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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

DS 2007-050

IN RE PETITION FOR DECLARATORY STATEMENT

HILLSBORO IMPERIAL CONDOMINIUM ASSOCIATION, INC.

Docket No. 2007054089

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DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes in response to Petitioner Hillsboro Imperial Condominium Association, Inc.'s request for an opinion regarding the following three issues:

(i) Whether Hillsboro Imperial Condominium Association, Inc. (Hillsboro) is required under section 718.111(11)(a), Florida Statutes (2003) to assess the cost of repairing casualty damage to limited common elements appurtenant to only one building of the condominium as a common expense of the association, where the Declaration provides that repair expenses are to be paid by owners of units in that building only, and insurance proceeds are insufficient to pay that portion of repair expenses because of a policy deductible;

(ii) Whether Hillsboro is required under section 718.111(11)(a), Florida Statutes, to assess the costs of repairing casualty damage to the limited common

elements of two buildings as a common expense against all association members, where insurance proceeds are insufficient to pay the expenses because of a policy deductible, and the Declaration provides that the repair of limited common elements is to be assessed against only appurtenant units; and

(iii) Whether Hillsboro is required under section 718.111(11)(a), Florida Statutes, to pass on to all association members as common expenses the costs of repairing casualty damage to units' windows, notwithstanding provisions in the declaration requiring that a unit's maintenance and casualty repair expense is to be paid by the individual unit owner where insurance proceeds are insufficient and the Association's casualty insurer denied coverage for the unit's window damage.

PRELIMINARY STATEMENT

On September 25, 2007, the Division received a petition for declaratory statement from Hillsboro. Notice of receipt of the petition was published in Florida Administrative Weekly on October 9, 2007. A hearing was not requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Hillsboro. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Hillsboro is an "association" as that term is defined by section 718.103(2), Florida Statutes, which operates and maintains Hillsboro Imperial

Apartments, A Condominium (Hillsboro Condominium). Art. 2, § 2.4, Declaration at 1.

2. Hillsboro Condominium filed an Amended Declaration of Condominium of Hillsboro Imperial Apartments, A Condominium (Declaration) in the public records of Broward County, Florida at CFN# 105041419 OR BK 39734. It was recorded on May 27, 2005.

3. The Declaration provides that the lands comprising Hillsboro Condominium are submitted to "the condominium form of ownership and use in the manner provided for in the Florida Condominium Act as it exists on the date hereof or may be amended from time to time." Art. I, § 1.3, Declaration at 1.

4. The condominium has an aggregate 118 units, divided between two buildings, the "East Building" and the "West Building." Art. III, § 3.1, Declaration at 6. According to the Petition for Declaratory Statement, however, the East Building contains 52 condominium units and the West Building contains 65 condominium units, for an aggregate of 117 units. Pet. for Dec. Stmt. at 2-3.

5. Unit owners own a percentage share of the common elements and funds and assets held by the association, and are liable for a proportionate share of the common expenses. Art. V, § 5.1, Declaration at 11.

6. Hillsboro determines the amount payable by unit owners to meet the common expenses of the condominium and allocates and assesses such expenses in accordance with the provisions of the declaration and its bylaws. Art. XI, Declaration at 20. Where the Board cannot in its discretion allocate common expenses "including but not limited to administrative, utility and

maintenance expenses," to one building or the other, it assesses 55.55% of the expenses to the West Building and 44.45% of the expenses to the East Building. Art. XI, § 11.1.2, Declaration at 21.

7. "Limited Common Expenses" are defined in the Declaration as follows:

> 2.24 Limited Common Expenses means and refers to those Common Expenses directly attributable to the operation of a particular building, that being either the East Building or the West Building, and the Limited Common Elements appertaining thereto, and other expenses that are allocated by the Condominium Documents to less than all Units.
>
> 2.24.1 The Limited Common Expenses of a particular Building does not include the Common Expenses directly attributable to the operation of any other Building within the Association except as expressly stated in this Declaration.
>
> 2.24.2 Limited Common Expenses for one building includes those expenses incurred by the Association to maintain, repair and replace: exterior walls, patios, terraces, balconies, roofs, conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility services to the Units in that building, those portions of a Unit that contribute to the support of that building, and property and installations such as pumps, tanks, motors, fans, compressors and cooling towers required for the furnishing of utilities and other services to more than one Unit within that building.
>
> 2.24.3 A Unit Owner of a Unit in a particular building (East Building or West Building) is responsible to pay for the Limited Common Expenses for that particular building based upon the percentage of ownership of Common Elements allocated to that Unit by Exhibit "C" compared to the sum of the percentages of ownership of Common Elements allocated to all Units in that Unit's Building by Exhibit "C".

Article II, § 2.24, Declaration at 5.

8. The Board determines the costs of ownership and operation of the East Building and the West Building, "including management fees, rental, taxes,

insurance, repairs, betterment, and other operating expenses." Art. 11, § 11.1, Declaration at 20. The allocation of expenses between the buildings is broken down further as follows:

> 11.1.1 The total sums needed for the costs of the East Building shall be allocated to East Building and the total sums needed for the costs of the West Building shall be allocated to the West Building.
>
> 11.1.2 Items which the Board in its discretion cannot allocate to one Building or another, including but not limited to administrative, utility and maintenance expenses as determined by the Board, shall be allocated between the East Building and the West Building utilizing the ratio of 55.55% for the West Building and 44.45% for the East Building.
>
> 11.1.3 After the Board allocates sums to the East Building and West Building, the amounts shall be further allocated in pro-rata amount of each Unit's percentage ownership of Common Elements as it relates to the percentage ownership in that Unit's Building, the numerator being the specific Unit's percentage and the denominator being the total percentage in that Building, and the resulting amount is an assessment and a debt due to the Association from the Unit and its Unit Owner/Member.

