

apm NEWS

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STAY INVOLVED WITH YOUR COMMUNITY ASSOCIATION

BY JOHN R. MATH, LCAM

(Reprint from Spring 2004 Issue)

Living in a community association can be the most rewarding or the most frustrating experience of your life! But the main reason for Unit Owners being unhappy and frustrated is due to not being involved and informed of the workings and operations of the Community Association.

In any form of community association, you, the owner, must stay involved in the workings of the association. The association always needs owner volunteers for the Board of Directors and Committees. In a diverse group of people, there are many people with many talents who should be willing to participate for the greater good of the community. In addition, the Board of Directors needs unit owner participation at meetings for input and guidance and to help in the overall decision-making process. The association does not operate on its own without the owners' involvement. Even if there is a management company or management staff handling the day-to-day operations and problems, it is the Board of Directors (the owners) who has the ultimate responsibility to manage and operate the association. It does not happen by itself. Otherwise, if there is no participation, involvement or direction from the owners, the association will be

aimless and not forward thinking. Problems will arise that could have been or should have been anticipated by an active community. To fully protect your investment and your lifestyle, an owner needs to be involved in the association and its operations. If this is not possible, you must at least go to Board of Directors, Committee, Workshop and/or Membership Meetings in order to stay informed and be able to benefit from the community association experience and lifestyle. A person's home is usually the single most important and costly investment that they will ever make. To leave major operations and maintenance decisions to others, without your input and participation, just does not make very good business sense.

The major cause of unhappiness and misunderstanding for an owner in a community association is usually the result of a belief that the association takes care of all maintenance, repair and replacement problems. This is a misconception that occurs daily in most communities. This misunderstanding is usually a result of a lack of a working knowledge of the documents and the state statutes that govern your association. In many cases, the owner believes that because they are paying maintenance fees, everything that ever needs maintenance, repairs or replacements should automatically

be handled by the association. In most cases, the documents will provide the guidelines for any repairs and replacements and will define who is responsible. If the documents are silent or are in conflict with state statutes, the state statutes may prevail.

It is the responsibility of the owner of the unit to read and understand the details of the documents and their ultimate ramifications upon the unit owner's lifestyle and budget. It may be assumed that since it is a condominium unit, everything should be maintained by the association, however, it is not uncommon to have doors, frames, garage doors and windows, etc. excluded from documents, as these elements may be the owner's responsibility and not the association's. Therefore, it is incumbent for the buyer to read the documents or have the help of an expert (usually an attorney who specializes in real estate law) to interpret the documents for a buyer.

In addition to being knowledgeable about the documents and the association's maintenance responsibilities, an owner should be able to read and interpret the association's budgets, balance sheets and income statements for the last few years. If there is a problem with any of these categories, there may be possible future increases in maintenance as

Continued From Page 1.

sessments in order to make up for past deficits. As an owner, if you are unable to read and understand the association's budgets and balance sheets, have someone who is knowledgeable to assist you in reading and interpreting them. In the long run, it could save you a lot of heartache and money. As a seller, you'll be able to promote the financial well being of your community when marketing your unit.

In a well-managed association you can expect to live in a community where you are respected as an individual, are well informed about the workings and operations of the community and are encouraged to be involved with your association, either actively or as a member participant. A well-run association will have an adequate budget to operate the association. It will have adequate funds for emergencies, long-term projects and funds set aside for reserves for major repairs and replacements. There will be adequate insurance to protect the association from casualty and liability losses. Professionals are used throughout the year by the association to help in the operations and management of the association. The records of the association are well maintained and readily available for unit owner inspections. A well run community association, is not only a place where you want to live but is also a place where you will be able to maximize your initial purchase, in the form of a higher resale value.

Most associations are not perfect but are a work in progress as events, conditions and membership in the association are constantly changing. No matter what is happening, the association should have the wherewithal to deal with most situations and circumstances for the benefit of the association, either in its operations, its talent pool of members or from its professional ranks. Either way, stay actively involved with your association or participate and attend Board of Directors, Members and Committee Meetings.

Ask The Attorney

By V. Claire Wyant-Cortez, Esq.

Q. Our Board of Directors ignores our management company when they recommend vendors or when they get us lower bids on services then Board gets. At our last meeting the Manager presented bids on fences and the Board choose their own fence company for \$2,000.00 higher. Is this wrong? Can they do this?

A. The lowest bid does not necessarily mean the best job and there is no requirement for the Board to award a bid to a vendor recommended by its Manager. Directors have a fiduciary relationship with the unit owners, and must use the highest degree of good faith in placing the interests of the unit owners above their own personal interests. Essentially the Board of Directors is the decision-making body for the association.

