SENATE BILL 4-D AND THE CHAMPLAIN TOWERS SOUTH DISASTER: A PROBLEM IN RESPONSE TO A PROBLEM

Vol. 96, No. 6 November/December 2022 Pg 62 Martin A. Schwartz and Kevin M. Koushel

Real Property, Probate and Trust Law

On June 24, 2021, we witnessed one of the most disturbing events in recent memory. A residential condominium building in Surfside partially collapsed overnight leaving 98 people dead and the surviving residents without a home. The actual cause of the Champlain Towers South tragedy is still under investigation, but several disparate factors are likely to blame. The state took immediate action and appointed a task force to make recommendations on how to prevent a similar tragedy.

The task force was comprised of eight attorneys, each of whom had extensive experience with condominium law on behalf of real estate developers or associations. After several months of inquiries and hearings with key stakeholders, the task force published its report (task force report),[1] which proposed significant changes to the Florida Condominium Act (condo act).[2]

State lawmakers responded by introducing many condominium bills in the 2022 regular legislative session, but none of them passed. This failure was widely criticized in the media[3] until suddenly, during the 2022 third special session called for other purposes, a new bill miraculously appeared, passed with unanimous support, and became law in less than a week on May 26.[4] This was Florida Senate Bill 4-D: Building Safety.

At first glance, S.B. 4-D makes a laudable attempt at addressing the physical issues facing Florida's aging condominium stock.[5] Its primary effect is to create two mandatory pillars of protection: 1) periodic milestone inspections and 2) structural integrity reserve studies.[6] But after months of digesting the new legislation, the prevailing consensus is that it may create more problems than it solves and ironically result in the elimination of many more Florida condominiums.[7]

The Task Force Report

Florida recognized the condominium form of ownership of real property almost 60 years ago.[8] Since then, real estate developers have built thousands of condominium projects all over the state. The longstanding perception was that a condominium unit provided a

more affordable housing option than a single-family residence.

This form of ownership, however, requires that the unit owners determine the operational and maintenance standards of the condominium. Perhaps practical in theory, but, as exemplified after Champlain Towers South,[9] residents of a condominium rarely agree on anything. Consequently, dissension and apathy often impede important decisions, including those related to building maintenance, repair, and replacement.[10]

This common pitfall drives the underlying cynicism throughout the task force report. It essentially proposed that government should shorten the leash on condominium self-governance because unit owners, as a whole, are incapable of protecting themselves. Those who disagreed — or initially preferred to wait until disclosure of the actual cause of the tragedy — could not overcome the immense political pressure to change the law quickly.

With this in mind, the task force identified 12 "areas of inquiry" that, in its view, establish the basis for future physical and financial stability of condominium buildings and associations. The list included 1) board of directors' obligation for maintenance, repair, and replacement; 2) special assessments and borrowing; 3) inspection reports and transparency; 4) association compliance with inspection report requirements and remedies of unit owners; 5) reserve studies, reserve waivers, and funding reserves; 6) developer warranties and liability and design professional liability; 7) termination of condominiums for economic waste/obsolescence; 8) DBPR Division of Florida Condominiums, Timeshares, and Mobile Homes Trust Fund; 9) unit owner financing; 10) community association managers and consulting professionals; 11) local government accountability; and 12) association insurance.[11]

The task force's subsequent recommendations for changes to the condo act targeted many of these areas. Its primary challenge was striking a balance between the need for a safe structure and the associated economic burden on unit owners. Unfortunately, thousands of condominium unit owners have limited or fixed incomes,[12] so, when faced with the option to waive or reduce reserves for capital projects, these individuals may choose their wallets over anything else. The task force was aware of this dilemma, but the predominant evaluation after the tragedy was that certain items "should not be left to chance."[13]

Accordingly, the task force report evolved into a comprehensive analysis of relative points that, if implemented or improved, *might* have prevented the Champlain Towers South tragedy. But what it failed to acknowledge is that Champlain Towers South was

built in 1981, and many older condominiums in Florida with less reserves and the absence of structural repairs have had no major structural issues. This suggests, as alluded to above, that the task force report may be a premature reassessment of existing regulation under the condo act and other relative policies surrounding condominium safety.

