Bill Could Ease Condo Redeveloping

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Each year, Florida's Legislature sits in session for sixty days. To say the least, it is a tumultuous and fast-moving process. The regular session of the Legislature ends tomorrow. In the next 48 hours, more action will likely take place with respect to Bills affecting association than has happened in the past 58 days combined.

Because Florida has one of the highest per-capita populations of people living in community association settings, it is not surprising that a variety of controversial issues affecting associations are brought up for consideration each year.

Six weeks ago, we began a review of pending legislation for 2005 with a look at S.B. 2632, a proposal that would severely limit an association's right to collect delinquent assessments through lien foreclosure proceedings. Absent a last minute miracle, that Bill is dead.

In the second installment we reviewed H.B. 1593/S.B. 2062, which addresses, among other things, the emergency powers of a condominium association board after a catastrophic event such as a hurricane. This one is still hanging on, although the House and Senate versions are in quite different forms.

In the third, fourth, fifth and sixth weeks, we shifted attention to House Bill 1229, one of the more controversial pieces of pending legislation. The first installment focused on reserve waivers, mandatory education for board members, and audit waivers. Next, we looked at more of H.B. 1229, including homeowners' association regulation, enforcement, and possible expansion of the role of the Ombudsman. The following week's column touched on unit owner complaints, reserves, board terms, and husbands and wives simultaneously serving on a board. In the final installment on H.B. 1229, we looked at handicapped parking, "opt out" rights, reserve waivers, and hurricane shutters. At press-time, H.B. 1229 appears to be hung up in committees, and with no Senate counterpart, looks likely to die.

Today, we end our review of proposed legislation for 2005 with a look at S.B. 2360, a proposal that may well be passed out of this year's session. S.B. 2360 addresses "termination" of condominiums, an issue that has been getting a lot of attention after the 2004 hurricanes. However, termination had already become an increasingly problematic issue, as many condominium buildings reach the end of their useful life, and talk of redevelopment occurs. Under many condominium documents, one person can "hold out" until the bitter end, making redevelopment impossible.

S.B. 2360, primarily being pushed by real estate lawyers in Florida, would accomplish the following:

- **Termination Due To Economic Waste Or Impossibility:** The law would permit a majority vote to terminate a condominium where repair costs exceed the combined fair market value of all units in the condominium.

- **Optional Termination:** As opposed to the one hundred percent "default" threshold currently found in the law, the new law would permit optional termination by a vote of eighty percent of the voting interests.

- **Mortgagee Approval:** The new law would provide that mortgage holders are not eligible to vote on a plan of termination unless it would result in them being paid less than the full satisfaction amount for their outstanding mortgage.

- **Powers Of Association In Connection With Termination:** The new law would permit the association to act essentially as a trustee in liquidating the property, including its sale at public or private auction.

The proposed new law is definitely an improvement over the current situation. However, because many documents were written to require one hundred percent approval for termination, and some even provide that the termination clause cannot be amended without unanimous approval, there are some constitutional questions as to whether this law can be retroactively applied, which is where it is needed most.

Remember, whether you are for or against, your Legislator wants to hear from you. Members of the Southwest Florida delegation can be contacted as follows:

Sen. Mike Bennett, District 21; 823-5718; bennett.mike.web@flsenate.gov
Sen. Burt Saunders, District 37; 338-2777 in Lee or 417-6220 in Collier; saunders.burt.web@flsenate.gov
Rep. Michael Grant, House District 71; 941-764-1100; michael.grant@myfloridahouse.gov
Rep. Paige Kreegel, House District 72, 941-575-5820; paige.kreegel@myfloridahouse.gov
Rep. Bruce Kyle, District 73, 335-2411; kyle.bruce@myfloridahouse.gov
Rep. Jeff Kottkamp, District 74, 344-4900; kottkamp.jeff@myfloridahouse.gov
Rep. Trudi Williams, District 75, 433-6775; trudi.williams@myfloridahouse.gov ■

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Q&A: Fire Marshal has Right to Require Alarm Upgrades

Question: The local Fire Marshall appears to be singling our condominium complex out for "code improvements" that will require a substantial assessment. Our condominium was built in the mid-1970's, and has had to upgrade common area emergency lighting (which, by the way, nobody had complained about). The question is whether the Fire Marshall can require changes to an individual condominium unit. The current issue involves installation of a smoke detector/fire alarm horn that would tie into the building's alarm system. I strongly object to the idea of being awakened by a loud fire horn in my unit triggered by someone's burned toast. Where can we draw the line, isn't there a "grandfather clause" that comes into play? N.K. (via e-mail)

Answer: Section 1-5 of the Florida Fire Prevention Code, which is applicable to structures within the State of Florida, makes the Code applicable to both new and existing structures. Conditions in existing buildings, however, which do not meet the requirements of the Code, may continue to exist unless the agency having authority to enforce compliance determines, in its discretion, that the lack of conformity presents an imminent danger.