Q. Our Board of Directors has been told by our management company to make sure that all of our vendors and workers have liability insurance, workmen's compensation insurance and the appropriate licenses. They continue to hire workers and companies that do not have this paper work. If someone gets hurt on the job can we be liable for their injuries? How can we make the Board of Directors use good business judgments?

A. Recall any board member who is not using good business judgment and not acting within their fiduciary duty to the Association. Any member of the board may be recalled and removed from office with or without cause by a vote or agreement in writing by a majority of all the voting interests. Ten percent of the unit owners may petition the board for a special meeting to consider removing a board member or members. A majority vote of all the voting interests can be obtained at a special meeting of the unit owners or by written agreement.

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REMINDERS!

1. Be sure to update your files to include a new Question & Answer Sheet as of January 1, 2007.
2. Fees to the Division are due, and are late if not paid by March 1, 2007. The amount is \$4.00 per unit, for all condominiums and cooperatives.
3. Corporate Annual Reports must be filled out and received by the Secretary of State by May 1, 2007. The Fee is \$61.25 for Not-For-Profit Corporations.

**Overview of Recent Division Declaratory Statements Affecting
Condominium Association Casualty/Windstorm Insurance
by Robert B. Burr, Esq. of St. John, Core & Lemme, P.A.**

This brief article gives an overview of certain recent and very significant Declaratory Statements from the Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") affecting condominium casualty/windstorm insurance. These Declaratory Statements are: Plaza East, Molokai Villas and Costa Del Sol. There is also a Palm Beach County Court case construing one of the declaratory statements, and the Division is in the process of adopting a rule regarding the primary issue. Homeowners associations operating communities of attached dwellings may also find this article interesting for comparison with the insurance provisions in their governing documents.

A short explanation of the background is helpful. Florida Statute 718.111(11) sets forth the statutory responsibilities of a Florida condominium association to obtain casualty insurance. Casualty insurance is the insurance to protect against damage by windstorm, fire and other hazards. Florida Statute 718.111(11) also dictates to some extent the coverage of such casualty insurance policies issued for condominiums. This insurance statute has been evolving over many years.

In 2006, the Division construed 2003 changes to the statute in a way which greatly affected condominium associations and superseded parts of many declarations of condominium. Here is what happened. The Florida Legislature, in 2003 amended the condominium insurance statute to allow the association to buy a casualty policy with "reasonable deductibles" and made certain other changes. That 2003 change allowing "reasonable deductibles" was positive, but did not come as a great surprise since condominium casualty policies could not, as a practical matter, be obtained without deductibles. However, the big impact on condominium associations came when the Division construed the 2003 changes in the Division's 2006 Declaratory Statement, Plaza East Association, Inc., DS2005-055.

Under the condominium insurance statute Florida Statute 718.111 (11), a casualty policy issued to a condominium association covers more than just the common elements. The casualty policy covers all "condominium property" either located inside or outside the units, and condominium property most frequently includes components which may be defined as being part of the unit such as windows and sheet rock partition walls located inside the perimeter of the unit. The statute excludes certain components in the unit such as floor, wall and ceiling coverings, and interior cabinets from coverage under the association's policy. Most declarations of condominium have provisions setting forth how the cost of repairs and restoration is allocated after a hurricane or other casualty. Many declarations of condominium state that where there is not enough insurance proceeds to pay for restoration, the cost of repairs is allocated according to who (unit owner or association) would otherwise be responsible to maintain the item. For example, under the language of many declarations of condominium, the windows are defined as part of the unit, and the declaration would provide that if there was not enough insurance proceeds to repair damage, the unit owner would be responsible to pay for repairing or replacing the window.

Plaza East and Molokai: In the 2006 Declaratory Statement Plaza East, the Division stated that where there is a component covered by the association's casualty policy (example, a window), the cost restoring casualty damage is a common expense of the association to the extent insurance proceeds are unavailable. In Plaza East, the Division found that the screens and sliding glass patio doors on units were by statute covered by the association's casualty policy, and that the deductible must by statute be absorbed by the association as a common expense regardless of contrary language in the decla-

ration. The Division in Plaza East held that any contrary provisions in the declaration of condominium which may impose that cost on individual owners are superseded.

The Division in the more recent Molokai Villas Declaratory Statement, DS2006-028, followed the Plaza East Declaratory Statement. Under Plaza East and Molokai, damage to the condominium property covered by the condominium casualty insurance must be absorbed as a common expense. This principle applies either because the damage is below the deductible or because after payment of insurance proceeds, there is not enough insurance proceeds. The Division in Molokai again stated that the statute supersedes any contrary language in the declaration which may impose the cost on individual owners.

