THE CONDO ASSOCIATION

March 23, 2023

DIRECTORS' DIGEST

35 YEARS OF EXCELLENCE

A Publication of the Law Offices of Lobeck & Hanson

PERFECT STORM

A Coming Condo Cash Crunch ?

Insurance

Inflation

Inspections

Insane 2025 Reserve Mandate

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2023 Legislative Preview

Reforms to Inspection and Reserve Law?

Hurricane Safety

Protecting Developers

Just as our communities emerge from a successful battle with an international pandemic, we are faced with a Perfect Storm in the triple threat of inflation, insurance hikes and a misplaced state response to a Miami condo collapse, which together threaten to balloon Association budgets and make condo living increasingly unaffordable for many.

As discussed in this *Directors Digest*, attorneys of our firm are working within the Florida Bar and otherwise on legislative reforms to reduce the huge financial impacts of the post-Surfside laws. Better approaches are also needed by the Legislature to give Associations improved options for property insurance. Inflation seems to be cooling although not yet enough.

Throughout past and new challenges, The Law Offices of Lobeck and Hanson stands ready to help Associations understand and apply the law in pursuit of cost-effective solutions to meet the needs of their communities. We appreciate those who partner with us in that goal.

Lobeck & Hanson

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WE ARE PLEASEDTO INTRODUCE OUR NEWEST ATTORNEYS

Kimlyn Walker joined our firm in 2022 and assists our clients in a broad range of matters, including land use and litigation. Prior to obtaining her law degree, for 18 years Kimlyn worked for the Hillsborough County Planning Commission as a land use planner, including in a principal and senior capacity. Additionally, Kimlyn has effective public presentation skills and is adept at working with both the public and governmental agencies. Kimlyn has presented myriad times before local governments, both county and city, and a variety of intergovernmental agencies. She has counseled and advised clients on development issues in both unincorporated county and city municipalities. With an extensive history in real estate, as well as condominium and HOA legal services with a major local firm before joining Lobeck and Hanson, Kimlyn is skilled in research, analysis, negotiating, drafting, and other legal services.

Caitlin Dreher joined our firm shortly after passing the July 2022 Florida Bar exam. She graduated from the University of Florida and Stetson University College of Law. While attending law school, Caitlin worked as the Litigation Operations Manager at BLG Association Law PLLC, where she became well versed in Condominium and HOA lien foreclosures, as well as acting as the foremost legal blogger on the firm's website. Caitlin also has previous experience as an editor and a project manager, developing skills in editing, research, and drafting. Caitlin serves our clients principally in litigation matters, including lien foreclosures, legal research and other services.

SB-4: Mandatory Inspections and Reserves

At 1 am on June 24, 2021, a 13-story condominium building collapsed in Surfside, Florida, leaving 98 people dead.

As the anniversary of that horrific tragedy approached in 2022, state legislators scrambled for a government response.

The result was the passage of SB-4, signed into law by the Governor, imposing mandatory building inspections, repairs and reserves on thousands of condominium and cooperative buildings throughout the state.

The new law has major problems which may be addressed to some degree by the 2023 or 2024 Legislature. It is opposed by some as excessive big government overreach which creates unreasonable new burdens and expenses, many unrelated to the Surfside collapse. For now, though, Associations have to deal with it, prior to compliance deadlines which largely occur on **December 31, 2024.**

The new law mandates certain inspections and repairs and a long list of non-waivable reserves, including massive and nonsensical reserves for replacement of the foundation and structural walls

What buildings are included?

First, it should be recognized that the requirements of the new law **both for inspections and reserves** do not apply to a building which is less than three stories. (The Florida Building Code defines "story" as the space between a floor and the floor or roof above, so garages and other unoccupied levels count as stories).

As to buildings of three stories or more, the inspection and repair requirements apply only to buildings at least 30 years old, or 25 years within three miles of a "coastline" (as that term is defined by s. 376.031, Florida Statutes), now or later when that age occurs.

However, the burdensome and expensive new non-waivable reserve requirements apply to buildings three stories and higher — either after the building is ten years old, or regardless of its age, the new law being ambiguous in that regard. Some, including the Division of Florida Condominiums, Timeshares and Mobile Homes, interpret the new law to require the reserves for all condominiums regardless of height, although that seems doubtful under its wording.