Art. 11, Declaration at 21.

9. The common expenses of Hillsboro include "expenses of maintenance, operation, protection, repair or replacement of Common Elements and Association Property," as well as "all expenses properly incurred by the Association in the performance of its duties, including expenses specified in Florida Statutes, Section 718.115." Art. II, §§ 2.9.2, 2.9.8, Declaration at 2-3. Common expenses also include "the expenses of a reserve for (if required by law) the operation, maintenance, repair and replacement of the Common

Elements, costs of carrying out the powers and duties of the Association and any other expenses designated as Common Expenses by the Act and the Condominium Documents. . . ." Art. 11, § 11.2, Declaration at 21.

10. "Units" include "that part of the Condominium Property which is subject to exclusive ownership." Art. II, § 2.26, Declaration at 5. The perimetrical boundaries of each unit are the "vertical planes of the unfinished interior surfaces of the walls bounding the Unit extended to their planar intersections with each other and with the upper and lower boundaries." Art. II, § 3.2.2, Declaration at 7. Windows are part of the unit. Art. III, § 3.2.3, Declaration at 7. The Declaration includes windows and doors as "Apertures":

> Where there are apertures in any boundary, including, but not limited to, windows, doors, bay windows and skylights, such boundaries shall be extended to include the interior unfinished surfaces of such apertures, including all frameworks thereof. Exterior surfaces made of glass or other transparent material, and all framing and casings therefor, shall be included in the boundaries of the Unit.

Art. III, § 3.2.3, Declaration at 7.

11. Common elements are "the portions of the Condominium Property which are not included in the Units." Art. II, § 2.8, Declaration at 2.

12. Limited common elements are defined in the Declaration as "those Common Elements the use of which is reserved to a certain Unit or Units to the exclusion of other Units, as specified in this Declaration. References herein to Common Elements also shall include all Limited Common Elements unless the context would prohibit or it is otherwise expressly provided." Art. II, § 2.23, Declaration at 4.

13. The East Building is a limited common element, and the West Building is a limited common element. Pet. at 3; Art. III, §§ 3.3.5-3.3.6, Declaration at 8.

14. Under the general maintenance obligations in the Declaration, Hillsboro must maintain, repair, and replace the common elements, except for limited common elements or to the extent insurance proceeds are available for the repairs with the cost and expense charged to all unit owners as a common expense. Art. VII, § 7.1, Declaration at 13-14.

15. Under the general maintenance obligations, a unit owner must maintain, repair, and replace "any Unit or Limited Common Elements appurtenant thereto, whether structural or nonstructural, ordinary or extraordinary, including, without limitation, maintenance, repair and replacement of screens, windows, entrance door(s) and all other doors . . . all interior surfaces and the entire interior of the Unit lying within the boundaries of the Unit or the Limited Common Elements or other property belonging to the Unit Owner." Art. VII, Declaration at 13.

16. Hillsboro is required to use its best efforts to maintain casualty insurance covering the following property:

> The Building [including all fixtures, installations or additions comprising that part of the Building within the boundaries of the Units and required by the Act to be insured under the Association's policy(ies), but excluding all furniture, furnishings, unit floor coverings, wall coverings and ceiling coverings or other personal property owned, supplied or installed by Unit Owners or lessees of Unit Owners, and also excluding hurricane shutters, and the following equipment if it is located within a Unit and the Unit Owner

> is required to repair or replace such equipment: electrical fixtures, appliances, air conditioner or heating equipment, water heaters, built-in cabinets or any other item, personal property, fixture, appliance, or equipment permitted to be excluded from the Condominium's insurance policy pursuant to the Act, as same may be amended or renumbered from time to time] and all improvements located on the Common Elements from time to time, together with all fixtures, Building service equipment, personal property and supplies constituting the Common Elements or owned by the Association (collectively the "Insured Property") . . . .

Art. XIII, § 13.2.1, Declaration at 25.

17. The named insured under the insurance policy "shall be the Association, individually and as agent for Owners of Units covered by the policy, without naming them, and as agent for their mortgagees, without naming them. The Unit Owners and their mortgagees shall be deemed additional insureds." Art. XIII, 13.1.3, Declaration at 25.

18. The "Insured Property" shall be "insured in an amount not less than one hundred (100%) percent of the full insurable replacement value thereof, excluding foundation and excavation costs and a commercially reasonable deductible as determined by the Board." Art. XIII, § 13.2.1, Declaration at 25-26.

