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Condominium Law: How Florida Must Continue to Adapt in the Wake of the Champlain Towers South Collapse

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Condominium Law: How Florida Must Continue to Adapt in the Wake of the Champlain Towers South Collapse

AUSTIN PRICE*

Condominiums represent a large portion of the housing inventory throughout the state of Florida. However, until recently, the maintenance of condominium buildings was left largely unregulated in most areas of the state. Only two counties, Broward and Miami-Dade, had inspection protocols in place, but each was limited in scope and allowed for long periods between inspections. Beyond those regulations, Florida law also gave residents the power to waive reserves even for the most important building components. After the tragic events that took place at Champlain Towers South, the state of Florida made great strides in improving the existing procedures by mandating inspections statewide and by decreasing the time permitted between inspections. The state also restricted the ability to underfund reserves for certain building elements. This Article analyzes the recent changes, where there is still room for improvement, and the shortcomings of the solutions offered here.

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INTRODUCTION

The Champlain Towers South tragedy exposed a three-pronged problem throughout the state of Florida: (1) the large number of aging condominiums; (2) the inadequate recertification system to monitor building safety; and (3) the ability of condominium owners to continuously waive reserves for building maintenance. On June 24, 2021, Champlain Towers South suffered a partial collapse that resulted in the deaths of ninety-eight people.¹ And while the exact cause of the incident has yet to be determined, it has become clear that the building was in poor health before the collapse.² Just three years earlier, the building had received a report from a structural engineer detailing various issues and providing notice that some issues needed to be addressed immediately.³ By the time of the collapse, the condominium association was just beginning to make preparations to fix the most pressing issues, but unfortunately that action came too late.⁴ The aftermath of the collapse left many questions to be answered, but the discussion here will focus on how important repairs were neglected for so long. Part I will outline the current statutory scheme for building maintenance, the previous system, and the total number of Floridians that the system affects. Part II will discuss the different pitfalls of the current inspection timeline and procedure, the waiver of reserves, and the termination threshold. Finally, Part III will propose a multi-step solution while also acknowledging the solution's potential flaws for both individuals and the environment.

¹ Giulia Heyward et al., *Final Victim of Surfside Condo Collapse Is Identified*, N.Y. TIMES (July 26, 2021), <https://www.nytimes.com/2021/07/26/us/surfside-collapse-last-victim.html>.

² See Mike Baker et al., *Engineer Warned of 'Major Structural Damage' at Florida Condo Complex*, N.Y. TIMES (June 26, 2021), <https://www.nytimes.com/2021/06/26/us/miami-building-collapse-investigation.html>.

³ See *id.*

⁴ See *id.*

I. CONDOMINIUM RECERTIFICATION: A LOOK AT BOTH THE PAST AND PRESENT

A. *Condominiums Throughout Florida*

A condominium is a “communal form of estate in property, consisting of individually owned units which are supported by collectively held facilities and areas.”⁵ A key component of the concept is the condominium association.⁶ Under Chapter 718 of the Florida Statutes, an “association” is defined as “any entity which operates or maintains other real property in which owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.”⁷ In Florida, condominium associations must be incorporated.⁸ These entities are responsible for things like regulating the common areas and collecting funds for building maintenance.⁹ In most cases, a board of directors is responsible for carrying out the association’s actions in accordance with the property’s rules and regulations.¹⁰

In Florida, this particular type of property is quite common, with 1,529,764 residential condominium units throughout the state.¹¹ When that total number is broken down further by condominium

⁵ 15B AM. JUR. 2D, *Condominiums and Cooperative Apartments* § 1, Westlaw (database updated Aug. 2022).

⁶ William P. Sklar, *Concepts of Condominium and Homeowner Association Ownership*, FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW § 1.3(B)(1) (4th ed. 2018, CONDO FL-CLE 1-1).

⁷ FLA. STAT. ANN. § 718.103(2) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

⁸ § 718.111(1)(a) (Westlaw). *But see* DEP’T OF LICENSING AND REGUL. AFFS., CONDOMINIUM ACT FREQUENTLY ASKED QUESTIONS 3 (Rev. Jan. 2019), <https://www.michigan.gov/lara/-/media/Project/Websites/lara/about/Policy/Frequently-Asked-Questions.pdf?rev=5d58aaefd5194d4f837980662bc978c3> (noting that Michigan does not require that condominium associations be incorporated).

⁹ Sklar, *supra* note 6.

¹⁰ *Id.* at § 1.3(B)(2).

¹¹ WILLIAM P. SKLAR ET AL., REPORT OF THE FLORIDA BAR RPPTL CONDOMINIUM LAW AND POLICY LIFE SAFETY ADVISORY TASK FORCE 4 (Oct. 12, 2021), <https://www-media.floridabar.org/uploads/2021/10/Condominium-Law-and-Policy-Life-Safety-Advisory-Task-Force-Report.pdf>.

age, 912,376 are over thirty years old with another 141,773 between twenty and thirty years old.¹² In terms of individuals affected, over 2,000,000 people live in buildings that have been battered by the elements for more than three decades.¹³ That is just under ten percent of the state's population, which is estimated to be roughly 21,700,000 people.¹⁴ These numbers indicate the extent of the problem discussed throughout this Article.

