

# BECKER & POLIAKOFF

Legal and Business Strategists

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## MEMORANDUM

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**TO:** Homeowners' Association Clients of Becker & Poliakoff, P.A.  
**FROM:** Kenneth S. Direktor, Esq., on behalf of the Community Association Practice Group  
**DATE:** August 2, 2007  
**RE:** New Laws Affecting Homeowners' Associations

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As you may be aware, during the 2007 legislative session, the legislature adopted SB 902 and SB 1844, which include numerous provisions affecting homeowners' associations. The new laws became effective on July 1, 2007. The purpose of this memo is to make sure our homeowners' association clients are informed regarding the impact of these new laws.

***New Collection Procedures:*** Section 720.3085 was added to the Florida Statutes. Pursuant to this new law, an association may not file a claim of lien against a parcel owner for unpaid assessments until 45 days written notice for past due assessments has been given by the homeowners' association. Additional requirements for this notice, including where and how it is to be mailed, are included. The new law also requires the homeowners' association to provide a second 45 day notice of its intent to foreclose the claim of lien prior to filing a foreclosure lawsuit.

The new law provides that a parcel owner is liable for **all** assessments, including joint and several liability with the previous owner for all unpaid assessments that came due up to the time of transfer of title. In the case of a bank foreclosure, the law provides that the bank (or first mortgage holder) will be required to pay the homeowners' association all unpaid assessments that were due at the time of transfer of title. The full impact of this new law on foreclosing mortgagees remains to be seen after it is tested in court. Associations can get ahead of the curve by amending their documents to comport with the new law.

The new law also provides for the payment of interest on unpaid assessments, prioritizes the application of any payment received, prohibits the placement of a restrictive endorsement on the payment, and 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. The new law also permits the association to charge late fees if authorized by the

declaration or bylaws. If your governing documents do not authorize late fees, you should consider amending the documents.

If you would like assistance with the new law or considering amendments to your documents to make them consistent with the new law, please contact your association attorney.

**Architectural Control:** Section 720.3035 was added to the Florida Statutes, addressing architectural control. The new law provides that the authority of an association or an architectural control committee (ACC) 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.

The term "reasonably inferred" basically means that the scope of the architectural control committee's (ACC's) authority and ability to regulate the exterior appearance of the homes and lots can be fairly broad, but the application of the ACC's authority must be reasonably inferable from the express language of the declaration. For example, if the declaration provides that owners are responsible for painting the exteriors of their homes, and that the association and/or the ACC has the authority to regulate exterior color, we would reasonably infer that the ACC has the ability to choose a palette of colors from which an owner must pick the exterior color of his/her home.

The new law also provides that if there are options for the use of materials, design, size, and location of the structure or improvement, then neither the association nor the ACC can restrict an owner's right to choose from among these options.

[This new law, as is the case with many new laws, is subject to interpretation until there is precedent to guide us.] [However, a homeowners' association or ACC 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 one is permitted by the declaration.] The key is to have the authority clearly provided in the declaration and more specific ACC standards in writing to the extent those standards address location, type, color, design, etc.

If your association would like assistance reviewing the declaration or other published guidelines or standards authorized by the declaration to determine whether any amendments are necessary based on this new law, please contact your association attorney.

**Reserves:** Section 720.303(6), Florida Statutes, was amended to address association reserves. An association is deemed to have provided for reserve accounts in the following instances: (1) when reserve accounts have been initially established by the developer or (2) when the membership of the association affirmatively elects to provide for reserves. If reserve accounts were 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 as provided by the statute (by the developer or by the affirmative vote of the members), the reserve accounts shall be funded or maintained unless the funding of reserves is waived or reduced (from the formulaic requirements described below) by the membership upon a majority vote at a meeting at which a quorum is present. If reserve accounts have not been established, each financial report must state in conspicuous type that the budget does not provide for reserves. (The exact language required is in Section 720.303(6)(c), Florida Statutes).

The new law provides funding formulas for reserves, describes the funding of pooled reserve accounts, and provides that reserve funds and any interest thereon must remain in the reserve account and 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.

**Financial Reporting:** Section 720.303(7), Florida Statutes, was amended to provide 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. The new Statute also 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.

**Presuit Mediation Procedures:** The mediation provisions contained within Section 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 may be taken in court, have been amended. The new law eliminates 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 is in the Statute and must be strictly adhered to. The written offer must be sent by 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. 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.

All Becker & Poliakoff Homeowner's Association Clients

August 2, 2007

Page 4

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.