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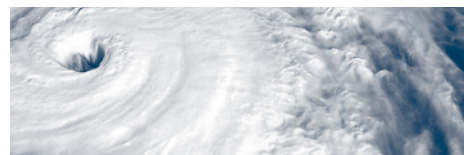
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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

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STORM SECURE | FPL's Five-Point Plan to Build a Stronger Grid for the Future

By: Donna D. Berger, Esq.



On January 30, 2006, FPL announced a comprehensive, progressive and industry-setting five-point program to build a stronger electrical grid for the future.

FPL developed its sweeping proposal over the past three months, conducting extensive analyses either directly or with the aid of external resources such as independent consultant KEMA, on the evidence of seven hurricane events over the last two seasons: Charley, Frances, Jeanne, Dennis, Katrina, Rita and Wilma. Equally important, they have received valuable input from local and state officials, emergency managers, community leaders and customers, whose expectations and sentiments have been expressed in the wake of this past storm season. After discussion and input from experts, emergency managers, government officials and customers, FPL has committed its company to implement the measures set forth below, which will harden the infrastructure of the communities it serves, both in the short-term and in years to come.

Hardening the Electric Network for the Long Term, including adopting National Electric Safety Code (NESC) extreme wind velocity zone criteria as the standard for all new construction and system upgrades (up to 150 mph in certain areas), using construction methods such as undergrounding, stronger poles (concrete poles in particular in many instances), shorter spans, guying, etc., as well as

upgrading existing overhead main lines, initially targeting those serving top critical infrastructure facilities and major thoroughfares.

Aggressively Promoting and Investing in Underground Conversions, including paying 25% of the cost of local government-sponsored overhead-to-underground conversion projects otherwise borne by the requesting locality; facilitating undergrounding projects by allowing cable, conduit and above-ground transformers and switch cabinets to be placed in road rights-of-way under specific standards and agreements; and aggressively pursuing legislation and local ordinances requiring all developers to provide underground service for new subdivisions, developments and projects.

Modifying and Enhancing FPL Current Pole Inspections, by adopting the Florida Public Service Commission's directive to have a systematic eight-year inspection program for all wood poles, including those poles owned by other utilities, and working with other utilities to address "joint-use" issues pertaining to loading.

Enhancing Line Clearing and Vegetation Management Practices, by increasing vegetation management and line clearing activities by nearly 30%, accelerating trimming along main lines to complete 75% of line clearing work before every year's peak hurricane season, completing line clearing for circuits that serve top critical infrastructure facilities prior to every hurricane season, ensuring a 3-year line

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clearing cycle for all main lines, aggressively pursuing the “Right Tree Right Place” program to educate communities regarding the placement, removal, species and type of trees that should be placed in proximity to poles and lines, and supporting legislation that would do so as well.

Completing all post-hurricane repairs and targeted facility upgrades to prepare for the 2006 hurricane season, including removing all pole stubs and braced poles, as well as replacing or realigning leaning poles – all before the start of the peak hurricane season. In addition to FPL’s own field assessments, customers are being encouraged to advise of any leaning poles, pole stubs or braced poles, so these can be addressed as quickly as possible.

As to trees and vegetation management in particular, evidence and analysis from the 2004 and 2005 hurricane seasons shows that trees and vegetation interfering, damaging or breaking poles, lines and other facilities were the greatest cause of hurricane-related outages. It is also an area that FPL cannot unilaterally control. Forensic analyses of tree-related distribution feeder (main line) and lateral (neighborhood line) outages from Hurricanes Katrina and Wilma in 2005 concluded that 81% of tree-related outages were not preventable by FPL; that is, no trimming standard or work performed by FPL would have prevented these outages from occurring. These outages were caused by damage to FPL facilities from trees

located off rights-of-way or outside of FPL’s property or its easements which toppled into FPL’s poles, lines and other facilities, or by limbs breaking off from trees and vegetative material located outside of FPL’s trim zone. That is why it is so essential that communities and government educate themselves about the “Right Tree Right Place” program and take action to regulate and enforce the location and types of trees and vegetation permitted in proximity to electric facilities, so that the prospect of interfering with, damaging or breaking electrical facilities is greatly reduced.

We have all experienced firsthand the significant impact of recent hurricanes in our state. No utility has had to respond to as many direct hits by hurricanes in recent years as FPL. If the recent cycle of increased hurricane activity is the new storm paradigm for our state, FPL’s service area and its customers will undoubtedly be impacted. Without fundamental and significant changes in the way FPL prepares for storms and hardens its infrastructure to prevent outages, the level of disruptions to its electrical system may well continue into the future.

It is a reality that, regardless of the initiatives set forth above, when hurricanes and severe weather events impact our state, outages will occur. However, necessary steps can be taken to mitigate such impact. The tactical and strategic initiatives outlined by FPL not only address the resiliency of their system to future severe weather events, but also provide for an increased level of day-to-day reliability for their customers. In



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WHAT YOUR ASSOCIATION NEEDS TO KNOW ABOUT COVENANT ENFORCEMENT

By: Jennifer Perelman, Esq.