B. *Relevant Florida State Statutes*

1. INSPECTION PROTOCOLS

As of May 2022, Florida enacted a statewide inspection requirement for condominiums.¹⁵ Historically, there had been no mandate in the Florida Statutes that applied to all counties, which meant all but two had chosen to have no recertification system at all.¹⁶ With the introduction of the new statutory scheme, any condominium building that reaches thirty years old must have a milestone inspection.¹⁷ For those buildings within three miles of the coast, inspections must happen at the twenty-five-year mark rather than the thirty-year mark.¹⁸ However, regardless of proximity to the coast, once the initial inspection has been conducted the process repeats every ten years.¹⁹

¹² *Id.*

¹³ *Id.* (using an average of 2.2 residents per condominium “based upon information provided by” the Florida Department of Business and Professional Regulation).

¹⁴ *Quick Facts Florida*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/FL> (last visited Aug. 5, 2022).

¹⁵ FLA. STAT. ANN. § 553.899(1) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

¹⁶ See Michelle Marchante & Madeleine Romance, *Does Your Aging Condo Building Need to Get Recertified? You Can Keep Track Of That*, MIAMI HERALD (July 22, 2021), <https://www.miamiherald.com/news/local/community/miamidade/miami-beach/article252593378.html>.

¹⁷ FLA. STAT. ANN. § 553.899(3).

¹⁸ *Id.*

¹⁹ *Id.*

2. REQUIRED RESERVES

Along with the changes to the inspection procedures, there were also revisions to the amount of control condominium owners have over funding reserves. Previously, owners could limit or even eliminate the funding of reserves for building maintenance by “majority vote at a duly called meeting.”²⁰ However, that option is no longer available under the newly enacted statute.²¹ Instead, owners must provide reserves based on numbers given in the structural integrity reserve study,²² a newly defined term, or based on the statutory formula if the item is not included in the study.²³ The previous statute also allowed the developer to waive reserves before building turnover,²⁴ but this too has been eliminated in the newest version.²⁵

3. TERMINATION OF A CONDOMINIUM

The final topic deserving of discussion deals with the mechanics of condominium termination.²⁶ In short, termination means the dismantling of the statutorily created form of ownership associated with a particular property and all the protections that come with it.²⁷ This vehicle is especially important when considering the potential costs of repairing aging condominiums and the residents who must

²⁰ FLA. STAT. ANN. § 718.112(2)(f)(2)(a) (West, Westlaw current with laws and joint resolutions from 2021 1st reg. sess. and spec. “A” and “B” sess. of the twenty-seventh leg.).

²¹ FLA. STAT. ANN. § 718.112(2)(f)(2)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

²² § 718.103(25) (Westlaw) (defining a structural integrity reserve study as “a study of the reserve funds required for future major repairs and replacement of common areas based on a visual inspection of the common areas”).

²³ § 718.112(2)(f)(2)(a) (Westlaw).

²⁴ FLA. STAT. ANN. § 718.112(2)(f)(2)(b) (West, Westlaw current with laws and joint resolutions from 2021 1st reg. sess. and spec. “A” and “B” sess. of the twenty-seventh leg.).

²⁵ § 718.112(2)(f)(2)(b) (Westlaw).

²⁶ FLA. STAT. ANN. § 718.117 (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

²⁷ See Marlene Brito, Note, *Terminating a Condominium or Terminating Property Rights: A Distinction Without A Difference*, 45 REAL EST. L.J. 200, 203 (2016).

bear those costs. Under the current statutory language, optional termination essentially requires a 95% approval vote from all voting interests.²⁸ While the statute does technically provide a threshold of 80%, it includes the caveat that if more than 5% of the total voting interests reject termination the vote will not succeed, which effectively makes the threshold 95%.²⁹ Furthermore, once an initial termination vote fails, a second vote is barred for another twenty-four months.³⁰

The only exceptions to the “default” rules of optional termination are cases of economic waste or impossibility.³¹ In instances of economic waste, the statute provides that if the total cost of repairs on the structure exceeds “the combined fair market value of the units in the condominium after completion of the construction or repairs” the termination can be approved by the “lesser of the lowest percentage of voting interest necessary to amend the declaration or as otherwise provided in the declaration”³² For instances of impossibility where reconstruction becomes impossible due to updated land use laws or regulations, the same voting parameters apply as in situations of economic waste.³³

C. *The Genesis of Condominium Recertification*

As mentioned previously,³⁴ prior to May of 2022 there were only two counties with recertification requirements in the state: Miami-Dade and Broward. The two programs were functionally identical and can therefore be discussed as one system. The goal of the system was to ensure that aging buildings remained safe, and in both counties the programs acted as a sort of quasi-code enforcement for structures built decades ago. Miami-Dade County was the first to implement the system in the mid-1970s, while Broward County waited

²⁸ See § 718.117(3) (Westlaw).

²⁹ See *id.*

³⁰ § 718.117(3)(a)(2) (Westlaw).

³¹ § 718.117(2)(a)(1–2) (Westlaw).

³² § 718.117(2)(a)(1) (Westlaw).