19. Insurance proceeds are to be held in trust for the benefit of Hillsboro, the Unit Owners and their mortgagees:

> 13.6 Insurance Trustee: Share of Proceeds. All insurance policies obtained by or on behalf of the Association shall be for the benefit of the Association, the Unit Owners and their mortgagees, as their respective interests may appear, and shall provide that all proceeds covering property losses shall be paid to the Insurance Trustee which may, but need not, be designated by the Board of Directors. . . . The duty of the Insurance Trustee shall be to receive such proceeds as are paid and to hold the same in trust for the purposes elsewhere stated herein, and for the benefit of the Unit Owners and their respective mortgagees in the following

shares, but such shares need not be set forth on the records of the Insurance Trustee:

> 13.6.1 Insured Property. Proceeds on account of damage to the Insured Property shall be held in undivided shares for each Unit Owner, such shares being the same as the undivided shares in the Common Elements appurtenant to each Unit, provided that if the Insured Property so damaged includes property lying within the boundaries of specific Units, that portion of the proceeds allocable to such property shall be held as if that portion of the Insured Property were Optional Property as described in the paragraph below.

Article XIII, Declaration at 28.

20. Claims under the insurance policy may only be handled by Hillsboro, which serves as agent for all of the unit owners:

> Association as Agent. The Association is hereby irrevocably appointed as agent and attorney-in-fact for each Unit Owner and for each owner of a mortgage or other lien upon a Unit and for each owner of any other interest in the Condominium Property to adjust all claims arising under insurance policies purchased by the Association and to execute and deliver releases upon the payment of claims.

Art. XIII, § 13.9, Declaration at 29.

21. Hillsboro's insurance premiums are a common expense. Art. XIII, § 13.4, Declaration at 27. The association's insurance "policies may contain reasonable deductible provisions as determined by the Board of Directors of the Association." Art. XIII, § 13.2.1, Declaration at 26.

22. During 2004 and 2005, Hillsboro contracted with QBE Insurance Corporation (QBE) for one insurance policy to cover both the East Building and the West Building. See QBE Policy No. QW2449-07; QBE Policy No. QF2449-

08. Hillsboro treated the annual casualty insurance premium for statutory insurance coverage of the East Building, the West Building, and common elements, as a common expense which could not be separately allocated between units in the East Building and units in the West Building. Pet. for Dec. Stmt. at 7. During 2004 and 2005, Hillsboro's casualty insurer provided the association with annual premium bills which contained a total premium without differentiating between either the risk or the premium for the East Building or the West Building.[1] Id.

23. At all times relevant to the determination of the issues raised in this Declaratory Statement, QBE Policy No. QW2449-07 and QBE Policy No. QF2449-08 contained a hurricane deductible of $268,519 per occurrence. See QBE Policy No. QW2449-07 and QBE Policy No. QF2449-08, Commercial Property Coverage Part, Florida Hurricane Deductible Endorsement Page. The policy did not distinguish between the East Building and the West Building in application of the deductible. Id.

24. Unit owners must "obtain, maintain and keep a current copy on file with the Association, individual casualty and general liability policies insuring the property lying within the boundaries of their Unit and for their personal liability arising in the use of their own Unit and other areas of the Common Elements for which they have exclusive use." Art. XIII, § 13.5, Declaration at 27.

25. Article XIV of the Declaration, entitled "Reconstruction or Repair after Fire or Other Casualty," requires the following of Hillsboro after a casualty:

[1] Put simply, Hillsboro allocated insurance costs as a common expense under § 2.24 of the Declaration, using the 55.55% to 44.45% ratio to allocate expenses between the buildings.

> In the event of damage to or destruction of the Insured Property (and the Optional Property, if insurance has been obtained by the Association with respect thereto), as a result of fire or other casualty, the Board of Directors shall arrange for the prompt repair and restoration of the Insured Property (and the Optional Property, if insurance has been obtained by the Association with respect thereto) and the Insurance Trustee (if appointed) shall disburse the proceeds of all insurance policies to the contractors engaged in such repair and restoration in appropriate progress payments.

Art. XIV, § 14.1, Declaration at 30.

26. Article XIV of the Declaration, entitled, "Assessments for Reconstruction and Repair," also provides for assessments against unit owners where insurance proceeds are inadequate to cover casualty repair expenses:

> If the proceeds of the insurance are not sufficient to defray the estimated costs of reconstruction and repair to be effected by the Association, or if at any time during the reconstruction and repair, or upon completion of the reconstruction and repair, the funds for the payment of the costs of reconstruction and repair are insufficient, Assessments shall be made against the Unit Owners in sufficient amounts to provide funds for the payment of such costs. Such Assessments on account of damage to the Insured Property shall be in proportion to all of the Owners' respective shares in the Common Elements. Costs on account of damage to the Optional Property shall be charged to each Unit Owner in proportion to the cost of repairing the damage suffered by each Unit Owner thereof, as determined by the Association.

Art. XIV, § 14.4, Declaration at 33.

HURRICANE JEANNE

27. Hurricane Jeanne damaged the West Building in 2004.[2] Damage to the East Building was negligible. Pet. for Dec. Stmt. at 8. The expense to

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[2] Because the casualty damage occurred in the Fall of 2004, Section 718.111(11), Florida Statutes (2003) applies to the instant case. The petitioner states Hurricane Irene caused the damage but corrected this by letter dated November 14, 2007.

repair the damage to the West Building, including units and the limited common element roof, was less than Hillsboro's casualty insurance deductible. Id.

28. Hillsboro levied a 2004 special assessment against only the units located in the West Building, to acquire funds to repair the West Building's units and limited common element roof, as well as other damage to limited common elements appurtenant to units only in the West Building. Pet. for Dec. Stmt. at 8-9. There was no unit owner objection to the special assessment, which was collected in full. Id.

