

SPECIAL LEGISLATIVE ISSUE



SUMMARY OF THE 2007 LEGISLATIVE SESSION

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The 2007 Legislative Session was very eventful as there were a number of bills filed significantly affecting community associations. Thanks in large part to the efforts of the community associations participating in Becker & Poliakoff, P.A.'s Community Association Leadership Lobby (CALL), some beneficial legislation was adopted. In addition, legislation that would have had detrimental effects on community associations did not pass. CALL was also successful in modifying some legislation to remove objectionable language included in earlier versions of the legislation. This article will provide an overview of the major legislation adopted in 2007 that affects Florida's community associations.

SB 902: COMMUNITY ASSOCIATIONS

SB 902 affects condominium associations, cooperative associations, and homeowners' associations. The effective date is July 1, 2007.

CONDOMINIUM ASSOCIATION IMPACTS:

Beach Access: Amends §718.106, F.S., to state that a local government may not adopt an ordinance or regulation that prohibits unit owners or their guests from pedestrian access to a public beach contiguous to a condominium property, except where necessary to protect public health, safety, or natural resources.

Lender Consent of Amendments: Amends §718.110(11), F.S., to address lender consent of amendments when required by the condominium documents. Several of the noteworthy provisions are as follows:

- 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 or 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 consents shall be enforceable;
- Includes a method for identifying the holders of outstanding mortgages and providing them with notice of the proposed amendment;
- After the notice is sent to the mortgagees as required under the 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;
- For amendments requiring mortgage 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;
- Sets a statute of limitations for actions to void an amendment.

These lender consent provisions will be most beneficial to condominium associations whose documents require mortgagee approval for amendments. Previously, an association would have to spend substantial time and money to obtain the required mortgagee consents. One of the most beneficial provisions in this new law is that if the procedural steps for providing notice are followed and the mortgagee does not respond, it will be deemed an approval. This should make it easier for associations to reach the level of consent required by the governing documents.

Power to Acquire Leaseholds, Memberships or Other Possessory or Use Interests: Amends §718.114, F.S., to provide that subsequent to the recording of the declaration, agreements

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acquiring leaseholds, memberships or other possessory or use interests not entered into within twelve (12) months following the recording of the declaration must be approved in the same manner as material alterations or substantial additions to real property that is association property.

Mixed-Use Condominiums: Amends §718.404(1) and (2), F.S., dealing with mixed use condominiums. §718.404(1) prohibits the condominium documents from permitting the owner of any commercial unit to have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules and regulations of the association. §718.404(2) provides that where the number of residential units in the condominium equals or exceeds fifty percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. The new law will make these provisions retroactive as a remedial measure.

COOPERATIVE ASSOCIATION IMPACTS:

Equities Facilities Clubs: Amends §719.103(18), F.S., to provide a definition for an “equities facilities club.” It provides that an “equity facilities club” means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation.



HOMEOWNERS' ASSOCIATION IMPACTS:

Presuit Mediation Procedures: Amends the petition for mediation provisions contained within §720.311, F.S., 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 could be filed in court. The effective date of this new law is July 1, 2007. The new law eliminates much of the burdensome requirements of the petition for mediation process. Specifically, the aggrieved party no longer has to file a petition for mediation with the Division of Land Sales, Condominiums and Mobile Homes. 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 must be strictly adhered to. A sample written offer is contained within the new statute. 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 of the five certified mediators. If the responding party agrees to attend mediation with one of the five suggested mediators, the mediation must be scheduled within 90 days, unless extended by mutual written agreement. Both parties are likewise 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 via certified and regular first class

mail within 20 days of the date of the mailing; (2) fails to agree to one 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. In addition, 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.

Overall, the changes made to §720.311, F.S., will prove very beneficial to homeowners' associations. The new law will dramatically accelerate the presuit mediation process. Additionally, the new law will provide homeowners' associations a quicker and less expensive path to the courts by providing a smaller procedural hurdle to jump over. If you have any questions concerning the new requirements mandated by §720.311,

F.S., you should contact your legal counsel to guide you through the process.

