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Disaster Planning and Recovery

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DISASTER PLANNING AND RECOVERY

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I.	INTRODUCTION.....	457
II.	IDENTIFYING THE POTENTIAL CONSEQUENCES OF A DISASTER	458
	A. <i>Dislocation Caused by the Total or Partial Destruction of the Premises</i>	458
	B. <i>Economic Impact</i>	458
III.	DEVELOPING A DISASTER PLAN	459
	A. <i>Designation of a Disaster Coordinator</i>	459
	B. <i>Designation of an Information Facilitator</i>	459
IV.	REMOVE THE BARRIERS TO RECOVERY	459
	A. <i>Reconstruction</i>	459
	1. “Insurance Trustee” Provisions.....	459
	2. Access to Units	460
	3. Powers of Board or Disaster Coordinator to Act in an Emergency.....	460
	B. <i>Termination</i>	461
	1. Reconstruction vs. Termination.....	461
	2. The “50% Rule”	461
V.	ACTIVATING THE DISASTER PLAN.....	461
VI.	HASTE MAKES WASTE IN RECONSTRUCTION.....	462
	A. <i>Avoiding the Pitfalls of Disaster Recovery</i>	463
	B. <i>Restoration of the Property</i>	463
VII.	SETTLING THE INSURANCE CLAIMS	464
VIII.	CONCLUSION	465

I. INTRODUCTION

Hurricane Andrew, which devastated South Miami-Dade on August 24, 1992,¹ opened our eyes to the vulnerability of common interest ownership housing communities (i.e., condominiums, cooperatives, and deed restricted communities governed by a mandatory membership homeowners associa-

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1. National Hurricane Center, Hurricane Preparedness: Hurricane History, <http://www.nhc.noaa.gov/HAW2/english/history.shtml> (last visited June 2, 2007).

tion) to catastrophic events. The lessons learned from Andrew's 142 mile per hour winds were accentuated by Hurricane Opal, which struck the Florida Panhandle with twenty foot storm surges.² These lessons were reinforced by the events of 2004, when four major storm criss-crossed the state of Florida leaving devastation in their paths.³

In the aftermath of these storms, the importance of developing and implementing a disaster plan has become self-evident. This article is based upon first hand experience gained in assisting the victims of Hurricanes Andrew, Opal, Charley, Frances, Ivan, Jeanne, Katrina, and Wilma.

II. IDENTIFYING THE POTENTIAL CONSEQUENCES OF A DISASTER

Prior to September 11, 2001, the term "disaster" was generally associated with naturally occurring events such as fires, hurricanes, earthquakes, mudslides, or floods. Now, acts of terrorism need to be factored into the equation.

A. *Dislocation Caused by the Total or Partial Destruction of the Premises*

A properly prepared disaster plan will anticipate not only the possibility of a total casualty loss, but also the need to relocate, temporarily or permanently, due to the loss of both one's residence and, potentially, one's place of work. While many individuals were able to clean up their storm debris and return to their normal routines within a relatively short period of time, for tens of thousands of others, life remained in turmoil for years after being impacted by the devastation of recent storm events.

B. *Economic Impact*

The economic impact of a disaster is felt on many fronts. For example, many Florida Panhandle residents owned condominium units which were placed in rental pools and provided the respective owners a source of revenue. This source of revenue was temporarily disrupted as a result of Hurricane Opal.

Unit owners displaced from work may be unable to meet their financial obligations to the association. Uninsured, underinsured, or non-covered losses will necessitate special assessments, which could further stress the already overtaxed unit owners. The higher cost of goods and services resulting from shortages further compounds the problem.

2. *Id.*

3. *See id.*

III. DEVELOPING A DISASTER PLAN

A. *Designation of a Disaster Coordinator*

The ability of the community association to minimize damages and speed up recovery, to a large extent, will be dependent upon the association's ability to react quickly and decisively when a disaster strikes. The ability to do so is dependent upon having a pre-designated person or committee in place prior to the disaster with full power and authority to implement the Disaster Plan.

