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

IN RE PETITION FOR DECLARATORY STATEMENT
Docket No. 2006027924

COSTA DEL SOL ASSOCIATION, INC.

DECLARATORY STATEMENT DS 2006-024

Costa del Sol Association, Inc. (Costa del Sol), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Costa del Sol Association, Inc. is required to insure the screen enclosures, trellises and Jacuzzis on the patios and balconies, which are attached to or a part of certain units, under section 718.111(11)(a), Florida Statutes (2006). The Division finds that Costa del Sol is required to do so.

PRELIMINARY STATEMENT

On May 23, 2006, the Division received a petition for declaratory statement from Costa del Sol. On September 22, 2006, the association supplemented its petition with additional information and clarified some of the factual statements. Juan M. Fernandez (Fernandez), a member of the board and representative for Condominium E, filed a response to the petition on May 23, 2006. Olga Marlene Batista (Batista), a unit owner and a board member for Condominium A filed a response on September 20, 2006.

Notice of receipt of the petition was published in Florida Administrative Weekly on June 9, 2006. A hearing was not requested or held.

FINDINGS OF FACT

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

I. General Facts.

1. Costa del Sol is a multicondominium association that operates 28 condominiums consisting of 768 units located in Miami-Dade County, Florida.

2. Juan M. Fernandez is a unit owner of Condominium E and a board member of Costa del Sol.

3. Olga Marlene Batista is a unit owner and a board member representing Condominium A.

4. Costa del Sol is comprised of condominiums "Costa Del Sol A" through "Costa Del Sol W", consecutively, "Costa Del Sol 1" through "Costa Del Sol 4", consecutively, and "Costa Del Sol Cluster A."

5. The declarations of condominium for 1 through 4 were recorded in the public records in 1974. Declarations A through W and Cluster A were recorded at various intervals between 1981 and 1990.

6. Costa del Sol provided excerpts from the declarations of condominium for each of the condominiums in the association and complete current copies of the governing documents for Costa del Sol A, C, 1 and Cluster A. Based on the information provided, each of the declarations adopt the

Condominium Act for the year in which the declaration is recorded without adopting any future amendments to the act.

7. Costa del Sol also provided copies of its insurance contracts for the years covering 2005 and 2006. The contracts are for a period from May 1 to May 1.

8. Following a lawsuit brought in 1981 that resolved that Costa del Sol was the association that controls the project, an amendment to all of the declarations was recorded in 1993. Only certain provisions were amended. The insurance and reconstruction after casualty provisions were not amended. However, the amendments clarified that unit owners within each condominium were responsible for the common expenses of their condominium and that the unit owners were also responsible for a proportionate share of the common expenses of the multicondominium association. Amends. Declarations (1993) (see § 12 designating manner of assessing common expenses).

9. Many of the screen enclosures were damaged in the 2005 hurricanes. The association has received conflicting reports from unit owner insurance carriers and its own insurance carrier as to the responsibility for damages to the screen enclosures and the unit owner improvements installed on the patios and balconies.

10. Fernandez asserts that since 1984 when he purchased his unit in Condominium E, the unit owners were obligated to maintain the optional screen enclosures. He asserts that many enclosures were damaged because the unit owners failed to properly maintain them. He also asserts that some unit owners

have been reimbursed by their insurance companies for the damage to the screen enclosures, so having to assess all unit owners for the repairs caused by the hurricane would not be fair as it would penalize those unit owners who properly prepared for the hurricane by insuring the enclosures and maintaining them in good condition by paying for the repairs to the enclosures to those owners, who in his opinion, did not.

11. Batista estimates a cost of $1,360,000 if the association assumes financial responsibility for unit owner installed screen enclosures. Batista asserts that the increased cost will affect property values, pose a financial hardship on unit owners, and be contrary to the intent of the legislature.

II. Improvements.

12. The association has authorized unit owner improvements to the patios and balconies in the community, including trellises, Jacuzzis, and screen enclosures.

A. Trellises.

13. The association provided photographs showing trellises for each type of condominium unit. Supp. Petition, exhibits 4-13. The trellises are architectural elements. They are an open crosshatch of beams, which are attached to the outside walls or roof fascia board of the building and the center line of patio walls.

B. Jacuzzis.

14. The association provided photographs of Jacuzzis for each type of condominium. Supp. Petition, exhibits 14-19. All the Jacuzzis photographed are

in-ground installations. None are freestanding. None are placed on top of a patio floor with a plug that could be plugged into a wall outlet. The association states that these Jacuzzis "may have been built by the developers of those units" and would then have been initially installed when the condominium was built. The Jacuzzis appear to be affixed to the common element plumbing and electrical wiring.

C. Screen Enclosures.

15. The association provided photographs of the types of screen enclosures for units in Condominiums A through W, 1 through 4, and Cluster A. Supp. Petition, exhibits 1-3. The photographs for Condominiums A through W for a single-story unit and a two-story townhome unit shows that the framing for the screen attaches to the roof fascia board of the building and bows out and down to attach to the center of the wall of the patio connecting the unit to the units on either side. Supp. Pet. exhibits 1-2. The patio wall is below the height of the sliding glass doors and extends out to the common area grass. No dimensions were provided.

16. The screen enclosures for Condominiums 1 through 4 and Cluster A type unit shows the screen enclosure framing attached to the roof, the inside of the patio walls and the center line of the outside patio wall, which is a short perpendicular extension of a few feet on either side toward the center of the patio where the patio meets the grass area. The side walls are L shapes that bracket the patio with the bottom of the L facing each other like brackets "[ ]." The

outside extension or bottom of the L is about the height of a chair while the side walls are at roof height and run as dividing walls between unit patios.

17. For all but condominiums 1 through 4, the screen enclosures were developer upgrades to the units when sold or later approved by the board on request of the unit owner. For condominiums 1 through 4, the screen enclosures were developer upgrades to units, were initially installed prior to purchase, and were not unit owner installed.

