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

DS 2006-028

IN RE PETITION FOR DECLARATORY STATEMENT
Docket No. 2006035317
MOLOKAI VILLAS CONDOMINIUM ASSOCIATION, INC.
_____/

DECLARATORY STATEMENT

Molokai Villas Condominium Association, Inc. (Molokai Villas), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Molokai Villas may assess the cost of rebuilding a condominium building that exceeds the amount reimbursed under the association's insurance policy against four of the twenty-one unit owners whose four units in the building were destroyed by fire and hurricane under sections 718.111(11) and 718.115, Florida Statutes (2006), where the declaration of condominium shifts this common expense to the four affected unit owners.

PRELIMINARY STATEMENT

On June 20, 2006, the Division received a petition for declaratory statement from Molokai Villas. Notice of receipt of the petition was published in Florida Administrative Weekly on August 4, 2006. A hearing was not requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Molokai Villas. 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. Molokai Villas is a condominium association that operates a condominium consisting of 21 units located in Escambia County, Florida.

2. Molokai Villas Condominium was developed in two phases, with the first phase recorded on July 1, 1982 and the second phase recorded on October 12, 1983. The condominium was submitted to "condominium ownership and use, pursuant to chapter 718, Florida Statutes, hereinafter called "The Condominium Act." Declaration at 1.

3. Phase I contains 7 single unit buildings on the beachside. Phase II contains 7 buildings with 2 units per building and is located on the riverside. Art. 3, Declaration at 3-6.

4. On August 29, 2005, during Hurricane Katrina, two buildings containing four units in phase II on the riverside were destroyed by fire. All of the buildings were presently being renovated due to the damage caused by Hurricane Ivan in 2004.

5. Molokai Villas filed and received proceeds from its insurer for the damage to the two buildings destroyed by fire. The cost of repair and reconstruction to the two buildings is $200,000.00 more than the insurance proceeds received on the claim paid by the association's insurer.

6. The four unit owners had casualty insurance on their units. The four unit owners did not and cannot insure the building. Pet. at 2.

7. The Declaration of Condominium of Molokai Villas, A Condominium provides that the common expenses of the association include:

> (1)a. Expenses of Administration;
> b. Expenses of maintenance, operation, repair or replacement of the common elements and any portions of the units to be maintained by the Association.
> * * * *
> d. Reasonable reserves for replacement of the items set forth in subparagraph (b) and (c) of this paragraph 2 B (1).
> * * * *
> (3) Any valid charge against the Condominium property as a whole.
> C. "Condominium" means aLL [sic] of the condominium property as whole when the context so permits, as well as the meaning stated in the Condominium Act.

Art. 2(B), Declaration, at 2-3.

8. Insurance, including a deductible, is a common expense. Arts. 2(B), 16(C), Declaration at 2-3, 22. Each unit owner pays assessments for insurance in the same manner as all other assessments. Id. Art. 16(C).

9. Every unit owner is a member of the association, owns a percentage share of the common elements, is liable for a percentage share of the common expenses and owns a percentage share of the common surplus of the condominium. Arts. 7, 8, Declaration at 7.

10. Each unit is described in the plot plan and in the declaration as consisting of "the space bounded by the vertical projections of the unit boundary lines as shown on said Exhibit "C" between the horizontal planes at the

unfinished floor and ceiling elevations...." The unit is the space between the unfinished floor, walls, and ceiling. Art. 3(C), Declaration, at 3-4 and Ex. C: Plot Plan. Additionally, "[w]here there is attached to the Building a balcony, loggia, terrace, canopy, stairway or other portion of the building serving the unit being bounded, the boundary of such unit shall be deemed to include all of such structures and fixtures thereon." Id.

11. The common elements are the land and all other parts of the condominium property that is not included in the units. Art. 3(D), Declaration, at 4.

12. When phase II was completed, each unit owned 1/21st share of the common elements in both completed phases. Arts. 3(E), 7, Declaration, at 4; First Amend. Declaration (Oct. 12, 1983) (amending declaration to add units in phase II as planned).

