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YOUR HOME IS YOUR CASTLE: HOWEVER, IN A CONDOMINIUM YOUR REIGN IS NOT ABSOLUTE — PART 1 OF A 2-PART SERIES

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"A man's home is his castle."

This proverbial expression which illustrates the principle of individual privacy existed long before there were condominiums, cooperatives and homeowners associations in Florida. How true is that expression in such modern settings? In 1971, in denying a condominium unit owner's right to install glass jalousies where a screened enclosure had once stood, the Circuit Court revisited the proverb and held:

"...Every man may justly consider his home his castle and himself as the king thereof; nonetheless, his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."

Stirling Village Condominium Association v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971).

Condominium ownership is not without its rights. In fact such ownership comes with a long list of rights mandated by Chapter 718, Florida Statutes. Those rights, which are too numerous to list in this article, include, but are not limited to, the right to receive a complete set of documents and the most recent year-end financial reports before purchasing the unit; exclusive possession of the unit; the right to peaceably assemble on the common elements; the right to invite candidates for public office to appear and speak on the common elements; the right to receive notice of meetings and notice of any special assessments. These rights

are provided by Florida law and may not be taken away by a condominium's governing documents or rules and regulations. Aspects of condominium living not covered by these statutory provisions are usually covered by the association's governing documents. However, the average condominium unit purchaser does not review the Florida Statutes before making a purchase and many do not take advantage of their right to thoroughly review the governing documents before closing on the sale of a unit. That is where the problems often begin. This article explores some common misconceptions prospective owners and current unit owners have and how judges and arbitrators have resolved such disputes.

"The realtor (or sales agent) said I could have a dog. I was told that the association never enforces its rules so I should be permitted to keep my pet."

Who said the association's rules were not going to be enforced and how binding is that promise on the association? Case law, arbitration decisions and the Florida Statutes hold that oral representations made by the sales agents of developers are not binding. One case even held this to be true when the sales agent occupied a position on the association's board of directors. The basic principle is that neither a third party nor an individual board member may waive the association's enforcement rights. Courts hold that it is not reasonable for a prospective unit owner to rely on representations of the sales agent. It is only when the association itself, through a vote of the Board of Directors at a properly noticed meeting, makes representations that a restriction will not be enforced that a unit owner may rely upon such statements. Additionally, even if the unit owner is unaware of the restrictions because they failed to read the documents presented to them prior to the sale, under Florida's Recording Act, recordation of an instrument, such as the governing documents of the association, is considered constructive notice to subsequent purchasers of its content.

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**“This is my unit.
You cannot enter without my permission.
I won’t give you a key.”**

This is a contentious issue. Unit owners do not want to have strangers in their home, especially when they are away. So what happens when a pipe bursts in unit 203 while the unit owner is at work and it suddenly seems to be raining in unit 103 below? It may be left to representatives of the association to take immediate action to handle this situation. They will have to gain entry to unit 203 to stop the source of the leak and may have to enter unit 103 to determine the extent of the damage. This is part of the association’s obligation to maintain and protect the condominium building. Therefore, in condominiums as well as cooperatives, the right of entry into a unit is provided by Statute. Section 718.111(5), Florida Statutes, provides the condominium association with:

“...the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.”

A similar provision is found in Section 719.104, Florida Statutes, for cooperatives. Unit owners are not permitted to prevent such access to units. Additionally, if the rules and regulations or governing documents of the association require that a key be provided to the association, a unit owner must provide one. The right of access is provided to the association so that it may protect the property and a key may be required for such access because, in the event of an emergency, precious minutes could be lost if the association had to find an owner, resort to a locksmith or break the door down. Even the claim that the owner keeps national defense secrets unsecured in his unit was rejected by an arbitrator as an excuse for not providing a key. Additionally, a unit owner may not condition access and repairs on requiring proof of insurance and a valid building permit.

In a condominium setting a man’s or woman’s home is still his or her castle, but the keys to the castle, and the ability to live without conflict, are found in the governing documents. Part 2 of this series (appearing in our next publication) explores the issue of condominium living in further depth and considers alterations to units, the obligation to pay assessments, and using a condominium unit in a manner which disturbs other residents. ■



HURRICANE CHRISTI – REPAIRS ALMOST COMPLETE BUT THE CONFUSION LINGERS ON...

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“Whether just those who benefit should pay, or whether everyone should pay, often depends on which side of the ledge you fall on.”

This is the conclusion of our case study of hypothetical Hurricane Christi and the Green Flash Condominium Association.