III. Condominium Declarations.

A. Condominiums A, B and K.

18. Costa del Sol states that declarations A, B and K contain the same boundary description for the units. The upper and lower boundaries of the unit are the unfinished interior of the ceiling and floor slab, including any part of a rise (vertical section) for a raised ceiling or floor in a room in the unit. Pet. ex. A, § 3.2 Declaration of Costa del Sol Condominium "A", at 4-5. The vertical boundaries are the unfinished interior of the walls and the intersections where the walls meet the floor and ceiling boundaries. Id. § 3.2 at 5. Windows and sliding glass doors are part of the vertical boundary walls. Id. The window and door screens are part of the vertical boundary wall.[1] Id.

19. The limited common elements for condominiums A, B and K are defined as "[a]ny patio, terrace or yard which is enclosed on at least three sides

[1] Section 3.2 provides: "when the vertical planes of the unfinished interior of the bounding walls do not intersect with each other on the unfinished interior surfaces of the bounding walls or within an intervening partition, the vertical planes of the unfinished interior surfaces of bounding walls shall be extended to intersect with the plane of the center line of the intervening partition and that plane of the center line of the intervening partition and that plane shall be one of the perimetrical boundaries of the Unit. (If a screen forms the perimetrical boundary of the Unit, then said screen

and as to which direct and exclusive access shall be afforded to any particular Unit." Pet. ex. A, § 3.3, at 5. The patio side-walls divide the patios from each other, are below the height of the sliding glass door, and extend to the end of the patio to the common element grass area.

20. The framing for the screen attaches to the roof fascia board of the building and bows out and down to attach to the center of the side-walls of the patio, which connect the unit patio to the patios on either side. Supp. Pet. exhibits 1-2.

21. Declarations A, B and K require the association to purchase and maintain full replacement casualty insurance on the "Building (including all fixtures, installations or additions comprising that part of the Building within the boundaries of the Units initially installed, or replacements thereof, in accordance with the original plans and specifications therefor, but excluding all furniture, furnishings or other personal property owned, supplied or installed by Unit Owners or tenants of Unit Owners) and all Improvements located on the Common Elements from time to time, together with all service machinery contained therein...." Pet. ex. A, §§ 14.1(a), 14.2(a), at 16-17; § 5(k), Amend. By-Laws Costa del Sol at 10 (association authority to purchase adequate insurance to protect the property) (2001). The association insurance "policies may contain reasonable deductible provisions as determined by the Board of Directors." Id.

22. Insurance payments are a common expense. Id. § 14.4 at 18; § 9.8(h), Amend. By-Laws at 17-18 (accounting records expense classification).

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shall be included within the Unit and the boundary shall be the vertical plane established by the exterior surface thereof.)"

However, unit owners are individually liable for any increase in the association's insurance premium caused by their "misuse, occupancy or abandonment of any one or more Units or their appurtenances or the Common Elements." Id. If insurance proceeds are insufficient to repair all of the damage, the association assesses the unit owners in their proportionate shares to make up the difference. Id. § 15.5 at 21-22; § 5(w), By-Laws at 12 (power to levy special assessments for emergencies).

23. Declarations for A, B and K, provide that unit owners "may" insure "the property lying within the boundaries of their Unit, including, but not limited to, their personal property...." Id. § 14.1(f). The declaration requires the association to contract for insurance that names "unit owners and their mortgagees [as] additional insureds." Id. § 14.1(c).

24. Declarations A, B and K provide for the appointment of an insurance trustee to manage the insurance proceeds for the reconstruction and repair of first the common elements and then the units. Pet., ex. A, §§ 14.5, 14.6 at 18-19. Unit owners own the insurance proceeds in their proportionate shares; however, any portion of the proceeds related to damage inside a unit or its contents are apportioned to the unit. Id. §§ 14.5, 14.6, 15 at 18-24. If there is any balance left in the insurance proceeds after repairing the covered property, the proceeds are distributed to unit owners in amounts equal to the cost of repair of the damage to the "optional" property, if it is not insured or underinsured. Id. 15.6(b)(iii) at 22.

25. Under the general maintenance provisions, unit owners are required to maintain, repair and replace the "screens, windows, the interior side of the entrance door and all other doors within or affording access to a Unit, and the electrical, plumbing, heating and air-conditioning equipment, fixtures and outlets, if any, within the Unit or the Limited Common Elements...." § 7.1, Declaration at 10.

26. Under the reconstruction after casualty provisions of the declaration, if the damage is only to those parts of the property that the unit owner is required to maintain and repair under the general maintenance provision, "then Unit Owners shall be responsible for all necessary reconstruction and repair (unless insurance proceeds are held by the Association with respect thereto by reason of the purchase of optional insurance thereon, in which case the Association shall have the responsibility to reconstruct and repair the damaged Optional Property...." Id. § 15.3 at 21.

B. Condominiums C-J, L-W.

27. Declarations for condominiums C through J and L through W define the unit boundaries as including the horizontal planes of the unfinished surfaces of the ceiling and floor and the perimetrical boundaries as "the vertical planes of the unfinished interior of the walls bounding the Unit extended to intersections with each other and with the upper and lower boundaries" – the ceiling and floor. Pet. at 5, ex. C: Declaration C, § 3.2, at 4.

28. These declarations define the limited common elements appurtenant to each unit as "[a]ny patio, terrace or yard which is enclosed on at

least three (3) sides and as to which direct and exclusive access shall be afforded to any particular Unit. . .." Pet., ex. C, § 3.3, at 4, Plot Plan. The screen enclosures are the same as for condominiums A, B and K.