The Division in Plaza East and Molokai also stated that the condominium insurance statute Florida Statute 718.111(11) dictates what the casualty policy issued to a Florida condominium association must cover. The Division stated that windows are by statute covered by the association's casualty policy. However, there is at least one insurer which is arguing that point when dealing with Wilma claims.

Moreover, there is at least one court case, Brady v. Placido Mar Association, Inc. (citation omitted) where a Palm Beach County Court Judge upheld Plaza East and held that a condominium association was responsible for the cost of restoring hurricane damage to a sliding glass door where the damage was below the association's deductible. In Brady, the sliding glass door was defined as part of the unit, and under the declaration of condominium, the owner would have been responsible for the cost of repair because the damage was below the association's deductible. The Court in Brady held that the condominium insurance statute, as construed by the Division in Plaza East, superseded such language in the declaration of condominium.

The third and most recent Declaratory Statement is the Costa Del Sol Association, Inc. Declaratory Statement, DS2006-024 issued November 29, 2006. The Division in the Costa Del Sol held that an association is required to insure screen enclosures, trellises, and jacuzzis on patios and balconies. In Costa Del Sol, unit owners installed trellises, jacuzzis and screen enclosures on balconies and patios. There were several condominiums operated by one condominium association – a multicondominium association. In some instances, the balcony or patio was defined as limited common elements, and in other situations the balcony or patio was defined as part of the unit. In some situations the additions were developer upgrades, but in other situations, the additions were board approved unit owner additions.

The Division in Costa del Sol held that these additions became part of the building and are therefore such additions were required to be insured by the association. The Division thereafter applied the Plaza East principal that to the extent the balcony or patio additions were damaged by a casualty event and there was not insurance proceeds under the Association's policy to pay for restoration, then the cost of restoring such additions was a common expense. The Division focused on the fact that the insurance statute specifically excludes certain items from coverage under the association's policy – for example floor wall and ceiling coverings in the unit, which items are covered by the unit owner's policy. The Division noted that the enclosures and additions to balconies were not excluded in the statute from coverage under the association's policy. The Division also apparently felt that unit owners would not as a practical matter be able to insure such additions to balconies and patios.

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APM NEWS

PAGE 4.

APM NEWS

Spring 2007

The third Declaratory Statement, Costa Del Sol represents another dramatic change in the interpretation of the insurance statute. An interesting point is whether the Costa Del Sol Declaratory Statement will affect the validity of prior Division arbitration decisions dealing with unit owner additions to balconies and patios. There is a line of Division arbitration cases beginning with Carriage House v. Haya, Arbitration Case No. 95-0476 which hold that when a unit owner installs additions to a limited common element balcony or patio, the additions are considered the unit owner's personal property, and the owner is responsible for ordinary maintenance, repair or replacement, unless there is some specific agreement by the association otherwise. However, the Costa Del Sol Declaratory Statement held that such additions become part of the building for insurance purposes – this somewhat goes against the notion of these items being owner's personal property for ordinary maintenance purposes. It will be interesting to see how Costa Del Sol affects future arbitration decisions dealing with owner additions on balconies and patios.

The Division, at the time this article is written, is in the process of adopting a rule (proposed to be Section 61B-22.007) codifying the Plaza East interpretation of the insurance statute.

The Division's Declaratory Statements do not, in my opinion, address the separate but related issue of who is responsible to actually perform the restoration and repair work. If the condominium declaration clarifies who is responsible to make the repairs and restoration to unit components after a hurricane or other casualty, the association in my opinion is bound by those provisions. There is a condominium arbitration decision which suggests that the association has some discretion regarding who does the restoration work. **Note:** also that Declaratory Statements address the cost of restoring damage from a hurricane,

fire, flood or other casualty event. The Declaratory Statements do not address the cost of ordinary maintenance and repair, which is otherwise governed each condominium's governing documents and Chapter 718.

Condominium associations and homeowners associations may wish to review the provisions in their declarations and tune up or clarify the provisions regarding restoration after a casualty. If an association has questions or issues regarding how costs need to be absorbed following a hurricane or other casualty or who is responsible to do the work of restoration, the association should consult its attorney.

Condominium associations should also monitor this point of law. It is very possible that the Florida legislature could resolve the controversy by a statutory amendment or an appellate court could issue a decision bearing on the issues.

The information contained in this article is intended to provide general information and is not regarded as rendering legal advice to your particular community association. You are urged to contact your association's attorney should you have questions on the applicability of this article to your association. Please be aware that legal principles as referred to in this article are subject to change from time to time. For example, it is possible that the legislature could further amend the condominium insurance statute to address the issues discussed above. Condominium insurance is a developing area of law. 2/5/2007

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