S.B. 4-D: Building Safety

The inability to resolve countervailing concerns by the legislature during the 2022 regular session resulted in the absence of any legislation in this area. However, facing criticism for the failure to act, the legislature proposed S.B. 4-D during the 2022 third special session. It took some of the recommendations from the task force report (*i.e.*, on mandatory inspections and reserve requirements), but ignored consequences that concerned the task force and some of the legislators during the 2022 regular session. The result is a slew of new obligations, unrealistic deadlines, and a complete disregard of whether the requirements are achievable or what the new measures may cost many thousands of Floridians.

• *Milestone Inspections* — The first significant aspect of S.B. 4-D is not a change to the condo act. Instead, it adds a section to the Florida Building Code, entitled "Mandatory structural inspections for condominium and cooperative buildings."[14] The new mandate, referred to as a "milestone inspection," has two phases: 1) a visual inspection of the building for substantial structural deterioration; and 2) possible destructive or nondestructive testing, and only required if substantial structural deterioration is found during phase one.[15]

It is worth noting, however, that the milestone inspection is required only for condominium and co-op buildings that are three stories or higher. Applicable buildings that received their certificate of occupancy (CO) on or before July 1, 1992, must complete the milestone inspection by December 31, 2024, and then every 10 years thereafter.[16] All other applicable buildings must complete the milestone inspection by December 31 of the year in which the building reaches 30 years of age, or 25 years if the building is located within three miles of the coastline, as defined in F.S. §376.031 — and then every 10 years thereafter.[17]

One major flaw with these deadlines is that they fail to consider buildings that received their CO after July 1, 1992, but are already at or near the age triggering the milestone inspection requirement. To illustrate, a condominium or cooperative building within three miles of the coastline with a CO issued between July 2, 1992, and December 31,

1996, would need to go back in time to complete its milestone inspection between 2017 and 2021 per the statute's formula. Similarly, those within three miles of the coastline with a CO issued between January 1, 1997, and December 31, 1998, would need to complete a milestone inspection before the end of 2022 or 2023, respectively. This is an earlier deadline than for the thousands of older condominiums and co-op buildings with COs issued on or before July 1, 1992, which have until the end of 2024 to complete their milestone inspection.[18] Apparently, the legislature did not consider the impossibility, real and practical, of these requirements.

Another constraint with the milestone inspections is the limited pool of individuals qualified to perform them. F.S. §553.899(7) requires they be performed by a licensed architect or engineer authorized to practice in Florida. There are almost 25,000 condominiums with COs issued prior to July 1, 1992, and this excludes any within three miles of the coastline that recently turned, or are about to turn, 25 years of age. Based on these numbers, and presuming the existing architects and engineers will have additional work other than milestone inspections prior to December 31, 2024, it appears unrealistic to believe there are enough days between now and the initial deadline for all affected condominiums to complete the necessary milestone inspections.

Additionally, the deadline for completing the milestone inspection fails to distinguish between the inspection portion and any potential remediation work. This will definitely be a problem. An association may be able to complete the milestone inspection well before December 31, 2024, but if the report reveals substantial structural deterioration, the subsequent time needed to obtain building plans and permits, negotiate an agreement with a general contractor, and complete the actual repairs could easily take more than a year. In which case, has the association then failed to meet the deadline?

Further confusing the issue is the language in F.S. §553.899(5): "Upon determining that a building must have a milestone inspection, the local enforcement agency must provide written notice of such required inspection to the condominium association or cooperative association by certified mail, return receipt requested."[19] This raises the question of whether an association has to perform a milestone inspection if it does not receive notice to do so from a local enforcement agency. The next provision, F.S. §553.899(6), goes on to require the association to complete a phase one milestone inspection within six months from receipt of the written notice.[20] This suggests that if the local enforcement agency sends notice at any time before July 1, 2024, it can reduce

the association's time to complete the milestone inspection. Conversely, if a local enforcement agency provides the written notice after July 1, 2024, does the association have beyond December 31, 2024, to comply?