HURRICANE WILMA

29. Hurricane Wilma damaged the Condominium's East Building and its West Building, in 2005. Pet. for Dec. Stmt. at 9. The damage to the West Building was not as extensive as the damage to the East building. Id.

30. In late 2005, Hillsboro levied special assessments against condominium unit owners for Hurricane Wilma casualty damage repair expenses that were covered by insurance but not paid by the insurer because of the deductible. Pet. for Dec. Stmt. at 9. Hillsboro levied the special assessment against only unit owners in the East Building for a total of $268,519.00 under the following formula:

a. The West Building limited common element damages were assessed as part of a special assessment against units in the West Building.

b. The East Building limited common element damages were assessed as part of a special assessment against units in the East Building.

c. Expenses to repair damage to common elements which were not limited common elements were allocated by allotting 55.55% of the total repair expenses to units in the West Building and 44.45% to units in the East Building.

d. Individual unit damage repair expenses were allocated to the unit owners, except to the extent that the association's casualty insurer provided funds for the expense.

Id.

31. Two or more unit owners in the East Building have demanded that Hillsboro treat the 2005 Hurricane Wilma repair expenses for insured property that were not reimbursed by insurance proceeds under the association's policy deductible as a common expense, to be allocated 55.55% to the West Building and 44.45% to the East Building pursuant to Article XI, § 11.1.2 of the Declaration. Pet. for Dec. Stmt. at 9-10.

32. In response to the demands by the unit owners in the East Building, Hillsboro levied a second special assessment against unit owners in the West Building of $149,162, to acquire funds to complete repairs to limited common elements appurtenant to the East Building. Pet. for Dec. Stmt. at 10. Hillsboro's Board of Directors have voted and directed that these funds be applied to East Building repair expenses, but unit owner representatives of the West Building have objected to the manner by which the special assessment was allocated between the two buildings. Id.

WINDOWS

33. Hillsboro's casualty insurer initially denied coverage for many of the unit owners' claims for window damage, partially on the grounds that the damage was not caused by a casualty loss but rather by a lack of unit owner

maintenance. Pet. for Dec. Stmt. at 10. (Although the Petition is silent on the matter, one may reasonably infer that the "casualty loss" represents damage caused by one or more of the hurricanes referenced in the Petition.)

34. Some unit owners claim that Hillsboro must repair or reimburse the unit owners' costs of window repairs, because their units' windows were originally installed by the developer. Pet. for Dec. Stmt. at 11.

CONCLUSIONS OF LAW

35. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

36. Hillsboro has standing to seek this declaratory statement.

37. If the damage is caused by an insurable event, the cost of the repairs is covered by section 718.111(11), Florida Statutes (2003), which controls over any provision to the contrary in a declaration of condominium. See § 718.111(11), Fla. Stat. (providing that "paragraphs (a), (b), and (c) are deemed to apply to every residential condominium in the state, regardless of the date of its declaration of condominium."

I. The Condominium Act.

38. Section 718.111(11), Florida Statutes (2003), provides, in part, the following (emphasis added):

> (11) INSURANCE.--In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this section. Therefore, the Legislature

requires a report to be prepared by the Office of Insurance Regulation of the Department of Financial Services for publication 18 months from the effective date of this act, evaluating premium increases or decreases for associations, unit owner premium increases or decreases, recommended changes to better define common areas, or any other information the Office of Insurance Regulation deems appropriate.

(a) A unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). . . . An association may also obtain and maintain . . . flood insurance for common elements, association property, and units. Adequate insurance, regardless of any requirement in the declaration of condominium for coverage by the association for "full insurable value," "replacement cost," or the like, may include reasonable deductibles as determined by the board. An association or group of associations may self-insure against claims against the association, the association property, and the condominium property required to be insured by an association, upon compliance with ss. 624.460-624.488. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

(b) Every hazard insurance policy issued or renewed on or after January 1, 2004, to protect the condominium shall provide primary coverage for:

1. All portions of the condominium property located outside the units;

2. The condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed; and

3. All portions of the condominium property for which the declaration of condominium requires coverage by the association.

Anything to the contrary notwithstanding, the terms "condominium property," "building," "improvements," "insurable improvements," "common elements," "association property," or any other term found in the declaration of condominium which defines the scope of property or casualty insurance that a condominium association must obtain shall exclude all floor, wall, and ceiling coverings,

electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries. The foregoing is intended to establish the property or casualty insuring responsibilities of the association and those of the individual unit owner and do not serve to broaden or extend the perils of coverage afforded by any insurance contract provided to the individual unit owner. Beginning January 1, 2004, the association shall have the authority to amend the declaration of condominium, without regard to any requirement for mortgagee approval of amendments affecting insurance requirements, to conform the declaration of condominium to the coverage requirements of this section.

(c) Every hazard insurance policy issued or renewed on or after January 1, 2004, to an individual unit owner shall provide that the coverage afforded by such policy is excess over the amount recoverable under any other policy covering the same property. Each insurance policy issued to an individual unit owner providing such coverage shall be without rights of subrogation against the condominium association that operates the condominium in which such unit owner's unit is located. All real or personal property located within the boundaries of the unit owner's unit which is excluded from the coverage to be provided by the association as set forth in paragraph (b) shall be insured by the individual unit owner.

