

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS, AND MOBILE HOMES,)
)
Petitioner,) Case No. 06-3957
)
vs.)
)
FOUNTAINS SOUTH CONDOMINIUM NO.)
3C ASSOCIATION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on November 6, 2007, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Thomas Barnhart, Esquire
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The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Rod Tennyson, Esquire
1450 Centrepark Boulevard Suite 100
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent condominium association should have assessed unit owners, in proportionate

shares, to pay for the replacement of hurricane-damaged balcony screens, in accordance with Petitioner's policy that repair costs which do not exceed an insurance deductible are "costs of insurance" that must be paid as "common expenses" regardless of what the declaration of condominium provides concerning reconstruction or repair after a casualty.

PRELIMINARY STATEMENT

On July 28, 2006, Petitioner Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, entered a Notice to Show Cause directing Respondent Fountains South Condominium No. 3C Association, Inc., to reimburse a unit owner the \$1,200 cost of replacing hurricane-damaged balcony screens, using common funds collected through a proportionate-share assessment. This was to remedy an alleged violation of Section 718.115(2), Florida Statutes, which requires that funds for payment of "common expenses" be collected by assessments against the units in proportionate shares. Respondent, which disputed the allegation that it had failed properly to make assessments for common expenses, timely requested a formal hearing.

On October 10, 2006, the case was referred to the Division of Administrative Hearings ("DOAH"), where it was assigned to an administrative law judge, who scheduled a final hearing for December 18, 2006. Thereafter, the case was placed in abeyance,

at the parties' joint request, ultimately postponing the hearing by nearly a year.

The final hearing took place on November 6, 2007, as finally scheduled, with all parties present. Petitioner called three witnesses: Flora Ginns, Milton Kutzin, and Jonathon Peet. Also at the hearing, Petitioner introduced Exhibits numbered 1 through 11, which were received in evidence. Afterwards, Petitioner was allowed to supplement the record with the deposition testimony of its expert witness, James T. Harrison, Jr., which was taken on November 19, 2007.

Respondent presented two witnesses: Jerry Wahl and Debbie Poulette. Respondent submitted, as well, the deposition testimony of Mr. Harrison (Petitioner's expert witness), which had been taken on October 29, 2007. Finally, Respondent's Exhibits 1 through 9 were admitted.

The final hearing transcript was not filed. Pursuant to the schedule established at the conclusion of the final hearing, Proposed Recommended Orders were due on December 17, 2007. This deadline was enlarged, without objection, to December 19, 2007. Each party timely filed a Proposed Recommended Order, and these were carefully considered during the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

1. Respondent Fountains South Condominium No. 3C Association, Inc. ("Association") is the entity responsible for operating the Fountains South Condominium No. 3C ("Condominium"). As such, the Association is subject to the regulatory jurisdiction of Petitioner Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division").

2. The Condominium was created—and continues to be governed by—a Declaration of Fountains South Condominium No. 3C ("Declaration"), which instrument was recorded, in 1987, in the public records of Palm Beach County, Florida.

3. On October 24, 2005, Hurricane Wilma struck Palm Beach County, causing damage to elements of the Condominium. The damaged property included some portions of the "Common Elements." Also damaged were some parts of the "Limited Common Elements." (The terms "Common Elements" and "Limited Common Elements" are defined in the Declaration, the relevant provisions of which will be set forth verbatim below. Generally speaking, though, the Common Elements comprise all of the property of which the Condominium is composed except for that included within the residential units. The Limited Common Elements, which are a subset of the Common Elements, consist of properties or structures whose use is reserved to a particular unit or units to the exclusion of other units.)

4. Fulfilling a statutory obligation (that will be discussed in detail below), the Association had purchased property insurance to protect the Common Elements and Limited Common Elements. Issued by Nutmeg Insurance Company ("Nutmeg"), Policy No. SW 0000071 (the "Policy") provided coverage to the Association for loss or damage to property from multiple risks, including hurricanes. The premium for the Policy—the effective dates of which were from December 31, 2004 to December 31, 2005—was \$395,000.

5. The Policy provided for various deductibles depending on the cause of the covered loss. For loss or damage caused by a hurricane, the deductible was 5 percent of the value of the insured property. It is undisputed that, at the time of Hurricane Wilma, this deductible was approximately a quarter of a million dollars. Under the relevant provisions of the Policy, therefore, Nutmeg would not be obligated to indemnify the Association for any loss or damage caused by Hurricane Wilma unless and until the total losses from that particular occurrence exceeded (roughly) \$250,000.

6. The Association paid about \$5,000 to repair the damage that Hurricane Wilma caused to the Common Elements, using funds on hand that had been saved for such contingencies. Because this expense was far below the applicable deductible, the Association did not submit a claim to Nutmeg.

7. The Association's position regarding the damage to the Limited Common Elements, consistent with its longstanding view of such matters, was that the costs of repairing or replacing such properties should be borne by the respective unit owners to whose exclusive use the damaged elements were reserved. The Association based its position on a provision of the Declaration (which will be quoted below) that assigns the general responsibility for maintenance and repair of the units, together with the Limited Common Elements appurtenant thereto, to the respective unit owners.

8. At the time of Hurricane Wilma, Haskell and Flora Ginns (the "Ginns") owned Unit No. 201 in the Condominium. (As of the final hearing, the Ginns were still the owners of this unit.) The hurricane caused damage both to their unit and to the screens surrounding the balcony outside their unit. It is undisputed that the balcony and screens appurtenant to the Ginns' unit are part of the Limited Common Elements.

9. The Ginns submitted a claim for these losses to their insurer, Allstate Floridian Insurance Company ("Allstate"). By letter dated January 7, 2006, Allstate denied the portion of the Ginns' claim relating to the damaged screens, asserting that the screens were not covered property under the Ginns' policy because they were within the "insuring responsibility" of the Association. The Ginns did not protest Allstate's decision in

this regard. (Allstate paid the full policy limit of nearly \$30,000 on the Ginns' claim anyway; thus, its denial of coverage for the damaged screens actually had no effect on the reimbursement that the Ginns received from Allstate.)

10. The Ginns then wrote a letter to the Association's president, Milton Kutzin, requesting that the Association pay to replace the damaged screens. Dated January 16, 2006,ⁱ the letter reads as follows:

Dear Milton:

As you may be aware, the screens on the deck of our condo were severely damaged because of Hurricane Wilma. According to the attached memo, the condo is responsible for replacing them. For your information, my insurance company, Allstate Floridian, has refused payment and has advised us that our condo association is responsible (by law) to replace them.