³³ § 718.117(2)(a)(2) (Westlaw).

³⁴ See discussion *supra* Section I(B)(1).

until 2006.³⁵ Broward County's own documents note that their requirements were modeled after those created in Miami-Dade County.³⁶ These two counties formed the basis for the recently enacted statewide recertification laws.

Section 8.11(f) of the Miami-Dade County code of ordinances provided a timeline for when recertification should take place. Any building—except single-family residences and duplexes—had to be recertified as habitable once it reached the age of forty years old.³⁷ After that initial recertification, the interval for reinspection shortened to ten years moving forward.³⁸ The building systems primarily at issue in each inspection were the electrical system and the building's structural components including elements such as columns, foundations, and walls.³⁹ Broward County followed the same timeline and included similar inspection parameters.⁴⁰

D. *A General Overview of the Recertification Process*

The umbrella of the current recertification process can be split into two distinct areas: (1) the milestone inspection⁴¹ and (2) the

³⁵ BOARD OF RULES AND APPEALS, BROWARD COUNTY BUILDING SAFETY INSPECTION PROGRAM 5.84 (Rev. Jan. 9, 2020), <https://www.broward.org/CodeAppeals/Documents/Broward%20County%20Building%20Safety%20Inspection%20Program.pdf>.

³⁶ *Id.*

³⁷ MIAMI-DADE BUILDING CODE § 8-11(f)(ii)(1) (Aug. 5, 2022), https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH8BUCO_ARTIAD_S8-11EXBU.

³⁸ MIAMI-DADE BUILDING CODE § 8-11(f)(ii)(2).

³⁹ MIAMI-DADE BUILDING CODE § 8-11(f)(i)(2).

⁴⁰ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.84.

⁴¹ FLA. STAT. ANN. § 553.899(2)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2nd reg. sess.). The statute defines a milestone inspection as “a structural inspection of a building, including an inspection of load-bearing walls and the primary structural members and the primary structural systems as those terms are defined in s. 627.706, by a licensed architect or engineer authorized to practice in this state for the purposes of attesting to the life safety and adequacy of the structural components of the building and, to the extent reasonably possible, determining the general structural condition of the building as it affects the safety of such building, including the determination of any necessary maintenance, repair, or replacement of any structural component of the building.” *Id.*

structural integrity reserve study.⁴² Upon reaching the thirty year or twenty-five year threshold, the statute requires that the condominium association perform a milestone inspection.⁴³ Phase one of the inspection is made up of a “visual examination of habitable and non-habitable areas of a building, including the major structural components of a building” and a “qualitative assessment of the structural conditions of the building.”⁴⁴ If there are no signs of substantial structural deterioration, a defined term,⁴⁵ the architect or engineer may submit their report without moving on to phase two.⁴⁶ If phase two is necessary, which only happens in instances where substantial structural deterioration is identified in phase one, the statute gives the inspector extensive discretion.⁴⁷ Once phase two is complete, the architect or engineer is required to submit a report with “material findings and recommendations” to the condominium association and the building official of the local government.⁴⁸

Along with the milestone inspection, condominium associations are also now required to have a structural integrity reserve study at least every ten years.⁴⁹ The study is a visual inspection of the common areas along with an estimation of the remaining useful life, the estimated replacement cost or deferred maintenance expense of an item, and the recommended annual reserve amount.⁵⁰ In conducting the study, the architect or engineer should at minimum specifically address the following components of the building: (1) roof; (2) load

⁴² § 718.103(25) (Westlaw) (defining a structural integrity reserve study as “a study of the reserve funds required for future major repairs and replacement of common areas based on a visual inspection of the common areas”).

⁴³ § 553.899(3) (Westlaw).

⁴⁴ § 553.899(7)(a) (Westlaw).

⁴⁵ § 553.899(2)(b) (Westlaw). The statute defines substantial structural deterioration as “substantial structural distress that negatively affects a building’s general structural condition and integrity.” *Id.* The definition excludes cracks, distortion, sagging, deflections, misalignment, signs of leakage, and peeling finishes unless the engineer or architect conducting the inspection determines those symptoms are signs of a greater issue.

⁴⁶ § 553.899(7)(a) (Westlaw).

⁴⁷ § 553.899(7)(a–b) (Westlaw) (noting that a phase two inspection can include “destructive or nondestructive testing at the inspector’s direction” and can be as “extensive or limited as necessary”).

⁴⁸ § 553.899(8) (Westlaw).

⁴⁹ FLA. STAT. ANN. § 718.112(2)(g)(1) (Westlaw).