Another tweak is that the inspection and repair requirements do not apply to a single-family, two-family or three-family building (that is, with one to three units) with three or fewer habitable stories above ground.

Further, although unclear, it appears that the mandatory reserves only apply to common element building components (called "common areas" in the statute), and not to parts of buildings within unit boundaries. (Although it would make sense to exclude limited common elements which are the responsibility of the unit owners, and perhaps to include parts of units maintained by the Association, the new law does not make that distinction).

As to buildings which are subject to the new laws, the requirements include the following:

"Milestone Inspections"

The new law requires "a structural inspection" of the building, including "load-bearing walls and the primary structural members and primary structural systems" as defined by s. 627.706, Florida Statutes. To the extent "reasonably possible," the inspection must determine "the general structural condition of the building" as it affects its safety. It must also determine "any necessary maintenance, repair or replacement of any structural component of the building". A determination of code compliance is not required. "Surface imperfections," including

cracks and signs of leakage, need not be called out unless they indicate "substantial structural deterioration."

The inspection must be by "a licensed architect or engineer authorized to practice in this state for the purposes of attesting to the life safety and adequacy of the structural components of the building." One problem with this is that architects are not really authorized by the state to attest to the structural safety of buildings and as such may not be available for the inspections. Only structural engineers clearly qualify for that purpose.

This creates a huge problem for Associations to meet the December 31, 2024 deadline. There are simply not enough structural engineers in the state to do it in time. One newspaper article for instance estimated that in the City of Sarasota alone, there are 190 condominiums with buildings of a height and age to require the inspection.

When a legislative committee debated this legislation in the 2022 regular session — and failed to pass it in part because of this concern — one legislator defended the proposal by saying that engineering schools will recruit more students and more engineers will move to Florida.

It is very likely that the 2023 or 2024 Florida Legislature will extend the deadline, just as the Legislature did repeatedly with fire sprinkler retrofit requirements. However, Associations facing the inspection requirement should not count on that and should try to line up a structural engineer for the inspection to the extent that proves possible.

One reason to take this seriously, as the Legislature intends, is the part of the new law which makes an Association officer or Director personally liable for breach of fiduciary duty if he or she willfully and knowingly fails to cause the Association to timely obtain the inspection. (It would be well for the Association to seek a Directors and Officers liability insurance policy with terms which cover that liability, if possible — and with regard to the even broader liability for failing to obtain the new reserve study by the same deadline, as discussed below).

The building inspection, called a "milestone inspection" under the statute, is in two phases. The first phase is a visual inspection producing a "qualitative assessment" report, of the structural conditions of the building. If any "substantial structural deterioration" is found in that phase one report, the phase two report is required.

To promote compliance, the new law requires **all condominium and cooperative Associations** which exist on July 1, 2022 — not just those which require milestone inspections — to provide certain information to the Florida Department of Business Regulation. The deadline for the reports was **January 1, 2023**, so any Association which has not yet complied should do so now. The report requires a Contact Name, Phone Number, and Email Address; the name of the condominium or cooperative; its "license number" (with a link to look it up); the number of buildings three stories or higher; the number of units in such buildings; the addresses of all such buildings; and the counties in which they are located. The form and its filing may be accessed at www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/building-report/.

The phase two report is as extensive as necessary (which may include destructive or nondestructive testing) to "fully assess areas of structural distress" and either confirm structural safety or recommend a program to fully assess or repair distressed or damaged portions of the building, and shall specifically identify any "unsafe or dangerous conditions".

The phase one report and, if one is done, the phase two report, go to the Association and to the local government building official. The report must include a summary, which the Association must provide to each unit owner in a certain manner. The Association also must post the summary and full report on the Association's website.

The Association must complete any repairs to correct "substantial structural deterioration" which are

recommended in a phase two report within 365 days of receiving the report. The local government may require earlier performance and may prescribe penalties for noncompliance, as well as determine if the building is safe for occupancy.

A milestone inspection of each building for which one is required must also be done again every ten years.

Mandatory Reserves

Again, the new law requires certain reserves for condominium and cooperative buildings which are three stories or more in height, effective after December 31, 2024, for every building at least ten years old — or potentially regardless of its age, due to an ambiguity in the legislation.