We do have an estimate to replace the screens. I shall be happy to discuss this matter with you at any time. Please let me know approximately when this matter will be settled.

(The "attached memo" to which the Ginns referred purports to be an undated letter from the Director of Maintenance of Versailles Court (evidently a residential community) to the homeowners of that project, clarifying the responsibilities of the homeowners, on the one hand, and their homeowners' association, on the other, vis-à-vis maintenance obligations. As far as the

undersigned can tell, this Versailles Court memorandum has no bearing whatsoever on the issues at hand.)

11. If the Association responded in writing to the Ginns' letter of January 16, 2006, the document is not in evidence. In any event, the Association refused to repair the screens surrounding the Ginns' balcony because (a) it believed that the Ginns were responsible, under the Declaration, for the cost of such repair and (b) the total losses to the Common Elements and Limited Common Elements (including the screens in question) did not come near the deductible under the Nutmeg Policy, meaning that there were no insurance proceeds to distribute to unit owners for repairs to Limited Common Elements.

12. On January 18, 2006, the Ginns paid a company called Rainguard, Inc. either \$1,100 or \$1,200 to replace the damaged screens around "their" balcony.ⁱⁱ

13. Meantime, on January 13, 2006, the Division rendered a Declaratory Statement in In Re Petition for Declaratory Statement of Plaza East Association, Inc., Docket No. 2005059934, Final Order No. BPR-2006-00239 (DBPR Jan. 13, 2006)(the "Plaza East Declaration"). In the Plaza East Declaration, the Division made a number of statements concerning the meaning and effect of certain provisions of the Florida Condominium Act ("Act") pertaining to the duties of condominium associations as they relate to property insurance. These

statements will be examined in greater detail below. For now, it suffices to quote several sentences that form the core of the Division's policy regarding the scope of an association's "insuring responsibilities":

33. As 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. 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. . . . As such, an association may not shift the cost of an insurance common expense to an individual unit owner as common expenses must be assessed in the proportions or percentages required under sections 718.104(4)(f), 718.116(9), Florida Statutes.

34. [An association therefore] may not shift the cost of the deductible, a common expense, to only those unit owners whose windows were damaged by the insurable event such as a hurricane.

Plaza East Declaration at 16 (emphasis added).

14. The Plaza East Declaration reflected—and continues to be authoritative regarding—the Division's firmly fixed policy, which is that the deductible under a property insurance policy is a "cost" that an association must incur, using common funds collected through proportionate-share assessments. The Division's expert witness made this clear, giving the following

testimony (which the undersigned accepts as credible) in deposition:

Q. Doesn't [the] Plaza East [Declaration] declare that a deductible is a common expense?

A. Well, it makes the deductible a common expense because insurance is a common expense and the deductible is just a part of the insurance purchase decision.

* * *

Q. Let me ask you this: Is there anything in [the Act] that clearly states that a casualty loss insurance deductible is a common expense?

A. No, sir, there's nothing [in the statutes] that specifically says that.

Q. But [the] Plaza East [Declaration] says that, doesn't it?

A. Plaza East says that, yes, sir.

Q. So that's a policy of the Department?

A. Yes, sir, that is.

Q. And it's a general policy, isn't it?

A. Yes, sir.

Q. And it's a general policy that would apply to any condominium in South Florida regardless of what the declaration of condominium said?

A. Yes, sir.

Q. And that's being applied in this case, isn't it?

A. Yes, sir.

Deposition of James T. Harrison, Jr. (10/29/07) at 20-21.

15. At some point after the issuance of the Plaza East Declaration, the Ginns sought the Division's help in persuading the Association to reimburse them for the new screens. The Division informed the Ginns of the Plaza East Declaration. Armed with this information, the Ginns again pressed the Association to reimburse them for replacing the screens. The Association, again, declined.

16. By letter dated May 3, 2006, the Ginns made a formal complaint to the Division regarding the Association's refusal to pay for the replacement of the screens. The Division acted promptly, completing its investigation into the matter on or before May 10, 2006. Siding with the Ginns, the Division demanded, in a letter dated May 22, 2006, that the Association either reimburse the Ginns or (possibly) be fined. Yet, the Association resisted.

17. On July 28, 2006, the Division entered a Notice to Show Cause against the Association, charging as follows:

Count 1: Respondent [Association], in violation of section 718.115(2), Florida Statutes, failed to assess unit owners in their proportionate shares for the common expense insurance deductible to repair damage to condominium property caused by a

hazard to be insured by Respondent under section 718.111(11), Florida Statutes. The Respondent refused to treat the hurricane damage to the wrap-a-round deck and screens in unit #201 as a common expense covered by the association's policy under sections 718.111(11) and 718.115(1), Florida Statutes. Specifically, the Respondent failed to reimburse Haskell Ginns and Flora Ginns for damage sustained by Hurricane Wilma to their wrap-a-round screens. Since the May 22, 2006, warning letter, the complainants have replaced their wrap-a-round deck screens at a cost of \$1,200.00 and have requested reimbursement from Respondent.

The Association demanded a formal hearing.

CONCLUSIONS OF LAW

18. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

19. Upon finding reasonable cause to believe that a violation of the Condominium Act or any rule promulgated thereunder has occurred, the Division is authorized to institute an administrative enforcement proceeding through which various coercive means of securing compliance may be imposed, including "a civil penalty [of up to \$5,000] against a developer or association, or its assignee or agent"

§ 718.501(1)(d)4., Fla. Stat.

20. Because the imposition of a fine is (obviously) punitive in nature and implicates significant property rights,

the Division has the burden, in an enforcement proceeding brought for that purpose, of proving the alleged violation by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

21. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Fourth District's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where

the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

22. In this case, the Division has alleged that the Association failed to assess unit owners in their respective proportionate shares for the "common expense insurance deductible." The Division's reasoning, in a nutshell, goes like this. *First*, condominium associations are required by statute to obtain insurance to protect all "condominium property." *Second*, the statutory definition of "common expenses" makes clear that "costs of insurance" are included within the meaning of the term "common expenses." *Third*, the statute requires that funds for payment of common expenses be collected by assessments against the units, in proportionate shares. So far, so good: The Association agrees with these three premises, which are clearly correct, as will be seen.