B. *Designation of an Information Facilitator*

In times of crisis, people want to know—they need to know! A major hurdle to recovery is rumor and misinformation. Left unchecked, both can hamper the recovery efforts. This can be short-circuited through the use of an "Information Facilitator." Today's computer technology provides the ideal vehicle for this purpose. Every association should have its own website. During normal times, it is the ideal resource for disseminating information and staying in touch with the unit owners. At times of a disaster, it is the vital link. The Information Facilitator should work in concert with the Disaster Coordinator as a type of "Press Secretary."

IV. REMOVING THE BARRIERS TO RECOVERY

A. *Reconstruction*

State laws and document restrictions designed to insure owner access to information and input in the decision-making process often impede disaster recovery. For example, the use of reserve funds in an emergency is hampered by laws requiring prior approval by a majority of the voting interests present, in person or by proxy, at a meeting. If necessary, documents should be reviewed and amended to remove barriers to recovery and provide boards with emergency powers. Areas of concern include:

1. "Insurance Trustee" Provisions

Generally found within the insurance section of the documents, these provisions require that the proceeds of insurance settlements be paid to a third party for disbursement at the instruction of the association's engineer. When such a provision exists, insurers will not pay proceeds to the association until a trustee is designated. This can critically delay the receipt of funds necessary for disaster response. It is preferable for the board to act as

a trustee with disbursements being authorized only when approved in advance by an independent engineer or construction manager employed by the association.

2. Access to Units

While the Condominium and Cooperative Acts grant associations an irrevocable right of access when necessary for the maintenance, repair, or replacement of the common elements or of any portion of a unit to be maintained by the association, or as necessary to prevent damage to the common elements or to a unit, a gray area exists in relation to the repair or reconstruction of portions of the units maintained by the unit owners. To avoid conflicts, all common interest ownership housing documents should be amended to provide:

- Right of access to the units to repair or replace any portion of the property insured by the association; and
- Association as agent: The association should be irrevocably appointed as agent for each unit owner, each owner of a mortgage or other lien upon a unit, and each owner of any other interest in the property, in order to adjust all claims arising under insurance policies purchased by the association and to execute and deliver releases upon the payment of claims.

It is of interest to note that in the aftermath of Hurricane Opal, Florida's Division of Florida Land Sales, Condominiums and Mobile Homes affirmed the right of an association to enter the unit to remove the carpet, cabinets, hot water heater, and other appliances damaged by the storm.⁴

3. Powers of Board or Disaster Coordinator to Act in an Emergency

Members of the board (though less than a quorum) and/or a designated disaster coordinator, who act in good faith without pecuniary gain, should be indemnified from actions by members of the association and should have emergency powers, including, but not limited to, the power to contract for: 1) emergency services; 2) security from vandalism; 3) removal of debris; and 4) engineering and other professional services to assist in disaster recovery.

4. See *In re* Petition for Arbitration Higdon v. Seaspray Condominium Ass'n, Inc., Case No. 96-0430.

B. Termination

1. Reconstruction vs. Termination

The unit owners at one South Miami-Dade County condominium destroyed by Hurricane Andrew were shocked to learn of a provision in their declaration of condominium which provided for automatic termination when damage exceeded fifty (50%) percent or more of the condominium, unless a majority of the total voting interests voted within sixty days to rebuild. Since the unit owners had scattered all across the country, the association had to seek court relief to prevent the activation of the provision. It is preferable for the documents to require a vote of the owners to terminate the condominium, not to rebuild it.