⁵⁰ § 719.103(25) (Westlaw).

bearing walls or other primary structural members; (3) floor; (4) foundation; (5) fireproofing and fire protection systems; (6) plumbing; (7) electrical systems; (8) waterproofing and exterior painting; (9) windows; and (10) anything that has a deferred maintenance expense or replacement cost that exceeds \$10,000.⁵¹ The statute also requires that developers perform this study prior to turning the building over to the association.⁵² Together these two requirements are meant to ensure continued building safety, though it is worth noting that neither one is meant to verify compliance with the Florida Building Code.⁵³

1. THE PREVIOUS PROCESS FOR RECERTIFICATION

The previous system for both Miami-Dade and Broward County was less expansive and had no structural integrity reserve study requirement. Instead, both local governments required that there be an inspection of two key components: (1) the electrical system of the building⁵⁴ and (2) the structural components of the building.⁵⁵ The system also had a different recertification timeline than what is now present in the Florida Statutes. Once the structure turned forty years old,⁵⁶ rather than thirty or twenty-five, the condominium association was responsible for hiring an architect or engineer and submitting a report within ninety days of the notice of inspection.⁵⁷ If the report found any issues that needed repair, Miami-Dade County allowed 150 days to bring the building within code.⁵⁸ Broward County was more specific and stated that any repairs that immediately threatened

⁵¹ § 718.112(2)(g)(1)(a-j) (Westlaw).

⁵² § 718.112(2)(g)(2) (Westlaw).

⁵³ See FLA. STAT. ANN. § 719.103(25) (Westlaw); see also FLA. STAT. ANN. § 553.899(2)(a) (Westlaw).

⁵⁴ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.88e; MIAMI-DADE BUILDING CODE § 8-11(f)(ii)(2) (Dec. 14, 2021), https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH8BUCO_ARTIAD_S8-11EXBU.

⁵⁵ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.88; MIAMI-DADE BUILDING CODE § 8-11(f)(ii)(2).

⁵⁶ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.84; MIAMI-DADE BUILDING CODE § 8-11(f)(ii)(1).

⁵⁷ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.84; MIAMI-DADE BUILDING CODE § 8-11(f)(iv)(1).

⁵⁸ MIAMI-DADE BUILDING CODE § 8-11(f)(iv)(5).

life safety had to be rectified within 180 days, while others could be fixed at a later date.⁵⁹ However, all guidelines of the previous system were simply that—guidelines. The only real requirements were that inspectors adequately complete county forms,⁶⁰ or inspect enough typical components to address in a report.⁶¹

II. THE PITFALLS OF THE CURRENT STATUTES

A. Room to Improve the Recertification Process

The recent changes to the recertification timeline, specifically reducing the recertification cutoff to thirty years and including the structural integrity reserve study, are steps in the right direction. Forty years between the initial certificate of occupancy and recertification was far too long. The day a building reaches forty years old is not akin to an alarm clock that wakes up building decay, something illustrated by the Champlain Towers South tragedy.⁶² In that case, there were likely issues that presented themselves long before the forty-year mark, specifically ones that might have been caught if the building was inspected and repaired sooner.⁶³ However, there is still room for improvement in how often buildings get inspected.

⁵⁹ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.84.

⁶⁰ *See id.* at 5.88, 5.88f-5.89g (providing the Broward County specific forms for submission to building officials).

⁶¹ *See General Consideration*, REGUL. & ECON. RES. DEP'T, GENERAL CONSIDERATIONS (Nov. 18, 2021), <https://www.miamidade.gov/permits/library/structural-recertification.pdf> (highlighting that not all structural components must be examined to write an adequate inspection report).

⁶² *See Swaine et al., Engineer Warned of 'Major Structural Damage' Years Before Florida Condo Building Collapse*, WASH. POST (June 26, 2021), https://www.washingtonpost.com/national/champlain-towers-south-surfside/2021/06/26/a509519a-d5de-11eb-a53a-3b5450fdca7a_story.html (citing structural issues found by an engineer in 2018, before the state-imposed deadline).

⁶³ *See id.*; *see also* Final Report of the Miami-Dade County Grand Jury, at 23–24, *The Surfside Condo Collapse Tragedy: Recommendations to Make Buildings Safer* (Fla. Cir. Ct. Dec. 15, 2021), https://miamisao.com/wp-content/uploads/2021/12/GRAND-JURY_202112151434-1.pdf (describing the various building components that were suffering from corrosion at inspection in 2018 and noting that corrosion is a known issue for buildings located on the coast).

1. ALIGNMENT WITH FLORIDA BUILDING CODE

The aim of building recertification is not to bring the structure into 100% compliance with the updated Building Code.⁶⁴ However, to ignore the Building Code entirely in verifying a building's health also seems imprudent, but the current statutes do exactly that.⁶⁵ If inspections were conducted more regularly—more often than every ten years as required by the structural integrity reserve study—with a greater focus on the large-scale code updates, there could be an opportunity for condominiums approaching the thirty year mark to extend their life even further.

One example of a large-scale update was the code changes that took place when Hurricane Andrew hit Florida in August of 1992—the year that buildings inspected in 2022 were built.⁶⁶ There were three major modifications in the aftermath of that storm: (1) revised building codes, with a specific focus on wind resistance; (2) more stringent product review for materials to be installed in homes and other buildings; and (3) better education for building inspectors, officials, and plan examiners.⁶⁷ These changes necessarily had a focus on new single-family residences and smaller buildings because of the over 25,000 homes lost in the damage caused by Hurricane Andrew.⁶⁸ However, the greater education of those inspecting and verifying that buildings are safe likely affected all buildings as did the revised code. This potentially puts structures that were built prior to Hurricane Andrew at a disadvantage when it comes to deterioration. And if Hurricane Andrew's changes did not make the construction

⁶⁴ See FLA. STAT. ANN. § 553.899(2)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2nd reg. sess.).