Ch. 2003-14, § 4, Laws of Fla.[3]

II. Legislative History.

39. The legislature intended to clarify what portions of the insurance and insurable expenses for the condominium were to be paid by the association and what portions were paid by an individual unit owner for hazard policies when it amended this section in 2003.[4] Fla. H.R. Comm. on Jud., CS for HB 165 (2003)

[3] Under § 718.104(4)(m), Fla. Stat. (2003), a declaration may not contain provisions inconsistent with Chapter 718.

[4] Section 624.604, Florida Statutes (2004), defines "property insurance" as insuring real or personal property against any "hazard." The insurance law does not define hazard, but does list

Staff Analysis 1, 9 (Mar. 20, 2003) (available on Florida Legislature website < http://www.flsenate.gov/data/session/2003/House/bills/analysis/pdf/>). This provision also appeared in CS for CS for SB592 in which it was presented as a clarification of "the property and casualty insuring responsibilities of the association provided "that these responsibilities" do not affect any insurance contract provided to a unit owner." Fla. Sen. Comm. on Jud., CS for CS for SB 592 (2003) Staff Analysis 10 (Apr. 15, 2003) (available on Florida Legislature website < http://www.flsenate.gov/data/session/2003/Senate/bills/analysis/pdf/>). The insurance amendment:

> [S]upersedes certain coverage requirements for hazard insurance policies provided to the association, covering a condominium building, and requires, instead, that every policy issued or renewed on or after January 1, 2004 to provide primary coverage for the following: All portions of condominium property located outside the units; Condominium property located inside the units as initially installed or replaced with like kind and quality in accordance with original plans or, if those plans are not available, as they existed in the unit at the time of conveyance; and all portions of the condominium property required to be covered under the declaration."

Id. The bill expanded the list of items that could not to be covered under the association's policy. These include items in the interior of the unit: water filters, countertops, and air conditioning compressors serving only one unit. Id. The

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the following as hazards: "pollution and environmental hazards," "disease hazards," fire hazards," and "slip and fall hazards." § 627.0625(3)(a), Fla. Stat. (2004). Cases have been found that use the term in reference to policies covering fire and hurricanes. Public Fire Ins. Co. v. Crumpton, 148 So. 537 (Fla. 1933) (fire); Tench v. American Reliance Ins. Co., 671 So.2d 801 (Fla. 3d DCA 1996) (hurricane). "Hazard" is generally defined as "danger, peril," "accident," "a condition that tends to create or increase the possibility of loss," "the effect of unpredictable, unplanned, and unanalyzable forces." Webster's 3d New Internat'l Dict. 1041. Traditionally, coverage of hazards under policies protect for damage caused by fire, wind, rain. In Re: Pet. for Dec. Stmt Lake Maitland Terr. Apts., Inc., at 3, (Sept. 30,1983) (denying petition as declaratory statement was not proper forum to determine liability under insurance policy for damage caused by water leak around soap dish).

items excluded from association coverage are covered under the unit owner's policy. Id. The amendment became effective on May 21, 2003. Ch. 2003-14, § 16, Laws of Fla.

40. A discussion on amendment 2 to House Bill 165, which added this provision to that bill, presented the insurance amendment as a clarification that the association insures all of the condominium building and improvements and a unit owner purchases what amounts to "renter's" insurance on the personal property and contents. Tape recoding of H.R. Comm. on Jud. (Mar. 5, 2003) (available at Fla. Dep't of State, Div. of Archives, ser. 414, carton 1413, Tallahassee, Fla.). The amendment was to ensure "fairness between condo[minium] associations and the unit owners." Id. (comments by Rep. Mack). The amendment provided for "reasonable deductibles" to be determined by the board. Id. (comments by R. Penske). If the damage to the building under the association policy falls below the deductible, the association must pay for it. Id.; see also Pet. for Dec. Stmt., The Renaissance of Pompano Beach II, DS89500 (May 23, 1990) (finding that unit owner was properly assessed as a common expense to pay deductible for damages to another owner's unit for a common element water leak).

41. Finally, the amendment repealed a provision grandfathering in declarations recorded before 1986 that required an association to insure portions of units that the unit owner was required to repair or replace. The repealed language is:

> However, unless prior to October 1, 1986, the association is required by the declaration to provide coverage therefor, the word "building" does not include unit floor coverings, wall coverings, or ceiling coverings, and, as to contracts entered into after July 1, 1992, does not include the following equipment if it is located within a unit and the unit owner is required to repair or replace such equipment.

Ch. 2003-14, § 4, Laws of Fla. (unit owner coverage of floor, wall and ceiling coverings was moved to subsection 3, only the grandfathering language was repealed).

42. The legislature intended to make condominium property casualty insurance contracts uniform across the state and make it clear which items of the condominium property were the responsibility of the association to insure and which were the responsibility of the unit owner.[5] Beginning January 1, 2004, all Florida condominium associations were responsible for adequately insuring for the replacement cost of the buildings, and the components of the building structures, which includes the windows, doors, screens, and sliding glass doors that were initially installed when the building was built even where these are designated as inside the unit's boundaries. § 718.111(11)(a)-(c), Fla. Stat. But see Pet. Dec. Stmt. Bayway Isles-Point Brittany Two Condo. Corp. Inc., DS98-010 (May 22, 1998) (finding that under § 718.111(11), Fla. Stat. (1992) as

[5] Hillsboro suggests that the Division is improperly attempting to enforce an unadopted rule in its interpretation of section 718.111(11). Citing In Re: Pet. for Dec. Stmt Plaza East Ass'n, Inc., DS 2005055, BPR 2005-00239 (January 13, 2006). Pet. for Dec. Stmt at 14. However, the legislature's intent in drafting section 718.111(11), as described herein, is clearly discerned by a plain reading of the statute and a declaratory statement does not constitute a "rule" simply because it has general applicability to others who are similarly situated. See, e.g., Chiles v. Dept. of State, Div. of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).

applied to a 1969 condominium, the declaration and statute required unit owners to insure and replace the appliances).