As reported earlier, Green Flash Association spent about two hundred thousand dollars in the immediate aftermath of the hurricane, including temporary patches to the roof, water extraction, and various miscellaneous expenses.

Fortunately, Green Flash had set up a reserve fund called “Hurricane Deductible Expenses,” which covered about half the initial costs. The board levied a special assessment for the other one hundred thousand dollars. Many owners were pleased to learn that their individual insurance policy contained a feature called “loss assessment coverage,” which reimbursed them for the special assessment levied by the association, although many of the policies capped loss assessment reimbursement at one thousand dollars.

After the initial emergency repairs, Green Flash took prompt action to rebuild the condominium. A contract with Randy’s Roofing was entered into, after review of the contract by Attorney Justice and preparation of the new roof’s specifications by Engineer Tom Techno. The association also hired Techno to

administer the contract, and make sure work was progressing as draw requests were made by Randy’s.

Justice also helped the association with filing a “Notice of Commencement” in the Public Records, and advised Green Flash to make sure that lien waivers were secured from subcontractors and material suppliers who had filed Notices To Owner, before draw payments were made to Randy’s Roofing. The contract also protected the association by requiring the issuance of a new manufacturer’s warranty for the roof before Randy could receive final payment.

The total cost for the re-roof came to two hundred thousand dollars. Fortunately, Green Flash was only expecting a few more years of service life out of the old roof, and had accumulated \$150,000.00 in the roof reserve, leaving a shortfall of only fifty thousand dollars for the roof replacement cost.

Because Randy’s wanted to get the roof work done during the dry season, and to avoid another immediate assessment against the beleaguered owners, the association took out a line of credit with Carl’s Community Bank, to provide cash flow for the roof work as it was progressing. Carl’s was one of many local

banks willing to loan money to condominium associations, after verifying that the condominium documents would not preclude the board of directors from taking out a loan. While the Green Flash condominium documents are antiquated, they do not specifically require unit owner approval to borrow money, and confer all corporate powers on the association, to be exercised by the board. On that basis, Attorney Justice was comfortable in opining that the board could borrow the money without a vote from the members.

The association also hired Storm Chasers, the contractor who did the initial emergency repairs, to act as the general contractor for the remaining aspects of the rebuilding. Unfortunately, things with Storm Chasers did not get off to such a smooth start. Because many owners were starting to question how long the process was taking, and how much things were costing, Manager Goodfellow and Association President Dooright made the uncharacteristic and soon to be regretted decision to sign with Storm Chasers without legal review of the contract, nor assistance from Techno in generating the specifications for the repair work. Storm Chasers' foreman was apparently able to convince Dooright and Goodfellow that Storm Chasers' three-page form was "industry standard," was "used all over the country," and was not full of "legal gobbledeygook."

It did not take long for the lid to start coming off at Green Flash. Those owners whose units were not damaged insisted that it was because they had the foresight to install hurricane shutters, and they should not be assessed for their



neighbor's penny-pinching decisions. Some of the owners with damaged sliding glass doors insisted that the association replace them with state-of-the-art hurricane impact glass doors, at the expense of the association. Others questioned why Storm Chasers was being hired to do interior drywall work, since several of the owners had other contractors they would rather hire. No one knew how much the contract with Storm Chasers was going to cost, or who was going to have to pay.

Fortunately the association's improvident decision to enter into a poorly written contract with Storm Chasers worked out for the best (although that is often not the case in the real world) and that all of the liens Storm Chasers' material suppliers had recorded against the building were ultimately taken care of.

We can also assume, for the sake of illustrating our points, that the entire cost for all post-hurricane repairs at Green Flash Condominium came very close to, but did not quite reach, the association's \$800,000.00 named-storm deductible. The association has decided to pay off its bank loans and now needs to assess its forty unit owners for the repair costs, roughly \$20,000.00 each. Ouch!

Some owners claim that certain expenses should only be paid by those who suffered the damage. The Declaration of Condominium for Green Flash provides: "If there are insufficient insurance proceeds to cover damage to the condominium property, assessments shall be made against all owners for damage to the common elements and against the owners of the affected units for damage to the units."

Allocating some of the repair costs is a no-brainer. For example, the replacement of landscaping and the roof repair work clearly involve common elements, and are to be shared on a 1/40 basis.