23. The Division continues with the assertion—which it claims is "axiomatic"—that, *fourth*, "a deductible is part of the cost of insurance." Thus, the Division concludes, one, that the deductible is a common expense (see the *second* premise) and, two, that as a common expense, the deductible must be paid through proportionate-share assessments (see the *third* premise).

24. The Division's conclusions follow logically from its four premises—three of which, as noted, are both undisputed and correct. As for the *fourth* premise (and conclusion one that follows therefrom), however, the Association contends that the Division's "axiom" is a rule-by-definition that cannot be applied here to determine its substantial interests. Without the *fourth* premise, of course, the Division's case against the Association would collapse, because if the deductible were not a "cost of insurance" (and hence a common expense), as the Division insists, then the Association would not have been required to make an assessment to cover it (which is the specific charge at issue). The Division counters that its "deductible = cost of insurance = common expense" statement is not a "rule," but merely a straightforward application of plain statutory language.

25. The deductible has become, unfortunately, a red herring in this case that has confused the parties and distracted them from the real issue underlying the seminal dispute between the Ginns and the Association, which is (as will be seen) whether the Association has a duty to repair Limited Common Elements, such as the screens outside Unit No. 201, when they are damaged in consequence of a hurricane or other occurrence covered under the Association's insurance policy. Without saying so explicitly, the Division effectively has

conflated the Association's duty to obtain insurance (which the Association clearly satisfied in this instance) with a duty to repair Limited Common Elements. These are, however, separate and independent duties—as the Act makes clear.

26. Before examining the statutes, however, it must be said that, while the Division repeatedly proclaims, as though it were self-evidently true, that "a deductible is part of the cost of insurance," this statement is just not correct. A deductible is, generally speaking (and specifically under the Nutmeg Policy), the amount that the insurer, in arriving at the net sum payable to the insured, will deduct from the total adjusted cost (up to the policy limit) of a covered loss. The deductible thus represents the portion of a covered loss for which the insured has retained the risk, thereby reducing the insurer's overall exposure.

27. But while the deductible reflects the amount by which the insured remains on the risk, notwithstanding the existence of coverage for the loss, the deductible is not, of itself, an expense—and certainly not a "cost of insurance."ⁱⁱⁱ The strange, but unavoidable, implication of the Division's claim that the deductible is a "cost of insurance" is that the deductible must be paid, like premium,^{iv} to the insurer. (This is because, if the deductible were part of the consideration given for insurance, as a "cost of insurance," then, one

reasonably would infer, the "deductible" should be paid to the provider of the insurance.) In fact, however, a deductible is not like bill or invoice, which becomes due and payable upon the occurrence of a covered loss as consideration for insurance. Rather, in simplest terms, the deductible is the amount of the loss that will be the insured's loss to suffer; that is how deductibles usually work, and that is how the deductibles under the Nutmeg Policy operated.

28. As the deductible carries it with it no duty to pay, it likewise imposes no duty to act. Insurance policies do not typically (and the Nutmeg Policy in particular did not) require the insured to incur expenses in recovering from a loss. Unless the insured is under an external duty to repair, as, e.g., a landlord might be under a lease agreement, then where the nonreimbursable cost of repairing, replacing, or restoring damaged property is more than the insured is able or willing to pay, the insured is free to make the best of the situation as he sees fit, which might mean applying an inexpensive, do-it-yourself fix—or simply doing without the damaged property.

29. To make sense of the Division's position, it is necessary to realize that the Division uses the term "deductible" in a loose sense, to mean, roughly, *nonreimbursable (by the association's insurer) costs of repair or replacement of condominium property damaged by an occurrence covered under the*

association's property insurance policy. Although this understanding of the term "deductible" is not necessarily incorrect, it tends to beg (or at least sidestep) a significant question, namely whether the association itself must incur such nonreimbursable repair costs.

30. As mentioned above, the Nutmeg Policy did not require the Association to incur repair costs up to the amount of the deductible. In other words, the Association, in its capacity as the insured, was not under a duty to repair; as far as Nutmeg was concerned, the Association could accept the loss with stoic resignation and become accustomed to seeing damaged screens on the property, or simply take them down. The Division, however, implicitly assumes that the Association was duty-bound to repair or replace the screens at issue; yet it never explains, in this case, from whence it believes this putative duty arises.

31. Indeed, while the Division's position rests on a putative duty to repair, the Division never explicitly identifies this duty as such. Instead, the Division labels it something else, albeit indirectly. The Division does this by deeming the "deductible" (by which, again, it means the *nonreimbursable costs of repair or replacement of condominium property damaged by an occurrence covered under the association's property insurance policy*) an "insurance" cost.

32. For reasons already discussed, the Division's definitional sleight of hand is untenable. To be clear: Costs incurred by an insured after a loss to repair or replace damaged property are not "insurance" costs; they are repair costs. Likewise, if a condominium association assesses unit owners after a loss to raise funds to pay for the repair or replacement of damaged condominium property, the unit owners are not contributing to the purchase of "insurance"; they are contributing to the cost of repairs. Thus, although the Division's use of the term "deductible" to signify nonreimbursable "costs of repair" is defensible, if imprecise, its designation of repair costs as "insurance" costs is not.

33. Using this nomenclatural substitution ("cost of *insurance*" in place of "cost of *repair*"), the Division would covertly transform the statutory duty to obtain insurance into an assumed duty to make repairs. The two duties are logically distinct, however, and while not mutually exclusive, they are not necessarily joint, either. That is, consistent with reason and logic, one can be required (by law or contract), to purchase insurance for a particular loss without also being obligated personally to incur the costs of repair or replacement in the event of such a loss. Likewise, consistent with reason and logic, one can be required (by law or contract) to make repairs to damaged property without also being obligated to purchase

property insurance. Finally, one whose duty it is (by law or contract) to repair or replace certain property can also be required (by law or contract), consistent with reason and logic, to obtain insurance covering such property. Because it is undisputed that the Association in fact fulfilled the statutory obligation to obtain insurance, the issue on which the parties should have focused is whether, in refusing to replace the screens surrounding the Ginns' balcony, the Association violated a duty to repair Limited Common Elements.^v

34. With these thoughts in mind, we turn, finally, to the relevant statutes, starting with Section 718.111(11), Florida Statutes, which provides as follows:

(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 (a), (b), and (c) are deemed to apply to every residential 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 operating a residential condominium 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).