Official Records: Creates §720.303(5)(d), F.S., to provide that the association is not required to provide a prospective purchaser or lienholder with information about the subdivision or the association other than information required to be disclosed by Chapter 720. If the association chooses to provide information, the association may charge a reasonable fee for providing good faith responses to requests for

information if the fee does not exceed \$150 plus the reasonable costs for photocopying and attorney's fees.

Reserves: Amends §720.303(6), F.S., as follows:

- Provides that if the association does not provide for reserve accounts, each financial report must state in conspicuous type that the budget does not provide for reserves. (The exact language required is in §720.303(6)(c), F.S.).
- Provides that an association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves.
- Provides that if reserve accounts are not initially provided for by the developer, the membership may elect to establish reserve accounts upon the affirmative approval of not less than a majority of the total voting interests of the association.
- If reserve accounts are established, they shall be funded or maintained unless the reserves have been waived or reduced by the membership upon a majority vote at a meeting at which a quorum is present.
- Provides funding formulas for reserves.
- Describes the funding of pooled reserve accounts.
- Provides that reserve funds and any interest thereon must remain in the reserve account and be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present.

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Because architectural control is one of the most important functions of a homeowners' association, it is particularly important at this time that all homeowners' associations review their declaration of covenants and other published guidelines and standards providing for architectural control.

Financial Reports: Amends §720.303(7), F.S., as follows:

- Deletes the requirement that the association prepare a financial report within 60 days after the close of the fiscal year and replaces it with a requirement that within 90 days after the end of the fiscal year, or on the date provided in the bylaws, the association must prepare and complete, or contract with a third party for the preparation and completion of, a financial report for the preceding fiscal year.
- Requires that within 21 days after completion of the financial report, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association must provide each member with a copy of the financial report or a written notice that a copy of the financial report is available upon request.

Architectural Control Covenants: Creates §720.3035, F.S. The noteworthy provisions are as follows:

- Provides that the authority of an association or an architectural committee (or other similar committee) to review and approve plans and specifications for the location, size, type or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall be permitted only to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- Provides that if the declaration, or other published guidelines and standards authorized by the declaration, provides options for the use of materials, the size of the structure or improvement, the design of the structure for improvement, or the location of the structure or improvement on the parcel, neither the association nor any committee shall restrict the right of a parcel owner to select from the options provided in the declaration or other published guidelines and standards authorized by the declaration.
- Provides that unless otherwise specifically stated in the declaration or other published guidelines or standards authorized by the declaration, each parcel shall be deemed to have only one front for purposes of determining the required front setback. When the specific setback limitations are not provided, the applicable county or municipal setback limitations shall apply.
- Provides that if a homeowners' association or any committee should unreasonably, knowingly, and willingly infringe upon or impair the rights and privileges set forth in the declaration or

other published guidelines and standards authorized by the declaration, the adversely affected parcel owner is entitled to recover damages caused by such infringement or impairment, including any costs or reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner.

- States that neither the Association nor any architectural control committee shall enforce any policy or restriction inconsistent with the rights and privileges of a parcel owner set forth in the declaration or other published guidelines and standards authorized by the declaration, whether uniformly applied or not.

Because architectural control is one of the most important functions of a homeowners' association, it is particularly important at this time that all homeowners' associations review their declaration of covenants and other published guidelines and standards providing for architectural control. A homeowners' association, or an architectural committee (or other similar committee) should not rely on undefined, unwritten, or unpublished architectural control guidelines. Rather, guidelines and standards should be published in the declaration of covenants or in a separate document if authorized by the declaration of covenants.

The new law's apparent goal of requiring published guidelines and standards for architectural control should assist associations and architectural review boards when considering requests to approve plans and specifications and when enforcing architectural control requirements. This should eventually result in a fewer number of disputes between the association and parcel owners with respect to architectural control.

Attorney's Fees: Amends §720.305(1)(d), F.S., to provide that a member prevailing in an action against the association under §720.305(1) is entitled to recover reasonable attorney's fees and additional amounts as determined by the court to be necessary to reimburse the member for his share of assessments levied by the association to fund its expenses of the litigation.

