



Assigning Costs after a Calamity

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Today's column is the eleventh part of our series about updating the legal documents for your community association. In the first ten editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage restrictions and transfer restrictions, and discussed condominium insurance requirements.

Today's topic, how the documents allocate the responsibility and cost for repair after a calamity.

This clause in the declaration, usually called "repair after casualty", is one of those provisions that usually leads to glazed eyes and yawns when talking about document updates. While people naturally tend to focus their attention on amendments aimed at use and behavior (rental restrictions, pets, parking, etc.), the casualty repair provision is arguably the most important section of the documents, at least in terms of financial consequences. Just ask any condominium association which went through one of the 2004 hurricanes and is still fighting about how to allocate post-hurricane rebuilding costs.

There are several key elements which need to be considered when updating the clause on casualty repairs. Remember, this section of the legal documents will not only apply in cases of major catastrophe (such as a fire or hurricane), but also in more mundane situa-

tions, such as allocating repair and cost responsibilities after a hot water heater bursts and spews water for a couple of days on all of the neighbors below. Here are some basic points:

- **Vote For Rebuilding:** Many older condominium documents provide that if a set number of units are rendered "uninhabitable" as the result of a casualty, the condominium is automatically terminated unless a vote to rebuild is taken within a short time-frame of the event causing damage, often sixty or ninety days. The 2004 hurricanes taught several lessons in this regard. First, it is difficult to define what "uninhabitable" means. There are many buildings that should not or cannot be occupied for some period of time after a catastrophe, but certainly are not in a state where they will eventually be torn down. Secondly, after a major disaster devastates an area as Hurricane Charley did, it is virtually impossible to make decisions of this magnitude within sixty to ninety days. Factors contributing to this problem include the shortage of insurance adjusters, unreliable repair estimates, and the owners being scattered all over the country. It is preferable to provide in the declaration that the property will be automatically rebuilt (as opposed to automatically terminated) unless a vote of the owners is taken for termination. This basically reverses the presumption of automatic termination to automatic rebuilding.

- **Who Is Responsible To Fix What:** In condominiums, we are generally familiar with the concept of the unit owner taking care of the unit, and the association repairing common elements. However, as we learned in a previous installment in this series, the association will be responsible for insuring portions of the property that it neither owns nor has the general obligation to maintain. Interior partition drywall is a classic example. A well-drafted set of documents will be clear as to when the association can step in and undertake major portions of a rebuilding effort, even if portions of the individually-owned property (unit) are involved.
- **Allocation Of Deductibles:** One of the most confusing and contentious issues in condominium governance is how insurance deductibles are to be allocated. There are a number of sub-threads to this issue, including the fact that the association's master policy and individual unit owner's policy will both provide coverage (sometimes overlapping) when there is a casualty loss, each with its own deductible. This issue can have significant financial impact in a hurricane loss, where association master policy deductibles often run at an average of three percent of each building's value. The clearer the road map in your documents on deductible allocation, the less headaches the board will have when it needs to make the tough decision on how to spread the pain in terms of assessments.
- **Discretion In Rebuilding Specifications:** Many older documents provide that the association must reconstruct the buildings in accordance with the original plans and specifications. This presents a couple of problems. First, many communities cannot locate the original plans and specifications. More importantly, although significant damage from major calamities is a dark cloud indeed, there can be some "silver lining" in terms of an opportunity, with participation from insurers, to make desirable improvements to the property. Installation of hurricane-rated glass is one of those issues. Obviously, to the extent the documents give the board leeway in post-casualty repair, the less problem the association faces with "material alteration" challenges. On the other hand, it is probably not wise to give a board carte blanche authority to entirely change aesthetic features.

Obviously, the 2004 and 2005 hurricane seasons have heightened the awareness of the need for proper documentation which will serve as a guidepost in sorting out highly emotional and financially weighty issues. If you believe the weather experts, we are in for a 10 to 20 year cycle of heightened tropical storm activity. So, the upcoming months may be the time to look into that ounce of prevention, which is always cheaper than the pound of cure.

In the next installment of this series about document updates, we will consider the clauses in the document that allocate maintenance responsibilities as between the unit owner and the association. ■

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.

Self-insurance Law Complexity Deters Attempts

Question: I live in a condominium which has about 200 units. Because of the escalating cost of insurance, our board is considering being “self insured.” Can this be done under Florida law? — A.D. (via e-mail)

Answer: Section 718.111(11) of the Florida condominium statute requires an association to maintain “adequate insurance.” To the extent “self insurance” means that you would assess owners for uninsured losses, this would not be legal.

