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COMMUNITY UPDATE

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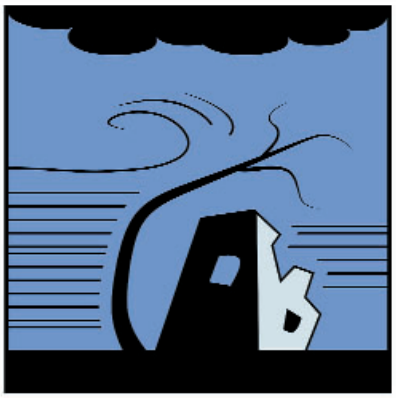

PROPERTY INSURANCE

What's In Your Policy?

By John Cottle, Esq.
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Florida Statute 718.111(11) deals with property insurance policies issued in the State of Florida that cover condominium property. That section provides, in part, as follows:

> Every property insurance policy issued or renewed on or after January 1, 2009, for the purpose of protecting the condominium must provide primary coverage for:
>
> 1. All portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications.
>
> 2. All alterations or additions made to the condominium property or association property pursuant to s. 718.113(2).

Florida Statute 627.418(1) requires that a provision of an insurance policy inconsistent with any statute must "be construed and applied in accordance with such conditions and provisions as would have applied had such policy … been in full compliance with the code." ***So what happens when an insurance company issues a condominium policy that attempts to exclude coverage for a portion of the condominium property which the statute requires the policy to cover?*** Reading these two statutory provisions together leads to the very logical conclusion that a policy not conforming with 718.111(11) will be construed so as to require conformity. Or stated differently, if an insurance company attempts to exclude property from coverage that the statute requires the policy to cover, it would seem that the exclusion should be declared invalid. Unfortunately for one condominium association, Florida's Fourth DCA did not view the matter this way.

In *Citizens Property Insurance Corp. v. River Manor Condominium Ass'n*, the court considered a claim made by River Manor, a residential condominium, under a property insurance policy issued by Citizens. The condominium sustained losses during Hurricane Wilma which included damage to "exterior common elements" such as seawalls, bridges, ramps and decks. Appraisers fixed the damage to these "exterior common elements" at approximately $1,250,000. The Citizens insurance

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NOTICE REQUIREMENT FOR SETTING CONDOMINIUM INSURANCE DEDUCTIBLES

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One of the most overlooked condominium association requirements is the notice requirement for establishing the amount of insurance deductibles that is found at Section 718.111(11)(c),3, F.S. Importantly, the meeting at which the amount of the deductibles is determined must be preceded by 14 days' notice that is hand delivered, mailed, or electronically transmitted when appropriate, to each member. Since insurance policies are renewed annually, presumably this meeting and the determination of the deductible for the upcoming year must also occur annually.

Ideally, setting insurance deductibles will take place as part of the annual budget adoption meeting, since that meeting also requires 14 days' advance notice to all members. But depending upon the date that the insurance policy expires, and depending upon the fiscal year of an association, determining the amount of deductibles with certainty at the budget meeting may not be practical. Even when the association's fiscal year and insurance policy renewal coincide on the first of the year, often the precise terms of the policy, or even the identity of the insurance carrier, are not known until days, or sometimes hours, before the policy goes into effect, thereby making a 14 day notice procedure impossible. In those cases, it may be most efficient and cost effective to go ahead and determine the deductibles to the best of the board's ability at the budget meeting, based upon past experience and consultation with the association's insurance agent. If the deductibles need to change for any reason, the board will need to address that at a later meeting preceded by 14 days' notice.

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> decision with respect to a Plaintiff's request, which necessarily includes the ability to conduct a meaningful review of the requested accommodation to determine if such an accommodation is required by law."

Prompt Response Required

Giving an admonition of caution, however, the appellate court pointed out that one of the facts supporting its ruling for Sun Harbor was that a prompt response was made to Bonura's reasonable accommodation request, and that failure to provide prompt responses to such requests may ". . . function as a denial."