29. These declarations contain the same insurance and maintenance provisions as A, B and K.

C. Condominiums 1, 2, 3, and 4.

30. Declarations for condominiums 1 through 4, as amended, are identical as to the description of the units. Section III of these declarations describe a unit as the unfinished inner surface of the perimeter walls, floor and ceiling, and further provides:

> Where there is attached to or abutting the building a porch or balcony, serving only the apartment abutting such porch or balcony, the boundary of the PRIVATE DWELLING shall be extended so as to include within it that part of such porch or balcony lying within the extension of the vertical and horizontal boundaries of the said PRIVATE DWELLING, as above expressed.
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> . . . .
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> PRIVATE DWELLINGS as the term is used herein shall also mean and include, where there is attached to or abutting the building a patio, garage, carport and/or sun deck serving only the apartment abutting such patio, garage, carport and/or sun deck. Furthermore, the boundary of the PRIVATE DWELLING shall be extended so as to include within it that portion of such patio, garage, carport and/or sun deck lying within the extension of the vertical and horizontal boundaries of the said PRIVATE DWELLING, as above expressed.

Amend. Declaration of Condo. 1-2 (Aug. 11, 1976) (recorded in the public records of Dade County at OR 9424 PG 793 *et seq.*).

31. Section XXII of the Declarations expressly provides that the "Condominium has no Limited Common Property." § XXII, Declaration at 7.

32. The screen enclosures for Condominiums 1 through 4 shows the framing for the screen enclosure attached to the roof, the inside of the patio walls and the center line of the outside patio wall. The side walls are L shapes that bracket the patio with the bottom of the L facing each other like brackets "[ ]." The outside extension or bottom of the L is the about height of a chair while the side walls are at roof height and run as dividing walls between unit patios.

33. Section XX of the Declaration 1 as amended governs the general maintenance responsibilities of the association and the unit owners. This section provides that "the Association is responsible and shall provide for exterior maintenance and each unit owner shall be responsible for maintenance of his 'Private Dwelling', as the term is defined herein." Amend. Declaration of Condo. 2 (Aug. 11, 1976). An owner is "further responsible and liable for maintenance, repair and replacement of any and all wall, ceiling and floor exterior surfaces which are a part of his Private Dwelling as the same is more particularly defined herein, painting, decorating and furnishings, and all other accessories which such owner may desire to place or maintain in his Private Dwelling."[2] Id. Section (15) of the amendment provides that "[n]otwithstanding anything in the aforesaid Declaration of Condominium of Restrictions and Maintenance Covenants to the contrary, the exterior of all private dwelling units shall be the responsibility of the Association and all expenses for same shall be a common expense of the Association." Id. at 7 (emphasis added).

[2] Exterior surfaces in conjunction with responsibility for wall coverings means the exterior (inside) surface of the boundary wall not the exterior outside surface of the boundary wall, which the association must maintain.

34. These provisions require unit owners to maintain the wall, ceiling and floor coverings for their unit and the association to maintain the outside of the buildings.

35. The association maintains and insures the screen enclosures of units in Condominiums 1 through 4.

36. Insurance is a common expense assessed against the unit owners and may not be charged against any single owner unless the expense is "solely and exclusively for the benefit of such owner to the exclusion of all of the other members of the Association." § XX, Amend. Declaration at 2.

37. Article XXIV is identical in each of the declarations 1 through 4 and provides, in part, as follows:

> The following insurance coverage shall be maintained in full force and effect by the Association:
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> (A) Casualty Insurance covering all of the Private Dwellings and Common Property in an amount equal to the maximum insurance replacement value thereof, exclusive of excavation and foundation costs, as determined annually by the insurance carrier, such coverage to afford protection against (1) loss or damage by fire or other hazards covered by the standard extended coverage or other perils endorsements; and (2) such other risks of a similar or dissimilar nature as are or shall be customarily covered with respect to buildings similar in construction, location and use to this Condominium, including, but not limited to, vandalism, malicious mischief, windstorm, water damage and war risk insurance, if available....

38. Unit owners insure their personal property under these declarations as follows:

> Risk of loss or of damage to any furniture, furnishings, personal effects and other personal property (other than such furniture,

> furnishings and personal property constituting a portion of the Common Property) belonging to or carried on the person of each Private Dwelling owner, or which may be stored in any Private Dwelling, or in or upon Common Property.... The owner of each Private Dwelling may, at his own expense, obtain insurance coverage for loss of or damage to any furniture, furnishings, personal effects and other personal property belonging to such owner...

Art. XXIII, declarations 1 through 4.

D. Condominium Cluster A.

39. The declaration of condominium for Cluster A, which was recorded in 1983, describes the boundaries of a unit as the unfinished surface of the ceiling, floor and interior walls. Art. 24, Declaration Cluster A. The exterior of unit doors are common elements and not part of the unit. Id. The unit owner owns the finished surfaces of the ceiling, floor and walls and the finished interior surfaces of doors and windows. Id.

40. Patios, balconies, sundecks, and garages are limited common elements appurtenant to the units. Art. 24, Plot plan, Declaration Cluster A. The screen enclosures are the same as for condominiums 1 through 4.

41. The general maintenance of the limited common elements is an association common expense. Art. 10, Declaration Cluster A. However, a unit owner is "responsible for the maintenance, care and preservation of the interior parapet walls, including floor and ceiling, if any, within said exterior balconies, patios, sundecks and garages and the replacement of light bulbs on said balconies, patios, sundecks and garages and the wiring, electrical outlets and

fixtures" and for any damage to the limited common elements caused by his or her negligence. Id.

42. The association must insure the condominium property as follows:

> A. Casualty Insurance covering all of the condominium units and common property in an amount equal to the maximum insurance replacement value thereof, exclusive of excavation and foundation costs, as determined annually by the insurance carrier, such coverage to afford protection against (1) loss or damage by fire or other hazards covered by the standard extended coverage or other perils endorsements; and (2) such other risks of a similar or dissimilar nature as are or shall be customarily covered with respect to buildings similar in construction, location and use to this condominium, including, but not limited to, vandalism, malicious mischief, windstorm, water damage and war risk insurance, if available....

Art. 16, Declaration Cluster A.