The condominium law does permit an association or group of associations to self-insure by complying with Section 624 of the Florida Statutes. However, this law requires establishment of loss reserves, annual audits, and oversight by professional insurance actuaries. The law is complicated enough that I have never heard of any condominium association or group of associations attempting to self insure under it.

Also, many condominium documents require the association to obtain insurance through companies with a specified track record, often tied to some type of commercial rating index.

Question: During both hurricanes Charley and Wilma, I was the only owner in our condominium who had a generator. I ran the generator while power was disrupted at our condominium. I understand that our board has received complaints about my generator running, and is considering proposing a rule or an amendment to our documents that would prohibit the use of generators at the condominium. What do you think? — J.N. (via e-mail)

Answer: Solomon himself would have a tough time with this one.

I have received numerous e-mails from column readers about the “generator issue,” and they seem

to largely run in opposition to generators being used at condominiums. Noise is usually cited as the main beef.

Obviously, you cannot run the generator indoors, and therefore it is necessary to operate it on the common elements, which you do not own (or which, technically speaking, you own in common with all of your neighbors).

If the board adopted a rule prohibiting post-hurricane generator use on common elements, it would be subject to the test of “reasonableness.” Reasonableness is in the eyes of the beholder. I think that a blanket prohibition against the use of generators, through a board-made rule, might be suspect. A more narrowly tailored rule (such as one that prohibited running the generator during nighttime hours when people are trying to sleep) might have a better chance of passing muster.

If the ban is enacted through an amendment to the declaration of condominium, the courts have held that the restriction is not subject to a reasonableness test, it simply cannot be arbitrary or contrary to law. I think a declaration amendment would have a reasonable chance of passing scrutiny.

Question: I live in a village of condominium buildings and townhomes. One of the townhome associations does not enforce any of its rules. The association in question has allowed their owners to rent out rooms in their units. Some of the renters have old junker cars which make a lot of noise, are horrible looking, and often have no license plates. One of these renters has a pit bull which is too large for the rules on pets. We also have a problem with extended families who visit during the winter holidays and spring break. They take over the swimming pool and by sheer number and lack of discipline of the chil-

dren, make it impossible for anyone else to enjoy it. Everyone has complained, but because this association refuses to enforce any rules, there is little which can be done. Help! — M.M. (via e-mail)

Answer: AIt sounds like you live in a master planned community with different “sub-associations,” each of which is responsible for administering its own regulations.

In most communities of this nature, there is also a “master association,” which may have regulations that apply to the entire community, and are enforceable by the master association board. I would start by looking at that angle.

If you cannot obtain relief through the master association, your only resort would be to code enforcement, if any of the complained-of uses violated applicable laws or ordinances. If you are not a member of the neighboring sub-association, you do not have “standing” to enforce its regulations, nor insist that it do so.

Question: At what percentage of the homes sold (closed) is it suggested for the owners to start getting involved in the turnover process? How is the turnover committee organized and how are committee officers/directors elected? — C.T. (via e-mail)

Answer: For homeowners associations, the owners are entitled to elect a majority of the board no later than three months after 90 percent of the parcels

in all phases of the development have been conveyed (a deed is given) to purchasers. The time at which condominium unit owners are entitled to elect a majority of the board may be determined by one of five different methods as set forth in Section 718.301(1), but the most common calculation for condominium association turnover is also no later than three months after 90 percent of the units that will be operated ultimately by the association are conveyed to the unit owners.

The formation and involvement of an “ad hoc” turnover committee is an important event at a key time in the life of an association, but there are no established statutes or rules governing these committees. The form of the committee, be it incorporated as a not-for-profit corporation with detailed bylaws, or just maintained as a loose organization of neighbors, is entirely up to those who organize it.

Typically, the developer will maintain contact with homeowners and will give sufficient advance notice that turnover is on the horizon to allow the members to get organized. Some developers, however, refuse to recognize “ad hoc committees,” and will only address issues of common interest after a board has been duly-elected after the turnover. However, in my opinion, this does not mean that the neighborhood still is not well-served by having such a committee. I have dealt with many transition committees over the years, and find that, in general, they have a positive impact on the community and facilitate a smoother transition. ■

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