



## Updated Documents Can Save Big Hassles

Fort Myers The News-Press, February 15, 2007

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Condominium associations must accommodate many competing interests, including economic interests. When something is broken, it must be fixed. In a condominium, there are only two choices in passing on costs: to the association (with everybody sharing) or to the individual unit owner.

We have been trying to apply these concepts through the use of a hypothetical case study involving the Green Flash Condominium Association and Hurricane Christi. However, the challenges faced by our make-believe association are, in reality, being dealt with every day by associations across the State of Florida.

In concluding our hypothetical case study, we can fast-forward a bit and assume that 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. As stated in our original hypothetical, 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 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 ledger 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 that, write your Legislator. ■

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*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](mailto: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](http://www.becker-poliakoff.com).*

## Controversy Not Sufficient Reason to Abstain

**Question:** I serve on my condominium association's board of directors. We have a very controversial matter coming up at our next meeting. No matter which way I vote, I know my vote will upset some of my friends. Our president says that if I do not vote, he will have my vote recorded as a "no" vote. May I abstain from the vote? K.M. (via e-mail)

**Answer:** In a condominium association, a member of the board who is present at a board meeting where action on any corporate matter is taken is presumed to have assented to the action unless he or she votes against the action or abstains from voting because of an asserted conflict of interest. A vote or abstention from each board member present must be recorded in the minutes.

The only reason you can abstain is if you have a conflict of interest in the subject matter of the vote. The political popularity of an issue is not a sufficient ground for claiming a conflict of interest. If you do not have a conflict of interest that would justify an abstention, your "non-vote" would be equivalent to voting the same way as a majority of the other directors.

In a homeowners' association, Chapter 720 of the Florida Statutes, which is unofficially referred to as the Florida Homeowners' Association Act, only requires that a vote or abstention for each director present at a board meeting be recorded in the minutes. There is no requirement in the law that an abstention be based solely on an asserted conflict of interest.

Additionally, Chapter 617 of the Florida Statutes, the Florida Not-For-Profit Corporation Act, states that a director of a corporation who is present at a meeting of the board when corporate action is taken is deemed to have assented to the action taken unless the director objects at the beginning of the meeting,

or promptly upon his or her arrival, to holding the meeting or transacting specified affairs at the meeting, or the director votes against or abstains from the action taken.

In your case, a "non-vote" is not automatically recorded as a "no" vote. Rather it will be construed as assenting to the action taken by the rest of the board unless you specifically vote against it, or you have a conflict of interest and properly abstain from the vote.

**Question:** The board of our homeowner's association passed an assessment without giving the members 14 days' notice. Is this assessment enforceable? If not, what recourse do the members have? A.N. (via e-mail)

**Answer:** Your question does not indicate whether the assessment that was passed is the regular, annual assessment based upon the annual budget, or is a special assessment.

The Florida Homeowners' Association Act provides, in general, that notice of a board meeting must be posted 48 hours in advance of the meeting. Although the law contains some internal conflict, most feel that notice of a meeting where the regular, annual assessments are being voted on by the board are subject to the 48 hour requirement. However, the Board must then notify the members that a copy of the budget is available, free of charge. You should also review your association's governing documents to see if there are any additional notice requirements for board meetings where the budget or regular assessments will be considered.

Regarding special assessments, the board can levy them only if it has the authority to do so per your documents, and only at a meeting that is preceded by a 14 day notice. This notice must be mailed,

delivered, or, if the association has complied with other requirements, electronically transmitted to the members, and must also be posted conspicuously on the property.

If a board in a homeowners' association levies a special assessment without meeting these notice requirements, the assessment is not enforceable. However, presuming the governing documents permit the board to levy special assessments without member approval, the oversight concerning the notice can be corrected if the board re-notices the assessment meeting by giving the proper notice under the statute, and levies the assessment at that time. A grace period for payment may need to be given, and penalties (interest, late fees, etc. cannot attach to an illegally levied assessment).

**Question:** Recently, many members of my condominium association were outraged when they received a copy of the annual budget for our association. When several of these owners approached the president regarding the lack of involvement by the unit owners in preparing the budget, the president advised that we had no say as unit owners in the board's decisions regarding the adoption of the new budget. Are unit owners not entitled to have a say in the creation of the budget? C.R. (via e-mail)

**Answer:** You first need to review your condominium documents to determine whether the budget is adopted by only a vote of the board, or if a membership vote is required.

The Florida Condominium Act requires that any meeting where a proposed budget will be considered by the board or unit owners must be open to all unit owners. The Association must hand deliver to each owner, mail to each owner, or electronically transmit to each owner a notice of the meeting and a copy of the proposed annual budget at least 14 days prior to the meeting. In order to verify that this notice requirement is complied with, an officer or manager of the association, or other person providing notice of the meeting, must execute an affidavit to be filed with the official records of the association.

You should also note that the Florida Condominium Act provides a mechanism for the owners to call a special meeting to consider a substitute budget if the board adopts an annual budget which requires assessments against unit owners exceeding 115% of the assessments for the preceding fiscal year, excluding reserves for repairing or replacing the condominium property, anticipated expenses of the association which the board does not expect to be incurred on a regular or annual basis, or assessments for betterments to the condominium property. ■

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