. . . 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 based upon available funds or predetermined assessment authority at the time that the insurance is obtained.

* * *

2. 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 the applicable provisions of ss. 624.460-624.488, which shall be considered adequate insurance for the purposes of this section. 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.

(Emphasis added.)

35. Several points regarding Section 718.111(11) are worth emphasizing. First, the insuring responsibility imposed on each unit-owner controlled association is to obtain and maintain adequate insurance, nothing more, nothing less. Second, the stated purpose of the insurance which the association must obtain and maintain is to protect the association and (in short) the common elements of the condominium project—not the real and personal property located within the boundaries of each individual unit, which latter must be insured by the respective unit owners. Third, the law explicitly permits the requisite insurance coverage to be subject to reasonable deductibles, which means the legislature clearly knew that, in the event of a covered loss, an association might not necessarily receive from its insurer 100 percent indemnification for the loss, even though its coverage was "adequate."

36. Significantly, Section 718.111(11), Florida Statutes, does not say that the association must pay for the repair or replacement of damaged property (or reimburse a unit owner for making such repairs) up to the amount of any applicable deductible. (This is, admittedly, a restatement of the first point in the preceding paragraph, but its importance is such that it bears repeating.) That this section is silent as to the respective repair responsibilities (as opposed to the insuring responsibilities) of the association, on the one hand, and the unit owners, on the other, should come as no surprise, however, because the subject of maintenance and repairs is addressed elsewhere in the Act.

37. Section 718.113, Florida Statutes, provides in pertinent part as follows:

(1) Maintenance of the common elements is the responsibility of the association. The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association shall provide the maintenance, either as a common expense or with the cost shared only by those entitled to use the limited common elements. If the maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in detail the method of apportioning such costs among those entitled to use the limited common elements, and the association may use the provisions of s. 718.116 to enforce payment of the shares of such costs by the unit owners entitled to use the limited common elements.

38. The foregoing section is crucial to the resolution of this case. Under Section 718.113, an association clearly does have the duty to maintain the "common elements," i.e. "the portions of the condominium property not included in the units." See § 718.103(8), Fla. Stat. Thus, if property belonging to the "common elements" is damaged in, say, a hurricane, then the association must undertake to restore that property to a state of proper repair, and the cost of doing so will be a "common expense."^{vi} See § 718.115(1)(a), Fla. Stat. ("Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, [as well as, among other things, the] costs of carrying out the powers and duties of the association[.]"). To the extent insurance proceeds are not available to defray the cost of such repair work, whether because of deductibles, exclusions, or otherwise, the association must raise funds for payment of necessary repairs "by assessments against the units in that condominium in the proportions or percentages provided in that condominium's declaration." See § 718.115(2), Fla. Stat. Note, however, that in this situation it is the repair cost, not the deductible, which is the "common expense."

39. Unlike the association's duty to maintain the "common elements," which is mandatory, the duty to maintain "limited common elements," i.e. "those common elements which are reserved for the use of a certain unit or units to the exclusion of all other units," § 718.103(19), Fla. Stat., can be assigned, in the declaration, either (a) to the association or (b) to the unit owner(s) entitled to use the "limited common elements" in question. If the association is assigned the duty to maintain the "limited common elements," then the costs of fulfilling that duty can be treated (pursuant to the declaration) either as (1) common expenses or (2) expenses payable only by the unit owner(s) entitled to use the "limited common elements" in question. Obviously, if the declaration assigns to various unit owners the responsibility for maintaining and repairing "limited common elements," then the association need not incur, as "common expenses" or any other kind of expense, the costs of repairing or replacing such "limited common elements" in the event a hurricane or other casualty causes damage to them. *This is true, even though the association is required, under Section 718.111(11), to obtain and maintain insurance covering the "limited common elements."*

40. To recapitulate, then, if property belonging to the "limited common elements" is damaged in a hurricane, the association will be obligated to restore that property to a

state of proper repair only if the declaration so provides. If the declaration places the repair obligation on a particular owner or owners, then they—rather than the association or the unit owners as a whole—will be required to make, or arrange and pay for, any necessary repairs, whether insurance proceeds are available or not—even though the association is required, under Section 718.111(11), to obtain and maintain insurance covering the "limited common elements."^{vii} This is clearly spelled out in Section 718.113(1), and nothing in Section 718.111(11) is to the contrary.

41. If the association has a duty, pursuant to the declaration, to maintain the "limited common elements," then it must arrange and pay for necessary repairs in the wake of a hurricane or other casualty, regardless of whether any insurance money might be available to cover the cost, in whole or in part. The repair cost will be a "common expense" chargeable to all unit owners in proportionate shares, however, only if the declaration so provides.^{viii} If the declaration specifies that the cost of maintaining the "limited common elements" shall be paid by a particular owner or owners, then they—not the association or the unit owners collectively—will be responsible for paying the cost of any necessary repairs, out of their own pockets if need be, even though the association is required, under Section 718.111(11), to obtain and maintain insurance

covering the "limited common elements." This, again, is clearly spelled out in Section 718.113(1), and nothing in Section 718.111(11) is to the contrary.

42. In sum, the fact—which is a given—that the association is required under Section 718.111(11) to obtain insurance covering the "limited common elements," is not determinative of whether the association has a duty, under Section 718.113(1), to maintain the "limited common elements," without which duty the cost of repairing the "limited common elements" will not be a "common expense." Ultimately, as Section 718.113(1) unambiguously provides, it is the declaration that assigns the duty to repair "limited common elements" and, even more important to this case, specifies whether the cost of repairing or replacing "limited common elements" constitutes a "common expense" payable by all the unit owners in proportionate shares, or, rather, a personal expense that must be borne by a particular owner or owners.

43. The applicable Declaration addresses the subject of "maintenance and repairs" in Section 7, which provides as follows:

7.1 Units. All maintenance, repairs and replacements of, in or to any Unit and Limited Common Elements appurtenant thereto (except for parking spaces), whether structural or nonstructural, ordinary or extraordinary, including, without limitation, maintenance, repair and

replacement of screens, windows, the interior side of the entrance door and all other doors within or affording access to a Unit, and the electrical (including wiring), plumbing (including fixtures and connections), heating and air-conditioning equipment, fixtures and outlets, appliances, carpets and other floor coverings, all interior surfaces and the entire interior of the Unit or the Limited Common Elements (except for parking spaces) or other property belonging to the Unit Owner, shall be performed by the Owner of such Unit at the Owner's sole cost and expense, *except as otherwise expressly provided to the contrary herein.*

7.2 Common Elements. Except to the extent (i) expressly to the contrary provided herein, or (ii) proceeds of insurance are made available therefor, all maintenance, repairs and replacements in or to the Common Elements (other than certain Limited Common Elements as provided above) shall be performed by the Association and the cost and expense thereof shall be charged to all Unit Owners as a Common Expense, except to the extent arising from or necessitated by the negligence, misuse or neglect of specific Unit Owners, in which case such cost and expense shall be paid solely by such Unit Owners.