The new law requires a "Structural Integrity Reserve Study" for those buildings, by the end of 2024 and every ten years (apparently thereafter, although the wording is every ten years after the building's "creation").

For every budget adopted beginning January 1, 2025, these reserves must be fully funded, by a formula which divides expense by the number of years until needed. The reserves are for the replacement of the following items. [For the waterproofing and painting, it is for the less than annual ("deferred") maintenance]:

a. Roof.
b. Load-bearing walls or other primary structural members.
c. Floor.
d. Foundation.
e. Fireproofing and fire protection systems.
f. Plumbing.
g. Electrical systems.
h. Waterproofing and exterior painting.
i. Windows.
j. Any other item that has a deferred maintenance expense or replacement cost that exceeds $10,000 and the failure to replace or maintain such item negatively affects the items listed in sub-subparagraphs a.-i., as determined by the licensed engineer or architect performing the visual inspection portion of the structural integrity reserve study.

Remarkably, Associations may not, by a unit owner vote or otherwise, reduce or waive this reserve funding. They are barred from making a choice to pay for these needs when they occur instead by a special assessment or by borrowing.

Although it's called a "Structural Reserve Study" to suggest that it is in response to the Surfside tragedy, most of the mandated reserves have nothing to do with such a lack of structural integrity. A building would not be expected to collapse just because the roof leaks or the paint fades.

And as to those items which could impair structural integrity if they are not sound — that is the foundation and the load-bearing walls and other primary structural members — they never get reserved because they are expected to last the life of the building. When is the last time you ever heard of a condominium Association replacing a foundation or a structural wall? How would the foundation even get replaced?

The statute says that the reserve study may be performed by "any person qualified to perform such study." Originally it was drafted to require an architect or engineer, but was changed before adoption to the current wording by lobbyists for other reserve study professionals. Nevertheless, another part of the new law still (as recited above) requires an architect or engineer to determine which items not listed "negatively affect" the listed items if neglected and as such must be included in the mandatory reserves if the cost will be over $10,000.

Because of all of these problems in the statute, reserve study professionals are widely indicating that they would be unable to perform a "structural integrity reserve study" as will be required by the new law.

Other reserves of a condominium or cooperative Association other than the a through j items listed above, remain subject to reduction or waiver by a vote of the unit owners, as before. That's not much

though, being (1) paving and (2) any item other than those listed in a though j which costs more than $10,000 and do not negatively affect any of them if they are neglected.

Reserve accounts for items a through j are each limited to its purpose and may not be cross-utilized or used for any other purpose. A vote of the owners to do so is not allowed and it appears that "pooling" of those so-called "structural integrity reserves" would not be allowed, either just for them or for all reserves together.

The new law makes any officer or Director of an Association who "fails to complete a structural integrity reserve study" by December 31, 2024 personally liable for breach of fiduciary duty. Unlike that penalty for failing to timely obtain a structural integrity "milestone inspection" and report by that date, as noted above, this does not require that the failure be "willful and knowing."

On page 7, we review potential reforms to this new law by the 2023 Legislature. Let us all hope that our elected representatives see greater reason at that time.

Condos Face Insurance Crisis

According to the Insurance Information Institute, property insurance premiums in Florida are expected to increase an average of about 40% in 2023, despite actions taken in two recent special sessions of the Florida Legislature. Some condominium Associations have seen even worse, at times being put in doubt of even being able to obtain coverage.

Legislators say it could take up to two years for their "reforms" to reduce premiums, but it remains unknown what effect they will have, if any.

Some risk of insurers fleeing Florida has been reduced by $2 billion that the state will make available to insurance carriers through 2023 for "reinsurance", that is insurance for insurance companies against not being able to pay claims.

Other measures may help consumers a bit. One provides that if an insurer denies coverage for a roof because it is more than 15 years old, you are able to overcome that with a professional building inspection showing that the roof still has five or more useful years remaining. (That law is being attacked in court by the roofing industry on technical grounds, because it delays roof replacements).

But most of the Legislature's approach has been to incentivize insurers to hold the line on premiums by measures which will hurt consumers in other ways.

One is to outlaw the practice of contracting with a company to make repairs and replacements in return for receiving an assignment of insurance benefits.