⁶⁵ *Id.*

⁶⁶ Kim Bellware, *Hurricane Andrew Transformed Florida's Building Codes. The Champlain Towers Collapse Could Usher in a New Era of Regulations.*, WASH. POST (June 30, 2021), <https://www.washingtonpost.com/history/2021/06/30/florida-building-codes/>; FLA. HOUSING FIN. CORP., OVERVIEW OF THE FLORIDA BUILDING CODE 1 (Aug. 2017), <https://www.floridahousing.org/docs/default-source/aboutflorida/august2017/august2017/tab4.pdf> (last visit Dec. 31, 2021) (describing how Florida building code changed after Hurricane Andrew and how the flaws of a patchwork system of local building codes were exposed).

⁶⁷ Bellware, *supra* note 66; FLA. HOUSING FIN. CORP., *supra* note 66, at 1.

⁶⁸ See Bellware, *supra* note 66.

methods used in aging buildings antiquated, it is likely that building code changes that progressively happened in the thirty years after did. Ignoring changes like those that happened after Andrew would be a mistake. The meaning of building health is constantly changing as the building code is updated every three years.⁶⁹ And as the world deals with the realities of climate change, something already affecting Florida,⁷⁰ the code changes will become an even more important consideration.

2. INACCURATE PRICING FOR RESERVES

Under the language of the current statute, reserves are tied to the structural integrity reserve study,⁷¹ which is done at minimum every ten years.⁷² But to base reserves on pricing estimates that are as much as ten years old is misguided. Price fluctuations are a part of life, and more specifically a part of construction.⁷³ For instance, in the year 2021 alone the price of construction materials—materials that would likely be needed in repairs of a condominium—rose an estimated twenty percent.⁷⁴ And if reserves must be kept at the amount given in the structural integrity reserve study those prices must be updated more regularly than every decade.

⁶⁹ FLA. HOUSING FIN. CORP., *supra* note 66, at 1.

⁷⁰ See Alex Harris, *Florida's Building Code Doesn't Take Sea Rise Into Account. That Could Change.*, MIA. HERALD (Nov. 13, 2019), <https://www.miami-herald.com/article237241299.html> (recommending that Florida building code add another one foot to all new building elevations to combat rising sea levels); see also Christopher Flavell & Patricia Mazzei, *Miami Says It Can Adapt to Rising Seas. Not Everyone Is Convinced.*, N.Y. TIMES (Mar. 2, 2021), <https://www.ny-times.com/2021/03/02/climate/miami-sea-level-rise.html> (describing Miami-Dade County's new plan for dealing with rising sea levels, which entails elevating homes and roads as well as increased construction farther inland).

⁷¹ FLA. STAT. ANN. § 718.112(2)(f)(2)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2nd reg. sess.).

⁷² § 718.112(2)(g)(1) (Westlaw).

⁷³ Isaac Barzo, *Construction Costs Experienced the Largest Spike Since 1970: Can Contractors Fight the Effects?*, LEVELSET (Mar. 29, 2022), <https://www.levelset.com/news/construction-costs-spike-can-contractors-fight-effects/> (noting that construction material prices have had the largest spike since 1970).

⁷⁴ Matthew Thibault, *Construction Material Prices Soared Nearly 20% in 2021: Report*, SUPPLYCHAIN-DIVE (Jan. 20, 2022), <https://www.supplychain-dive.com/news/construction-materials-prices-soared-2021/617219/>.

B. *Preserving Resident Autonomy in Waiving Reserves*

The condominium as a form of ownership is a balance. The rights of individual unit owners must be weighed against the benefits of the building as a whole. This delicate equilibrium is highlighted by the ability to waive reserves, or rather not waive them under the current statute.⁷⁵ Previously owners could vote to keep reserve funding at zero.⁷⁶ Of course the ability to waive reserves that low is inadequate if the system for keeping condominiums safe is to be improved, but completely taking away that right is also not the answer. Living in a condominium still entails ownership of a unit and there should be a reasonable threshold to which reserves can be waived.

C. *An Unrealistic Termination Threshold*

At the surface level, termination seems like a misfit when included under the recertification umbrella. In reality, the process of termination is an escape hatch for those unit owners that can no longer afford the upkeep of their building and provides a way to collect more than what would be received in a typical sale. However, as it stands the current termination statute is not an asset to unit owners.⁷⁷ The statute essentially requires that 95% of those voting must approve an optional condominium termination otherwise the termination will fail,⁷⁸ and once it fails it cannot be reintroduced to be voted on again for another twenty-four months.⁷⁹ This percentage is unworkable. An approval level of 95% on anything is unrealistic in today's society. Take the dissolution of corporations for example.⁸⁰

⁷⁵ § 718.112(2)(f)(2)(a) (Westlaw).

⁷⁶ FLA. STAT. ANN. § 718.112(2)(f)(2)(a) (West, Westlaw current with laws and joint resolutions from 2021 1st reg. sess. and spec. "A" and "B" sess. of the twenty-seventh leg.).