2. The “50% Rule”

Even if a condominium does not contain an “automatic termination” provision, a regulation of the National Flood Insurance Program, as adopted by most counties and cities, will significantly impact an association’s ability to reconstruct based upon the adequacy of insurance proceeds and other funds.⁵ The “50% Rule” provides that if the condominium/home is below the 100-year flood elevation, and if the condominium is “substantially damaged” or “substantially improved,” the condominium/home will be required to be rebuilt based upon current building codes, which might necessitate tearing it down, raising the elevation, and then reconstructing it.⁶

V. ACTIVATING THE DISASTER PLAN

A quick response in accordance with a preconceived plan will minimize damage and promote a speedy recovery. After the disaster, associations should take steps to:

- **Account For Residents.** Knowing the whereabouts of all residents greatly enhances emergency response time following a disaster. In a situation such as a hurricane where there is advance warning, a committee should ascertain which residents are remaining in the community and which are evacuating. A temporary destination address and phone number should be obtained from those who are evacuating.

5. See FEMA, The National Flood Insurance Program, <http://www.fema.gov/about/programs/nfip/index.shtm> (last visited June 2, 2007).

6. See FLA. STAT. § 215.555(4)(b)4, (4)(e)1 (2006).

- **Attend to the injured.** After disaster strikes, the board's first action should be to direct emergency medical assistance to any residents in need.

- **Secure the community from acts of vandalism and looting.** In some cases, it may be necessary to hire security personnel to protect against vandalism, theft, and other criminal activities.

- **Remove storm debris.**

- **"Dry In"/"Shore Up" the building structures in order to mitigate against further damage.** Depending upon the nature and extent of the damage, it may be necessary to evacuate the premises or shore-up the structure.

- **"Dry Out."** This is the removal, where necessary, of wet carpet, wall board, cabinets, etc. when necessary to prevent the growth of mold.

- **Survey the Property and Identify Areas Needing Priority Attention.** In the case of widespread disaster, unit owners will not be able to depend upon local law enforcement agencies whose attention might be diverted to higher priority matters. Arrangements for security, debris cleanup, and emergency repairs should be made as part of a disaster plan, not after the fact, when it will be difficult, if not impossible, to find help.

- **Activate the Plan.** Following a disaster, the disaster coordinator and information facilitator move into action. The information facilitator opens lines of communications with the unit owners. The disaster coordinator contacts emergency services and notifies the contractors and employees, advising them of their duties and needs. In some cases, it may be necessary to suspend or cancel ongoing contracts such as lawn and pool maintenance. Hopefully, a provision was made in the contract for such right of suspension without penalty in situations such as a disaster when the contracted services are no longer needed.

VI. HASTE MAKES WASTE IN RECONSTRUCTION

Within hours of any disaster, the affected community will be besieged by companies and individuals looking for work and/or offering disaster recovery services. This group will consist of qualified professionals, ranging from public adjusters to companies specializing in disaster recovery. The larger of these companies will arrive decked out in color-coordinated uniforms, with large debris removing equipment and even helicopters. Interspersed among the new arrivals will be the con men and profiteers who prey upon the misfortune of others. While it is very tempting to sign the first contract stuck in your face, when confronted with what initially will appear to be an insurmountable task of reconstruction, experience has shown that these

quick solutions are formulas for disasters of greater magnitude than those already suffered. No greater application exists for the old adage that “haste makes waste” than in these situations. The best advice is to “just say no” and stick to your disaster plan which, hopefully, will include a plan that anticipates the five phases of reconstruction: 1) Project planning/scheduling; 2) Construction bidding; 3) Contract negotiations; 4) Construction/rehabilitation; and 5) Project completion/close out.

There are intervening steps you should take which may require contracts of short duration and for specific purposes. Even these contracts should be reviewed to insure that proper precautions are taken.

A. *Avoiding the Pitfalls of Disaster Recovery*

The pitfalls of disaster include disputes between insurance carriers (flood, windstorm, hazard) and the association over the nature and extent of damage, cost of repair or replacement, and/or whether appropriate mitigation was effectuated. With regard to claims made by unit owners against their boards over the mismanagement of insurance proceeds, the association owes a duty to the owners and their mortgagees to exercise reasonable care in the management of the insurance proceeds and to hold the proceeds for the benefit of the owners and mortgagees.⁷ Claims of contractors, subcontractors, materialmen, and suppliers that were not paid by the general contractor will likely result in the association having to pay double because of the failure to comply with Florida’s Construction Lien Law.⁸ Suits against contractors and subcontractors over poor quality repairs are also common.