43. Insurance is a common expense. Art. 16, Declaration Cluster A. Proceeds are applied first to the repair and reconstruction of the common elements, then to the units. Id. If the funds are not sufficient to complete the repairs, then the association may apply funds from its Reserve and Replacement Fund, then special assess for the amounts necessary to complete the repairs. Id.

IV. Insurance.

44. The association contracts for insurance for all the condominiums under one policy. It has always maintained and insured the screen enclosures for condominiums 1 through 4.

A. Insurance Policy 2005.

45. The association contracted for property casualty insurance from May 1, 2005 to May 1, 2006. Pacific Ins. Co., Ltd. Endorsement #2. The policy

covered windstorm perils and provided a replacement cost for the condominium buildings with a total insured value of $70,852,434 and a 3% deductible. Id. at 1, Binder (Apr. 29, 2005). The annual premium was $229,487.00. Id. Endorsement #2.

46. Under the policy, each "building" is separately listed with a total value given for the building. Id. Endorsement #3. All condominium buildings appear to be covered by the policy. The policy also covers the common elements, which includes the recreation buildings and facilities. Id.

47. The association also contracted for additional excess property insurance for the same period.

B. Insurance Policy 2006.

48. The association contracted with General Star Indemnity Company for property casualty insurance from May 1, 2006 to May 1, 2007.

49. The General Star policy defined the covered "buildings" as all buildings or structures described in the declaration, completed additions, fixtures, outdoor fixtures, and permanently installed machinery and equipment. General Star policy, Building and Personal Property Coverage Form, ¶ 1.a. at 1. "Bridges, roadways, walks, patios or other paved surfaces" are excluded from coverage. Id. ¶ 2.d. at 2. The exclusion of the patio in this context appears to be the paved surface of the patio but not the walls. The walls would be covered under the definition of building as described in the declarations as part of the common elements with the additions of the screen enclosures, trellises and

Jacuzzis. Id. A.1.a. at 1. The policy is a replacement cost policy but does not cover personal property of others or the contents of a residence. Id. ¶ G.3. at 13.

50. The association also contracted for property insurance with Citizens Property Insurance from May1, 2006 to May 1, 2007. Citizens Prop. Ins. Corp. Prop. Policy. The Citizens supplemental declarations show basic coverage for each "building" with the number of units within each building being covered by the policy. The policy forms provided do not separately define "building." The policy schedule did not include all of the schedules and endorsements included in the primary policy, such as the Condominium Association Coverage Form or the Florida Changes for Condominiums form. Therefore, it cannot be determined if the policy defines "building" differently from the declaration or the statute. The annual premium was $776,899.00 and carries a 3% deductible. Id.

CONCLUSIONS OF LAW

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

52. Costa del Sol has standing to seek this declaratory statement.

53. Fernandez has standing to intervene in this proceeding.

54. Batista has standing to intervene in this proceeding.

55. The Division has taken the position in In re: Plaza East Condo. Ass'n Inc., Docket No. 2005059934 (Jan. 13, 2006), that the insurance deductible is a common expense that may not be assessed against only one unit owner who suffered damage to the unit caused by a hurricane. If the damage is

caused by an insurable event, the cost of the repairs is covered by section 718.111(11), Florida Statutes (2003), which controls over any provision to the contrary in a declaration of condominium. While Plaza East is limited in application to that association and may not be applied to Costa del Sol, the analysis of the insurance issue is similar. The additional question asked by Costa del Sol is whether this section provides direction as to coverage for improvements to some of the patios.

I. The Condominium Act.

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

> (11) INSURANCE.--In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this section. Therefore, the Legislature requires a report to be prepared by the Office of Insurance Regulation of the Department of Financial Services for publication 18 months from the effective date of this act, evaluating premium increases or decreases for associations, unit owner premium increases or decreases, recommended changes to better define common areas, or any other information the Office of Insurance Regulation deems appropriate.
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> (a) A unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). . .. An association may also obtain and maintain ... flood insurance for common elements, association property, and units. Adequate insurance, regardless of any requirement in the declaration of condominium for coverage by the association for "full insurable value," "replacement cost," or the like,

may include reasonable deductibles as determined by the board. An association or group of associations may self-insure against claims against the association, the association property, and the condominium property required to be insured by an association, upon compliance with ss. 624.460-624.488. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

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

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

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

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

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

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

See ch. 2003-14, § 4, Laws of Fla.

II. Legislative History.

57. The legislature intended to clarify what portions of the insurance and insurable expenses for the condominium were to be paid by the association and what portions were paid by an individual unit owner for hazard policies when it amended this section in 2003.[3] Fla. H.R. Comm. on Jud., CS for HB 165 (2003) Staff Analysis 1, 9 (Mar. 20, 2003) (available on Florida Legislature website < http://www.flsenate.gov/data/session/2003/House/bills/analysis/pdf/>). This provision also appeared in CS for CS for SB592 in which it was presented as a clarification of "the property and casualty insuring responsibilities of the association provided . . ." that these responsibilities "do not affect any insurance contract provided to a unit owner." Fla. Sen. Comm. on Jud., CS for CS for SB

[3] Section 624.604, Florida Statutes (2004), defines "property insurance" as insuring real or personal property against any "hazard." The insurance law does not define hazard, but does list the following as hazards: "pollution and environmental hazards," "disease hazards," fire hazards," and "slip and fall hazards." § 627.0625(3)(a), Fla. Stat. Cases have been found that use the term in reference to policies covering fire and hurricanes. Public Fire Ins. Co. v. Crumpton, 148 So. 537 (Fla. 1933) (fire); Tench v. American Reliance Ins. Co., 671 So.2d 801 (Fla. 3d DCA 1996) (hurricane). "Hazard" is generally defined as "danger, peril," "accident," "a condition that tends to create or increase the possibility of loss," "the effect of unpredictable, unplanned, and unanalyzable forces." Webster's 3d New Internat'l Dict. 1041. Traditionally, coverage of hazards under policies protect for damage caused by fire, wind, rain. Pet. Dec. Stmt., Lake Maitland Terr.