⁷⁷ See FLA. STAT. ANN. § 718.117(3) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2nd reg. sess.) (employing such a high threshold that it is not helpful to unit owners).

⁷⁸ See *id.*

⁷⁹ § 718.117(3)(a)(2) (Westlaw).

⁸⁰ See JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 26:1 (3d ed.), Westlaw LAWOFPCORP (database updated Dec. 2021) (detailing the steps of dissolving a corporation and noting that dissolution itself "involves the termination of the corporate existence").

While not a perfectly analogous pairing, the threshold for dissolution there is much lower. Florida law provides that unless the articles of incorporation say otherwise or the board of directors requires a greater vote, the approval of a corporation's dissolution can be granted if a majority of those entitled to cast a vote approve the proposal.⁸¹ The Model Business Corporation Act takes it a step further and allows for approval if a majority of those that make up a quorum vote in favor of dissolution.⁸² And Delaware General Corporation Law follows in the steps of Florida, stating that if a majority of the outstanding stock of a corporation votes in favor of the dissolution, the dissolution is approved.⁸³ While the threshold for optional termination should not be lowered to the majority of those voting, it should be brought below 95%.

The major flaw with the termination threshold is also not relieved by the economic waste or impossibility exceptions provided in the statute. In instances of economic waste, the cost of construction must exceed the combined fair market value of the units after the completion of construction for the exception to apply.⁸⁴ In effect, this means that even if the repairs are millions of dollars, such as in the situation of the Champlain Towers South building,⁸⁵ and the total value of units is high enough, the 95% termination threshold would still apply. This situation could easily play out several times over in locations where the property is already valuable prior to construction. Though repair costs will lower the market price of a building, they do not automatically trigger the "out." The second exception provides little more assistance to residents than the first. Engineers or architects can likely find some way to make a new configuration work, which then makes residents rely on exception one. The question that then follows the above explanation is why residents

⁸¹ FLA. STAT. ANN. § 607.1402(5) (Westlaw).

⁸² MODEL BUS. CORP. ACT § 14.02(e) (AM. BAR ASS'N, revised 2020).

⁸³ DEL. CODE ANN. tit. 8, § 275(b) (West, Westlaw current through ch. 351 of the 151st Gen. Assemb. (2021–2022)).

⁸⁴ FLA. STAT. ANN. § 718.117(2)(a)(1) (Westlaw).

⁸⁵ Kevin McCoy, 'Condo Wars': *Surfside Association Fighting in Florida Was Extreme, But It's a Familiar Battle for HOAs*, USA TODAY (July 10, 2021), <https://www.usatoday.com/story/news/2021/07/10/surfside-condo-building-collapse-associations-fights-plans/7840468002/> (stating that the total cost of the construction necessary to bring the Champlain Towers South building up to code was approximately \$10,300,000 and that the reserve funding was inadequate).

with a potential opportunity to use either exception would choose not to. The answer is that those residents would rather make the dilapidated building work, even if the value added is minimal. The byproduct is a building that falls far short of today's building standards.

III. A POTENTIAL SOLUTION

A. *A Multi-Step Approach to Improve Condominium Recertification*

After analyzing the tragedy that took place at the Champlain Towers South site, it was clear that major revisions were needed in terms of how Florida handled the recertification of aging structures. Only recertifying those buildings located in the most southern part of Florida was no longer appropriate.⁸⁶ And with last year's update to the statewide condominium maintenance procedure that concern has been quieted.⁸⁷ However, even the most recent changes can be improved upon with the below multi-step approach.

1. THE RECERTIFICATION TIMELINE

First, there must be an adjustment in the timing of recertifications. Instead of having a separate system between the structural integrity reserve study and the milestone inspection, the two processes should be melded together. Under the revisions proposed here, limited milestone inspections would be conducted every seven years while also hitting on all the topics required by the structural integrity

⁸⁶ See Final Report of the Miami-Dade County Grand Jury, *supra* note 63, at 2 (indicating that 40% of the over 1,500,000 condominiums in Florida are located outside Broward, Palm Beach, and Miami-Dade County); see also Gabe Stern, *Pinellas Mayors Consider New High-rise Protections After Surfside Collapse*, TAMPA BAY TIMES (July 1, 2021), <https://www.tampabay.com/news/pinellas/2021/07/01/pinellas-mayors-consider-new-high-rise-protections-after-surfside-collapse/> (estimating that Pinellas County has added 30,000 high-rise condominiums since 1980 with no recertification protocol resembling the procedures present in South Florida).

⁸⁷ See *Fla Gov Signs Condo Safety Bill After Building Collapse*, U.S. NEWS (May 26, 2022), <https://www.usnews.com/news/us/articles/2022-05-26/desantis-signs-bill-addressing-safety-after-condo-collapse> (noting all the changes to condominium recertification and their application throughout the state).

reserve study. At the twenty-eight-year mark, the milestone inspection would transition to the definition currently included in the statute,⁸⁸ while also continuing to update the items included under the structural integrity reserve study. There are several reasons for this change.