Also, the Legislature is discouraging lawsuits by consumers against their insurance companies for refusing to pay what the insurance policy provides.

Towards that end, the Legislature is limiting the right to recover attorney's fees by a consumer prevailing in such a legal action.

Also, the Legislature is making it more difficult for consumers to obtain coverage from Citizens Property Insurance Corporation, Florida's "insurer of last resort." If a consumer can buy insurance from an authorized private insurer at a rate not more than 20% higher than Citizens' premiums, it must do so.

While Florida law requires that a condominium Association maintain "adequate" insurance based on 100% replacement cost, and allows reasonable deductibles, the Declaration of Condominium should be examined (and perhaps amended) with regard to more specific requirements.

2023 Legislative Preview

SB-4 (Surfside Law) Reforms

SB 154 and HB 1395 seek to respond to flaws in the post-Surfside SB-4. They continue however to keep mandatory reserves and building inspections. At press time, the bills differ and the final text is uncertain. In response to the impossibility of enough engineers to timely do the inspections, HB 1395 would expand who can do the first phase of inspections to certain licensed contractors and others. Both bills would allow local governments to extend the inspection deadlines for Associations which are under contract for that service.

Neither bill corrects the absurd requirement of reserves to replace foundations and the rest of the structure. However, HB 1395 exempts from reserves any listed component not needing maintenance, repair or replacement for 25 years. SB 154 instead exempts any listed component for which an estimated remaining useful life "cannot be determined." On the list of mandated reserves, SB 154 deletes "Floors" and HB 1395 deletes nothing but adds "Doors." SB 154 allows an "alternative funding method" to reserves is allowed but only — for no stated reason — for "multicondominium" associations, and under a definition which is unintelligible (as it requires sufficient funds instead in the annual budget), and would be determined by the Division.

Hurricane Protection

SB 556 and **HB 395** would amend the current provisions of the Condominium Act regarding hurricane protection to allow an Association upon approval by a majority of the voting interests to require all unit owners to install hurricane shutters, code-compliant windows and doors or other hurricane protection. That would be even where the windows and doors are common elements maintained by the Association, and in that instance there need not be a vote of the unit owners. The current law provides for the installation by the Association, and requires the vote of owner approval if the windows or doors are not common elements or otherwise maintained by the Association. Provisions are also added to require an owner to remove and reinstall any hurricane protection, or pay for the Association to do it, when needed for building maintenance and repairs.

Construction Defects

Even though the condo collapse in Surfside was due to old construction defects (and not low reserves or failure to get an engineering report), the Legislature is — amazingly — about to make it more difficult for Associations to sue developers for old construction defects. **HB 85** would amend the "statute of repose" to reduce from ten to seven years from construction the time after which a developer cannot be sued for hidden (latent) construction defects, as well as adding other protections for developers.

Associations Can't Defend Themselves

In the annals of absurd condominium bills which seek to advance the animus of some unit owners against their Associations, this one takes the cake. **HB 919**, titled the "Community Associations Bill of Rights," prohibits the use of Association funds to pay for attorney's fees to defend a civil or criminal proceeding or an administrative or arbitration proceeding.

Electronic Voting

SB 316 allows a unit owner to consent to electronic voting by electronic means, rather than only by written consent, as at present.

Division Name

As if the name of the state agency that regulates condominiums was not already long enough, **SB 406** and SB **83** would give big boat sales their due by renaming it the Florida Division of Condominiums, Timeshares, Yacht Brokers and Mobile Homes.

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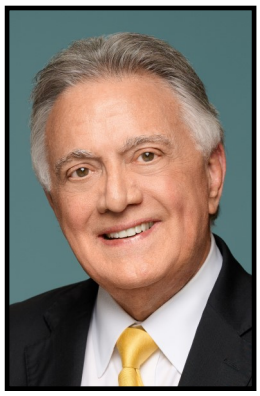

Dan Lobeck

Mark Hanson

Michelle Rowe

Leah Ellington

Kimlyn Walker

Caitlin Dreher

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2033 Main Street, Suite 403, Sarasota, Florida 34237
(941) 955-5622 law@lobeckhanson.com
Check Out Our Website at www.lobeckhanson.com

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