43. The amendment also allowed associations that were required under their declarations to insure the property for full replacement value to contract for a reasonable deductible. This would assist associations with lowering the cost of insurance.

44. Under the amendment, unit owner insurance is no longer an option, but an obligation. In making this change, the legislature correspondingly deleted reference to a unit owner's repair obligation. The items excluded from association coverage are covered under the unit owner's policy. Now, all repairs made after an insurable event are governed by the statute, declaration insurance provisions as amended by the statute, and insurance contracts.

45. Under insurance regulations, condominium associations purchase commercial residential property insurance and unit owners purchase personal residential property insurance. Fla. Off. of Ins. Reg., Condominium Insurance Report, at 1, (Nov. 19, 2004) (filed with the legislature in accordance with § 718.111(11), Fla. Stat.; § 627.4025, Fla. Stat. (2003)).

III. Application of Amendment.

46. Hillsboro Condominium filed an amended declaration that was recorded in the public records of Broward County on May 27, 2005. That Declaration submits Hillsboro Condominium "to the condominium form of ownership and use in the manner provided for in the Florida Condominium Act as

it exists on the date hereof or may be amended from time to time." Therefore section 718.111(11) as amended applies to Hillsboro Condominium. See, e.g., Suntide Cond. Ass'n v. Div. of Florida Land Sales and Condominiums, 463 So. 2d 314, 317 ("The law in existence on the date of recording the declaration is as controlling as if engrafted onto the documents.").

47. Associations have a duty to obtain adequate insurance and manage the insurance proceeds for the benefit of the unit owners under section 718.111(11), Fla. Stat. See also Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d 1104 (Fla. 3d DCA 1997) (holding that the association had a duty to exercise reasonable care in managing insurance proceeds for the benefit of the unit owners and mortgagees). The statute requires that unit owners insure the contents of the unit that are excluded from the association's policy. § 718.111(11)(c), Fla. Stat. For example, window treatments are excluded from the association policy, so a unit owner insures the window treatments. Id. But windows are not excluded from the association policy, so the association insures the windows. Id.

48. Insurance for the association is a common expense. §§ 718.111(11), 718.115(1)(a), Fla. Stat. (2003); § 718.115(1)(f), Fla. Stat. (2007); accord art. XI, § 11.1-.2, 13.2.1, 13.4, Declaration at 20-21, 25-27 (common expenses include the costs designated as common expenses under the declaration and the Act). Insurance proceeds are treated as revenue to the association and constitute common surplus. § 718.103(10), Fla. Stat. (2003); accord art. 13.6, Declaration at 28-9.

49. Section 718.115, Florida Statutes (2007) provides in relevant part:

> (1)(a) Common expenses include the expenses of the operation, maintenance, repair, *replacement, or protection* of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as a common expense by this chapter, the declaration, the documents creating the association, or the bylaws. . . .
>
> . . .
>
> (f) *Common expenses include the costs of insurance* acquired by the association under the authority of s. 718.111(11), including costs and contingent expenses required to participate in a self-insurance fund authorized and approved pursuant to s. 624.462.
>
> . . .
>
> (2) Except as otherwise provided by this chapter, funds for payment of the common expenses of a condominium shall be collected by assessments against the units in that condominium in the proportions or percentages provided in that condominium's declaration. In a residential condominium, or mixed-use condominium created after January 1, 1996, each unit's share of the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements.

(emphasis added.)

50. An association is not required to insure 100% of the replacement cost of the condominium property, but must have adequate insurance to replace the property destroyed by a hurricane. Hillsboro, however, is required to insure the full replacement value of the property under the Declaration. Art. XIII, § 13.2.1, Declaration at 25. The board may include reasonable deductibles in replacement value insurance policies. § 718.111(11)(a), Fla. Stat.; accord id. at 26. A deductible amount is part of the cost of insurance and is a common expense for which reserves could be set aside. §§ 718.111(11), 718.115, Fla. Stat.; accord art. XI, § 11, Declaration at 30-31. As such, an association may not

shift the cost of an insurable common expense to an individual unit owner as common expenses must be assessed in the proportions or percentages required under sections 718.104(4)(f), 718.116(9), Florida Statutes.

IV. Issue One: Individual Building Loss

51. Hillsboro asks whether it or the unit owners in the West building are responsible for costs to repair casualty damage caused by Hurricane Jeanne in 2004 to that building, where the damage does not exceed the deductible under the association's insurance policy. Pet. for Dec. Stmt. at 3.

52. Hillsboro questions whether only unit owners in the West Building should bear the repair expenses, insofar as the Declaration defines each building as a limited common element and imposes the direct costs of operating the West Building to only West Building owners. Art. II, § 2.24, Declaration at 5.