Finally, F.S. §553.899(11) also empowers local boards of county commissioners to require associations to schedule or commence phase two repairs within a specified timeframe after the enforcement agency receives the association's milestone inspection report.[21] But the provision then provides that such repairs must begin within a year of receiving such report.[22] Thus, once again, there is confusion in the statute whether authorized state action can shorten or lengthen the specified deadlines.

· *Reserves* — The second significant aspect of S.B. 4-D is that after December 31, 2024, associations with buildings three stories or higher can no longer waive reserves for certain building components deemed critical to structural soundness and safety.[23] Applicable associations must also complete a structural integrity reserve study (SIRS) for these components, and they must establish reserves to fund them in full over their remaining useful life.[24] The immediate effect after January 1, 2025, will be a dramatic increase in assessments for thousands of condominiums and co-ops across the state. Associations will not only have to make up reserves waived in prior years, but also provide new reserves for building components where reserves were not previously required.

Some of the newly identified components under F.S. §718.112(2)(g), *e.g.*, a building's foundation, are questionable at best.[25] No one doubts that a foundation is vital to a building's overall structure, but inspecting this component is extremely difficult or practically impossible without substantial destructive work. The new legislation ignores this reality and arguably requires the inspector to assign it a useful life in the SIRS so the association in turn can establish it as a reserve item.[26] What would one consider the useful life of the foundation of the Empire State Building or the Colosseum in Rome? Equally elusive may be determining the useful life of the condominium's floors, load-bearing walls, or other primary structural members.[27] Finally, the legislature also added windows as a SIRS item, but in many condominiums, unit owners are responsible for repairing and replacing their windows. This means the new statute may require associations to assess unit owners for building components it has no obligation to maintain under its governing documents.

Take a step further, what if the architect or engineer cannot establish a useful life for one or more of the building components such as the foundation? Is the report inadequate to satisfy the mandate? Should the architect or engineer be sanctioned for not

addressing the impossible?

If the foregoing were not enough of a morass, the legislature also decided to impose personal liability on association officers and directors if they fail to comply with the milestone inspection and SIRS requirements.[28] As many people know, serving on an association's board of directors is typically a thankless job. It is an unpaid position requiring constant communication with dissatisfied unit owners about why certain things regarding the building are either occurring or not occurring. Thus, board positions were already difficult to fill in many cases, and now it will likely be even harder to find volunteers willing to subject themselves to personal liability if the association fails or is unable to comply with the legislature's new directives.

• *Other Requirements Under S.B. 4-D* — Although the Milestone Inspections and new reserve requirements are attracting most of the attention, S.B. 4-D also includes related disclosure mandates. The legislature tasked the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) with collecting data from condominiums with buildings that are three stories or higher in height.[29] Associations existing on or before July 1, 2022, will have until January 1, 2023, to provide the division with the following: 1) the number of buildings on the property that are three stories or higher; 2) the total number of units in all such buildings; 3) the addresses of all such buildings; and 4) the counties in which all such buildings are located.[30] The division will then publish the foregoing information on its website, and associations are obligated to notify the division of any changes.[31]

S.B. 4-D also requires the milestone inspection report and SIRS to be official records of the association, which it must maintain for at least 15 years.[32] Once received, the association is required to disseminate the inspector-prepared milestone inspection summary to unit owners in three separate ways: 1) by personal delivery, U.S. mail, or electronic transmission, as applicable; 2) by posting a copy in a conspicuous place on the condominium property; and 3) by publishing a copy on the association's website, if a website is required per F.S. §718.111(12)(g).[33] Finally, developers and non-developer owners (*i.e.*, for resales) are now required to provide copies of the most recent Milestone Inspection report and SIRS (or a statement that the association has not completed a SIRS) to prospective buyers of condominium units.[34]

Potential Glitch Bill

Aside from the systemic problems discussed above, S.B. 4-D also contains technical issues that a future glitch bill may need to address. Nowhere in S.B. 4-D, for example, does it specify an intent to apply retroactively to existing condominiums. One would think a fair reading would imply such an application, but courts typically require an affirmative statement.[35] Even if S.B. 4-D were permitted to apply to existing condominiums, would it unconstitutionally impair existing declarations that currently allow unit owners to waive reserves?[36] On another note, what is the magic of "three stories in height" as compared to four or five stories? What if the first story is solely for parking and the inhabited portions of the building are only on the second and third stories? Further complicating this issue is that the statute's height requirement does not apply to a "single family, two-family or three-family dwelling with three or fewer habitable stories above ground."[37] So, is a three-story, three-unit condominium occupied by three different families with one on each floor, subject to the new regulations?