The governing documents of a condominium, including the restrictive covenants, are designed to depict the tone of the community, as well as set forth the standard of conduct expected of the condominium's residents. It is the enforcement of these documents and covenants that preserves the common scheme, as well as ensures the long-term goals and standards of the community.

Effective enforcement of the restrictive covenants is dependent upon the timeliness and uniformity of the action taken by the Association. It is imperative that the Association takes immediate action upon learning of a violation of the governing documents. Furthermore, the Association must enforce the documents uniformly throughout the condominium as to ALL unit owners. If the documents prohibit pets, the Association cannot enforce the restriction against one unit owner, while overlooking the same violation by another unit owner. The failure of the Association to enforce one of its restrictive covenants in a timely and uniform manner may result in the forfeiture of the right to

enforce that restriction.

The essential elements for the effective enforcement of the restrictive covenants are the following:

- 1) Knowledge and understanding of the documents;
- 2) Notice and record of the violation;
- 3) Levying a fine (if permitted by the documents);
- 4) Mandatory non-binding arbitration; and
- 5) Additional litigation

Knowledge and Understanding of the Documents

In order to be able to effectively enforce the governing documents, it is essential that the unit owners, as well as the Board, have a clear understanding of the terms and provisions of the documents. Although knowledge of the governing documents is presumed, based upon the recordation of the original documents and any additional amendments, the Board is required to maintain copies of all governing documents.

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In addition to the initiatives outlined above, FPL intends to make further refinements to this action plan based on additional input and analyses, and will include such refinements as part of a 10-year hardening plan. FPL expects this plan to provide a clear roadmap to improving the long-term resiliency of their electric infrastructure. Furthermore, FPL will include localized hardening plans that they will share with respective community leaders and local emergency managers.

FPL will be working with communities to prepare for the upcoming hurricane season, including identification and validation of critical infrastructure facilities and local priorities with emergency managers. They will be also be making further enhancements, which will be ongoing, to their hurricane restoration processes and to their communications with customers, government officials and emergency managers before, during and after a major storm event. Working in conjunction with FPL to identify and resolve any areas of electrical infrastructure weakness in your community is a worthwhile part of any hurricane preparedness plan.

COVENANT *cont.*

Such documents are to be made available to all unit owners upon request. The Board must be thoroughly familiar with the governing documents in order to recognize a violation and enforce the covenants.

Notice and Record of the Violation

As soon as the Board is made aware of a violation of the Bylaws, Declaration, rules and regulations, the first step is to provide the violating party with a formal written notice of the violation. The notice should include a clear description of the prohibited act, as well as provide specific reference to the section of the documents that is being violated. In addition, the notice should provide a deadline for compliance, allowing the unit owner a reasonable opportunity to correct the violation.

From the time the violation first occurs, a record of such conduct should be maintained by the Board in order for the Association to succeed in its effort of formal enforcement. The documentation should include the date, time and nature of the violation, as well as the names of anyone who witnessed the violation.

Levying a Fine

The Condominium Act allows for a condominium association to levy a fine against a unit owner for violation of the covenants, if the condominium's governing documents so provide. If the documents allow for fining, the Board may levy a fine so long as the unit owner is given 14-day notice and an opportunity for a hearing before a committee of unit owners. In addition, the maximum fine amount is \$100 per day and \$1,000 total. If the Association's documents allow for fining, the procedure should be implemented with the assistance of the Association's counsel.

Formal Enforcement Actions

When the efforts to achieve voluntary compliance are not successful, the next step is to initiate a formal enforcement action. Depending upon the nature of the dispute, a formal action would entail either non-binding arbitration or filing suit in court. In addition, prior to an arbitration or a

trial, there may also be voluntary or ordered mediation.

Florida law requires that certain disputes between governing boards and unit owners be heard before an arbitrator from the Division of Florida Land Sales, Condominiums and Mobile Homes ("the Division"). Prior to filing a petition for arbitration, the Board must provide notice to the opposing party of the intention to enter into arbitration. The notice must include a demand for relief and provide a reasonable opportunity to comply with the demand. The notice must also state that legal action will be commenced if the party fails to comply. A copy of such notice must be attached to the arbitration petition.

The arbitration process is intended to provide community associations with a more swift and inexpensive means of dispute resolution than is available in court. Although the final decision of the arbitrator is non-binding, the vast majority of parties do not choose to take the matter any further because of the potential cost. If a party is unhappy with the decision of the arbitrator and chooses to bring the matter to court, he/she will be responsible for the other party's attorney's fees (including their arbitration fees) if the court decision is not more favorable than that of the arbitrator. In addition, should one of the parties decide to "appeal" the decision in court, the opinion of the arbitrator may be used as evidence. If neither party file a complaint in court within (30) days of the arbitrator's decision, the decision becomes final. Once the decision becomes final, either party may file a petition in court to enforce the terms of the arbitrator's decision.

