Concrete Restoration: Typical Issues Controlling the Condominium Association

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Last month, we generally discussed the nature of the concrete restoration and preservation industry. Today, we will consider typical issues confronting the Board of Directors of Condominium Associations when it comes time to perform the work.

As we said last month, the key to a successful concrete restoration and/or preservation project is to have an adequate “Scope of Work.” In almost every case, this should be generated by a professional engineer. Never accept the Contractor’s specifications. We see many cases where a concrete restoration/preservation project fails after a couple of years. When the Association goes back to the Contractor on a warranty claim, the Contractor’s response is often: “We did what was specified, don’t blame us if you chose inadequate specifications.”

Generating the Scope of Work will help the Board nail down two key issues. First, how much is the project going to cost? This will enable the Board to consider financing options, discussed below. Secondly, the Scope of Work will permit the Board to evaluate interrelationships between the Association and the individual unit owner. For example, will balcony floor coverings have to be removed? If so, who pays for the cost of removal? Can the Association regulate permissible floor coverings placed back on the balcony floor after the restoration/preservation project? We will explore these issues, and more, today.

The most common method of funding restoration/preservation projects is through the use of special assessments. Most of the problem cases we see, from a legal standpoint, involve situations where the Association failed to follow some technicality in the special assessment process. The first step is to review the Declaration of Condominium, Articles of Incorporation and By-Laws (“Condominium Documents”). It is a common misunderstanding that the Florida Condominium Act authorizes the Board to levy special assessments. This is not true. The Condominium Act states that special assessments must be levied as provided in the Condominium Documents. Some Condominium Documents
require membership approval for special assessments. In such cases, unit owner approval should be obtained. Some documents do not authorize special assessments at all, but only assessments for “emergencies.” Some (many) documents conflict wherein they will provide that the Board has the authority in one place, but provide in some other section that a unit owner vote is required. Most modern Condominium Documents simply provide that the Board of Directors has the authority to levy special assessments. In any case, in most instances, the Association will be required to follow the procedures set forth in the Condominium Documents, unless they are in violation of the minimum standards set forth in the Condominium Act. Assuming that the Board can levy special assessments, the notice of the special assessment meeting is governed by very specific notice procedures, found at Section 718.112(2)(c) of the Condominium Act. Generally speaking, the notice of the Board meeting where the special assessment will be considered must be mailed to each unit owner at least 14 days in advance of the Board meeting, and also posted at the conspicuous place in the Condominium, designated by Board rule. The notice must state that a special assessment will be considered, and the nature of the special assessment.

When the Board meets and levies the special assessment, the assessment should be set at a fixed amount. Many Associations provide for installment payment options. The Board must then send out a second notice, this one being required by Section 718.116(10) of the Condominium Act. Essentially, this notice must notify the owners that a special assessment has been levied, the purpose of the special assessment, and the due dates. Pursuant to the same statutory provision, special assessment funds, once collected, cannot be used for any purpose other than that for which the special assessment is levied (except that when the project is over, leftover monies can be applied as a credit toward future unit owner assessments).

If unit owners do not pay a duly levied special assessment, the Association may levy late fees (if authorized by the Condominium Documents), charge interest at the rate specified in the Declaration of Condominium (or if the Declaration of Condominium is silent, at 18 percent per annum). Payment may be secured by recording a Claim of Lien against the unit, which also secures all future assessments accruing, as well as costs and attorney’s fees affiliated with the collection effort.

A second common financing option is to use “reserve” funds to pay for some or all of the work. Here, the Board must examine how its reserves are structured, meaning whether the reserve funds are restricted as to use, or whether there are “general” or “contingency” reserve funds available (Associations wishing to establish “general” or “contingency” reserves are urged to consult with their CPA, as the Internal Revenue Service is apparently taking a restrictive view on the taxation of some of these funds). If the money is in a “general” or “contingency” reserve fund, the Board can apply the money to the restoration/preservation project. If the money is in a “statutory” reserve account, the Association cannot use the funds without a unit owner vote (except
that painting reserves can probably be applied to most waterproofing projects. The use of other “restricted” reserves, however, must be approved, in advance, by a vote of a majority of all units (not a majority of a quorum).

The third financing option, and certainly the least common, is a bank loan. Although some Associations are desirous of using bank financing as a method of easing the burden of special assessments, the reality is that you are only adding interest costs to the job. Therefore, absent unusual circumstances, it is not recommended that bank loans be pursued as a means of financing building restoration/preservation projects. Unit owners who desire financing, or who need financing due to their own constraints, can usually find same out on the open market.

In our experience, one of the most troubling aspects of restoration/preservation projects is sorting out who (the individual unit owner, or the Association as a common expense) is responsible for various aspects of the project. Here, the answers to your questions will not be found in the Condominium Act. Rather, all answers lie in the Condominium Documents. Unfortunately, in many cases, the answers are not clear. We will turn to the ten most common questions we encounter, and provide you the ten most common answers. Again, these answers may not apply to your particular Association, depending on the language of your Condominium Documents.