592 (2003) Staff Analysis 10 (Apr. 15, 2003) (available on Florida Legislature website < http://www.flsenate.gov/data/session/2003/Senate/bills/analysis/pdf/>). The insurance amendment "supersedes certain coverage requirements for hazard insurance policies provided to the association, covering a condominium building, and requires, instead, that every policy issued or renewed on or after January 1, 2004 to provide primary coverage for the following: All portions of condominium property located outside the units; Condominium property located inside the units as initially installed or replaced with like kind and quality in accordance with original plans or, if those plans are not available, as they existed in the unit at the time of conveyance; and all portions of the condominium property required to be covered under the declaration." Id. The bill expanded the list of items that could not to be covered under the association's policy. These include items in the interior of the unit: water filters, countertops, and air conditioning compressors serving only one unit. Id. The items excluded from association coverage are covered under the unit owner's policy. Id. The amendment became effective on May 21, 2003. Ch. 2003-14, § 16, Laws of Fla.

58. A discussion on amendment 2 to House Bill 165, which added this provision to that bill, presented the insurance amendment as a clarification that the association insures all of the condominium building and improvements and a unit owner purchases what amounts to "renter's" insurance on the personal property and contents. Tape recoding of H.R. Comm. on Jud. (Mar. 5, 2003) (available at Fla. Dep't of State, Div. of Archives, ser. 414, carton 1413,

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Apts., Inc., at 3, (Sept. 30,1983) (denying petition as declaratory statement was not proper forum

Tallahassee, Fla.). The amendment was to ensure "fairness between condo[minium] associations and the unit owners." Id. (comments by Rep. Mack). The amendment provided for "reasonable deductibles" to be determined by the board. Id. (comments by R. Penske). If the damage to the building under the association policy falls below the deductible, the association must pay for it. Id.; see also Pet. for Dec. Stmt., The Renaissance of Pompano Beach II, DS89500 (May 23, 1990) (finding that unit owner was properly assessed as a common expense to pay deductible for damages to another owner's unit for a common element water leak).

59. The bill also repealed the association's obligation to make unit owners additional insureds under the association's insurance policy. Fla. HB 165 (2003) (First Engrossed) (available on Florida Legislature website < http://www.flsenate.gov/data/session/2003/House/bills/analysis/pdf/>) (~~With respect to the coverage provided for by this paragraph, the unit owners shall be considered additional insureds under the policy.).~~

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

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

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to determine liability under insurance policy for damage caused by water leak around soap dish).

a unit and the unit owner is required to repair or replace such equipment.

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

61. The legislature intended to make condominium property casualty insurance contracts uniform across the state and make it clear which items of the condominium property were the responsibility of the association to insure and which were the responsibility of the unit owner. Beginning January 1, 2004, all Florida condominium associations were responsible for adequately insuring the common elements, the improvements, and the buildings, which includes the windows and doors that were initially installed when the building was built even where these are designated as inside the unit's boundaries. § 718.111(11)(a)-(c), Fla. Stat.

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

63. Under the amendment, unit owner insurance is no longer an option, but an obligation. In making this change, the legislature correspondingly deleted reference to a unit owner's repair obligation and the association's obligation to make unit owners additional insureds under the association's policy. The items excluded from association coverage are covered under the unit owner's policy.

Now, all repairs made after an insurable event are governed by the statute, declaration insurance provisions as amended by the statute, and insurance contracts.

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

III. Application of Amendment.

65. Associations have a duty to obtain adequate insurance and manage the insurance proceeds for the benefit of the unit owners. § 718.111(11), Fla. Stat.; Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d 1104 (Fla. 3d DCA 1997) (holding that the association had a duty to exercise reasonable care in managing insurance proceeds for the benefit of the unit owners and mortgagees). Unit owners were to insure the contents of the unit that were excluded from the association's policy. Id. § 718.111(11)(c). For example, window treatments are excluded from the association policy, so a unit owner insures the window treatments. Windows are not excluded from the association policy, so the association insures the windows even where the declaration defines the windows as part of the unit and not part of the common elements. Additionally, unit owners are no longer additional named insureds under the association's policy.

66. Costa del Sol is a multicondominium. The cost of insurance is a common expense of the owners within each condominium. Costa del Sol provided copies of the insurance contracts. It contracts for insurance for all condominiums under one policy. Under section 718.115, Florida Statutes, a multicondominium budgets and assesses for common expenses within each condominium and for project-wide association expenses against all condominium owners. The association's policy insures each condominium building for its replacement value. The unit owners within each condominium are assessed for the proportionate share of the cost of the coverage for their condominium property in addition to the proportionate share of insuring the community property.

A. Screen Enclosures.

67. The association asks whether it or individual unit owners within each condominium must insure the screen enclosures. Costa del Sol distinguishes between the condominiums based on whether the screen enclosures are a part of the unit or common elements and whether the screen enclosures were originally installed by the developer or the unit owner.

(1) Condominiums A, B, and K.

68. For A, B and K, the screen enclosures are improvements to the limited common elements. Costa del Sol does not know if the screen enclosures were installed by the developer as original construction or an

upgrade, or installed by the unit owner with association approval. However, the declaration provisions and the photographs indicate that the screen enclosures are permanently affixed to the boundary walls of the patio, are part of the common elements, and are not part of the unit. The association is responsible for insuring the improvements[4] to the common elements, which includes the screen enclosures. Pet. ex. A, §§ 14.1(a), 14.2(a), at 16-17; § 5(k), Amend.

69. The association is responsible for maintaining the exterior of the buildings; the unit owner is responsible for maintaining the inside surfaces of the unit boundary walls and the electrical, plumbing, heating and air-conditioning equipment, fixtures and outlets on the limited common elements. § 7.1, Declaration at 10.