7.3 Specific Unit Owner Responsibility. The obligation to maintain and repair any equipment, fixtures or other items of property which service a particular Unit or Units shall be the responsibility of the applicable Unit Owners, individually, and not the Association, without regard to whether such items are included within the boundaries of the Units, are Limited Common Elements or are Common Elements other than Limited Common Elements.

(Emphasis added.)

44. The Declaration defines "Limited Common Elements" as follows:

2.6 "Limited Common Elements" mean those Common Elements the use of which is reserved to a certain Unit or Units to the exclusion of other Units, as specified in this Declaration. Reference herein to Common Elements shall include all Limited Common Elements unless the context would prohibit or it is otherwise expressly provided.

Concerning the Limited Common Elements, the Declaration further provides:

3.3 Limited Common Elements. Each Unit may have, to the extent applicable and subject to the provisions of the Declaration, as Limited Common Elements appurtenant thereto:

(a) Patios, Balconies and Terraces. Any patio (and all improvements thereto) which is fenced-in and as to which direct and exclusive access shall be afforded to any particular Unit or Units shall be a Limited Common Element of such Unit(s). Balconies and terraces shall be Limited Common Elements of those Units having direct and exclusive access thereto.

(b) Miscellaneous Areas, Equipment. Any equipment or fixtures (including heating and air-conditioning rooms and equipment in such rooms or otherwise serving one Unit) which are for the exclusive use of any particular Unit or Units shall be Limited Common Elements of such Unit(s).

45. What the above provisions make unambiguously clear is that the owners of the Condominium have chosen to place the duty of maintaining Limited Common Elements such as balcony screens squarely on the respective owners entitled to use them

exclusively, rather than the Association—a choice plainly authorized under Section 718.13(1), Florida Statutes. This general duty is limited only "as otherwise expressly provided to the contrary" in the Declaration.

46. All agree that the damaged screens at issue were part of the Condominium's Limited Common Elements. The Association contends that, because the affected screens were appurtenant to the Ginns' unit, the Ginns were obligated, pursuant to Section 7.1, to repair or replace the screens at their sole cost and expense. The Division concedes that the Ginns had a "general duty to maintain and repair their balcony screens." It argues, however, that the Declaration specifically provides otherwise with regard to the duty to repair following a major catastrophe such as a hurricane, citing Section 14.2, which provides in pertinent part as follows:

14.2 Coverage. The Association shall maintain insurance covering the following:

(a) Casualty. The Building . . . and all Improvements located on the Common Elements from time to time, together with all fixtures, building service equipment, personal property and supplies constituting the Common Elements or owned by the Association (collectively the "Insured Property"), shall be insured in an amount not less than 100% of the full insurable replacement value thereof, excluding foundation and excavation costs. Such policies may contain reasonable deductible provisions as determined by the Board of

Directors of the Association. Such coverage shall afford protection against:

(i) Loss or Damage by Fire and Other Hazards covered by standard extended coverage endorsement; and

(ii) Such Other Risks as from time to time are customarily covered with respect to buildings and improvements similar to the Insured Property in construction, location and use, including, but not limited to, vandalism and malicious mischief.

47. The Division's reliance on Section 14.2 as the controlling factor in determining the duty to repair following a hurricane or other casualty is misplaced. Section 14.2 obligates the Association to maintain insurance, nothing more and nothing less. Section 14.2 thus mirrors Section 718.111(11), Florida Statutes. The provisions of Section 14.2 (duty to maintain insurance) are not in any way "expressly . . . to the contrary" of Section 7.1 (duty to repair Limited Common Elements); therefore, Section 14.2 does not limit the duty to repair imposed on unit owners under Section 7.1. It is undisputed, moreover, that the Association fulfilled its duty to obtain and maintain insurance coverage pursuant to Section 14.2 of the Declaration and Section 718.111(11), Florida Statutes.

48. But demonstrating that the Division's argument concerning Section 7.1 is wrong does not necessarily prove the Association's reliance on that Section is right. As it happens, neither party has referred to Section 15 of the Declaration,

whose title, "Reconstruction or Repair After Fire or Other Casualty," denotes its particular relevance. This overlooked Section provides, in pertinent part, as follows:

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

* * *

Whenever in this Section the words "promptly repair" are used, it shall mean that repairs are to begin not more than sixty (60) days from the date the Insurance Trustee (if appointed) notifies the Board of Directors and Unit Owners that it holds proceeds of insurance on account of such damage or destruction sufficient to pay the estimated cost of such work, or not more than ninety (90) days after the Insurance Trustee (if appointed) notifies the Board of Directors and the Unit Owners that such proceeds of insurance are insufficient to pay the estimated costs of such work.

49. The plain language of Section 15.1 (unlike that of Section 14.2) does "expressly provide to the contrary" of Section 7.1 with regard to the repair of Limited Common Elements damaged as a result of fire or other casualty, e.g. hurricane. This is because the Limited Common Elements (as a subset of the

Common Elements) clearly fall within the definition of Insured Property as set forth in Section 14.2(a) of the Declaration. Section 15.1 expressly requires the Association (through its Board of Directors) to repair and restore Insured Property (including Limited Common Elements) damaged by fire or other casualty. Thus, whereas the responsibility for maintaining and repairing Limited Common Elements falls generally on the unit owner(s) exclusively entitled to use such Limited Common Elements, in those specific instances where the Limited Common Elements are damaged by fire or other casualty, the Association must repair them pursuant to Section 15.1, the provisions of Section 7.1 to the contrary notwithstanding.