Unintended Consequences

The short- and long-term effects of S.B. 4-D are still unknown, but if it remains in substantially the same form as it is now, it may displace thousands from their homes and force statewide condominium terminations. This is due to simple economics. Unit owners in older condominiums on limited or fixed incomes will be unable to afford the increase in assessments brought upon by the new mandates. Financing options may be limited or nonexistent. Any loss of affordable housing stock would also seem to exacerbate the existing lack of affordable housing in Florida.

If unit owners are able to afford higher assessments they might equally elect to terminate their condominiums if there is no return on their investment. Champlain Towers South presented this issue when estimated repairs were factoring out from $80,000 to over $300,000 per unit.[38] If unit owners in a comparable building end up paying these large amounts, it is unlikely their units will see any significant increase in resale value. The legislature surely did not intend for condominium unit owners to part with life savings or face financial ruin simply to keep their homes the status quo. These consequences are also alarming considering the "need" for S.B. 4-D was predicated on a tragedy still under investigation, while other condominium buildings, far older than Champlain Towers South and which have not invested substantial sums in retrofitting, have not experienced the same result.

Conclusion

Ensuring the safety of Florida's condominiums and co-ops is unquestionably a laudable goal. This is especially true in a world post Champlain Towers South. But with S.B. 4-D, the legislature was apparently so focused on "protection" that it ignored the corresponding price tag to existing owners. As such, the new legislation may only "protect" many unit owners by effectively forcing them out of their existing homes when the costs of building safety become unaffordable.

[1] *Report of The Florida Bar RPPTL Condominium Law and Policy Life Safety Advisory Task Force* (Oct. 12, 2021) (hereinafter *Task Force Report*), *available at* https://www-media.floridabar.org/uploads/2021/10/Condominium-Law-and-Policy-Life-Safety-Advisory-Task-Force-Report.pdf.

[2] Fla. Stat. Ch. 718.

[3] *See, e.g.*, David Lyons, *Now What? Lawmakers' Failure to Pass Condo Safety Bill Leaves Residents, Buyers in Limbo*, Sun Sentinel, Mar. 21, 2022, *available at* https://www.sun-sentinel.com/business/fl-bz-condos-safety-flop-20220319-aafxwh6an5bmrma7bptgzvq5de-story.html; *and* Gary M. Mars, *What's Next for Condo-Safety Reforms After Legislature Fails to Act?*, Miami Herald, Mar. 25, 2022, *available at* https://www.miamiherald.com/news/business/real-estate-news/article259718215.html.

[4] *See* Bill History of S.B. 4-D: Building Safety, *available at* https://www.flsenate.gov/Session/Bill/2022D/4D.

[5] Laws of Fla. Ch. 2022-269. The new bill also creates and/or amends analogous provisions in Ch. 719 for Florida's cooperative buildings, but the focus of this article is on condominiums.

[6] Laws of Fla. Ch. 2022-269, §§3, 6.

[7] *See, e.g.*, Robert C. Samouce, *Florida Senate Bill 4-D Part II*, Naples Daily News, Aug. 6, 2022, *available at* https://www.naplesnews.com/story/money/real-estate/2022/08/06/florida-senate-bill-4-d-part-ii/10211030002/ ("Many believe these new laws…will be heavily tweaked…to lessen the heavy burdens these laws place on Florida Condominium [sic] owners who cannot afford such large reserve requirements in order to prevent large numbers of foreclosures and condominium terminations that could result if these laws are left as is.").

[8] *Task Force Report* at *6.

