Wilma's Visit Means Dealing with Repairs

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Talk about timing!

Today's column was supposed to continue our series about updating the constituent legal documents for your community association, with today's emphasis on the provisions of the documents which provide guidance about repair after casualty. Never in my wildest imagination did I think that a late-October column about disaster repair issues would qualify as a "current events" piece.

As with Hurricane Charley 14 months ago, Southwest Florida took one directly on the chin from Wilma. Like Charley, Wilma was moving at a brisk pace, as far as hurricanes go, when it made landfall here. As with Charley, although moderate flooding was experienced in some localities, we did not see the catastrophic storm surge that might accompany a slower-moving storm of this magnitude. Additionally, although there appears to have been widespread wind damage, it does not appear to have been as intense as when Charley made its more compact buzz-saw path a bit further to the north on August 13, 2004.

Nonetheless, nearly every community association will be dealing with post-hurricane repair issues, which may be as mundane as cleaning up landscape debris, or as significant as re-roofing buildings. Therefore, while we will get back to the discussion of legal document amendments in a couple of weeks, I would like to pass on some post-hurricane tips for community associations:

- **Shore-Up:** The first order of business for an association is to ensure that the community can be safely accessed as soon as the local government authority has permitted entry back onto the property. This will include clearing landscape debris and assessing the premises for dangerous conditions, such as broken glass, jagged metal, or exposed electrical lines.

- **Dry-In:** As soon as the property can be safely entered, the association must make sure that the buildings are protected from further damage, particularly water intrusion. Although we were "fortunate" to have Wilma followed by some cool-dry weather, there is no guarantee that it will hold. The association's insurance policies likely require taking reasonable steps to mitigate damage. Appropriate dry-in techniques will vary between different types of construction, often involving patches or temporary roofs on high-rise buildings, and the ubiquitous "blue tarps" on low-rise structures. Windows and sliding glass doors may need to be boarded up, although in some cases the building will need fresh air circulation.

- **Dry-Out:** One of the most important steps in preventing mold taking hold is to extract water from the buildings. Keep in mind that even though parts of a building may appear "dry" a day or two after the storm, water "wicks" (saturates into the gypsum-board and migrates downward). This situation should be monitored

closely, carefully, and continuously. A common source of dispute is when water invades only a single unit, such as in a case where water is wind-driven under a unit's door, or enters through a blown-out or leaky window. This is especially problematic in many condominiums because, even in late-October, a fair number of units are still unoccupied by their seasonal residents. My general advice is for the association to take the lead in getting the water out now, and you can argue later about who should pay the extraction costs.

- **Inspect and Re-Inspect the Units:** I recommend that the association inspect every unit within its jurisdiction. Hopefully, the association has a key. Remember, even if no problems are detected a day or two after the storm, that does not mean problems will not manifest themselves sometime later.
- **Engage an Expert:** The best protection for the association and the board of directors is to have a qualified professional assist in post-disaster assessment and remediation. This will typically be an independent engineer or licensed construction consultant. In my opinion, relying on a property manager (who is not licensed to dispense technical advice), a contractor (who stands to benefit from the advice given) or even an attorney (who is trained in the law, but not engineering) is unwise. Every situation will present different dynamics, and under Florida's "Business Judgment Rule", the board is entitled to rely on the opinion of professional consultants in deciding the best course of action. Remember "haste makes waste", and the decisions the board makes next week, may be examined under a microscope next year.

Next week we will talk about traps for the unwary in post-hurricane construction contracts. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representingcondominium, 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****.*

Association Should Have Storm Shutter Specifications

Question: I live in a condominium on the second floor. I would like to have hurricane shutters installed. I want roll-down shutters because the only way to get to the back window of my unit is with a very long ladder, making it difficult and costly to have panels put up and taken down each time we have a hurricane warning. The Board will not allow me to install roll-down shutters because they do not want anything permanent attached to the building. Is this legal? RBC (via e-mail)

Answer: The association, through the board of directors, is charged with the responsibility of administering and maintaining the common elements of the condominium, which typically includes the exterior of multi-unit buildings. Section 718.113(2)(a) of the Florida Condominium Act prohibits any "material alteration" of the common elements unless permitted by the declaration or, in the absence of a provision in the declaration, unless approved by seventy-five percent of the owners. Therefore, the board is, itself, restricted as to what it can and cannot approve to be installed on the building.