The windows present a more difficult question. For our purposes the windows are considered "limited common elements," because they are located outside of the unit's boundaries, but are required by the Green Flash documents to be maintained, repaired, and replaced by the individual unit owner. However, given the language found in the Green Flash declaration, the window replacement cost should be assessed on a 1/40 basis, because the windows are common elements.

Another dynamic that is always present in this situation involves whether the association can get by with simply replacing broken glass with new panes, or whether state-of-the-art hurricane

impact glass must be installed. Obviously, if the association is paying for the work, the unit owner prefers the latter. Most associations take the position, however, that if broken glass can be legally replaced with like-kind (old code) windows, the association's obligations

end there, and that any upgrade of the windows would be at the expense of the individual owner.

If the window issue is not hazy enough, what about the sliding glass doors? Remember from our hypothetical that these are described in the Green Flash documents as part of the "unit" (not common elements), and are the maintenance responsibility of the individual unit owner. We have also learned that state law requires the sliders to be insured by the association. According to the Green Flash Declaration, since the sliding glass doors are part of the "unit," any shortfalls attributable to their replacement are assessed only against the door owners, and not the association as a whole. However, the state agency which regulates condominiums is telling associations that the 2004 change to the insurance law now makes these an association obligation, at everyone's expense. Confused yet?

The window-walls present another twist. Remember, these are after-market installations. Are they part of the "condominium property" that the association is required to insure? While most insurers and attorneys I have spoken with interpret the law to say that "upgrades" are the insurance and replacement

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responsibility of the individual owner, others interpret the law differently.

If the Green Flash Board is not ready to tear out its hair yet, wait until it tries to figure out how to pass on the dry-out costs. In many hurricanes, the insurer will conclude that only a fraction (often less than half) of the dry-out costs were attributable to preserving association-insured assets (drywall, etc.) and that the remaining costs were for the benefit of individual owners, preserving their carpeting, furniture, and interior fixtures and installations. Whether just those who benefit should pay, or whether everyone should pay, often depends on which side

of the ledge you fall on. Solomon himself would be baffled in deciding what is fair and just.

Hopefully, our fiction will assist in understanding a reality that defies easy explanation. A couple of things are clear. Updated condominium documents will save a lot of hassle. The association can change its documents. The law also needs to be clarified in several key areas. The association also has control over changes to the law by, among other things, becoming involved with Firm's Community Association Legislative Lobby and contacting your local legislators to discuss these issues and how they impact association operations. ■



“Unless otherwise provided in the bylaws” the officers and members of the board shall serve without compensation.

AUTHORITY FOR APPROVAL OF BOARD COMPENSATION

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In re Petition for Declaratory Statement, Inverness Village Condominium Association, Inc.

Docket no. 2006056782 (January 10, 2007)

The Division of Florida Land Sales, Condominiums and Mobile Homes (the “Division”) in In re Petition for Declaratory Statement, Inverness Village Condominium Association, Inc., Docket no. 2006056782 (January 10, 2007), issued a statement regarding whether directors and officers who directly participated in hurricane cleanup and code compliance may be compensated for their work under Section 718.112(2)(a)1, Florida Statutes, and if so, whether the directors to be compensated may vote or abstain from voting on the question under Section 718.111(1)(b), Florida Statutes.

In construing Section 718.112(2)(a)1, the Division observed that the provision explicitly states that “unless otherwise provided in the bylaws” the officers and members of the board shall serve without compensation. In this case, the bylaws for Inverness Village did not allow the board to approve their own compensation, but did provide that the officers and board members could receive compensation upon the affirmative vote of 75% of the unit owners approving such compensation.

Therefore, the Division concluded that Section 718.112(2)(a)1 does not prohibit paying the directors and officers, but, in accordance with its bylaws, such approval must come from the unit owners and not the board. In addition, since the bylaws precluded the board from voting on their own compensation, Section 718.111(1)(b), regarding abstaining from voting at a board meeting due to an asserted conflict of interest, did not apply to the issues presented.

Regarding the issue whether the directors could vote as members at a member meeting called to determine whether the directors are to be compensated, the Division stated that board members are also unit owners and that pursuant to Section 718.106(2)(d), Florida Statutes, membership in the association, including full voting rights, is an appurtenance to unit ownership. Moreover, the Division noted the Inverness Village bylaws indicated that each unit owner is entitled to one vote at any meeting of the members, and observed that the declaration provided that each unit owner is entitled to one vote for each unit owned. Based on its interpretation of the statutes and governing documents, the Division concluded that the directors to be compensated may vote as unit owners at a member meeting on whether they will receive compensation. ■

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