

CLAYTON & McCULLOH

Highlights

FLORIDA'S 2007 LEGISLATIVE UPDATES CONCERNING ASSOCIATIONS

Architectural Guidelines to Homeowners' Associations:

- 1.) Associations or their architectural committees may no longer have the power to enforce generic architectural control provisions. Florida Law now, ostensibly, requires such authority to be specifically stated or reasonably inferred from your Governing Documents as to the location, size, type, or appearance sought to be regulated. This new law profoundly effects an association's ability to effectuate architectural controls.
- 2.) If the Association's Governing Documents provides for options to owners as to location, size, type, or appearance (i.e., color chart), the Association may not restrict an owner's choice among these options.
- 3.) If the Governing Documents do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply.
- 4.) Should an association infringe upon or impair the rights and privileges set forth in the Governing Documents, the owner shall be entitled to recover damages, including any costs and reasonable attorneys fees.

Collection Procedure Changes to Homeowners' Associations:

- 1.) The statute now expressly states that an owner in a mandatory association has an obligation and liability for assessments and describes the obligation in detail as well as mandating that the owner is jointly and severally liable with the previous owner of the land if the property was sold with unpaid assessments.
- 2.) The association may not file a lien on the property unless the association has sent a written demand to the owner. This demand must allow the owner 45 days to pay the debt and must be sent via U.S. first-class and Registered mail to the owner's address if different than the property address and to the property address. (Currently, Clayton & McCulloh gives 30 days, and otherwise already complies with the statutory changes)
- 3.) The association may not foreclose on the lien until a notice of intent to foreclose (NOITF) has been sent to the owner. Once again, this NOITF must allow the owner 45 days to pay the debt and must be sent via U.S. first-class and Registered mail to the owners address if different than the property address and to the property address. This sub-section further provides that (a) by sending the NOITF, the association may recover reasonable attorneys' fees in its judgment; and (b) the association may purchase the property at the foreclosure sale and hold, lease, mortgage, or convey the property thereafter. (Currently, Clayton & McCulloh gives 30 days, and otherwise already complies with the statutory changes)
- 4.) Once a complaint has been filed, an owner has the right to submit a "qualifying offer" to the

Court prior to the entry of a foreclosure judgment which will stay the foreclosure action for no more than 60 days. A "qualifying offer" means "a written offer to pay all amounts secured by the lien of the association plus interest accruing during the pendency of the offer at the rate of interest provided in this section." The owner may make only one such qualifying offer. In order to make such a qualifying offer, the owner must follow the specific statutory requirements. If the owner breaches the terms of the qualifying offer, then the association may proceed in its foreclosure action against the owner. (C&M has previously, when appropriate, sought to work out settlement agreements with owners so long as the owners essentially agree to the terms and conditions of a qualified offer. Because the stay imposed is new and it essentially allows a homeowner to scrape together the funds to payoff the debt in a short time, C&M feels that this new provision may be a boon to the association. C&M also acknowledges that there are owners and attorneys representing owners who could abuse the provisions of the statute, but now the statute has provided specific terms that must be met, so we believe that we have a solid basis for curtailing abuse and moving toward a resolution.)

Mediation changes applicable to Homeowners' Associations:

- 1.) Mediation for homeowners associations has been replaced with a requirement for "Statutory Offer to Participate in Presuit Mediation" which must be served by an "aggrieved party" prior to a suit being filed in Court. A Statutory Offer to Participate in Presuit Mediation must follow the requirements set forth in the statute, including that it must state the specific nature of the dispute, provide a choice of 5 pre-selected Supreme Court Certified Civil Mediators, state that both parties must share the cost of presuit mediation, and that the responding party must respond in 20 days by mailing a response by certified mail and U.S. mail. Recall disputes, pursuant to the Florida Statutes and election disputes between a member and an association shall continue to be subject to arbitration by a division appointed arbitrator.
- 2.) Allows the aggrieved party to file a suit in state court if the responding party does not respond within 20 days and, should any party fail to respond to a demand or response, agree to a mediator, to make advance payment of fees and costs to the mediator, or appear at a scheduled mediation session, an impasse may be declared and the other party may proceed in court regarding the covenant violations and may recover attorney fees and costs associated with the mediation. A party who has not participated in the entire mediation process may not recover any attorney fees or costs in subsequent litigation, even if that party should prevail.
- 3.) If presuit mediation is unsuccessful, in whole or in part, either party may file in a court of competent jurisdiction. If both parties agree, they may also enter into binding or non-binding arbitration as per Chapter 718.1255.
- 4.) The Division's Certification and Training Program for private mediators has been eliminated.
- 5.) The educational program developed by the Division to assist Homeowners, Associations, Board Members and Managers has been eliminated

Budget changes applicable to Homeowners' Associations:

- 1.) Homeowners associations may elect (by majority vote or by written consent of the majority of

the members) to include reserve accounts in the association's budgets for capital expenditures and deferred maintenance for which the association is responsible, regardless of whether the power to establish reserve accounts appears in the association's governing documents, subject to certain limitations.

