



Do's and Don'ts of Repairing

Fort Myers The News-Press, November 3, 2005

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

As the inimitable Yogi Berra once said, this is like *deja vu* all over again.

Although Hurricane Charley caused much misery and negative financial impact, local condominium associations at least can learn from their neighbors' lessons about the "do's and don'ts" of post-hurricane contracting.

As many associations unfortunately learned from Charley, leaping before you look in post-hurricane contracting can result in a disaster greater than the hurricane itself.

The following are some tips for associations:

- **Thoroughly Review Proposed Contracts:** Asking your lawyer to take a look at a contract after you have signed it is usually of limited or no value. Many contractors entice associations with "simple" forms, often one or two pages in length. You can bet that these were prepared by the contractor's lawyer, and will offer little in the way of protection to the association. Be wary of forms generated by trade industry groups, such as engineers and architects. These forms tend to protect the design professional, the contractor, and the owner (association), in that order.
- **Be Prepared For Disputes:** Disputes, particularly in large construction projects, are not uncommon.
- **Contact Your Insurer:** Many policies require that a representative of the insurance company make inspections before the work begins. Further, don't sign a contract and expect the insurance company to pay for the work if they have not been involved in that process as part of adjusting the claim.
- **Select Only Licensed and Qualified Contractors:** General contractors and many specialty contractors must be registered with the state. Licensure, and complaints against licenses, can be checked on-line. Many cities and counties also require specific licensure and registration. Check references. Discuss bonding with your design professional and counsel. A bondable contractor is usually preferable to a non-bondable contractor.
- **Verify Contractor's Insurance:** Insurance coverage may differ widely for items such as premises liability and the liability for the acts of employees. An association would typically want to be an "additional insured" under the policy. Both your insurance agent and legal counsel should assist in making sure that adequate insurance protections exist.

- **Use a Design Professional:** Accepting the contractor's specifications at face value is probably the largest source of construction contract disputes, and a fertile source for both disappointment and legal entanglement. Every significant construction contract should include specifications that are either prepared or approved by an independent qualified party, who is beholden only to the association. This is especially important when new work must be tied in with pre-existing building components, or when new codes must be adhered to.
- **Review Warranties:** Many manufacturer's warranties are nearly worthless. For example, a warranty that is only good as long as the contractor/applicator is in business may be of no value if your contractor goes out of business.
- **Have Your Attorney Participate in the Contract Process:** There are many issues commonly found in construction contracts that will not be addressed in the "simple form" your contractor provides. You will want to look at areas such as indemnification (hold harmless), time of completion and liquidated damages, bonding, compliance with lien laws, and other important items.

While associations may not have the luxury of extensive negotiations for immediately-required services (such as dry-in of buildings), the biggest mistake made by associations after Charley was signing what started as temporary repair contracts, but turned into major reconstruction contracts, with no legal protection. While the shortage of materials and qualified contractors that follows disasters entices many to take what they can get, this is usually a Category 5 mistake. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Compare Management Teams Apples to Apples

Question: We are a small homeowners' association and want to look at management companies. How do we know if they will meet our needs? R.J. (via e-mail)

Answer: Management companies will typically provide a bid package including their marketing materials, as well as the price-quote for their services. Prices are usually quoted on a "per door" basis. However, be careful when comparing prices, you want to compare "apples to apples." You especially need to review those services for which the management company will be charging extra.

For example, I have seen a clause in some management contracts which permits the management company to extract a percentage fee for any insurance claim they help the association process. In my opinion, this is a terrible idea. As we have learned from the past two years' hurricanes, disaster claims can involve millions of dollars, and there is typically little relationship between what a management company will be asked to do after a significant casualty, and a percentage of the proceeds. On the other hand, the management company cannot be expected to provide extraordinary services for free, so an additional hourly charge at an agreed sum may be entirely appropriate.

It is also important to make sure that you know who will be handling your association's business. Most management companies have a number of managers, each of whom manages a specified number of association accounts. Most management companies will provide a free-of-charge interview if their bid is being considered. In addition to the principal of the management company, ask that the manager who will be assigned to your account also be present at the interview. Ask them about their experience.

There is no clear way to tell if a management company is meeting your needs. Obvious factors include

their producing required records (financial reports, minutes of board meetings, etc.) in a timely fashion, and your owners perceiving them as being helpful when addressing problems. I am aware of some associations who have maintained a relationship with the same management company for many years. I have seen other associations go through a new management company every year.

The best way to protect the association is to make sure that the agreement can be canceled by either the manager or the association, with or without cause, on reasonable written notice (such as 30 days).

Good luck.

Question: I'm the president of a small association. The problem we have is with one resident who is feeding Muscovy ducks. Early this summer, we had four or five ducks and a couple pairs nested (successfully – unfortunately).

Long story short, we now have close to fifty ducks on the pond, this owner feeds them two times a day. We are getting numerous complaints from the residents because the ducks are all over the subdivision now and they are leaving a mess everywhere.

I have called animal control, the Fish and Wildlife Commission, and code enforcement, and they don't do anything about these ducks even though there are ordinances prohibiting their feeding.

What can we do to make this stop? Can we—as a board—hire a trapper to remove the ducks and bill the owner for the removal? Are there any other options? C.S. (via e-mail)

Answer: Communities often consider Muscovy ducks to be nuisance birds. The black and white

birds, with warty red flesh around their bills, leave common areas covered in feces, potentially creating respiratory problems for residents. The birds can also carry various flu viruses.

Section 6-39(a), Lee County Code authorizes the animal control agency to declare unsanitary conditions created by Muscovy ducks to be a health nuisance. If a health nuisance is determined to exist, the animal control agency may break the eggs and humanely euthanize the ducks. Where a nuisance is created by a Muscovy duck or ducks, and the ownership of or person responsible for the ducks can be determined, the owner or responsible person may be issued a citation for contributing to the creation of a health nuisance.

The nuisances created by these ducks may also give the board grounds to seek removal of these ducks as the association has a responsibility to protect those who use and occupy the common areas of the community from foreseeable hazards. The association's governing documents should be reviewed to verify the board's authority to act.

Question: I live in a "55 and over" condominium. We have a board of directors member that only has a "life estate interest" in the unit he occupies. His son is the "remainderman." Is there anything in Florida law that says that a life estate equals ownership? Our declaration of condominium and bylaws state that directors and officers must be unit owners. N.W. (via e-mail)

Answer: A life estate is measured by a "measuring life" and terminates at the end of the measuring life. A remainder interest is what follows the life estate. By law, a life tenant's use and enjoyment is only restricted in that he or she may not "permanently diminish or change the value of the future estate of the remainderman."

Under Florida law, the life estate holder is considered the unit owner, and is entitled to the use and enjoyment of his unit. This includes rights provided to the unit owners via the governing documents, for instance, the ability to vote on association matters and eligibility as a board member. Therefore, the unit holder as a life estate holder, is eligible to be a board member. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.