13. Under the general maintenance provision, the declaration as amended provides:

> the association shall maintain, repair and replace all portions of a unit, except the interior surfaces, contributing to the support of the building containing said unit, which portion shall include, but not be limited to, the outside walls of the building and all fixtures on its exterior, (provided that windows, screens and doors shall be the responsibility of the unit owners as provided below) boundary walls of the unit, floor and ceiling slabs and roof tops, load-bearing columns and load-bearing walls; all conduits, ducts, plumbing, fireplace chimneys, wiring and other facilities for the furnishing of utility services contained in the portions of the unit maintained by the association; and all such facilities contained in the portions of the unit which service a part or parts of the condominium other than the unit within which contained. All incidental damage caused to a unit by such work shall be repaired promptly at the expense of the association.

Art. 10(A)(1), Declaration, at 8; Third Amend. Declaration (Sept. 19, 2002).

14. Under the general maintenance provision of the original declaration, unit owners were responsible for maintaining, repairing and replacing the interior surfaces of the unit and the windows, screens and doors. This includes "all portions of his unit (including the terrace, balcony and railings thereon and all heating and air conditioning located in the unit and on the roof and/or ground which services the unit) except the portions to be maintained, repaired and replaced by the Association." Art. 10, Declaration, at 8-9.

15. This section was amended in 2002 to change the association's maintenance responsibility as follows:

> (1) all stairs, stair railings, deck railings and deck louvers due to insurance requirements;
> (2) all decks that are the primary entrances to the units, as follows: (a.) A Units: small deck on driveway side; (b.) B Units: large deck with louvers; and (c.) riverside units: deck landings on staircase; (3) all exterior lights unless controlled by an inside switch; and (4) all electrical panel boxes.
> It is the responsibility of the individual unit owners as follows: (a.) A Units: oceanside deck; (b.) B Units small deck off bedroom; and (c.) riverside units: rear decks; (2) exterior lights if controlled by an inside switch – all fixtures must be approved by the board; and (3) doors, windows, screens, threshholds, dryer vents, attic power vents – with approval of the board.

Third Amend. Declaration (Sept. 19, 2002).

16. The association is responsible for maintenance of the common elements. Art. 10(B), Declaration, at 9.

17. All unit owners are responsible for payment of assessments. Art. 11, Declaration, at 10. Additionally, unit owners must pay for repairs made by the association that are caused by the unit owner's negligence or willful action. Art. 14(A), Declaration, at 18. A unit owner must pay any increase in insurance

premium that results from the use, misuse, occupancy or abandonment of the unit. Id.

18. The association must purchase replacement value casualty insurance for the condominium property, which includes the buildings, the common elements, the limited common elements and the units, against loss by fire and hazards covered by a standard endorsement. Art. 16, Declaration, at 21. The association may contract for a deductible in its policy. Id. "Any casualty insurance policy purchased shall show the amount of insurance for each separate building, and for each portion of the common elements not contained in a building." Id. Casualty insurance policies "shall show the amount of insurance for each separate building, and for each portion of the common elements not contained in a building." Id. Casualty insurance policies are for the benefit of the association and the unit owners and their mortgagees. Id.

19. With the exception of substantial destruction, casualty damages to the condominium property must be repaired, replaced, or rebuilt with the unit owners sharing the cost in proportion to their shares of the common elements. Art. 16(D), Declaration, at 22.

20. After a casualty loss to the condominium, the association must get detailed estimates of the damage and cost to repair. Art. 16(E), Declaration, at 22. However, if the loss is to a single unit, "then it shall be the responsibility of that unit owner to obtain estimates of the cost of replacement...." Id. The association shifts the cost to the unit owners affected under these circumstances. Pet. ¶ 10, at 3.

