Legislation Would Affect High-Rises

Fort Myers The News-Press, June 1, 2006

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Today marks the official start of "the season" in Florida. No, not the "season" marked by traffic jams and sunburned tourists, but Hurricane Season. Today's column is the fourth installment in a series of tips for community associations in weathering the storms, both before and after. Today, we will take a look at a new law which, at press-time, is still awaiting action by the Governor.

House Bill 7121 was adopted by the 2006 Florida Legislature and sent to the Governor on May 26, 2006. By law, HB 7121 will become the law within fifteen days of the May 26th submittal, unless vetoed. Much of HB 7121 deals with issues of tangential interest only to community associations, such as provisions for emergency power to gas stations after the loss of electricity.

Section 12 of HB 7121 is the part of the law that applies to associations, particularly condominiums with buildings of seventy-five feet or higher. The new law would require each high-rise condominium (for purposes of this discussion, any condominium building which is seventy-five feet in height or higher) to have at least one elevator that is capable of operating on an alternate power source, such as a generator, for emergency purposes. The law requires that alternate power "shall be available for the purpose of allowing all residents access for a specified number of hours each day over a 5-day period following a natural disaster…" The alternate power source that controls elevator operations must also be capable of powering any connected fire alarm system in the building. Further, the alternate power supply must be sufficient to provide emergency lighting to the interior lobbies, hallways, and other portions of the building used by the public.

The new law also requires associations which operate high rise buildings to have an available generator and fuel source on the property, or have proof of a current contract, which must be conspicuously posted, affirming a current guaranteed service contract for such equipment and fuel source. The contract must provide for on-call service within 24 hours of request.

By December 31, 2006, associations will need to provide the local building official with verification of an engineering plan for the required installations, assuming that the required infrastructure is not already in place (many newer buildings will already comply with the law, many older buildings will not). Compliance with installation requirements must be verified by the local building inspector and reported to the county emergency management agency no later than December 31, 2007.

The new law would also require associations which operate high rise buildings to adopt and maintain a written "emergency operations plan". The plan must detail the sequence of operations before, during, and after a natural or manmade disaster, or other emergency situation. The plan must include, at a minimum, a

life safety plan for evacuation, maintenance of the electrical and lighting supply, and provisions for the health, safety, and welfare of the residents.

Further, the association or its manager must keep written records of any contracts for alternative power generation equipment, and post quarterly inspection records of life safety equipment and alternate power generation equipment. The inspections must confirm that the equipment is properly maintained and in good working order.

Unlike the requirement for retrofitting generators to service the elevators, lights and fire alarms, there does not appear to be any phase-in requirement in the law for adoption of the emergency operation plan. Therefore, assuming the law is signed (or not vetoed) by the Governor, associations with high rise buildings will need to adopt their emergency operation plan immediately.

Like most laws, this one smacks of good intentions, but may lead to unintended consequences. According to input received during the legislative hearing process, the requirement for generator-powered elevator capability will not impose hardship on most associations, since the building codes for quite some time have required emergency generator availability to power elevators during electrical outages. Obviously, associations will also need to verify that their generators can also operate the building's connected fire alarm systems and common area lighting.

The legislative mandate to adopt a written emergency operation plan may be a cause for concern. For one thing, there is virtually no lead-time granted to associations for adopting the plan. Secondly, if the Legislature is going to mandate that condominium associations adopt written evacuation plans, it is unclear why the mandate should be limited to high rise buildings.

Perhaps of greatest concern is the requirement that the written emergency operation plan make provision for the "health, safety, and welfare of the residents". There is a legal doctrine, known as "negligence per se", which can establish the negligence of a party, without need for proof of fault, for failure to comply with laws aimed at public health, safety, and welfare. In the event of a tragic mishap affiliated with a disastrous event, an association which does not have the required written emergency operation plan in place could find itself on the receiving end of a costly lawsuit.