2.) If an association's budget includes reserve accounts in any year, the association must determine, maintain and waive reserves in compliance with the Statute that year and every year thereafter. After reserve accounts have been established, the members may, by majority vote, elect to waive or reduce the funding of reserve accounts. Any such vote, however, will only apply to one budget year. If the members fail to reach a majority vote to waive or reduce the funding of reserve accounts, the reserves as included in the budget will go into effect.

3.) When an association's budget does not include reserve accounts for repair and maintenance of capital improvements for which the association is responsible and the association may potentially levy a special assessment to repair and maintain those capital improvements, then each financial report of the association for the preceding fiscal year (as required by the Florida Statutes) must contain a statement which notifies the members of the association that they may elect to provide for reserve accounts in the budget for capital expenditures and deferred maintenance. The exact required wording of such statement can be found in the Statute.

4.) There are two formulas from which associations must choose when calculating the required funding for their reserve accounts and these formulas are set forth in the Statute.

5.) Funds in reserve accounts and any interest accrued thereon may not be used for anything but their designated purpose unless a majority of the members vote otherwise.

6.) Prior to turnover, a developer controlled association shall not vote to use funds in a reserve account for anything but the originally designated purpose without the approval of at least a majority of all non-developer controlled voting interests in the association.

7.) After turnover to the parcel owners in an association from the developer, the developer may vote its remaining voting interests in the association to waive or reduce funding of reserve accounts.

Condominium Conversion Updates:

1.) In conversion condominiums, developers must now prepare a report disclosing the condition of the improvements and certain components as of the date of the report. The developer has to update the report annually to within 1 year of the filing of the Declaration, and the report may not contain representations regarding the condition of future, planned improvements or repairs.

2.) In calculating the amount of money which must be put into converter reserve accounts for converted condominiums, the developer must now round the age of any component to the nearest whole year (no more fractional years). Also, the vote to waive or reduce funding to a regular reserve account under the statute does not affect or negate the developer's obligation to create a reserve account, offer a warranty, or provide a bond pursuant to the statute. If the developer

grants a warranty instead of a converter reserve account, then the items specifically identified in the former statute have been deleted, presumably expanding the warranty to all improvements. The developer also must now disclose in large, conspicuous type in the contract of sale whether it has opted to provide a converter reserve account, a warranty, or a bond.

Insurance:

1.) Because of the problems associations have had in obtaining insurance, the legislature is enabling associations to self-insure. This update will be most beneficial to associations unable to acquire insurance.

Various Changes:

1.) New statutory revisions allow Condominiums, who have had difficulty amending their documents due to unreasonable mortgagee consent requirements, to amend their documents without receiving mortgagee consent, under certain conditions.

2.) In Homeowners Associations, meetings of any committee or similar body wherein a final decision will be made as to expenditure of Association funds, as well as ANY meeting of a body with the power to approve or disapprove architectural decisions, must now be noticed in the same manner as Board meetings.

3.) For voluntary/non-mandatory Homeowners Associations, Covenant Revitalization procedures are now available, for the revival of certain covenants that may have lapsed due to the effects of the Marketable Record Title Act.

4.) For Homeowners Associations, the Association is now officially not required by law to provide a prospective purchaser (or any agent working with a prospective purchaser, such as a mortgage company) any information other than that which it is required to be disclosed by law (for example, official records). However, if the Association, acting in good faith, wants to respond to a request for additional information, the Association is now able to charge a limited fee, costs, and even attorneys fees, for providing this information.

5.) In a condominium, agreements acquiring leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration for a condominium shall be considered a material alteration or substantial addition to the real property that is association property, and such, will not be valid unless approved by the membership.

6.) Developers of homeowners association's must now provide an audited financial statement of the association and the source documents from the incorporation of the association through the date of turnover. The records must be audited by an independent CPA.

7.) If a guarantee of assessments is not included in the purchase contract of a home in a homeowners' association, then it can only be effective upon approval of a majority of the voting interests of the members other than the developer. The guarantee period must be specific as to beginning and ending dates, must state the exact dollar amount of assessments for each lot, and the guarantor must cover any short falls in the Association's budget during the guarantee period.