21. Once the cost of replacement is determined, the declaration provides:

> []If the net proceeds of insurance are insufficient to pay the estimated cost of reconstruction and repair, the Board of Directors shall promptly, upon determination of deficiency, levy a special assessment against all unit owners for that portion of the deficiency related to common elements and limited common elements in accordance with each unit's share of the common elements as set forth in this Declaration and against the individual unit owners for that portion of the deficiency related to individual damaged units; provided, however, that if, in the opinion of the Board of Directors, it is impossible to accurately and adequately determine the portion of the deficiency relating to individual damaged units, the Board of directors shall levy the special assessment for the total deficiency against each of the unit owners according to each unit's share of the common expenses as set forth in this Declaration, except as provided in subparagraph I below.
>
> Unless there occurs substantial damage to, or destruction of, all or a substantial portion of the Condominium Property and the unit owners fail to elect to rebuild and repair as provided in subparagraph F below, the Association shall disburse the net proceeds and the funds collected by the Board of Directors from the assessment herinabove set forth to repair and replace any damage or destruction of property, and shall pay any balance remaining to the unit owners and mortgagees as their interests may appear. The proceeds of insurance and the funds collected by the Board of Directors from the assessments as hereinabove provided shall be held in trust by the Association for the uses and purposes herein provided.

Art. 16(E), Declaration, at 22-23.

22. First mortgagees may require the association to deposit enough funds in an escrow account to insure payment of the casualty insurance premiums insuring the Condominium Property. Art. 16(G), Declaration, at 25.

23. The declaration provides that each apartment building "shall for the purposes of reconstruction and repair in the event of a casualty loss be treated as if the same were the only Apartment Building in the Condominium, to the effect that:

1. All insurance proceeds reasonably attributable under the insurance policy to the damage or destruction to one such Apartment Building shall be first used for the reconstruction and repair of that Building, to the extent that proceeds are sufficient; and, in the event that such proceeds are not sufficient, the Condominium unit owners in that Building alone shall be assessed in proportion to their relative shares of the common elements for any deficiency or insufficiency in the funds necessary to such reconstruction or repair as contemplated by subparagraph D above. For the purpose of this subparagraph 1, the relative share of common elements attributable to a unit owner shall be deemed to be that percentage which is the quotient of such unit owner's share of the common elements as set forth in this Declaration, divided by the sum total of the shares in the common elements as set forth in this Declaration, divided by the sum total of the shares in the common elements attributable to all the Condominium units in that Building as set forth in this Declaration. The relative proportion thus established with respect to all Condominium units in an Apartment Building is hereinafter referred to as the "relative common elements per Building."

2. If under the provisions of subparagraph E above, the Board of Directors shall be required to levy a special assessment for a portion of the deficiency in funds available for reconstruction and repair of a separate Apartment Building related to the common elements and limited common elements, then the Board of Directors shall determine in its reasonable opinion what portion of any of the deficiency is related to common elements not exclusively within the particular Apartment Building which has suffered casualty loss and damage and that portion of such deficiency shall be distributed among all unit owners as an assessment in proportion to their shares of the common elements, and the balance of the deficiency so attributable to the common elements and limited common elements shall be distributed as an assessment among the unit owners in that Apartment Building suffering such casualty loss or damage in proportion to the relative common elements per building attributable to each of said units and as computed in accordance with provisions of subparagraph I.1 above.

* * * *

4. In the event that there shall occur to a separate and discrete Apartment Building the degree of damage or destruction described in subparagraph F.2 above, but the Condominium as a whole shall not have experienced the degree of damage, destruction or loss as set forth in subparagraph F.1 above, and the Apartment Building suffering such damage or destruction shall have failed to elect to be repaired or reconstructed in accordance with the provisions of subparagraph F above, then the Condominium Regime shall be deemed terminated with respect to that Apartment Building only and this Declaration of Condominium shall be deemed amended....

Art. 16(I), Declaration, at 26-28.

24. If only one building is destroyed and the unit owners in that building do not elect to replace the building at their own expense, then the declaration provides procedures for terminating the building as part of the condominium and procedures for holding a unit owner meeting to terminate the condominium. The declaration provides procedures to determining the fair market value of the destroyed units and for determining each owner's interests. The association would then use that value to purchase the units – buyout the unit owners' and mortgage holders' interests. Once purchased, the association would hold a meeting to determine whether to rebuild the destroyed building or terminate the units from the condominium. Art. 16(I), Declaration.

CONCLUSIONS OF LAW

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

26. Molokai Villas has standing to seek this declaratory statement.

27. The division has taken the position in In re: Plaza East Condominium Association, Inc., BPR-2006-00239, Division Docket No. Ds 2005-055 (Jan. 13, 2006) that 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. In Plaza East, the division found that the cost of the deductible under the association's insurance policy may not be passed on to only those unit owners

affected by an insurable loss, but must be paid by all unit owners in their proportionate shares.