In other words, although your condominium was constructed thirty years ago, it is not "grandfathered", if the fire official determines that a life safety threat exists.

In most local jurisdictions, there is a procedure for appealing a fire official's determination regarding upgrade requirements.

Question: I live in a condominium association. Some owners seem to think that amendments to our condominium documents can be drafted by the owners or the board, and they only need to be notarized and filed at the courthouse. Is this true? J.T. (via e-mail)

Answer: The Florida condominium statute, Chapter 718, provides the method by which condominium documents must be amended. This typically involves striking through those things you are removing and underlining those things you are adding.

The documents will also state how amendments are to be adopted, particularly what percentage vote is required. There is also a state-mandated proxy form that must be used for amendment votes.

The Condominium Act further requires that once an amendment has been approved, it must be recorded in the public records of the county where the condominium is located, along with a certificate that must be executed with the formalities of a deed. Amendments to the articles of incorporation must also be filed with the Secretary of State in Tallahassee.

The wording of amendments to documents is very important, legal cases are won and lost over it all of the time. That is why the preparation of amendments by community association managers is considered "unlicensed practice of law", and associations should not attempt to "do it yourself" with document amendments, the stakes are too high.

An attorney who routinely handles document amendments should be able to address your amendments for a reasonable fee, with some ability to predict the estimated fees in advance. This is one area where an ounce of prevention is definitely worth a pound of cure.

Question: In my two-story condominium building, the water heater in an upstairs unit burst, causing extensive structural damage to the unit below. Portions of the ceiling and walls in the lower unit need to be replaced. The condominium association and its insurance agent have declined to repair this structural damage. The lower unit owners' insurance company has failed to respond. We were informed that the Associations' insurance would not help us because the deductible is $5,000.00. Also, we were told that the insurance company or the association would pursue the upstairs unit owner for repayment (subrogation) if it were forced to pay for these repairs. I

have two questions. First, who is responsible for the repair of the structural components (i.e. wallboard, sheet rock and ceiling material). Secondly, can the association or its insurance company recover any repair costs it incurs from the upstairs unit owner? R.B. (via e-mail)

Answer: Analyzing these issues can be confusing because there is a distinction between the obligation to insure the condominium property and the obligation to repair damage to the property. The association's obligation to insure is found in the Florida Condominium Act. That law requires that every hazard insurance policy issued or renewed on or after January 1, 2004, shall provide primary coverage for all portions of the condominium property located outside the unit; the condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality; and all portions of the condominium property for which the declaration of condominium requires coverage by the association.

The law goes on to specifically exclude floor, wall and ceiling coverings, and a host of other items from the association's insurance responsibility. The law also specifically allows the association to carry a reasonable deductible.

The obligation to insure certain property does not necessarily mean that the association is responsible for repairing that same property. The obligation to repair damage is determined by the definition of the "unit" and "common elements", and how the documents allocate repair responsibility.

Assuming this water heater damage resulted from an insurable event (which a burst water heater most likely is) then the insurance company must pay. But if the cost of repair does not exceed the deductible, the short fall and the responsibility to repair remains with the responsible party as defined in the Declaration. A unit owner can protect against this by purchasing her own insurance (usually called an "HO-6 Policy") which has lower deductibles available and is specifically written to cover losses in excess of the association's insurance coverage. In your case, your best recourse is to demand that the lower unit's insurer meets its obligations. Be sure to read the policy closely and comply with all claim notice requirements.

Where the association's insurance proceeds are not sufficient to cover the total cost of repairs, many declarations of condominium give the association the right to assess the extra cost to the unit owners of the damaged units. Again, this is where the unit owner's separate insurance policy is important. Also, even if insurance proceeds are sufficient, these policies almost always give the insurer the right to seek reimbursement from a person who is at fault for causing the damage. These are called subrogation rights.

Also, remember that as a unit owner, you have the right to inspect and copy the association's insurance policy. This may help to confirm what you have been told about the provisions of that policy.

Question: Our board conducts much of its business through e-mail. Is this permitted under the "sunshine law" for homeowners' associations? T.M. (via e-mail)

Answer: Board members can communicate with each other by electronic mail (commonly known as "e-mail"). However, if these e-mails concern association business, they are part of the "official records" of the association unless they are protected by law. Protected documents typically involve attorney-client documents, medical records, transfer approval documents, and certain personnel records and information.

Conducting board business via e-mail in lieu of a meeting is impermissible. Action of the board must be taken at a meeting, which is properly noticed and open to the members. Further, minutes of the meeting must be taken. ■