Next week, we will continue this series with a look at potential amendments to the community's constituent legal documents, which may be of value when considering emergency powers of an association in post-catastrophic situations. ■

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****.*

Board Can't Borrow from Reserves Without Owner OK

Question: In order to pay for the increase to our condominium association's insurance policy, the Board is going to assess the owners in an amount greater than the cost of the policy's premiums. What type of information must they give owners? They have also borrowed money to pay for the insurance expense. I have suggested that they use the money accumulated in the operating budget as well as using some of our reserve funds and assessing the owners to pay back the reserves by the end of the year. Is this possible? E.P. (via e-mail)

Answer: There are two ways for a condominium association to pay for its obligations and expenses. The first is by assessing the owners. The second is by borrowing money. Reserve funds can only be used for other than their designated purpose if approved in advance by a vote of the owners. Therefore, the Board could not "borrow" from the reserve accounts in order to pay the insurance premium, even if the funds are to be paid back by the end of the year, unless such borrowing is approved in advance by the owners. However, the Board could borrow money from a bank without a vote of the owners, unless the condominium documents require a vote of the owners for borrowing money.

Assuming that the condominium documents give the Board of Directors the authority to adopt the budget and levy special assessments without a vote of the owners, the Board has discretion to determine the amount of the annual assessment and special assessments, if any. The Florida Condominium Act does require that the Board mail and post notice of any board meeting at which a special assessment is to be considered at least fourteen days in advance of the board meeting. If the Board levies a special assessment, the Board must then send a written notice to all owners specifying the purpose or purposes of the special assessment. The funds collected pursuant to a special assessment may be used only for the specified purpose or purposes set forth in such notice. However, upon completion of such specific purpose or purposes, any excess funds will be considered common surplus, and may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

Therefore, if the special assessment is for more than the cost of the insurance policy, the Board must indicate the purpose of the additional amount assessed in the notice materials for the board meeting and the billing for the assessment.

Question: The President of our condominium association has taken a job with the management company currently managing our property. Is this legal? L.L. (via e-mail)

Answer: Board members owe a fiduciary duty to the Association and its members. As such, Board members are prohibited from receiving anything of value as a result of their position as an officer or director, unless the bylaws permit them to be compensated. While there is nothing in the law prohibiting a Board member from accepting a position with a vendor providing services to the Association, I believe this is certainly a practice to be avoided. At the least, the President would need to refrain, on conflict of interest grounds, from participating in any vote affecting the management company relationship. In my opinion, the President should choose between service to the board and working for the management company.

Question: We own a condo unit and have been out voted on a few occasions where the board has sponsored restrictive changes to our condominium

regulations. The latest changes involve use of our unit by friends and relatives. It is bordering on abusive in that we are now restricted to the length of time and the number of times per year that we can allow our unit to be used (in our absence) by family and friends. We are wondering whether the rental grandfathering law also preempts this type restriction. J.H. (via e-mail)

Answer: Section 718.110(13) of the Florida Statutes state 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." There is no provision in the Florida Condominium Act which speaks directly to a unit owner's right to allow his friends and family to utilize the unit. In my opinion, the rental grandfathering law would not apply to a properly enacted amendment to the Declaration of Condominium regulating guest occupancy.

Question: The Board of Directors of our condominium Association has permitted individual home owners to put down mulch at their own expense. The Association has, however, required that the mulch be purchased though the Association's landscape contractor. Is it legal to restrict individuals from using a different landscaping company? L.L. (via e-mail)

Answer: I am assuming that the Association is also requiring its landscaper to lay the mulch as well. Your Association has a legitimate interest in insuring that the mulch which is provided is uniform in appearance and quality. More importantly, the Association has presumably checked to verify that its landscaper has proper insurance. Assuming the area in question is a common element, the Association is under no obligation to permit you to lay mulch. If the Association wishes to do so, I think it can establish reasonable precautions, including use of the Association's landscaper. ■

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****.*