



## Bill Puts Focus on Mold Inspections

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After a jury in 2001 awarded \$32 million to a Texas family with a “mold sick” home (although the award was significantly reduced by an appeals court a couple of years later), a veritable “mold industry” has sprung up throughout the nation. A quick search under the topic “mold” will instantly yield millions of hits on almost every internet search engine.

Here in Florida, mold and mildew has always been a factor in the construction and housing landscape, given the hot and humid climate. In particular, the hurricanes of 2004 and 2005 placed a heightened awareness on the detection and remediation of mold. Additionally, virtually every insurer who does business in the state has scrambled to revise their policies to limit, or disclaim altogether, mold-related coverage.

In the community association setting, particularly in condominiums, mold has always been a difficult issue to address. There are a variety of factors that contribute to the challenge, including the fact that many mold incidences occur during summer months, when a substantial number of units in condominium communities sit empty. When mold is discovered, there is plenty of opportunity for finger-pointing between the association and the unit owner as to whether the problem exists due to factors within the unit owner’s control (failure to

have the unit checked, inadequate interior temperature and humidity control, etc.), or whether the negligence of the association (for example, repeated roof leaks that are not repaired) is the proximate cause of the damage.

Additionally, questions abound as to who is qualified to determine whether a spot on the wall is a sign of “toxic mold”, or perhaps some simple growth that can be easily removed with some soap and water. In Florida, there are several hundred entities that provide mold identification and mold removal services. Many of these business entities hold them out as “certified” in assessing or remediating mold.

However, these “certifications” are conferred by industry trade organizations, some of which are no doubt very legitimate, and some of which are perhaps more akin to the mail-order college diploma.

Florida law does not currently provide training guidelines or education requirements to be a mold assessor or mold remediator, nor are education providers regulated.

In 2004, the then-President of the Florida Senate authorized a review of mold regulation, which resulted in the adoption of HB 315 in 2005. The

law, which passed both the House and Senate, provided for licensing of mold inspectors and mold remediators through the Department of Business and Professional Regulation and the Construction Industry Licensing Board.

Governor Bush vetoed HB 315, citing concerns that legitimate and responsible employees of mold assessment and mold remediation companies might be put out of business, because the law did not contain a “grandfathering” provision.

The Governor also directed the Secretary of the Department of Business and Professional Regulation to work with various stake holders to develop proposed new legislation. After the Department conducted workshops, the Department drafted a report which recommended alternatives to licensure.

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During the 2006 Legislative Session, SB 2670 and SB 1046 both addressed the regulation of mold assessment and mold remediation. However, both Bills died in Committee.

Senate Bill 2234 was adopted by the Florida Legislature on May 3, 2007. SB 2234 is currently awaiting the signature of Governor Crist. Unless vetoed, the Bill will become law effective July 1, 2010. This new law will provide relatively detailed regulation of mold inspection and remediation in Florida.

In the next installment of this column, unless the Bill is vetoed by the Governor in the intervening time, we will take a detailed look at SB 2234.



## Best Keep Condo Boards Unfettered

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**Q:** We are a 50 unit condominium, and we are in the process of updating our documents. As it stands now, it takes 66-2/3% of the entire membership to pass a special assessment. Most of the members are willing to consider a change to 66-2/3% of those who vote, and one other group suggests changing the voting requirement to 51% of those who vote. What is your opinion as to the implication of such a change? S.W. (via e-mail)

**A:** Despite the best efforts of the board of directors to establish a budget that meets all anticipated expenses, most associations, at one time or another, have a need for special assessments that arise from unanticipated or extraordinary expenses. The Florida Condominium Act contemplates that an association may levy special assessments, but contains no default provisions concerning the approval requirements for such special assessments. Instead, the Act provides that special assessments may be approved in accordance with the provisions of condominium documents. For many associations, it is adequate and acceptable to allow the board of directors unfettered discretion in levying special assessments both as to frequency and amount. Other associations apparently are concerned that the board will levy and spend excessively, and those associations choose to

include provisions in the condominium documents to limit the board's authority.

The answer to your question really depends upon the nature and make-up of your association. I am generally in favor of unlimited, or only very slightly limited, authority of the board to levy special assessments. This is because the board is already limited by the law and may only levy a special assessment to pay proper association expenses. Moreover, the Florida Condominium Act specifically provides that any special assessment must be levied for a specified purpose, and the funds collected for the special assessment may only be used for that specified purpose. Once the specified purpose is satisfied, the board of directors is obligated to either return surplus funds to the members, or to credit the surplus funds against future assessment. In other words, the proceeds of a special assessment are essentially held in trust by the association, as are all association funds, for the benefit of the unit owners.

If your association does elect to impose limits on the board's authority to levy special assessments by requiring member approval, it is my advice that the association carefully consider its experience and the historical involvement of its members. Often, I see unreasonably high vote requirements which create an obstacle to the association completing very

reasonable, and often necessary, projects, or even meeting routine operating needs.

**Q:** I was visiting my friend the other day and experienced something that boggled my mind. We were at the pool area and workers of the management company asked if they could eat their lunch at a table on the pool deck. My friend said okay. After the workers got situated, another owner came over and asked them to leave. She said it was a state law that workers are not permitted by the pool area to eat. Personally, my friend and I had never heard of that law, but thought if I e-mailed you, the condo expert, you could inform us. M.S. (via e-mail)

**A:** Florida law makes a distinction between private and public swimming pools. Pools operated by a community association are designated as public pools. Chapter 64E-9 of the Florida Administrative Code governs public swimming pools and contains supervision and safety requirements. One such requirement provides that rules and regulations must be posted in an area legible from the pool deck and must contain a rule stating “No food, drink, glass or animals in pool or on pool deck.” Therefore, if the workers were bringing food onto the pool deck, they would be in violation of the rules as required by the Florida Administrative Code. Notice, however, that the rule says nothing about “workers”. Therefore, it is not just “workers” who are unable to bring food onto the pool deck, but all persons.

**Q:** My neighbor has threatened to sue me personally because he feels that I am violating the condominium documents. He claims that the association voted to pay his legal fees if he files suit against me. I asked him if the association would be suing me too and he said no. Is this legal? B.C. (via e-mail)

**A:** Generally, association funds may only be expended for common expenses of the association. Association common expenses are all the expenses properly incurred by the association for the operation, maintenance, repair, replacement or protection of the common elements and association property, the costs of carrying out the powers and duties of the association, and the costs associated with employing a manager, attorney, or accountant. In addition, common expenses include all the expenses designated as such by the Condominium Act, the declaration of condominium, the documents creating the association, or the bylaws.

Pursuant to the Condominium Act, an owner is entitled to file a lawsuit against another owner for violations of the condominium documents, but the costs and fees of doing so are not a proper common expense and should be borne by the individual owner. The Association can also file legal action (usually beginning with a Petition for Arbitration) against an owner for violations of the condominium documents, and the costs and fees associated with such action are a proper common expense.

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