53. Article XIV, § 14.4 of the Declaration provides that "assessments shall be made against the unit owners" for the costs of repairs where insurance proceeds are "not sufficient" to defray repair costs that Hillsboro is required to make. The "assessments on account of damage to insured property shall be in proportion to all of the Owners' respective shares in the common elements." Id. Under article 11, § 11.1.2, the assessment proportion is specified as 55.55% against the owners of the West Building, and 44.45% against the owners of the East Building.

54. The hurricane damages were caused by an insurable hazard covered by the insurance provisions of section 718.111(11), Florida Statutes, as

to who is responsible for insuring for the replacement cost of the components. Therefore, the cost of repairs is covered by section 718.111(11), Florida Statutes.

55. Expenses to repair the West building did not exceed Hillsboro's casualty insurance deductible. A deductible amount is part of the cost of insurance and is a common expense for which reserves could be set aside. §§ 718.111(11), 718.115, Fla. Stat.; accord art. XI, § 11.2, Declaration at 21.

56. Hillsboro's insurance policy, QBE Policy No. QW2449-07, did not differentiate between the hurricane deductible for the East Building and the West Building. See Florida Hurricane Deductible Enforcement for QBE Policy No. QW2449-07. Rather, the policy contained one global hurricane deductible of $268,519. Id.

57. Hillsboro treated the 2004 and 2005 annual casualty insurance premiums for the insurance coverage mandated under section 718.111(11) as a common expense which could not be allocated to only units in the East Building or units in the West Building. Pet. for Dec. Stmt. at 7. The premiums were therefore allocated to units using the ratio of 55.55% for the West Building and 44.45% for the East Building, under § 11.1.2 of the Declaration. Id.

58. QBE billed Hillsboro for annual insurance premiums for 2004 and 2005, which contained a single total premium, without differentiating between either the risk or the premium for the East Building or the West Building. Pet. for Dec. Stmt. at 7.

59. Hillsboro may not now shift the cost of the hurricane deductible to only those unit owners in the building that was damaged by the insurable event, i.e., the hurricane. Hillsboro contracted for a hurricane deductible of $268,519, with respect to which the policy does not differentiate between the East Building and the West Building. To date, Hillsboro has treated the deductible as a common expense, insofar as the insurance policy premiums have not been allocated between the East Building and the West Building. Cf. Brickell Town House Ass'n, Inc. v. Del Valle, Arb. Case No. 95-0133, Final Order (Sept. 12, 1995) (Scheuerman, Arb.) (holding that incidental and direct costs of repairing hurricane damage to common elements, which included unit owner damages, such as living expenses, furniture storage, moving expenses and lost income, was a common expense).

60. The owners in the West Building paid their proportionate share of the insurance to repair the casualty damage in the first instance. Hillsboro manages the insurance claims and proceeds as the agent for these owners under article XIII of the Declaration. It must do so with reasonable care since the unit owners are prohibited from filing a claim under the association's policy. Article XIII, § 13.9, Declaration at 29; see also Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d 1104, 1108 (Fla. 3d 1997) (holding association liable for negligent management of insurance proceeds.) Furthermore, under section 718.111(11), Florida Statutes, individual unit owners are no longer able to insure the structural components of the building in which their units are located. Therefore, shifting the risk and the liability to unit owners in only the West

Building for these damages is unfair and inconsistent with the assignment of insurable risks determined by the legislature under section 718.111(11), Florida Statutes. If the Declaration were inconsistent with the statute, the statute would control. However, here the Declaration appears to be consistent because it makes insurance a common expense to be allocated between the buildings using the 55.55% to 45.55% ratio described in subsection 11.1.2 of the Declaration.

61. Under article XIII and section 718.111(11), Florida Statutes, unit owners must rely on their association to insure for property damages to the building in which their unit is located, regardless of what the declaration may have provided. If damage is caused by an insurable hazard, unit owners must look to the association to file a claim for insurance. If the repair cost exceeds the amount of the deductible, an association will file a claim for the insurance proceeds and assess all unit owners for the deductible amount in order to have enough funds to reconstruct the damaged structure. The same applies when the repair cost does not exceed the deductible amount and no claim is made. If the association did not have a deductible but had full replacement cost, it would have made a claim and repaired the damage. Therefore, the deductible is a cost of association insurance, which cannot be passed on to only a few unit owners.

V. Issue Two: Multiple Building Loss

62. Hillsboro asks whether it must assess the costs of repairing extensive casualty damage caused by Hurricane Wilma to the East Building as a common expense against all association members, where insurance proceeds are insufficient to pay the expenses because of a policy deductible or exclusion

and the Declaration provides that the East Building is a limited common element and that the repair of limited common elements is to be assessed against only appurtenant units. Pet. for Dec. Stmt. at 3-4.

63. The outcome of Issue Two is controlled by the same reasoning applicable to Issue One. The damage here was caused by an insurable hazard covered by the insurance provisions of section 718.111(11), Florida Statutes, as to who is responsible for insuring for the replacement cost of the components. Therefore, the cost of repairs is covered by section 718.111(11), Florida Statutes (2003). See paragraphs 51 to 61, supra.