Developer Requirements:

- Creates §720.307(3)(t), F.S., to provide that for associations incorporated after December 31, 2007, the developer must pay to have a turnover audit prepared of the association's financial records.
- Creates §720.308(2), F.S., to address guarantee of common expenses by the developer.

HB 7031: COMMUNITY ASSOCIATIONS

This bill, dealing with insurance, developer disclosures, and condominium conversions, became effective on May 24, 2007

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when it was approved by the Governor. It impacts condominium associations, homeowners' associations, and cooperative associations.

Insurance: During the 2007-A Special Session, the Florida Legislature adopted legislation permitting community associations operating at least fifty residential parcels or units to "self insure," for the purpose of pooling and spreading the liabilities of its group members relating to property or casualty risks or surety insurance. Specifically, the law permitted windstorm insurance coverage for a group of no fewer than three communities created and operated under Chapter 718 (Condominiums), Chapter 719 (Cooperatives), Chapter 720 (Homeowners' Associations), or Chapter 721 (Timeshare Associations) to be obtained and maintained for the communities if the insurance coverage is sufficient to cover an amount equal to the probable maximum loss for the communities for a 250-year windstorm event.

HB 7031 fixed what was perceived to be certain "glitches" in the law adopted during the Special Session, including:

- Amends §718.115 and §719.107 to provide that the common expenses of an association include the cost of insurance acquired by the association, including costs and contingent expenses required to participate in a self-insurance fund.
- Amends §720.308, F.S. to provide that assessments may be levied by the board to secure the obligation of the association for insurance acquired from a self-insurance fund.

Another "glitch" to be corrected was that the original legislation did not amend Chapters 719 and 720 to specifically authorize cooperative associations and homeowners' associations to self-insure. This law fixes that glitch and implements for cooperatives and homeowners' associations the self-insurance provisions in the law adopted during the 2007-A Special Session.

Developer Disclosures: Amends §§718.503 and 718.504, F.S. and §§719.503 and 719.504, F.S., relating to developer disclosures prior to sale. These provisions apply to both condominium and cooperative associations. The following are some of the changes:

- Provides that the figures contained in any budget delivered to a buyer are estimates only, that the actual cost of such items may exceed the estimated cost, and that any such changes in cost do not constitute material adverse changes in the offering.

- Requires that the budget prepared by a developer be prepared in good faith and must reflect accurate estimated amounts.
- Preserves the developer assessment guarantees in the prospectus and provides that subsequent increases that are beyond the control of the developer shall not be considered an amendment that would rise to rescission rights.
- Provides that if the closing on the contract occurs more than twelve months after the filing of the offering circular with the Division of Florida Land Sales, Condominiums, and Mobile Homes, the developer must provide a copy of the current operating budget to the buyer at closing.

Cooperative Special Assessments: Amends § 719.108, F.S. to clarify (similar to the Condominium Act) that if a special assessment is levied, excess funds may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

Condominium Conversions: Amends Chapter 718, Part VI, to change the information that must be disclosed by the developer of a residential condominium created by a conversion. Some of the changes include:

- Clarifies the law by adding the terms "converter" and "as provided in this section" to modify "reserve accounts" in order to better differentiate between converter reserve accounts and regular reserve accounts;
- Requires the age of any component or structure for which the developer is required to fund reserve accounts be measured in years, rounded to the nearest whole year. The amount of converter reserves to be funded must be based on the age of the structure as disclosed in the inspection report, which must be determined by an architect or engineer;
- Requires a developer who sells a condominium parcel in a condominium conversion project to disclose in conspicuous type in the contract whether the developer has established converter reserve accounts, provided a warranty of fitness and merchantability, or posted a surety bond for purposes of complying with the law.

S.B. 314: CONDOMINIUM TERMINATION

SB 314 had the strong support of the Real Property Section of the Florida Bar. A very similar bill passed the Legislature last session (unanimously), but was vetoed by Gov. Bush because

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DID YOU KNOW?

The Florida Environmental and Land Use Dispute Resolution Act created a new dispute resolution procedure (a special master/mediation process) for handling private property rights disputes between government entities and private citizens. Section 70.51(3), Florida Statutes specifically provides that:

Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner's real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

It is necessary to request the relief from either the elected or appointed head of the governmental entity that issued the developmental order or initiated the enforcement action. There is no filing or administrative fee involved in the process.