28. The issue raised by Molokai Villas is similar but not the same because the declarations for the two condominium associations are different and the facts are substantially different. In Plaza East, the division found that the cost of the insurance deductible for repairing screens and sliding glass patio doors damaged by a hurricane should be paid by the association as a common expense. In this case, the association declaration shifts the cost of replacing the entire condominium building housing the units to the individual unit owners.

29. The association interprets article 16 of the declaration as requiring unit owners to pay the amount for the replacement of the two buildings that is not covered by the insurance proceeds. Pet. ¶ 11, at 4. The association shifts the cost of the deductible and any additional repair costs to only the four unit owners whose units were lost when the two buildings burned down. So, four unit owners, not 21, are being asked to pay the $200,000 to rebuild two of the buildings comprising the condominium property even though these four unit owners have paid their share of the insurance for the buildings and cannot obtain casualty insurance to cover this cost in event the building burns down and this section of the declaration is applied.

30. The division finds that the cost of replacing the two buildings is a common expense that must be assessed against all unit owners in their proportionate shares under sections 718.111(11) and 718.115, Florida Statutes (2006).

I. The Condominium Act.

31. 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.

See ch. 2003-14, § 4, Laws of Fla.

II. Legislative History.

32. 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.[1] Fla. H.R. Comm. on Jud., CS for HB 165 (2003) 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 "supersedes 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

[1] 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 the following as hazards: "pollution and environmental hazards," "disease hazards," fire hazards," and "slip and fall hazards." § 627.0625(3)(a), Fla. Stat. 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. Pet. 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).

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 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.

33. 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).

34. 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).

35. 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. Beginning January 1, 2004, all Florida condominium associations were responsible for adequately insuring for the replacement cost of the buildings, 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 applied to a 1969 condominium, the declaration and statute required unit owners to insure and replace the appliances).

36. 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.

37. 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.

38. 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).

39. Section 718.115, Florida Statutes (2006), provides:

> (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 common expense by

this chapter, the declaration, the documents creating the association, or the bylaws. ...

(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.

III. Application of Amendment.

40. Associations have a duty to obtain adequate insurance and manage the insurance proceeds for the benefit of the unit owners. § 718.111(11), Fla. Stat.; 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). Unit owners were to insure the contents of the unit that were excluded from the association's policy. Id. § 718.111(11)(c). For example, window treatments, wall, floor and ceiling coverings are excluded from the association policy, so a unit owner insures the window treatments. Windows are not excluded from the association policy, so the association insures the windows.

41. In this case, Molokai Villas admits that it insured the building and that the unit owners could not insure the building, but did insure the unit contents. The association asks whether it may shift the $200,000 cost of replacing the buildings lost by fire to the four unit owners. The division finds that it may not do so under section 718.115, Florida Statutes.

42. The damage was caused by insurable hazards—fire and hurricane--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. It is not a typical maintenance responsibility under article 10 of the declaration. The four owners of these riverside units are obligated to maintain the "rear decks; (2) exterior lights if controlled by an inside switch ... and (3) doors, windows, screens, threshholds, dryer vents, attic power vents" in good repair under the owner's usual wear and tear and general upkeep obligations. Third Amend. Declaration (Sept. 19, 2002). General maintenance is not an insurable property hazard. Therefore, article 10 of the declaration as amended does not shift the burden of the cost of rebuilding the apartment building to these four unit owners when the building burns down or is destroyed by a hurricane. To do so, would conflict with the legislature's intent to clearly apportion the responsibility for the cost of insuring and replacing the building structure that was destroyed by fire and hurricane.

43. Under the insurance provision, article 16 of the declaration, which was amended in 2002, the responsibility shifts to the four unit owners for rebuilding the apartment building when the entire building is destroyed as has happened here. Art. 16(I), Declaration, at 28-30.