70. The damage to the screen enclosures was caused by an insurable hazard, Hurricanes Wilma and Katrina, and is covered by the insurance provisions of section 718.111(11), Florida Statutes. This section designates who is responsible for insuring for the repair cost of the condominium property after a property casualty. The hurricane damage is not a typical maintenance responsibility under the declaration. These declarations require owners to maintain the screen enclosures in good repair under the owner's usual wear and tear and general upkeep obligations. Wear and tear due to lack of general

[4] "Improvements" to real property includes any valuable addition to property that is intended to enhance its value or utility or adapt it for new or further purposes, including any building or structure added to the land. Black's Law Dict. 757 (6th ed. 1990); see also St. Augustine Pools, Inc. v. Johnson & Bailey Aluminum & Carpet, Inc., 424 So. 2d 910 (Fla. 5th DCA 1982) (pool

maintenance is not an insurable property hazard. Therefore, the general maintenance provision in a declaration may not shift the burden of the cost of repairing the screen enclosures to the unit owners when these improvements have been damaged by a hurricane. To do so, would conflict with the legislature's intent to clearly apportion the responsibility for the cost of insuring and replacing those components damaged by a hurricane.

71. The declaration appears to shift the cost of reconstruction and repair after casualty for "screens" to the unit owners. § 15.3, Declaration at 21. However, the section regarding general maintenance of "screens" applies to all units as originally planned and the word "screens" in this context would not have included the "screen enclosures," which were added to only some of the limited common element patios, not the units. The declarations do not address "screen enclosures, Jacuzzis, or trellises specifically. The declarations have not been amended to add these improvements to clarify the responsibility for maintenance.[5] Even so, the association is required to insure and maintain the exterior of the building and improvements to the common elements to which the screen enclosures have been permanently affixed. The reconstruction and repair after casualty provision does not shift the responsibility for repairs after an insurable event to the unit owner.

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screen enclosure was improvement); Union Trust Co. v. Lucas, 125 So. 2d 582 (Fla. 2d DCA 1982) (screen enclosure was building for purposes of zoning set back requirements).

[5] Arbitration decisions have found that unit owners are responsible for the general maintenance of improvements to the limited common elements appurtenant to their units. Four Seas Suns Condo. Ass'n, Inc. v. Pariseau, Arb. Case No. 00-0559 (Summ. Final Order) (Aug. 24, 2000) (finding that unit owner, who installed awnings as improvements to the limited common elements, was responsible for general maintenance of the awnings).

72. Section 7.1 of the declaration also shifts the cost of repair of the "fixtures and outlets" on the limited common elements. Fixtures[6] are limited in this context to those type of fixtures that are similar to outlets for electrical, plumbing, heating and air-conditioning. Eicoff v. Denson, 896 So. 2d 795 (Fla 5th DCA 2005) ("Ejusdem generis, which means 'of the same kind,' is a maxim providing that 'where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated.'"). The declaration did not reference screen enclosures as these were later improvements, so the reference to fixtures in this context would be to fixtures similar to electrical, plumbing, heating and air-conditioning, not to screen enclosures.

73. The association is responsible for insuring the common elements, which includes the limited common elements. § 718.103(19), Fla. Stat. The screen enclosures are part of the limited common elements for condominiums A, B and K. The association insures these screen enclosures under section 718.111(11)(b)1, Florida Statutes. ("All portions of the condominium property located outside the units."). The association's insurance policy covers the common elements. Under section 718.111(11)(b), Florida Statutes, the screen enclosures are not specifically excluded from the association's insurance responsibility and are not part of the unit to be insured by the owner under section 718.111(11)(c), Florida Statutes. The association may not shift the

[6] Fixtures are articles in the nature of personal property that have been permanently affixed to the real property and are not generally removable without damaging the property, such as a furnace or floor tile. Black's Law Dict. 638 (6th ed. 1990). See Gable v. Silver, 258 So. 2d 11, 15 (Fla. 4th

common expense cost of the insurance or the insurance deductible for repairing these enclosures to only those unit owners whose screen enclosures have been damaged by the hurricane under section 718.116(9), Florida Statutes.

(2) Condominiums C through J, L through W.

74. The screen enclosures are improvements to the limited common elements. The insurance and maintenance provisions for these condominiums are the same as for condominiums A, B and K. Therefore, the association is responsible for insuring the screen enclosures and paying the cost of repairing the screen enclosures after an insurable event, like the hurricanes.

(3) Condominium Cluster A.

75. The screen enclosures are improvements to the limited common elements. Unit owners are responsible for general maintenance of the patios, and the replacement of the wiring, electrical outlets and fixtures caused by his or her negligence. The association is responsible for insuring the condominium units and common elements. The association is responsible for the cost of repairing the condominium and the common elements, and the improvements on the common elements caused by an insurable event like a hurricane.

(4) Condominiums 1 through 4.

76. The screen enclosures are part of the unit as initially installed by the developer as upgrades when the unit was purchased in condominiums 1

DCA 1972), aff'd 264 So. 2d 418 (Fla. 1972) (permanently affixed air conditioning system is realty not a fixture).

through 4. The screen enclosures are permanently affixed to the exterior surface of the patio walls and common element roof. The association insures these screen enclosures under section 718.111(11)(b)2, Florida Statutes.[7] The cost of the insurance and the insurance deductible are common expenses. The cost of repairing a screen enclosure is covered by insurance, so the cost of the repair may not be assessed against only those unit owners whose screen enclosures have been damaged by a hurricane.

B. Trellises.

77. Costa del Sol also asks whether the association is required to insure the trellises, covering the patios or balconies. Yes, the trellises are improvements. The same analysis for the screen enclosures applies to the trellises.

C. Jacuzzis.

78. Costa del Sol also asks whether the association is required to insure the improvements, such as Jacuzzi tubs that were initially installed by the developer as permanent fixtures on some of the patios. The Jacuzzis are not personal property of the unit owners as they are affixed to real estate and to the common element plumbing and wiring.