64. Hillsboro may not now shift the cost of the hurricane deductible to only those unit owners in the building that was damaged by the insurable event, i.e., the hurricane. Therefore the deductible costs must be assessed as common expenses against the unit owners in both buildings using the same allocation method used to assess the premiums. [6]

VI. Issue Three: Windows

65. Hillsboro asks whether it or the unit owners are responsible for casualty repairs to units' window where the Declaration requires that a unit's maintenance and casualty repair expenses are to be paid by the unit owners and

[6] Though the owners of the West Building may complain that they would bear an inequitably disproportionate share of repair expenses for the 2004 and 2005 hurricanes under this reasoning, the Division is limited to the application of statute, rule or order when it issues a Declaratory Statement.. Cf., e.g., Gallagher v. Seagate of Gulfstream Condominium Ass'n, 423 So.2d 640 (Court rejected unjust enrichment argument by unit owners who had purchased a recreation facility, holding that statute required both purchasers and non-purchasers alike to pay rent, as a common expense, for the use of the facility.)

the insurance proceeds are insufficient because Hillsboro's casualty insurer, QBE, denied coverage for the unit's window damage. Pet. for Dec. Stmt. at 4.

66. Under the Declaration's general maintenance obligations, a unit owner must maintain, repair, and replace:

> [A]ny Unit or Limited Common Elements appurtenant thereto, whether structural or nonstructural, ordinary or extraordinary, including, without limitation, maintenance, repair, and replacement of screens, windows, entrance door(s) and all other doors . . . all interior surfaces and the entire interior of the Unit lying within the boundaries of the Unit or the Limited Common Elements or other property belonging to the Unit Owner.

Art. VII, § 7.1, Declaration at 13.

67. As stated in the Petition, it appears as though unit owners who suffered damage to their units' windows claim that the damage was caused by a hurricane, which is an insurable hazard and covered by the insurance provisions of section 718.111(11), Florida Statutes.[7] This statutory subsection designates who is responsible for insuring the repair cost of the condominium property after a property casualty. Hurricane damage is not a general maintenance responsibility under the Declaration. Therefore the general maintenance provision in this declaration may not shift the burden of the cost of repairing window damages to the unit owners where the windows have been damaged by a hurricane.

[7] The Association argues that making those unit owners who had replaced their windows with hurricane proof glass at their own expense under the general maintenance obligation to now pay for those owners who did not replace their windows would be a windfall to those unit owners who had not replaced their windows with hurricane proof glass under the unit owner's general maintenance obligation. Pet. Decl. Stmt. at 7. This equitable argument may not be answered in this proceeding at is beyond the application of a statute, rule or order and requires application of equitable priniciples. § 120.565, Fla. Stat.

68. Here, Hillsboro was required to provide coverage for the units' windows that were installed when the building was constructed because section 718.111(11)(b)2, Florida Statutes, requires insurance coverage for:

> The condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed . . . .

The Hillsboro Declaration defines unit windows as apertures located within the boundaries of the units. Article III, § 3.2.3, Declaration at 7. Windows are therefore "condominium property located inside the units," and are not otherwise excluded from coverage under the provisions of section 718.111(11)(b)3.

69. Unit owners were under a duty to insure any contents of their units that were excluded from the association's insurance policy. § 718.111(11)(c), Fla. Stat. Windows are not excluded from the policy, so an association insures unit windows even though the Declaration defines the windows as part of the unit and not part of the common elements. Unit owners do not insure windows under section 718.111(11)(c). They are not even the named insured under the association's policy. In contrast, for example, electrical fixtures are excluded from the association policy, so a unit owner insures those. Id.

70. Hillsboro may not now shift the cost of casualty window repairs to affected unit owners, because 718.111(11) clearly places the risk of such repair squarely upon Hillsboro by defining those portions of the property for which an association must obtain casualty insurance, and those portions of the condominium property for which an individual unit owner must obtain casualty

insurance. Nor may Hillsboro shift the deductible risk to those same owners, since under the reasoning set forth under Issue One and Issue Two, above, deductible costs must be assessed as common expenses.

VII. Conclusion.

71. The 2003 amendment to section 718.111(11), Florida Statutes, requires that condominium associations treat hazard insurance deductibles as a common expense, and overrides any provisions to the contrary in a condominium's declaration. Having correctly treated insurance costs as a common expense to be allocated among the buildings in the 55.55 percent to 44.45 percent ratio described in subsection 11.1.2 of the Declaration, Hillsboro must also treat *all* insurance costs, including the deductible, as a common expense to be allocated in the same manner. Hence, the hurricane casualty repair expenses in this case that fall within the policy deductible should be treated as a common expense. Section 718.111(11) also defines the respective property and casualty insurance responsibilities of the association and the unit owner, with the former being responsible for "condominium property located inside the units as such property was initially installed" or similar replacements. Since the unit windows in this case were located "inside" the units, Hillsboro is responsible for insuring against and repairing any damage caused to them by a casualty such as a hurricane.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under section 718.111(11), Florida Statutes, Hillsboro, is required to insure the

condominium property located outside the units, the property located inside the units as initially installed, and all portions of the condominium property requiring coverage by the association under section 718.111(11)(a), Florida Statutes. Notwithstanding provisions in the declaration, Hillsboro may not pass on to a single building or to less than all unit owners the cost of repairing those items that would have otherwise been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the coverage limits.

DONE and **ORDERED** this 19th day of March, 2008, at Tallahassee, Leon County, Florida.

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

Division of Florida Land Sales,
Condominiums & Mobile Homes

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2329, this 27th day of March, 2008.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel