parties are required to prepay one-half of the mediator's estimated fees. The aggrieved party is authorized to immediately proceed with the filing of a lawsuit against the responding party if the responding party: (1) fails to respond to the written offer to mediate via certified and regular first class mail within 20 days of the date of the mailing; (2) fails to agree to one or more of the five suggested certified mediators; or (3) fails to prepay one-half of the mediator's estimated fees. The new law also states that persons who refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute. Importantly, the new law allows the prevailing party in any subsequent arbitration or litigation proceeding to recover costs and attorney's fees incurred in the

presuit mediation process. Those costs can range from several hundred to several thousand dollars, depending upon the issue at hand and depending upon how vigorously the opposing party defends the allegations.

You can access all statutes including Chapter 720, F. S., as well as proposed statutes for the 2008 legislative session at the website www.flsenate.gov.

Q: Our homeowners' association covenants contain the following restrictions: units may not park more than two vehicles on a permanent basis; all vehicles of guests exceeding two vehicles shall be parked in designated guest areas; and owners and tenants and their families shall not park in areas designated for guests, as these are reserved for temporary use. Can my homeowners' association limit the number of vehicles that I can park in my garage or driveway, stop me from parking my vehicles in guest parking, and tell me that my guests cannot park in the street? **R.C. (via e-mail)**

A: Parking is one of the most difficult issues to deal with in community associations. As lots, driveways, and garages get smaller, there is less space for parking. If there is not enough space to park in the driveways and garages, many people will park in the street, which is not only a safety hazard but can distract from the aesthetics of the community. Too many cars parked in the driveway can also detract from the aesthetics. Therefore, many modern association governing documents include provisions restricting the number of cars that can be permanently parked and prohibiting or limiting street parking. Covenants contained in a recorded set of deed restrictions are presumed to be valid. Therefore, the restrictions that you mention in your covenants most likely can be enforced.

One difficult aspect of this issue is the method of enforcement. Many associations attempt to tow vehicles that are illegally parked. Towing is considered a "self help" remedy and is not favored in the law. I am of the opinion that in order to tow

vehicles as an enforcement remedy, the governing documents must allow the Board to tow vehicles. There is also a law dealing with towing, commonly referred to as the "Florida Towing Statute" which must be strictly complied with or else the association can open itself up to potential liability.

Q: I live in a community which is made up of four condominium associations. Recently, each of the four condominiums voted to merge. A few weeks ago, the condominium building in which I reside suffered damage as a result of a leaking pipe. The condominium manager sent out notice of a board meeting that states only the residents living in my condominium building are responsible to pay for the damage as a common expense and that the board will be meeting to levy a special assessment against the owners in my building. Why aren't they levying a special assessment against all of the owners in all of the buildings now that we have merged? **D.A. (via e-mail)**

A: There are two types of mergers that typically occur with condominium associations. The first type of merger, generally referred to as a "property merger", is where not only the individual corporations merge, but also where the common elements, common expenses, reserves, and association property of each condominium are all merged into one condominium association. This type of merger is extremely difficult to accomplish as it typically requires the unanimous approval of all of the unit owners and lienholders.

A more common form of merger, generally called a "corporate merger" is where condominium associations merge the separate corporations which manage and operate those condominiums into one corporation which manages all of the condominiums. In this type of merger, the actual condominiums maintain their separate declarations of condominium and the common elements, common expenses and reserve accounts are still individually maintained for each condominium. "Corporate mergers" are considerably more common as the percentage of unit owners necessary to authorize a corporate merger are

typically quite lower than the percentage of approval necessary for a “property merger”.

It appears that your association went through a “corporate merger” rather than a “property merger.” As such, the common elements for each condominium are not combined, and in such a case

the expense of repairing the common elements would typically only fall on those owners in the condominium which suffered the damage and would not be spread amongst all of the owners in all of the other condominiums.

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.