IV. Common Expense.

44. Insurance for the association is a common expense. §§ 718.111(11), 718.115, Fla. Stat.; accord art. IX, § E, Declaration. Insurance

proceeds are treated as revenue to the association and constitute common surplus. § 718.103(10), Fla. Stat.

45. 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 or fire. The board may include reasonable deductibles in replacement value insurance policies. § 718.111(11)(a), Fla. Stat. A deductible amount is part of the cost of insurance and is a common expense for which reserves might be set aside. § 718.111(11), 718.115, Fla. Stat.; accord art. 2(B), Declaration, at 2. 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) and 718.115, Florida Statutes. An association may not excuse one owner from payment without excusing all owners from payment of the common expenses. § 718.116(9), Fla. Stat.

46. Molokai Villas may not shift the cost of the deductible, a common expense, to only those unit owners whose buildings were destroyed by the insurable events of fire and hurricane. Compare Brickell Town House Ass'n, Inc. v. Del Valle, Case No. 95-0133 (Arb. Final Order, Sept. 12, 1995) (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 common expense). The owners in the destroyed buildings paid their proportionate share of the insurance to replace those buildings in the first instance. The association manages the insurance

claims and proceeds as the agent for these owners and their mortgage holders under article 16 of the declaration. It must do so with reasonable care since the association, not the unit owners, are entitled to file a claim under the association's policy. Art. 16 Declaration; see Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d at 1108. Furthermore, under section 718.111(11), Florida Statutes, unit owners are unable to insure the building structure. Therefore, shifting the risk and the liability to individual unit owners for these damages is unfair and inconsistent with the assignment of insurable risks determined by the legislature under section 718.111(11), Florida Statutes. To the extent the declaration is inconsistent with the statute as amended in 2003, the statute controls.

47. Under article 16 and section 718.111(11), Florida Statutes, unit owners must rely on their association to insure for property damages to the apartment buildings. 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, the association files a claim for the insurance proceeds and assesses all the unit owners for the deductible amount in order to have enough funds to reconstruct the damaged structure. The deductible is a cost of association insurance, which cannot be passed on to only a few unit owners.

48. In this case, the declaration shifts the risk and liability to the four owners. The four owners determine whether they want to rebuild at their own expense or if they want the association to buy them out at the fair market value of

the units before the building was destroyed. Art. 16(I), Declaration, at 28-30. If the association purchases the units, then the remaining unit owners determine whether they want to pay the cost of rebuilding the apartments or terminate those buildings from the condominium. The association did not provide any information as to whether the buyout cost exceeds the deductible or "shortfall" to rebuild. Given that all units are waterfront property, it would seem that the cost of buying out the four owners would exceed the $200,000 estimated rebuilding cost.

V. Constitutional Issue.

49. A question raised is whether the Condominium Act as amended in 2004 controls over the declaration insurance provision. Generally, the Condominium Act in effect on the date the condominium is created governs the declaration and the interpretation and application of its provisions. Sans Souci v. Division of Fla. Land Sales and Condo., Dep't of Bus. Reg., 421 So. 2d 623, 628 (Fla. 1st DCA 1982); Hovnanian Fla., Inc. v. Div. of Fla. Land Sales and Condo., Dep't Bus. Reg., 401 So. 2d 851, 854 (Fla. 1st DCA 1981) (declaration provision governs until amended or terminated). But see Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) (finding that statute in effect at time of board's action not the earlier statute in effect at time the declaration was recorded applied on the grounds that no precedent could be set except for condominiums created in same year).

50. There are two contracts affected by this amendment: (1) the declaration; and (2) the insurance contract(s). The 2003 amendment to section 718.111(11), Florida Statutes, is prospective in application as to the insurance contracts. By its terms, it applies to insurance contracts, which are generally one

year contracts, entered into after January 1, 2004. The insurance provision of the declaration adopts the amendment to section 718.111(11), Florida Statutes, so there is no constitutional infirmity in its application to article 16 of the declaration. It is the reconstruction obligation under article 16 of the declaration that calls for unit owners, not the association, to pay for the cost of rebuilding the structure when these unit owners are unable to insure the building. If the amendment reassigns responsibility for disbursing the insurance proceeds to cover damaged units between the association and unit owners under the declaration, then the question of whether the statute as amended impairs rights and obligations under the existing declaration arises. See art. I, § 10, Fla. Const. ("no . . .law impairing the obligation of contracts shall be passed"); Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774, 780 (Fla. 1979) (adopting a balancing test "to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objectives or is unreasonably" intrusive).