[9] Jeff Weinsier and Andrea Torres, *Champlain South Association Leadership Lacked Stability Before Building Collapse in Surfside*, Local10.com (June 30, 2021), https://www.local10.com/news/local/2021/06/29/woman-worried-about-condo-associations-dysfunctional-dynamic-remains-missing-after-collapse-in-surfside/.

[10] *See id.*

[11] *Task Force Report* at *8.

[12] *See* 1 Florida Real Property Litigation §5.40 (2021).

[13] *See id.*

[14] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899 (2022).

[15] *Id.* "Substantial structural deterioration" means substantial structural distress that negatively affects a building's general structural condition and integrity. The term does not include surface imperfections such as cracks, distortion, sagging, deflections, misalignment, signs of leakage, or peeling of finishes unless the licensed engineer or architect performing the phase one or phase two inspection determines that such surface imperfections are a sign of substantial structural deterioration."

[16] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(3) (2022).

[17] *Id.*

[18] *Id.*

[19] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(5) (2022).

[20] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(6) (2022).

[21] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(11) (2022).

[22] *Id.*

[23] Laws of Fla. Ch. 2022-269, §6, amending Fla. Stat. §718.112(2)(f)2.a. (2022).

[24] Laws of Fla. Ch. 2022-269, §6, creating Fla. Stat. §718.112(2)(g) (2022).

[25] *Id.*

[26] *See id.*

[27] *Id.*; *see also* Will Simons, *Senate Bill 4-D: A Step in the Right Direction*, Florida Community Association J. (Aug. 2022), *available at* https://www.fcapgroup.com/flcaj/flcaj-articles/senate-bill-4-d/ ("Establishing accurate life expectancies and costs for such components (which should typically have an indefinite lifespan), along with mandating that associations actively fund for their replacement, is a dubious proposition at best.").

[28] Laws of Fla. Ch. 2022-269, §6, creating Fla. Stat. §§718.112(2)(g)4. and 718.112(2)(h) (2022).

[29] Laws of Fla. Ch. 2022-269, §10, creating Fla. Stat. §718.501(3)(a) (2022).

[30] *Id.*; Dep't of Business and Professional Regulation, *Condominiums and Cooperatives: Building Reporting*, http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/building-report/.

[31] Laws of Fla. Ch. 2022-269, §10.

[32] Laws of Fla. Ch. 2022-269, §5, amending Fla. Stat. §§718.111(12)(a)11.c. and 718.111(12)(a)15. (2022).

[33] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(9) (2022).

[34] Laws of Fla. Ch. 2022-269, §11, amending Fla. Stat. §§718.503(1)(b) and 718.503(2) (2022).

[35] *See Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1272 (Fla. 2013) ("For the retroactive application of a law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature.").

[36] *See Tropicana Condo. Ass'n v. Tropical Condo., LLC*, 208 So. 3d 755, 758-59 (Fla. 3d DCA 2016).

[37] Laws of Fla. Ch. 2022-269, §3, creating Fla. Stat. §553.899(3).

[38] Casey Tolan, *Condo Owners in Surfside Building Were Facing Assessments for $15 Million Worth of Repairs*, CNN (June 29, 2021), https://www.cnn.com/2021/06/28/us/surfside-condo-owners-assessments-invs/index.html.

Martin A. Schwartz *is a partner in the Miami firm, Bilzin Sumberg Baena Price & Axelrod LLP, where he is as a member of its Real Estate Practice Group and the head of its condominium practice. His practice includes all aspects of real estate. He serves on the executive council of the Real Property, Probate and Trust Law Section of The Florida Bar and is a longstanding member of its Commercial Real Estate Committee and Condominium and Planned Development Committee. He has written extensively on various real estate topics and is board certified in condominium and planned development law.*

Kevin M. Koushel *is of counsel in the Miami firm, Bilzin Sumberg Baena Price & Axelrod LLP, where he is a member of its Real Estate Practice Group and part of its condominium practice. He has a diverse legal background that includes condominium and community association law, but his current practice focuses on all aspects of real estate. He is part of the Real Property, Probate and Trust Law Section and a member of the Condominium and Planned Development Committee.*

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Sarah Swaim Butters, chair, and Allison Archbold and Homer Duvall, editors.

Real Property, Probate and Trust Law

Older Column