The first reason is semi-alignment with the building code. As noted above, the Florida Building Code changes every three years.⁸⁹ Admittedly, not every change is major, nor does every change need to be implemented in aging buildings. However, making the time period between inspections seven years allows for buildings to review the changes of at least two building code cycles and incorporate anything that has a significant impact on life safety. It also allows buildings to potentially incorporate any code requirements necessitated by the effects of global warming on the pattern of weather and flooding throughout the state.⁹⁰ Requiring complete compliance with the code is not what is being proposed here,⁹¹ as that would be economically infeasible. However, incorporating some level of code review could make buildings safer and potentially extend their useful life, if residents are willing.

A second reason to adjust timing is the lifespan of some building systems. Items such as roof components, curtain walls, windows and doors, fire protection system, and elements of the electrical system have average useable lifespans at or below the current thirty-year threshold.⁹² By changing the frequency of inspections to every seven years, these items could be monitored to ensure that they actually last their estimated life. And, if it looks as if the component will prematurely fail, reserves can be updated accordingly.

⁸⁸ FLA. STAT. § 553.899(2)(a) (Westlaw) (defining milestone inspection as an inspection of the complete building rather than just the common areas).

⁸⁹ See discussion *supra* Section II(A)(1).

⁹⁰ See EPA, EPA 430-F-16-011, WHAT CLIMATE CHANGE MEANS FOR FLORIDA (Aug. 2016), <https://www.epa.gov/sites/default/files/2016-08/documents/climate-change-fl.pdf> (predicting an increase in severe storms and severe flooding throughout the state).

⁹¹ See § 553.899(2)(a) (Westlaw) (matching the intent of the current statute).

⁹² FANNIE MAE, FORM 4099.F, INSTRUCTIONS FOR PERFORMING A MULTIFAMILY PROPERTY CONDITION ASSESSMENT (VERSION 2.0) 2–3, 5–7 (Aug. 2019), <https://multifamily.fanniemae.com/media/6701/display> (laying out the average useable lifespan of building components and noting that items discussed in this piece have a lifespan at or below thirty years).

The final factor to consider is the current housing shortage in Florida, an issue that is expected to continue,⁹³ and something that has existed in the state for over a decade.⁹⁴ To combat this problem, Florida will likely need to keep construction going for many years as it works to satisfy the demands of its growing population.⁹⁵ And with that uptick in construction, Florida must have an adequate and comprehensive system in place to keep up with the accelerated pace. Part of that system must be increased inspections even beyond what has already been enacted by statute. This change will account for the evolving building methods of new construction.

Notwithstanding the factors provided above, shortening the time period between inspections has been advocated for by other parties.⁹⁶ In fact, the task force created in the wake of the Champlain Towers South incident proposed a requirement to get periodic inspections of structural and life safety systems after the building is turned over by the developer.⁹⁷ While they did not provide a specific

⁹³ See Emily Badger & Eve Washington, *The Housing Crisis Isn't Just a Coastal Crisis Anymore*, N.Y. TIMES (July 14, 2022), <https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html> (noting that the United States is short 3.8 million housing units and that Miami entered the pandemic short 200,000 housing units).

⁹⁴ Tom Hudson, *Expert Says Lack of Earning and the 'Right Kind of Housing' Keeps Florida in an Affordable Housing Crisis*, NPR (Nov. 1, 2021), <https://www.npr.org/templates/story/story.php?storyId=1051124514&ft=nprml&f=1051124514> (reporting that housing costs are rising throughout Florida faster than most areas of the country and that the trend has been present for an extended period of time).

⁹⁵ Scott Powers, *Florida's Population Growth Tops in Migration, Immigration*, FLA. POLITICS (Dec. 27, 2021), <https://floridapolitics.com/archives/482244-floridas-population-growth-tops-in-migration-immigration/> (observing that from July 2020 to July 2021 the population of Florida grew by an estimated 211,305 people or approximately 1%).

⁹⁶ See Andres Viglucci, *After Surfside Collapse, a Push Not Just for More High-rise Inspections but Smarter Ones*, MIA. HERALD (Jan. 21, 2022), <https://www.miamiherald.com/news/special-reports/surfside-investigation/article256589236.html> (noting that the Bar report recommends inspections every five years starting in 2024 and that the associations institute recommends building inspections at ten years, twenty years, and then five-year intervals after that).

⁹⁷ SKLAR ET AL., *supra* note 11, at 15.

amount of time, every seven years provides a good compromise between what was proposed by other organizations and what has now been codified in the statutes.⁹⁸

Having addressed the increase in inspection frequency, the only two items left to consider are the depth of inspection prior to the formal recertification at the twenty-eight year mark and the timing of inspections after formal recertification. Prior to the twenty-eight year mark, inspections should be a limited phase one milestone inspection of all common areas and a fraction of the units. Regardless of timing in the building's life cycle, the inspection should also provide a status for the following components: (1) every system included in Florida Statutes section 718.301(4)(p);⁹⁹ (2) all windows and doors; and (3) any component that would cost over \$10,000 to repair or replace. Once the building reaches the age of twenty-eight, associations should be required to conduct a full milestone inspection of all units and common areas. However, instead of making subsequent recertifications after the twenty-eight year mark every ten years,¹⁰⁰ the seven-year timeline should be continued. Together, all these changes will give consistency to the recertification system and allow the design professionals involved to keep extensive records on each building to better track any issues that start as very minor. It could also potentially save condominium owners money because a problem caught early enough could be fixed before getting substantially worse.¹⁰¹

⁹⁸ Viglucci, *supra* note 96 (providing the timelines proposed by the Bar report and the associations institute).