51. Molokai Villas amended the general maintenance provision in article 10 to meet insurance requirements, but did not amend article 16 covering reconstruction and repair after a casualty and disbursements of insurance proceeds. To the extent that article 16 might conflict with the insurance provisions of section 718.111(11), Florida Statutes (2003), the statute controls.

52. The question is whether the 2003 amendment applies to change the distribution of insurance proceeds and payment for the repair obligations under the declaration as recorded under the Condominium Act in 1983.

53. In 1983, the Condominium Act required the association to obtain hazard insurance to protect the condominium buildings. § 718.111(9), Fla. Stat. (1983). The word "building" wherever used in the policy shall include, but shall not necessarily be limited to, fixtures, installations, or additions comprising that part of the building within the unfinished interior surfaces of the perimeter walls, floors, and ceilings of the individual units initially installed, or replacements thereof of like kind or quality, in accordance with the original plans and specifications." Id. Unit owners were additional insureds under the association's policy. Id. If the condominium building containing the units was destroyed by fire or hurricane, the association was to apply insurance proceeds to rebuild it. The cost of the insurance and the reconstruction were common expenses that were assessed against all unit owners. §§ 718.103(7) (defining common expense); 718.111(9), (13)(h) (insurance costs as line item in financial report of common expenses), 718.115, Fla. Stat. (1983).

54. A statute is prospective in application and not applied retroactively to substantive rights and obligations unless the statute expressly states that it is to be applied retroactively, or it is unequivocally implied. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Century Vill., Inc. v. Wellington Condo. Ass'n, 361 So. 2d 128, 132 (Fla. 1978). Courts consider questions of "fair notice, reasonable reliance, and settled expectations" in determining if a statute operates retrospectively. R.A.M. of So. Fla., Inc. v. WCI Communities, Inc., 869 So. 2d 1210, 1215 (Fla.2d DCA 2004), review denied, 895 So. 2d 406 (Fla. 2005).

Statutes that impair vested rights, create new obligations, impose new duties, or attach new disabilities, on existing contracts operate retroactively. Id. at 1216.

55. A statute will be applied retroactively if it does not contravene a constitutional right, e.g. impair a vested contractual right. Century Vill. 361 So. 2d at 132. A vested right is an immediate fixed right of present or future enjoyment. Id. at 1218. Vested rights are not contingent, which are rights that come into existence based on an event or condition. Id. Vested rights are not expectant, which are rights based on the continued existence of a present condition. Id. (finding that statutory right to cure unlicensed status was not a vested right).

56. Under section 718.110(4), (8), and (13), Florida Statutes, unit owners have vested rights in the original declaration that involve: (1) the configuration and size of their unit; (2) their ownership share in the common expenses and surplus; (3) the appurtenances to the unit; (4) provisions regarding timesharing of units; and, now, (5) rights to lease. See Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002); Gary A. Poliakoff and Karl M. Scheuerman, The Woodside Covenants, Fla. Bar J. 10, 15 (May 2003) (owners are on notice that amendments may change the provisions in the declaration without their consent, so only those statutory amendments requiring consent may be considered vested); § 718.110(13), Fla. Stat. (2004) (right to lease may not be amended). Association contracts with third parties contain vested rights that may not be impaired by statutory amendment. E.g., Fleeman, 342 So. 2d 818. The legislature made the insurance amendment prospective as to insurance contracts by applying them to contracts entered into after January 1, 2004. It made the

insurance amendment retroactive to all declarations. § 718.111(11), Fla. Stat. (2003) ("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.").

57. Statutes that are remedial or procedural and that do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of already existing rights, do not come within the legal concept of a retroactive law or the general rule against retroactive operation of a statute. City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961); City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986); Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990). Legislative amendments that clarify existing law are generally not considered a retroactive application of the law because they explain the intent of the law as it was originally enacted. Palma Del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc., 586 So. 2d 315 (Fla. 1991).