This procedure may be utilized in connection with code enforcement actions under certain circumstances, but is not available once the thirty (30) day period has expired. Thus, if you believe that your property is unfairly burdened by a development order or enforcement action (or either are unreasonable), please notify your community association attorney immediately. ■

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he felt the threshold to terminate could be too easily attained. Hearings were held around the state to strike a balance between the property rights of condominium owners as a whole against the rights of a lone holdout who opposes the termination plan. The bill was modified to address those concerns.

SB 314 amends §718.117, F.S., to provide a method of terminating condominiums in the event of economic waste, disrepair of the property and when continued operation of the condominium is made impossible by law or regulation. In the event of economic waste, the percentage needed to terminate is the lesser of the lowest percentage of voting interests needed to amend the declaration or as provided in the Declaration for termination of condominiums. There are special provisions in this bill for the termination of timeshare units. Optional termination can be effectuated by 80 percent of the unit owners if not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto. Mortgagee consent is not required unless the plan of termination will result in less than full satisfaction of the mortgage lien. The effective date of this new law is July 1, 2007.

SB 1844: NEW COLLECTION AND FORECLOSURE REGULATIONS FOR HOMEOWNERS' ASSOCIATIONS

SB 1844 deals with liens and foreclosures for homeowners' associations. The effective date of this new law is July 1, 2007 and it will have a dramatic impact on the collection and foreclosure process for homeowners' associations. SB 1844 creates §720.3085, F.S., and several of the noteworthy provisions of the bill are documented below:

- The bill mandates that a parcel owner is liable for all assessments on a parcel and is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title.
- Provides for the payment of interest and late fees on unpaid assessments.
- Prioritizes the application of any payment received.
- Prohibits the placement of a restrictive endorsement on the payment.
- Requires written notice before a lien is filed against a parcel.
- Provides the owner with 45 days to make payment for all amounts due.
- Provides for the foreclosure of the lien, but not until 45 days after the parcel owner has been provided notice of the associations intent to foreclose.
- Permits the owner to make a qualifying offer one time during the pendency of a foreclosure action, in which case the foreclosure action is stayed for a period not to exceed 60 days.

HB 405: TIMESHARE AND VACATION PLANS

The new makes a number of changes to Chapter 721 dealing with timeshares and vacation plans. The effective date is July 1, 2007. Some of the significant changes include the following:

- Permits a seller to offer timeshare interests in a real estate property timeshare plan located outside of the state without filing a public offering statement provided certain criteria are satisfied.

- Creates definitions for "lead dealer" and "resale service provider" and creates new record-keeping requirements for lead dealers and resale service providers.
- Provides that the failure of the managing entity to obtain and maintain insurance coverage during any period of developer controls constitutes a breach of the managing entity's fiduciary duty.
- States that a managing entity that is an owners' association may waive or reduce reserves by a majority vote of those voting interests present, in person or by proxy, at a duly called meeting of the owners' association.
- States that the managing entity is authorized to manage the reservation and use of accommodations using those processes, analyses, procedures and methods that are in the best interest of the owners as a whole and to encourage the maximum use and enjoyment of the accommodations and other benefits.
- States that any determination by a timeshare association of whether assessments exceed 115 percent of assessments for the prior fiscal year shall exclude anticipated expenses for insurance coverage required by law or by the timeshare instrument.
- States that the managing entity shall use due diligence to obtain adequate casualty insurance in such covered amounts and subject to reasonable exclusions and reasonable deductibles.
- Provides certain factors to be taken into account when determining whether the insurance obtained by managing entity is "adequate."
- Provides that the managing entity is authorized to apply any existing reserves toward payment of insurance deductibles or the repair or replacement of the timeshare property after a casualty without regard to the purpose for which such reserves were originally established.

SB 259: MOBILE HOME RELOCATION

SB 259 changes the eviction notice requirements found in §723.062, F.S., by requiring the following language be added, "You may be entitled to compensation from the Florida Mobile Home Relocation Trust Fund, Administered by the Florida Mobile Home Relocation Corporation (FMHRC). FMHRC contact information is available from the Florida Department of Business and Professional Regulation." The bill also provides for late fees if a mobile park owner does not make payments to the Florida Mobile Home Relocation Corporation within the required time period. Additionally, the bill provides for a time period within which an application for funding for relocation expenses must be submitted to the Florida Mobile Home Relocation Corporation. SB 259 became law on May 22, 2007, the day the Governor signed the bill.

HB 7057: MY SAFE FLORIDA HOME PROGRAM, FLORIDA BUILDING CODE, AND CITIZENS PROPERTY INSURANCE CORPORATION AND OPENINGS PROTECTION

HB 7057 has a number of sections dealing with the My Safe Florida Home Program, the Florida Building Code, and eligibility for coverage by Citizens Property Insurance Corporation. The part that has received the most attention is the section creating §627.351(6)(a)8., F.S., which provides that effective

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January 1, 2009, a personal lines residential structure located in a wind-borne debris region that has an insured value on the structure of \$750,000 or more is not eligible for coverage by Citizens unless the structure has openings protections. A residential structure will comply with the requirements if it has shutters or openings protections on all openings and if such openings protections complied with the Florida Building Code at the time they were installed.

Note that condominium buildings are not considered "personal lines residential structure." Rather, condominium buildings are insured as a "commercial lines residential" structure. Therefore, it appears that the new law will apply to single family homes (with an insured valued of \$750,000 or more in the wind-borne debris region and insured by Citizens), but not to condominium buildings.

SB 2498: INSURANCE REFORM

Some of the highlights include:

- Freezes rates charged by Citizens Property Insurance Corporation until 2009.
- Amends §627.70131, F.S., to require insurance companies to pay or deny a claim or a portion of the claim within 90 days of receiving notice of a claim.
- Amends §627.70131, F.S., to apply the 90-day payment requirement to residential property claims, commercial property claims for structural or contents coverage if the insured structure is 10,000 square feet or less, and commercial property claims for contents coverage under a commercial property insurance policy if the insured structure is 10,000 square feet or less.
- Amends §627.70131, F.S., to require the insurer to pay interest on any payment or a portion of a claim paid 90 days after the insurer receives notice of the claim, or more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later.

SB 500: INSTANT BINGO

SB 500 deals with gambling regulations and amends §849.0931,

F.S. The effective date of the new law is July 1, 2007 and recognizes "instant bingo" as a permissible form of bingo on community association property. Instant bingo is a form of bingo that is played using tickets that contain numbers that are concealed by a cover. The player removes the cover and wins a prize if the set of numbers, letters, objects, or patterns on the ticket match a pre-designated pattern. The pre-designated pattern appears on a "game flare," which is a board or placard that contains the game name, the manufacturer's name or logo, the form number, the ticket count, the prize structure, the cost per play, and the serial number of the game. Although many of the new provisions governing instant bingo are identical to those governing traditional bingo, there are a few key differences.

The new law does not restrict the number of instant bingo prizes that may be awarded in one day. Likewise, the amount of each prize is not restricted. Instead, the prize amount is simply indicated on the game flare. Additionally, the number of days per week that instant bingo can be played is not limited by this legislation. The price of an instant bingo ticket must be printed by the manufacturer on the face of the ticket, and the price cannot exceed \$1.00. No discounts or free tickets are permitted. The game flare must be posted prior to the sale of any tickets, and the serial numbers of the tickets and the game flare must match.

SB 2234: REGULATION OF BUILDING INSPECTION PROFESSIONALS

This legislation will require that building inspectors, mold assessors, and mold remediators be licensed by the Department of Business and Professional Regulation by July 1, 2010.

SB 1824: MORTGAGE FRAUD

This legislation provides greater consumer protections related to the mortgage loan application process and makes mortgage fraud a third-degree felony. The effective date of the law is October 1, 2007.

All of the legislation is available on the CALL website found at www.callbp.com – if you have any trouble logging on the site, please email call@becker-poliakoff.com for assistance. ■



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