B. *Restoration of the Property*

Once conditions stabilize, the disaster recovery team will be in a position to meet with professionals trained in disaster recovery, such as:

- **Architect/Engineer:** These professionals are responsible for assessing the damage, preparing plans and specifications in accordance with new building codes, assisting in the selection of a construction manager, and defining other reconstruction requirements.

7. See Gill v. Surf Dweller Owners Ass’n, Inc, No. 97-0051 (Mar. 10, 1998) (Scheuerman, Arb.), reported in 2 DEP’T OF BUS. & PROF’L REGULATION: DIV. OF FLA. LAND SALES, CONDO. & MOBILE HOMES ARB. SECTION: REGULAR FINAL ORDER INDEX 27–28 (2001).

8. FLA. STAT. § 713.06 (2006); see, e.g., Adams v. McDonald, 356 So. 2d 864 (Fla. 1st Dist. Ct. App. 1978).

- **Construction Manager:** The construction manager oversees the selection of a general contractor, competitive bidding, and administrators; directs and coordinates pay requisitions, change orders and all other activities of the parties; and resolves disputes.

- **General Contractor:** Under the direction of the construction manager, the general contractor employs and supervises laborers, supplies materials, and builds project in accordance with architect's/engineer's plans and specifications.

- **Attorney:** The attorney reviews construction contracts to insure adequate assurance of job performance and warranties, and compliance with applicable lien laws.

- **Public Adjuster:** In some instances, the assistance of an independent public adjuster may be beneficial when dealing with the nuances of an ambiguous insurance policy. While most adjusters will work for a fee based upon a percentage of the insurance proceeds, when the scope of assistance required is limited to specific items, the fee should be adjusted accordingly.

Review your governing documents; particularly, the "repair after casualty" section of the insurance provision. It is common to find language such as the following:

- **Estimates of Costs.** Immediately after deciding to rebuild or repair damage to property for which the association is responsible, the association shall obtain reliable and detailed estimates of the cost to rebuild or repair.

- **Construction Fund.** The construction fund shall be disbursed in payment of such costs in the manner required by the board of directors of the association upon approval by an architect qualified to practice in Florida and employed by the association to supervise the work.

When the aforesaid provisions exist in your documents, contracting for reconstruction prior to obtaining a scope of work will be contrary to both the association's best interest and the obligations set forth in the documents.

VII. SETTLING THE INSURANCE CLAIMS

In order to respond to an emergency, the association may need to obtain a short-term loan. Without a restriction in the documents, not-for-profit community associations can borrow. However, they generally cannot pledge the condominium property as security. Most banks with which the association does business will approve a commercial line of credit secured by the association's accounts and/or assessment and lien rights. The association also

may obtain a small business administration loan that is available to victims of disaster, generally, at lower interest rates. Of course, reserve funds can also be utilized if approved by a majority of the total voting interests.

On television, within minutes of a disaster, an insurance adjuster appears on the scene with checkbook in hand. In the space of a thirty second commercial, all claims are resolved, and the victims shower praise on the company's quick response and positive attitude. While this does occasionally happen, it is an unlikely scenario. In a major disaster, it is rare, if not impossible, to fully assess the damages within such a short timeframe. In fact, the association should not seriously entertain a settlement until the full scope of work is known and costs ascertained.

Immediately following the disaster, it will be necessary for the association to secure the property to mitigate against further damage and clean-up debris. Most insurers will offer advances for this purpose. As long as the association doesn't sign any releases or settlements, there is nothing wrong with accepting such advances.

Insurance policies need to be examined to ensure that "proof of loss" forms are filed.

VIII. CONCLUSION

Disasters do not respect geographic location or economic status and can occur at any time. Their effects can last for years; however, pre-disaster readiness coupled with a well-orchestrated and executed disaster plan will minimize damages and promote a speedy recovery.