However, Section 718.113(5) of the condominium statute requires that the board adopt hurricane shutter specifications, and further provides that any owner who proposes to install shutters in accordance with those specifications must be permitted to do so. The process of adopting hurricane shutter specifications is part of the board's rulemaking authority. All rules enacted by the board must be reasonable.

Therefore, the answer to your question is a question of fact concerning whether it is reasonable to require you to endure the cost and difficulty of installing the panels in light of the board's competing desire and obligation to maintain the appearance of the condominium. A 1995 decision from the Division of Florida Land Sales, Condominiums and Mobile Homes' arbitration program does specifically include the difficulty in closing the type of shutters that are approved by a condominium board as one consideration in determining the reasonableness of the specifications.

Therefore, as long as your board's specifications meet the applicable building code, the specification will be upheld as long as it is "reasonable." What may be "reasonable" in one type of building may not be in another.

In my opinion, especially after the experience of the past two years, condominium associations should go the "extra mile" in encouraging the installation and use of hurricane shutters. You are correct that when removable panels must be installed on the upper levels of a building, it can be difficult as a storm approaches. Many owners are away for the summer, many are not in adequate physical shape to be climbing on ladders (nor would the association want them to) and finding contractors in Southwest Florida is always a challenge, let alone the day or two before a major hurricane strikes.

Permanent-type hurricane shutter specifications can be adopted which, if consistently applied, should have minimal aesthetic impact on the buildings. I think your board should reconsider its position on this issue.

Question: I read with great interest your recent article regarding condominium rental restrictions. We own a second-home type of condo unit in a 46-unit complex. I am a member of the board, and we are struggling with rental restrictions.

Our rental numbers have nearly doubled recently, and this is slowly destroying the family atmosphere we bought into. The typical new owner is an

investor-type buyer who is banking on appreciation, and renting to the hilt in the mean-time until they can get their price. What they do not understand is that the more rentals we have, the lower our property values go.

I made a presentation on the topic at our last annual meeting, and there was near unanimous support for full rent restrictions for new owners. After further study, including review of your past columns, it appears that a "yes" vote would apply to any owner who votes in favor of an amendment. We were thinking of a different angle, such as stating that a unit owner must hold title for a set time, say two to five years, before they could lease. Would that stand up in court? S.K. (via e-mail)

Answer: Regulation of rentals is probably the most contentious issue in condominium governance. While you say that more rentals hurts property values, your neighbor may feel the exact opposite. I can tell you that it is harder to get mortgage financing in a project with a high percentage of rental units.

Each community must address their rental situation individually, there is no one-size-fits-all answer. What works for a "55 and over" mobile home park primarily populated with seasonal retirees would have little relevance to a beach-front condo with a rental program.

Florida's condominium law was amended effective October 1, 2004 to provide that any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

I feel that an amendment which requires a person to hold title for a set time before leasing would be upheld, if done as a properly enacted amendment to the declaration of condominium. However, under the new law, you could not apply that clause retroactively to anyone who did not consent to the amendment. Human nature being what it is, why would anyone consent to the amendment? People do not think it is fair for their next door neighbor to have greater rights than they have.

Although the courts have historically frowned upon creating different classes of owners through "grandfathering dates", I believe that the new law leaves associations who wish to enact rental restrictions with little choice but to use a "grandfathering" approach. I believe that you could write an amendment that says that people who take title after a certain date would have to hold title to the unit for a set time before they could rent. You would basically be "grandfathering" all owners as of the effective date of the amendment.

Legal counsel competent in community association law should be engaged to prepare the amendment, provide the board with an opinion as to the required percentage for adopting it, and also assist with the procedural aspects of adoption of the amendment, including preparation of the voting materials and recording the amendment if it has been approved.

Question: We are a small homeowners' association (100 homes) and want to look at management alternatives. What is the best way to select a manager? How do we know if they are meeting our needs? R.J. (via e-mail)

Answer: There are basically two types of management arrangements common in community associations. The first is the on-site manager, where the association employs an employee (the manager), who oversees the operation of the community. On-site managers are

typically found in larger communities and in many high-rise buildings. It would not be common for a homeowners' association consisting of 100 members to have an on-site manager.

This leaves you with the management company alternative. Typically, the best way to start is to select three or so (maybe four or five) management companies that you would like to bid on handling your association's business. You can create your bidder's list through recommendations from your legal counsel, other community associations you may be familiar with, or an experience someone on your board has had in a past residence. ■

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