A. Section 718.111(11), Florida Statutes (2003), applies retroactively.

58. The legislature stated an express intention for this provision of the Condominium Act to apply retroactively, which intention is made even clearer by removing the grandfathering provision. Section 718.111, Florida Statutes (2003), expressly states that "paragraphs (b) and (c) are deemed to apply to every

condominium in the state, regardless of the date of its declaration of condominium."

B. The amendment to section 718.111(11), Florida Statutes, clarifies the insurance responsibilities.

59. The statutory amendment clarified the insurance responsibilities of associations and unit owners. It clarified that deductibles in insurance premiums were permitted under the act as a cost of insurance. See supra ¶ 21.

60. Insurance costs, premium deductibles, and insurance proceeds have always been common expenses and common surpluses of the association. See Providence Sq. Ass'n, Inc. v. Biancardi, 507 So. 2d 1366 (Fla. 1987) (reforming declaration to disburse common surplus insurance proceeds in same percentage share as ownership of common elements); see supra § IV. Associations hold insurance proceeds in trust for the benefit of the unit owners and their mortgagees. National Title Ins. Co. v. Lakeshore 1 Condominium Ass'n, Inc.,691 So. 2d 1104 (Fla. 3d DCA 1997). An association's misuse of the insurance proceeds in failing to repair damages after a casualty is actionable. Id. (holding that mortgagee had a cause of action in association's negligent disbursement of funds by not completing the reconstruction of units after Hurricane Andrew).

C. Insurance provisions do not create vested rights.

61. Section 718.111(11), Florida Statutes, has always provided that a unit owner controlled association should make its best effort to insure the condominium property, but has never imposed an absolute requirement to do

so. The obligation to insure portions of the condominium property has always rested with the association and the unit owners as their obligations appear in the declaration. These insurance provisions may be amended under the general amendment provisions in the declaration without mortgagee approval even if the declaration requires mortgagee approval. § 718.111(11)(b), Fla. Stat. (right to amend without regard to mortgagee approval); see Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) (unit owners may amend declaration to impose leasing restrictions as these are not within the restricted category of amendments requiring a unanimous vote under § 718.110(4), Fla. Stat.). The obligation to insure the condominium property creates an expectation that the association will be able to contract for insurance in each succeeding year and a contingent obligation based on the association finding an insurer willing to insure the condominium property at a cost the association finds reasonable. The obligation to insure certain components of the property is, therefore, not a fixed, right of present or future enjoyment and does not create new obligations or liabilities. However, the general obligation to insure the property still exists and is an enforceable right, as opposed to an obligation to insure certain components of the property, which may change with amendments to the declaration and the laws governing condominiums and insurance. See Munder v. Circle One Condo. Ass'n, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (finding corporate developer failed its obligation to insure clubhouse lost by fire, but directors did not breach their fiduciary duty so were not individually liable, which was superseded by

amendment to § 718.111(11)(a), Fla. Stat., which makes it a breach of fiduciary duty for a developer to fail to adequately insure condominium).

62. Even if an association was obligated under a declaration to insure the electrical fixtures within the units, it cannot do so under the present law. Electrical fixtures, water heaters, kitchen cabinets and other enumerated interior components under the present law are the responsibility of the unit owner. Unit owners may no longer be considered additional insureds under the association's policy. Unit owners cannot insure the interior walls, sliding glass balcony doors and other parts of the structure as these were originally installed. So, even if the amendment were found to be a vested right that could not apply retroactively, the association and unit owners would be unable to contract for insurance under these older declarations. The declaration provision would be impossible to perform.

D. Because condominiums and insurance are highly regulated, the amendment would apply retroactively even if substantive rights were affected.

63. Substantial regulation of the area by the state reduces the likelihood that a substantial impairment will be found. United States Fidelity and Guaranty Co. v. Dep't of Ins., 453 So. 2d 1355, 1360 (Fla. 1984) (holding that law requiring insurers to refund excess profits was not an unconstitutional impairment of contracts); Woodside, 806 at 455-56 (noting that condominiums are creatures of statute and highly regulated). Unit owners purchased condominiums knowing that both condominiums and insurance were highly regulated areas and subject to legislative changes. To require the association to maintain the enforceability

of the declaration insurance provisions, including the disbursement of proceeds under the cost shifting provisions of reconstruction and repair after casualty, even when such coverage is not available to unit owners from any insurer, would work too great a hardship on the owners. A declaration with provisions that contravene a statute or are unenforceable because market forces have changed making it impossible to perform should not control the outcome. See Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988).