**Question:** Our Condominium Documents provide that balconies are part of the “unit,” and that the unit owners (not the Association) are responsible for maintenance and repairs of “porches and verandas.” Why is the Board getting involved in fixing my porch?

**Answer:** In most cases, even where the interior air space of a “balcony” or “porch” is defined as part of the “unit” (apartment), the structural floor slab will still be deemed part of the common elements. Under the Florida condominium law (with a couple of exceptions) it is the Association’s duty to maintain the common elements (see Section 718.113(1) of the Act). As a policy matter, the Association does not want to delegate structural maintenance responsibilities to individual unit owners, for a variety of fairly obvious reasons.

**Question:** I live in a “middle” unit. The balconies servicing the “corner” units have twice as many square feet. It is not fair for me to have to pay an equal share of the assessment.

**Answer:** If the structural slabs are part of the common elements, the Association’s only option in, maintenance and repair is to assess all unit owners, as a common expense, in the percentages set forth in the Declaration of Condominium. In most cases, this will be an equal share (some Condominium Documents provide for weighted assessments based on the square footage of the units). Like the person who lives on the first floor and never uses the elevator, or the couch potato who doesn’t play tennis, the condominium concept anticipates communal maintenance of commonly owned facilities, including the
structure of the building.

**Question:** Can we change our Condominium Document to more fairly apportion the costs between the larger and smaller units?

**Answer:** In most cases, pursuant to Section 718.110(4) of the Florida Condominium Act, such an amendment could only be obtained through unanimous approval of all unit owners, as well as their mortgagees.

**Question:** The Board has told me that I must tear out the carpeting that was installed by the Developer, and that I will not be able to replace it when the restoration/preservation project is completed. Can they do this?

**Answer:** To date, there is no case law to answer this frequently asked question. It is our belief that the Board’s duty to maintain the structural integrity of the building indicates that the Board does have this power. This is particularly true where the Board’s decision is backed up by the report of the Association’s consulting engineer.

**Question:** I paid several thousand dollars to have marble flooring laid on my balcony. Now, the Board wants to tear it up to patch the rebar in the balcony deck. Does the Association have to reimburse me for my loss?

**Answer:** It depends. Many Condominium Documents contain “incidental damage” provisions, which will generally obligate an Association to compensate unit owners for damage that is “incidental” to the Association’s performance of its maintenance obligations. Also relevant in answering this question is whether the Condominium Documents required permission for balcony floor coverings, whether same was obtained, and the like.

**Question:** We are told that our unit will be unusable for six months, while the restoration/preservation project is ongoing. We will lose a significant amount of rental income. Is the Association responsible for our lost rental income?

**Answer:** The Association is generally not responsible for frustrated economic expectations, unless it can be demonstrated that culpable negligence of the Association led to the situation.

**Question:** We live at our Condominium full time. We are told that we will have to obtain alternate living arrangements for three months, during the height of the structural work. Who will pay for our lodging and meals?

**Answer:** Like the lost rental income, we do not believe that the Association is obligated to subsidize unit owners who are inconvenienced by necessary structural work. However, there was recently a disturbing (and highly criticized) decision from the State Arbitration Bureau which held that an Association would be liable to be removed and stored during the restoration/preservation project, and then reinstalled. Who pays for this?
Answer: Again, it depends. (Yes, we have heard the joke about the one armed lawyer.) Many Associations, as a condition to granting approval for shutter installation have provided that the unit owner (and their successors) must accept responsibility for removal and reinstallion, in the event of necessary building structural maintenance. If this procedure was followed, we believe the unit owner is responsible. If this procedure was not followed, it is again necessary to analyze the “incidental damage” provisions of the Condominium Documents.

Question: The Association has told me that it needs a key to my apartment, so that the workmen can have access to my balcony. I will be away for the summer. Isn’t this private property?

Answer: Pursuant to the Florida Condominium Act, the Association has the irrevocable right of access to units to maintain the common elements. Many Associations require unit owners to deposit pass keys with the Association. We recommend that if workmen will be inside an apartment, that the Association have one of its employees present during that time.

Question: Can we go back against the Developer for these problems?

Answer: Again, it depends. Most relevant is whether the problem is caused by faulty construction (code violations or deviations from plans and specifications such as negative sloping horizontal surfaces, insufficient concrete or stucco thickness, etc.). If so, the Association may have a warranty or “common law” claims against the Developer, and perhaps other parties, such as the General Contractor. Most relevant to the Association’s analysis will be the Statute of Limitations, which as to the Developer is generally four years from the turnover meeting (where unit owners elect a majority of the Board). There is an exception for “latent” defects, where the Statue of Limitations is four years from the date the defect was discovered (or should have been discovered) with an outside time frame of 15 years from the issuance of the Certificate of Occupancy (C.O.) on the building.

Next month, we will conclude this series by discussing how the Association can protect itself during the contracting process.