50. That said, due process demands that, before any remedial administrative action could be taken against the Association for breaching a contractual duty to repair (and the undersigned is not finding, concluding, or suggesting that it did), the Association would need to be notified of the alleged offense, through an appropriate accusatory instrument (such as a Notice to Show Cause), which notice is essential to affording a fair opportunity to defend against the charge. See, e.g., Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39

(Fla. 2d DCA 1993); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991). The Division did not charge the Association with breaching a duty to repair under Section 15.1 of the Declaration. Therefore, it is unnecessary—and would be inappropriate in this proceeding—for the undersigned or the Division to conclude that the Association was obligated under Section 15.1 of the Declaration to repair the screens appurtenant to the Ginns' unit.

51. Absent an authoritative determination that Section 15.1 of the Declaration obligated the Association to repair the screens in question, which cannot be made in this case, it is impossible to conclude herein that the cost of replacing those screens constituted a common expense. That being the case, the Association cannot be found guilty, in this proceeding, of failing to make proportionate-share assessments, pursuant to Section 718.115(2), Florida Statutes, to collect funds for replacing the screens at Unit No. 201.

52. There is one matter left to address, namely whether the Division is attempting to determine the Association's interests based on a rule-by-definition (or unadopted rule). The Association, recall, contends that the Division's policy,

which holds that the "cost of a deductible" is an "insurance cost" and hence a common expense that must be borne by all unit owners in proportionate shares, is an unadopted rule. The Association relies on Section 120.57(1)(e), Florida Statutes, which provides as follows:

- (e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.
- 2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:
 - a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;
 - b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
 - c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
 - d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
 - e. Is not being applied to the substantially affected party without due notice; and
 - f. Does not impose excessive regulatory costs on the regulated person, county, or city.
- 3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such

determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

The Division denies that its policy constitutes a rule-by-definition, asserting that its statement "adds nothing" to the statute, but merely applies the plain language of the present law.

53. The undersigned cannot agree with the Division. In the guise of "applying" Section 718.111(11), Florida Statutes, the Division would write a new law. To really appreciate what the Division is attempting to do requires that the Plaza East Declaration be revisited, for that order reflects the Division's policy in full.

54. In the declaratory statement, which was sought by a condominium association, the Division framed the issue presented as follows:

[Whether an association, which is required to insure condominium property under Section 718.111(11), Florida Statutes,] may pass on to the unit owner the cost of repairing those items that would otherwise have been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the

coverage limits, notwithstanding provisions in the declaration defining the condominium property as part of a unit with the cost of repairs to be paid for by the unit owner.

Plaza East Declaration at 1 (emphasis added). Right away, in the declaration, the Division's confusion of the association's statutory duty to obtain and maintain insurance (which the Division sometimes imprecisely calls a duty to insure) with an assumed duty to repair is evident. This confusion continues throughout the order (as here), muddying the Division's reasoning in the Plaza East Declaration, and in this case as well.

55. For instance, in the Plaza East Declaration's Findings of Fact, the Division states, as fact, that "Article VIII [of the applicable declaration] makes the association responsible for all matters relating to insurance and reconstruction and repair." Id. at 4 n.2 (emphasis added). Later, in the Conclusions of Law, the Division returns to this point, declaring: "Because article VIII(E) of the declaration makes the association responsible for paying for repairs for the damage covered by the insurance[,] and it . . . incorporates the statutory language in . . . section 718.111(11), Florida Statutes, [article VIII(E)] applies to the question raised." Id. at 15 (emphasis added).

56. If this were true, then there should have been no controversy over whether the repair costs would be common expenses. This is because, if the association were obligated, under the declaration, to pay for all repairs necessitated by a casualty covered under the association's property insurance policy, then the cost of such repairs plainly would be a common expense payable by the unit owners in proportionate shares (to the extent the insurance proceeds, if any, were insufficient), not because a deductible is a "cost of insurance," but because the association had a duty to repair, and the costs of carrying out the association's duties are common expenses. See § 718.115(1)(a), Fla. Stat. Consequently, if the subject declaration required the association to repair hurricane-damaged property, the Division could have (and should have) decided the question presented on that basis alone, without bringing the subject of insuring responsibilities (which were irrelevant if the declaration imposed a duty to repair on the association) into the discussion.

57. Examination of Article VIII (as it is quoted in the Plaza East Declaration) reveals, however, that this provision did not clearly obligate the association to repair damaged property; rather, Article VIII dealt with distribution of insurance proceeds, which is another matter entirely. Certainly the association did not believe that Article VIII imposed on it

a duty to repair, for the association maintained that "unit owners [were required] to maintain, repair and replace the unit's windows, doors and screened enclosures," id. at 4, which point the Division seemed to accept in framing the issue presented for determination. Yet, despite the absence of express textual support, the Division came to the conclusion that the association's insurance-related responsibilities under Article VIII were tantamount to duty to repair. This is the same mistake the Division makes when reading Section 718.111(11), Florida Statutes.

58. According to the Division, Section 718.111(11) reflects "the legislature's intent to clearly apportion the responsibility for the cost of insuring and replacing those components damaged by a hurricane." Id. at 15 (emphasis added). Similarly, the Division believes that "if the damage is caused by an insurable event, the cost of repairs is covered by section 718.111(11), Florida Statutes (2003), which controls over any provision to the contrary in a declaration of condominium." Id. at 7 (emphasis added).

59. Contrary to these statements, Section 718.111(11) is silent as to who is responsible for paying the costs of repairing or replacing property damaged by a hurricane or other casualty. In fact, by its plain terms, the statute merely strives to "establish the property or casualty insuring

responsibilities of the association and those of the individual unit owner" § 718.111(11)(b), Fla. Stat. (emphasis added). The Division's understanding of the statute as imposing a duty to repair on condominium associations is clearly erroneous.

60. Unfortunately, the Division did not explain in the Plaza East Declaration, nor has it explicated here, its rationale for equating the statutory duty "to obtain and maintain adequate insurance to protect" condominium property with a duty to repair condominium property damaged by a covered casualty.^x Nevertheless, it is clear the Division has adopted as a first principle—because its stated policy presupposes as true—the proposition that an association is legally obligated to repair any property for which it is legally obligated to purchase insurance, at least where the cause of the property damage is a covered occurrence.

61. There is little question that this underlying principle drives the Division to state that the "cost of a deductible" (by which it means, as revealed in the Plaza East Declaration's statement of the issue, the cost of repairing property that would have been paid by an insurer but for the applicability of a deductible) is a "cost of insurance." Once the foundational principle is brought to light, it becomes possible to see why the Division perceives no material

difference between (a) the cost of obtaining insurance and (b) the cost of repairing property covered by that insurance: It is because the Division views the duty to buy insurance as conterminous with the duty to pay for repairs. Collapsing the two duties into one enables the Division to think of repair costs as insurance costs, even though few people, if any, engaging in real-world transactions would regard the purchase of replacement property to be the same as buying insurance coverage, or consider the cost of the former purchase a "cost of insurance."