E. The amendment serves a legitimate public purpose of encouraging lower, stable insurance premiums for condominium associations.

64. Once a legitimate public purpose has been identified, a determination is made as to whether the public purpose has been reasonably served by the adjustment made to the rights and responsibilities of the parties. U.S. Fidelity and Guaranty, 453 So. 2d at 1361. Courts will defer to the legislature's judgment as to the necessity and reasonableness of the amendment. Id. If the impairment of the declaration reconstruction provision is considered substantial, then the legislature has stated the significant public purpose being served by the amendment. The legislature has provided that the insurance provisions are to protect the health, safety and welfare of Florida citizens, so the amendment is to apply to every condominium in the state regardless of the date of the declaration. The legislature recognized the need to stabilize and lower insurance premiums, especially for condominium associations and unit owners. According to the Office of Insurance Report, the "market ... appears stable, as evidenced by . . .modest increases in the rate." Condo. Ins.

Rpt. at 13. The legislature intended for the provisions to retroactively apply to declarations and to prospectively apply to all insurance contracts entered into after January 1, 2004.

F. Molokai Villas may not shift the cost of reconstruction of the condominium building, which was insured by the association as a common expense to the four individual unit owners who lost their units when the building was destroyed by fire and hurricane.

65. Molokai Villas may argue that even if the 2003 amendment applies, it may properly shift the cost of the repairs to unit owners under article 10 of the declaration. Under the grandfathering provision that was repealed, an association that did not have sufficient insurance proceeds to repair unit damages might look to the general repair provisions of the declaration to shift the cost to unit owners where the unit owners were required to maintain and repair these items, such as electrical fixtures or heating equipment. See ch. 2003-14, § 4, Laws of Fla. ("if the unit owner is required to repair or replace such equipment"). The statutory amendment, which repealed a unit owner's repair obligation, overrides the declaration.

66. Molokai Villas may not shift the cost to the four unit owners under article 16 of the declaration because it is inconsistent with sections 718.111(11) and 718.115, Florida Statutes (2006). It would have been inconsistent under the 1983 Condominium Act, which required the association to insure the building and the fixtures on the interior of the units as originally installed. §§ 718.111(9), 718.115, Fla. Stat. (1983).

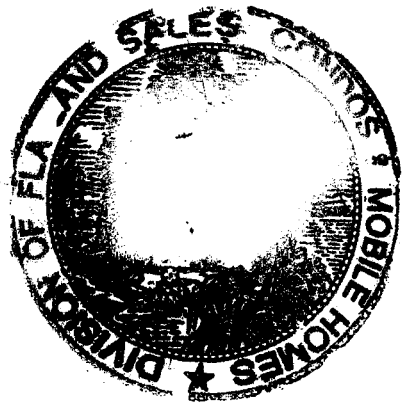
VI. Conclusion.

67. The 2003 amendment to section 718.111(11), Florida Statutes, permits associations to include a reasonable deductible, which is a common expense, in hazard insurance contracts. It does not permit associations to shift the cost of paying the deductible or the cost of replacing a building to individual unit owners in the destroyed building.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under sections 718.111(11) and 718.115, Florida Statutes (2006), Molokai Villas Condominium Association, Inc., which is required to insure the condominium property, which includes the buildings, under article 16 of the declaration and section 718.111(11)(a), Florida Statutes (2006), may not pass on to the four unit owners who own units in the building destroyed by fire and hurricane the cost of rebuilding the structure, notwithstanding provisions in the declaration shifting this cost and responsibility to these unit owners.

DONE and **ORDERED** this 28th day of August, 2006, 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

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 Jim Harris, President, Molokai Villas Condominium Association, Inc., 1149 Country Club Circle, Birmingham, Alabama 35244, this 12th day of September, 2006.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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