In the case of mediation, the parties are generally required to pay their own attorney's fees and split the expenses equally. In the case of arbitration, attorney's fees and costs are awarded depending upon the discretion of the arbitrator. Generally, however, the arbitrator will award some amount of attorney's fees to the prevailing party if the governing documents so provide. Similarly, in cases where the matter goes directly to court without arbitration, Florida statute allows for the prevailing party to recover attorney's fees.

COVENANT *cont.***Types of Disputes**

Generally, disputes between associations and unit owners fall into one of the following categories:

- Maintenance of common area property
- Architectural Standards
- Association approval prior to sale and/or transfer of property
- Association's Right of First Refusal (if provided in documents)
- Lease and rental restrictions
Age limitations
- Parking and unauthorized vehicles
- Pet restrictions
- Guest and occupancy restrictions
- Election disputes

Pursuant to Florida statute, mandatory non-binding arbitration is required in cases that involve the following:

- 1) The authority of the Board to require an unit owner to take action involving his/her unit;
- 2) The authority of the Board to add or alter a common area or element;
- 3) Failure of the Board to properly conduct elections;
- 4) Failure of the Board to give proper notice of meetings and other actions;
- 5) Failure of the Board to allow inspection of books and records

All other types of disputes must be brought directly to county or circuit court, depending upon the nature of the claim.

Since enforcing the covenants and restrictions is one of the Board's most basic duties, knowing and understanding the tools to do so is essential.

Bay Holdings, Inc. v. 2000 Island Blvd. Condominium Assoc. (Fla. 3rd DCA 2005)

In this case, the Court interpreted the provisions of Section 718.116(1), Florida Statutes, which provides a statutory cap on the liability of a first mortgagee or its successor or assignees for unpaid condominium assessments that become due prior to the first mortgagee's acquisition of title pursuant to a foreclosure proceeding. This statutory cap is the lesser of the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the six months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or one percent (1%) of the original mortgage debt. Bay Holdings was the subsequent assignee of the final judgment of foreclosure obtained by Bank United, after Bank United became the foreclosing first mortgagee on a condominium unit in Miami Dade County. The Court held that because the statute clearly and unambiguously afforded the safe harbor only to first mortgagees or a "subsequent holder of a first mortgagee," Bay Holdings, a subsequent assignee of a final judgment of foreclosure, did not qualify for this safe harbor and their liability for unpaid assessments was not capped under the Statute.

*Access 4 All, Inc. and Peter Spalluto v.
The Atlantic Hotel Condominium Association,
Inc. and Luxury Resorts International, Inc.
(U.S. District Court, S.D. Fla. 2005)*



The Atlantic Hotel Condominium is a condominium/hotel consisting of 124 residential units, 1 hotel unit and 4 commercial units. In this hybrid configuration, the common elements are minimized and instead made a part of the “Shared Components” of the Hotel Unit. Ownership of the Hotel Unit was retained by the developer. The Association has very little responsibility or duties, and as a consequence bills the residential unit owners only \$6.00 per month. The Hotel Unit owner charges a fee to the residential unit owners for the use of the “Shared Components” which ranges from \$335 to \$2,678 per month for the respective units. The owners of units may reside in their units, rent their units through the rental manager, rent their units on their own or not use their units at all. Most of the units were rented through the rental manager.

Suit was brought against the condominium association and the developer by Access 4 All, Inc., a non-profit membership organization and Peter Spalluto, a disabled person, seeking relief under Title III of the Americans

With Disabilities Act (ADA). The allegations of non-compliance included inadequate number of accessible guest rooms, inadequate parking facilities, inadequate number of accessible entrances, inadequate operating devices in the guest rooms and inadequate common area restroom facilities. The defendants attempted throughout the proceedings to characterize the property as a hotel for zoning purposes and a condominium for ADA purposes, while the plaintiffs sought to have the Court invalidate the chosen form of ownership.

Title III of the ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” (42 U.S.C. §12182(a)) The Court found that the Atlantic Hotel Condominium was designed and intended for use as a public accommodation because individual unit owners who purchased a unit were likely to rent the unit for public use. In holding that condominium buildings may be covered as places of public accommodation if they operate as places of lodging, the Court stated, “Determining whether a particular condominium facility is a place of public accommodation would depend on the extent to which it shares characteristics normally associated with a hotel, motel or inn. The Atlantic is virtually indistinguishable from a hotel.”

After determining that the Atlantic Hotel Condominium was subject to the ADA as a place of public accommodation, the Court held that it had violated the Act in several areas, some of which were corrected during the litigation process, and entered an order granting injunctive relief and an award of reasonable attorneys’ fees in favor of the plaintiffs.