62. Section 120.52(15), Florida Statutes, defines the term "rule" to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."

63. A statement is a rule if it has the effect of a rule regardless whether the agency calls it a rule. In determining whether a statement meets the statutory definition of a rule, the important question is: What consequences does this statement cause within its field of operation? As the Court of Appeal, First District, explained, the

breadth of the definition in Section 120.52(1[5]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [State Department of Administration v.] Stevens, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

State Department of Administration v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); see also Amos v. Department of Health and Rehabilitative Services, 444 So. 2d 43, 46 (Fla. 1st DCA 1983). Because the focus is on effect rather than form, a statement need not be in writing to be a rule-by-definition. See Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997).

64. Given the circumstances of this case, it is instructive to emphasize that the definition of "rule" expressly includes statements of general applicability that implement or interpret law. An agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule. See Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19,

22 (Fla. 1st DCA 1990); St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

65. A statement that purports to impose on every unit-owner controlled residential condominium association a duty to repair condominium property damaged by an insurable casualty is a statement of "general applicability" under any reasonable understanding of that phrase.^{xi} Moreover, such a statement unquestionably creates rights, requires compliance, and has the effect of law. Therefore, the Division's underlying policy, that an association is legally obligated to repair any property for which it is legally obligated to purchase insurance, at least where the cause of the property damage is a covered occurrence, is a rule-by-definition.

66. More important, so too, as the Association alleges, is the Division's explicit statement that the "cost of a deductible" is a "cost of insurance" and thus a common expense for which proportionate-share assessments must be made. Again, this is clearly a statement of general applicability, as the Division's expert witness admitted. It also gives a meaning to Section 718.111(11), Florida Statutes, which is not readily apparent on the face of the statute—indeed is not there at all, as the Division's expert witness admitted as well. Whatever the merits of a policy that requires condominium associations always

to expend common funds in payment of repairs until satisfying an insurance deductible, it is plainly a law-like prescription which the legislature has not seen fit to enact.

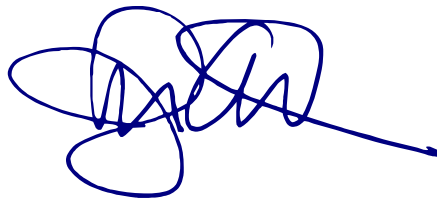
67. The Division's policy of equating deductibles with repair costs and deeming them "insurance costs" that must be treated as common expenses modifies and enlarges Section 718.111(11), Florida Statutes, adding a new duty (the duty to repair) to the present statutory duty to obtain and maintain insurance. Further, to the extent this new duty would require associations to repair limited common elements (which it does, according to the Division), the Division's "deductible = cost of insurance = common expense" statement (which necessarily assumes the existence of the repair duty) contravenes Section 718.113(1)(a). This is because Section 718.113(1)(a) authorizes unit owners to relieve the association of the responsibility of paying for—and even of undertaking—repairs to the limited common elements, if they choose. The Division's policy purports to deny unit owners this statutory right.

68. It is concluded, pursuant to Section 120.57(1)(e), Florida Statutes, that the Division cannot lawfully determine the Association's substantial interests based on the policy, which is an unadopted rule, that the "cost of a deductible" is an "insurance" cost and hence a common expense.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order rescinding the Notice to Show Cause and exonerating the Association of the charge of failing to assess unit owners, in proportionate shares, to pay the cost of repairing or replacing Limited Common Elements damaged during Hurricane Wilma.

DONE AND ENTERED this 10th day of January, 2008, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2008.

ENDNOTES

^{i/} The Ginns mistakenly identified the year as "2005." They obviously meant "2006" because the damage in question occurred on October 24, 2005.

ⁱⁱ/ In the check made out to Rainguard Inc., Mrs. Ginns authorized payment of "\$1,200.00" but described this sum as "Eleven hundred and no/100 dollars."

ⁱⁱⁱ/ When asked in deposition for his opinion on whether the deductible is a "cost of insurance," the Division's insurance expert refused to own this premise, offering instead his (uncontroversial) view that "the deductible is a part of the insurance purchase decision." Deposition of James T. Harrison, Jr. (11/19/07) at 8; see also Deposition of James T. Harrison, Jr. (10/29/07) at 20 (quoted supra in the text at ¶ 14, p. 10). Mr. Harrison explained that higher deductibles generally result in lower premiums—a point that, unlike the Division's *fourth* premise, probably is axiomatic. The bottom line, according to Mr. Harrison, is that the deductible amount is a factor that affects the cost of insurance. That proposition, however, is a truism, which differs substantially in meaning from the Division's pronouncement that the deductible is a cost of insurance.

^{iv}/ The term commonly used in reference to the cost of insurance is "premium."

^v/ In the Notice to Show Cause, the Division alleged that the Association had failed "to reimburse [the Ginns] for damage sustained by Hurricane Wilma to their wrap-a-round screens." The undersigned assumes that the Division believes the Association itself should have undertaken the repair or replacement of the screens in question (since the screens, as part of the Common Elements, were not really the Ginns' screens, but the condominium's), and that, when the Association refused to do so, the Ginns were justified (the Division evidently thinks) in arranging for the work to be done, at their expense, while reserving the right to seek reimbursement from the Association. Thus, when the Division demands that the Association reimburse the Ginns \$1,200 for this repair work, the undersigned assumes that the Division views this as a payback to the Ginns, akin to damages in a civil suit, for having discharged a duty to repair that, according to the Division, properly belonged to—and was breached by—the Association.

It should be noted, however, that the Division has not been clear on this point. It is possible the Division is demanding that the Association reimburse the Ginns, not because the Ginns performed the Association's duty to repair following the Association's breach thereof, but because the Association owed

the Ginns a duty to indemnify against damage to "their" balcony screens. This theory has many problems, though. First, this theory presupposes that the balcony screens belong to the Ginns, when in fact they do not; they are part of the Common Elements and hence "belong" to the condominium community. Second, this theory effectively makes the Association the Ginns' insurer pursuant to an imagined insurance policy that has no deductible (because the Association's duty apparently is to indemnify the Ginns for every penny of their out-of-pocket expense) and whose "premium" (otherwise known as the Nutmeg "deductible," which the Division calls a "cost of insurance") must be paid, not by the Ginns, but by all the unit owners in proportionate shares. There is simply no statutory warrant for such an unusual arrangement. Third, under this theory, the "premium"/"deductible"/"cost of insurance" for which proportionate-share assessments must be made is payable only after a loss; thus, it is not really a premium for insurance, but the pass-through cost of repairing the screens.