In arriving at its ruling for Sun Harbor, the appellate court summarized the elements required for a claimant to prevail in a lawsuit under the Federal Fair Housing Act as follows:

(1) the claimant's handicap;

(2) that the defendant had knowledge of the handicap;

(3) that an accommodation may be necessary to afford the claimant to equal opportunity to use and enjoy the dwelling;

(4) that the accommodation is reasonable; and

(5) the defendant's refusal to make the requested accommodation.

Association Entitled to "Meaningful Review"

The Court also pointed out that it has long been recognized by federal courts that a defendant has the right to perform a meaningful review of a request for an accommodation, to determine if the accommodation is required under the statute, and that the right to perform a meaningful review includes the right to request information from the allegedly disabled person in order to establish whether the disability exists and whether the accommodation is necessary.

Community associations should be alert to the admonition given by the appellate court in the *Sun Harbor* case to act "promptly" in responding to Fair Housing Act reasonable accommodation requests, and to the right to perform a "meaningful review" with regard to such requests. All such requests should be reviewed with the association's attorney to assure that the response and any requests for information are appropriate.

[1] For procedural reasons, the appellate court ruled that the trial court erroneously applied the Florida Fair Housing Act in this case, and that any need to address the Florida Act relative to its review of this case was rendered moot. The appellate court acknowledged, however, that the Florida Act requires the filing of a complaint with the Florida Commission on Human Rights as a precondition to filing a lawsuit.

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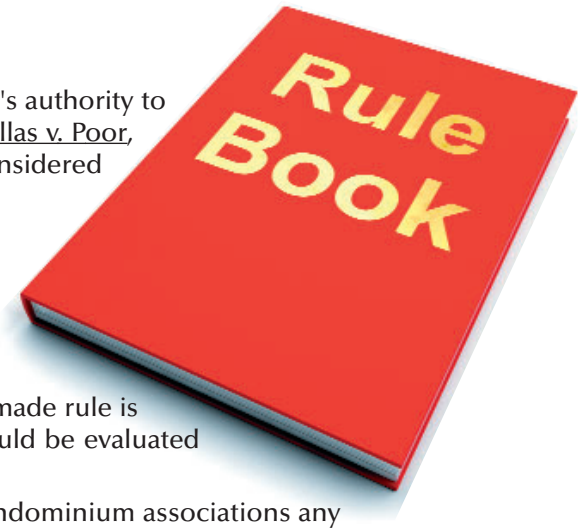
policy, however, specifically excluded coverage for "other structures … set apart from the building by clear space." The policy also provided that, "any terms of this policy which are in conflict with [Florida Statutes] are amended to conform to such statutes…"

Citizens, relying on the "other structures" exclusion, refused to pay the claim. River Manor sued, contending that the exclusion was unenforceable in light of the statutes, as well as the language of the policy itself providing that it would be interpreted to conform with Florida Statutes. After observing that "the path of least resistance would be to simply hold that the statute means what it says and says what it means," the court rejected the least resistant path and proceeded to examine the legislative intent behind 718.111(11). The court concluded that Chapter 718 was intended to regulate condominiums, not insurance companies. Reading Chapter 718 as an effort to regulate condominiums, the court concluded that the legislative intent of the statute was to identify the types of insurance a condominium association is responsible for securing and to assign responsibility for insuring the various elements of condominium property between an association and its unit owners. Thus, the court held that 718.111 "was not intended to impose a mandatory insurance obligation upon carriers." Citizens prevailed based on the policy's exclusion.

While the court's reasoning seems at odds with the plain language of the statute, as well as the language of the policy itself, the *River Manor* holding is now the law of Florida, at least for the moment. Therefore, no condominium association should assume that its property insurance policy will cover all condominium property merely because 718.111(11) says that it must. Association managers and boards would be well advised to examine their property insurance policies in light of this decision to determine what exclusions may be lurking within the policy's language. If the exclusion is not one the board feels it can live with, it should contact its insurance agent to discuss whether and how the exclusion may be removed. As *River Manor* demonstrates, assuming that a particular element of condominium property is covered based upon the statute alone is a gamble a condominium association should not take. If the policy excludes the coverage, the policy language will control, regardless of what the statute says.