(1) Condominiums A through W and Cluster A.

[7] Article XXIV of the declaration requires the association to insure the units and the owners to insure their personal property.

79. Patios are limited common elements in Condominiums A through W and Cluster A. The Jacuzzis are improvements to the limited common element patios. The declarations require the association to carry replacement cost insurance on the buildings and all common element improvements.

80. Under section 718.111(11)(b)1, Florida Statutes, the association must use its best efforts to insure all portions of the common elements located outside the units. This includes limited common elements, which are common elements designated for the exclusive use of the unit. The association insured the common elements. The association is responsible for the cost of insuring, repairing or replacing these limited common elements when damaged by an insurable hazard regardless of any provision in the declaration to the contrary.

(2) Condominiums 1 through 4.

81. The patios and Jacuzzis, if any, in condominiums 1 though 4 are part of the unit. The Jacuzzis were initially installed by the developer. Under section 718.111(11)(b)2, Florida Statutes, the association insures the condominium property located inside the units as such property was initially installed for its replacement value. See art. XXIV(A), Declaration (requiring full replacement value insurance on the units and common property). The cost of repairing the hurricane damage to the Jacuzzis, like

the screen enclosures, in condominiums 1 through 4 is a common expense that may not be passed on to the individual unit owners.

IV. Common Expense.

82. As a multicondominium, Costa del Sol assesses each unit owner for his or her proportionate share of common expenses for his or her condominium and a proportionate share of the association's expenses. The cost of insurance and the cost of repairs after casualty are common expenses of all the condominiums. § 718.115, Fla. Stat. (2006). Each owner is liable for his or her share of the repair costs for his or her condominium. Id.

V. Constitutional Issue.

83. There are two contracts affected by this amendment: (1) the declaration; and (2) the insurance contract(s). The amendment is prospective in application as to the insurance contracts. By its terms, it applies to insurance contracts, which are generally one year contracts, entered into after January 1, 2004.

84. Generally, the Condominium Act governing a particular condominium is the law in effect on the date of recording the declaration of condominium. Sans Souci v. Dep't of Bus. Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condo. Ass'n v. Dep't of Bus. Regulation, 463 So. 2d 314, 317 (Fla. 1st DCA 1984). But see Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) (holding that the 1985 act in effect at time of board's action, not the

1983 statute in effect at time declaration was recorded, applies because no precedent could be set except for condominiums created in same year).

85. The declarations for all of the condominiums operated by Costa del Sol were recorded and created under prior versions of the Condominium Act between 1974 and 1990. Therefore, the question of the retroactive application of the 2003 amendment to section 718.111(11), Florida Statutes, arises. See art. I, § 10, Fla. Const. ("no . . .law impairing the obligation of contracts shall be passed"); Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774, 780 (Fla. 1979) (adopting a balancing test "to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objectives or is unreasonably" intrusive). Costa del Sol is not challenging the constitutionality of applying the present version of the law to the condominiums, it questions how it is to do so.

86. The question is whether the 2003 amendment applies to change the distribution of insurance proceeds and payment for the repair obligations under the declarations as recorded under the Condominium Act in 1974 and 1981 through 1990. In 1974, the Condominium Act required developers to include in a declaration provisions for general maintenance, insurance and reconstruction and repair after casualty. § 711.08(1)(l), Fla. Stat. (Supp. 1974) (repealed ch. 76-222, § 3, Laws of Fla.). Costa del Sol and many other declarations of this period contain separate provisions for insurance and reconstruction. From 1981 to the present, the law has not contained the reconstruction and repair requirement as separate from the insurance obligation.

Ch. 76-222, § 1, at 417-19 (718.104 does not include insurance or reconstruction and repair provisions in declaration), § 1 at 423 (association authorized to obtain insurance), § 3 at 488 (repealing ch. 711, Fla. Stat.), Laws of Fla. (1976); § 718.111(11) (2003) (repealing the grandfathering provision shifting the burden to unit owners for replacing the wall and ceiling coverings "if the unit owner is required to repair or replace such equipment"). The insurance provision "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." Id.

87. A statute is prospective in application and not applied retroactively to substantive rights and obligations unless the statute expressly states that it is to be applied retroactively, or it is unequivocally implied. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Century Vill., Inc. v. Wellington Condo. Ass'n, 361 So. 2d 128, 132 (Fla. 1978). Courts consider questions of "fair notice, reasonable reliance, and settled expectations" in determining if a statute operates retrospectively. R.A.M. of So. Fla., Inc. v. WCI Communities, Inc., 869 So. 2d 1210, 1215 (Fla.2d DCA 2004), review denied, 895 So. 2d 406 (Fla. 2005). Statutes that impair vested rights, create new obligations, impose new duties, or attach new disabilities, on existing contracts operate retroactively. Id. at 1216.

88. A statute will be applied retroactively if it does not contravene a constitutional right, e.g. impair a vested contractual right. Century Vill. 361 So. 2d at 132. A vested right is an immediate fixed right of present or future enjoyment.

Id. at 1218. Vested rights are not contingent, which are rights that come into existence based on an event or condition. Id. Vested rights are not expectant, which are rights based on the continued existence of a present condition. Id. (finding that statutory right to cure unlicensed status was not a vested right).

89. Under section 718.110(4), (8), and (13), Florida Statutes, unit owners have vested rights in the original declaration that involve: (1) the configuration and size of their unit; (2) their ownership share in the common expenses and surplus; (3) the appurtenances to the unit; (4) provisions regarding timesharing of units; and, now, (5) rights to lease. See Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002); Gary A. Poliakoff and Karl M. Scheuerman, The Woodside Covenants, Fla. Bar J. 10, 15 (May 2003) (owners are on notice that amendments may change the provisions in the declaration without their consent, so only those statutory amendments requiring consent may be considered vested); § 718.110(13), Fla. Stat. (2004) (right to lease may not be amended). Association contracts with third parties contain vested rights that may not be impaired by statutory amendment. E.g., Fleeman, 342 So. 2d 818. The legislature made the insurance amendment prospective as to insurance contracts by applying them to contracts entered into after January 1, 2004. It made the insurance amendment retroactive to all declarations. § 718.111(11), Fla. Stat. (2003) ("In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to

apply to every condominium in the state, regardless of the date of its declaration of condominium.").