In practical effect, this "duty to indemnify" would be nearly indistinguishable from a duty to repair, except that if the Association's duty were merely to indemnify (as opposed to repair), then the Ginns (rather than the Association) presumably would have had the right, at all times, to exercise control over the repair work, even before the Association expressly declined to get involved. The undersigned assumes that the Division is not pressing a duty-to-indemnify theory, given its obvious flaws, but the outcome would be the same if the Division were espousing such a theory because, at bottom, a duty to indemnify is as distinct from a duty to obtain insurance as is a duty to repair.

^{vi}/ As commonly used and understood, the term "maintenance" encompasses repairs. See, e.g., Indiana Ins. Co. v. Winston, 377 So. 2d 718, 720 (Fla. 4th DCA 1979) ("Maintenance" means "the labor of keeping something in a state of repair or efficiency" and hence includes the installation of an air scoop on the hood of an automobile); cf. Serchay v. NTS Fort Lauderdale Joint Venture, 657 So. 2d 57, 58 (Fla. 4th DCA 1995) (disputed issues of fact precluded summary judgment on tenant's claim that landlord breached duty to maintain common areas by failing "to repair common area toilet, air conditioning, and leak problems"). Florida law in this regard is in line with longstanding precedent in many jurisdictions. Representative is the Supreme Court of Pennsylvania's influential definition of "maintenance," which follows:

To maintain means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse or cessation from that state or condition. See *City of New York v. Dry Dock, etc.*, 240 N.Y.S. 744, 746; *E.E. Kelly & Co. v. United States*, 17 Ct. of Cust. and Pat. App. 30, 32; cf. *Steir v. London Guarantee & Accident Co.*, 237 N.Y.S. 40, 41, affirmed 173 N.E. 873; see also *P.R.R. Co. v. Pa. Ohio Elec. Co.*, 296 Pa. 40, 45. In a wide variety of situations the word "maintain" has been taken to be synonymous with "repair." See 2 *Words & Phrases* (4th ed.) 610, and prior editions. This is the usual meaning, the dictionary meaning, and the meaning which must control in the absence of a clear expression of a contrary intention: *Restatement of Contracts*, section 235 (a). Here the act which gave rise to the injury for which a judgment was recovered took place while an employee of the assured was in the act of repairing an essential part of the car and, under the circumstances, was expressly within the term of the policy specified as "maintenance."

Morris v. American Liability & Surety Co., 185 A. 201, 202 (Pa. 1936). Giving effect to the plain meaning of the statute, the undersigned concludes that "maintenance," as used in § 718.113(1), Fla. Stat., includes repair work necessitated by a hurricane or other casualty. In this Recommended Order, therefore, the terms "duty to maintain" and "duty to repair" are synonymous and used interchangeably.

vii/ A unit owner who is responsible for repairing some "limited common elements" might be entitled to receive insurance proceeds payable under the policy obtained by the association pursuant to § 718.111(11), Fla. Stat. His duty to repair subsists, however, independent of the availability of insurance.

viii/ A proportionate-share assessment would be necessary, of course, only to the extent insurance proceeds were unavailable to cover the cost of such repair work.

^{ix/} "Optional Property," as defined in Section 14.5(b), includes only property that is not Insured Property. In other words, Insured Property and Optional Property are mutually exclusive categories. Because the screens at issue were in the set of Insured Property, they could not possibly be deemed Optional Property.

^{x/} In a paragraph that might give insight into the Division's thinking in this regard, the Division wrote:

[1] The owners with the damaged units paid their proportionate share of the insurance to replace those windows [that were damaged by a hurricane] in the first instance. [2] The association manages the insurance claims and proceeds as the agent for these owners under article VIII of the declaration. It must do so with reasonable care since the unit owners are prohibited from filing a claim under the association's policy. [Citations omitted.] [3] Furthermore, under section 718.111(11), Florida Statutes, unit owners are no longer able to insure the structural components of the building, which includes [sic] the windows and doors. 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.

Plaza East Declaration at 16-17. The problem here is that the premises of the Division's argument are either inaccurate or irrelevant; thus, the argument ultimately is incapable of persuading.

The first point (about the owners having paid already for insurance to replace the damaged property) overlooks the fact that there was no coverage available under the association's policy for losses within the deductible. That is, to the extent of the deductible, the risk of loss remained with the property owners or other parties having a duty to repair and was not transferred to the insurer. The premium that the unit owners paid (in proportionate shares) was lower than it would have been without the deductible precisely because the insurance purchased

would not pay for the replacement of windows (or anything else) until the deductible had been satisfied. Accordingly, where the replacement cost is less than the deductible (as was true for purposes of the Plaza East Declaration), it is wrong to say that the owners paid for insurance to replace the damaged property, for in fact they did not.

The next point regarding the association's obligation to manage insurance claims made under the association's policy might be true as far as it goes—but it does not follow logically therefrom that the association must also bear the costs of repair. Obviously, one can make an insurance claim as the agent for another, and be responsible for distributing any insurance proceeds obtained, without also being personally responsible for paying to remedy the loss.

The third assertion, that unit owners are "no longer able" to purchase insurance for the property falling within the association's insuring responsibility, is belied by Section 718.111(11)(c), Fla. Stat., which provides that any insurance a unit owner purchases shall be "excess over the amount recoverable under any other policy covering the same property." In other words, contrary to the Division's assertion, a unit owner can buy insurance covering, e.g., the windows, doors, and other structural components; his coverage, however, will be excess above the proceeds that can be collected from another insurer.

^{xi}/ To be generally applicable, a statement need not apply universally to every person within the agency's jurisdiction but rather uniformly to a class of persons over whom the agency properly may exercise authority. See, e.g., Disability Support Services, Inc. v. Department of Children and Families, DOAH Case No. 97-5104RU, 1997 Fla. Div. Adm. Hear. LEXIS 5331, *11 (Fla.Div.Admin.Hrgs. June 4, 1997).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.