Therefore, no condominium association should assume that its property insurance policy will cover all condominium property merely because 718.111(11) says that it must.

Rules and Regulations 101



One of the questions we often receive from our clients pertains to the board's authority to adopt Rules & Regulations. On this issue, the seminal case of Beachwood Villas v. Poor, 448 So. 2d 1143 (Fla. 4th DCA 1994) holds that a board-made Rule may be considered valid upon satisfaction of three "tests", which include:

1. The board must be granted rule-making authority in the governing documents;
2. The rule cannot conflict with any right contained within the governing documents, nor any right which is "inferable" there from; and
3. The rule must be "reasonable" and not discriminatory.

A "fourth" test which needs to be considered in connection with any board-made rule is that it be adopted in a procedurally correct manner. Each of these tests should be evaluated and considered by a board prior to the adoption of the subject Rules.

With regards to adopting the Rules in a procedurally correct manner, for condominium associations any proposed Rules must be mailed to all unit owners and posted not less than fourteen days in advance of the Board Meeting where the Rules will be considered if the Rules pertain to "unit use," as referenced below in Section 718.112(2)(c)(1), Florida Statutes. For homeowners associations there is a similar notice provision for Rules which pertain to "parcel use" contained within Section 720.303(2)(c)2, Florida Statutes. For cooperatives, there is a similar notice provision contained within Section 719.106(1)(c), Florida Statutes.

Additionally, board-made rules do not come with the same "presumption of validity" as do amendments to other governing documents which are voted on and approved by the members. See Beachwood Villas v. Poor. Overall, Rules serve an important purpose in governing community associations throughout Florida. That being said, Rules must be adopted according to the requirements referenced above and do have limitations. Boards should consult with their association attorney before adopting new Rules to ensure that they will be enforceable and adopted in a procedurally correct manner.

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NO DOGS ALLOWED

Does Not Equal Housing Discrimination

Sun Harbor HOA v. Bonura

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"No pet" rules, and efforts to enforce them, can result in community associations having to defend themselves against alleged violations of the Federal Fair Housing Act (42 U.S.C.A §§ 3601-3619) and/or the Florida Fair Housing Act (§§ 760.20 - 760.37, Florida Statutes). Not all claims under these laws are valid, and associations have successfully defended against them in some cases. Such was the case for Sun Harbor Homeowners' Association, Inc. when it filed a lawsuit to enforce its "no dogs allowed" rule against lot owner Bonura. *Sun Harbor Homeowners' Ass'n, Inc. v. Bonura*, 95 So. 3d 262 (Fla. 4th DCA 2012).

Trial Court Initially Ruled Against Association

Bonura filed a counterclaim against Sun Harbor in the lawsuit alleging that his fiancée was entitled to use of an "emotional therapy dog", and that Sun Harbor's actions in trying to have the dog removed were in violation of Florida's Fair Housing Act[1] and the Federal Fair Housing Act. Bonura's claim was that his fiancée suffered from a disability which entitled her to a reasonable accommodation for the use of an emotional therapy dog.

The trial court ruled in favor of Bonura and against Sun Harbor, finding that Bonura's fiancée was a handicapped person as defined under the Federal Fair Housing Act, and that she was entitled to an accommodation permitting her to possess her therapy dog.

Appellate Court Reverses in Favor of Association

Florida's Fourth District Court of Appeal reversed the trial court's ruling, finding that the evidence presented to the trial court failed to establish that Bonura's fiancée was "handicapped under the Federal Act", that Sun Harbor had knowledge of a handicap, or that Sun Harbor refused to accommodate the fiancée after being given an opportunity to conduct a meaningful review following a request for accommodation.

Quoting from other case law, the appellate court said:

> "The duty to make a reasonable accommodation does not simply spring from the fact that the handicapped person wants such an accommodation made. Defendants must instead have been given an opportunity to make a final

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