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

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

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

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

92. The statutory amendment clarified the insurance responsibilities of associations and unit owners. It clarified that deductibles in insurance premiums were permitted under the act as a cost of insurance. See supra ¶ 56.

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

C. Insurance provisions do not create vested rights.

94. Section 718.111(11), Florida Statutes, has always provided that a unit owner controlled association should make its best effort to insure the condominium property, but has never imposed an absolute requirement to do so. The obligation to insure portions of the condominium property has always rested with the association and the unit owners as their obligations appear in the declaration. These insurance provisions may be amended under the general amendment provisions in the declaration without mortgagee approval even if the

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

95. Even if an association was obligated under a declaration to insure the carpets within the units, it cannot do so under the present law. Carpets and other floor coverings are the responsibility of the unit owner under the present

law. Similarly, Costa del Sol is required to name unit owners as additional insureds under the association policy; however, it may no longer do so under the amendments to section 718.111(11), Florida Statutes. It is doubtful that any insurer would agree to do so. Unit owners can no longer insure the interior walls, window screens and other parts of the structure as these were originally installed. So, even if the amendment were found to be a vested right that could not apply retroactively, the association and unit owners would be unable to contract for insurance as required by these older declarations. The declaration provision would be impossible to perform.

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

96. Substantial regulation of the area by the state reduces the likelihood that a substantial impairment will be found. United States Fidelity and Guaranty Co. v. Dep't of Ins., 453 So. 2d 1355, 1360 (Fla. 1984) (holding that law requiring insurers to refund excess profits was not an unconstitutional impairment of contracts); Woodside, 806 at 455-56 (noting that condominiums are creatures of statute and highly regulated). Unit owners purchased condominiums knowing that both condominiums and insurance were highly regulated areas and subject to legislative changes. To require the association to maintain the enforceability of the declaration insurance provisions, including the disbursement of proceeds under the cost shifting provisions of reconstruction and repair after casualty, even when such coverage is no longer available from any insurer, would work too great a hardship on the owners. A declaration with outdated provisions that can

no longer be enforced because the law has changed or market forces have changed making it impossible to perform should not control the outcome. See Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988).

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

97. Once a legitimate public purpose has been identified, a determination is made as to whether the public purpose has been reasonably served by the adjustment made to the rights and responsibilities of the parties. U.S. Fidelity and Guaranty, 453 So. 2d at 1361. Courts will defer to the legislature's judgment as to the necessity and reasonableness of the amendment. Id. If the impairment of the declaration reconstruction provision is considered substantial, then the legislature has stated the significant public purpose being served by the amendment. The legislature has provided that the insurance provisions are to protect the health, safety and welfare of Florida citizens, so the amendment is to apply to every condominium in the state regardless of the date of the declaration. The legislature recognized the need to stabilize and lower insurance premiums, especially for condominium associations and unit owners. According to the Office of Insurance Report, the "market ... appears stable, as evidenced by . . .modest increases in the rate." Condo. Ins. Rpt. at 13. The legislature intended for the provisions to retroactively apply to declarations and to prospectively apply to all insurance contracts entered into after January 1, 2004.

F. Considerations of equity and increased costs in insurance are not within the scope of a declaratory statement.

98. The intervenors argue that it would be unfair to require all unit owners to pay for the repairs to screen enclosures, trellises and Jacuzzis that are improvements benefiting only some unit owners. This is an argument that may be raised in an arbitration or court proceeding. A declaratory statement is limited to the application of a statute, rule or order to Costa del Sol's questions. No procedure is available to take testimony or evidence regarding fairness in this type of proceeding. § 120.565, Fla. Stat.; Fla. Admin. Code Ch. 28-105.

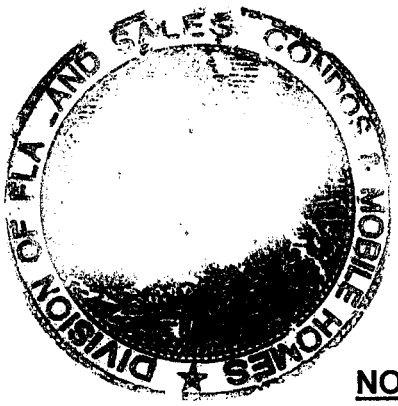
99. The intervenors argue that the cost of insurance will significantly increase for the association if it cannot pass on the cost of repairing these improvements after a property casualty to the unit owners who benefit from having them on the patios appurtenant to their units. The cost of insurance is a common expense. The legislature determined that the present method of spreading the cost of insurance and the risks would ensure lower and stable insurance premiums for condominiums across the state. This policy issue is outside the scope of a declaratory statement and was addressed by the legislature in the 2003 amendment. § 120.565, Fla. Stat.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under section 718.111(11), Florida Statutes (2003), Costa del Sol Association, Inc., is responsible for insuring the screen enclosures, the trellises and Jacuzzis in all condominiums.

DONE and **ORDERED** this 21st day of November, 2006,

at Tallahassee, Leon County, Florida.



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

NOTICE OF RIGHT TO APPEAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Laura M. Manning, Esq., Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., 515 North Flagler Drive, Suite 701, West Palm Beach, Florida 33401, Juan Fernandez, Costa del Sol Condominium E, 9849 Costa del Sol Blvd., Doral, FL 33178, Olga Batista, Costa del Sol Condomimium A, 3854 Alcantara Ave., Doral, FL 33178, this 1st day of December, 2006.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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