⁹⁹ FLA. STAT. ANN. § 718.301(4)(p)(1–14) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 2nd reg. sess.) (listing out the roof, structure, fireproofing and fire protection systems, elevators, heating and cooling systems, plumbing, electrical systems, swimming pool or spa and equipment, seawalls, pavement and parking areas, drainage systems, painting, and irrigation systems).

¹⁰⁰ FLA. STAT. ANN. § 553.899(3) (Westlaw).

¹⁰¹ See Janelle Penny, *Stop Wasting Money on Deferred Maintenance*, BLDGS. (Oct. 15, 2018), <https://www.buildings.com/articles/27864/stop-wasting-money-deferred-maintenance> (putting off regular maintenance can cost between three and ten times as much as it would to have a regular repair and inspection program).

2. AVAILABILITY OF INSPECTION REPORTS

In tandem with the revisions to the timing of recertification and the system in general, all inspection reports should be made readily available to the public. The task force created after the Champlain Towers collapse suggested that associations be required to create websites that give links to all relevant documents, such as inspection reports.¹⁰² It also suggested that a timeline of ten days be given to post reports.¹⁰³ The recently enacted statute followed through on that suggestion and made it mandatory for communities with over 150 units to have a website with copies of the structural integrity reserve study, as well as the inspection reports.¹⁰⁴ This change, while helpful, is not perfect. The cutoff of 150 units should be removed as it would leave out communities such as Champlain Towers South.¹⁰⁵ There should also be specific penalties for failing to post inspection reports and reserve studies within ten days, as suggested by the task force. If the association fails to post to its website or the design professional fails to post to the state-created website suggested below, there should be fines for each day that they are late.

In addition to a website created by each specific property, there should also be a state-run website that allows registered design professionals and inspectors to upload their reports. The penalty suggestion hints at a very real concern that associations might attempt to hide negative findings. By creating a statewide and government-run website, that concern will be negated and those overseeing each local municipality will be able to track issues with problem buildings. The more people who view the documents, the more likely it is that any major problems will get fixed or that the people in danger will be able to remove themselves from the unsafe building.

¹⁰² SKLAR ET AL., *supra* note 11, at 16.

¹⁰³ *Id.*

¹⁰⁴ FLA. STAT. ANN. § 718.111(12)(g)(1)(mn) (Westlaw).

¹⁰⁵ Joe Hernandez, *What Led to The Florida Condo Collapse? Here's What We Know So Far*, NPR (June 29, 2021), <https://www.npr.org/sections/live-updates-miami-area-condo-collapse/2021/06/29/1010976101/timeline-what-we-know-so-far-about-what-led-up-to-the-surfside-condo-collapse> (noting that Champlain Towers South had a total of 136 units).

3. A REVISED TERMINATION PROCEDURE

With the increased number of inspections, there must also be major changes to the Florida Statutes that pertain to condominium termination. As discussed, there are numerous flaws with the current language, especially with the 95% approval requirement for optional terminations.¹⁰⁶ Though the optional termination section and the sections concerning economic waste and impossibility are entirely separate, they operate together in some situations based on the current construction. The economic waste section in particular often leads back to the optional termination threshold because it only allows for less than 95% approval in instances where the cost of construction exceeds the market value of the units after construction is complete.¹⁰⁷ Thus, even if the repair is millions of dollars but the property is still reasonably valuable with its flaws, the residents remain responsible for funding the repair or getting over 95% approval to terminate. At first glance, this seems like a non-issue, but the added economic value must be evaluated more thoroughly than it currently is. The simple fact that the new market value exceeds the construction cost should not be the sole metric of measurement. It is important to ask whether making the repairs is a worthwhile use of funds.

First, the number for optional termination should be lowered to at least 80%, a threshold introduced by the task force.¹⁰⁸ This strikes a balance between giving unit owners the tool that termination should be, while also allowing real consideration before choosing to terminate. It could be argued that the number should go lower and push into the 70% range, but the concern would be hostile takeovers,¹⁰⁹ likely by an entity looking to redevelop the property. There must be a balance between allowing residents adequate freedom to

¹⁰⁶ See § 718.117(3) (Westlaw).

¹⁰⁷ § 718.117(2)(a)(1) (Westlaw).

¹⁰⁸ SKLAR ET AL., *supra* note 11, at 26 (proposing the 80% threshold in instances of economic waste and impossibility).

¹⁰⁹ In this context, the term hostile takeover means a rapid purchase of all the units in such a fashion that unit owners have little opportunity to protect themselves from termination. See Robert Bobby Parson, *Hostile Takeovers of Condominiums*, IT'S ABOUT JUSTICE (Sept. 19, 2019), <https://itsaboutjustice.law/hostile-takeovers-of-condominiums/> (noting the changes in condominium termination law and the abuses that took place with prior versions).

make a choice, while also protecting the condominium entity as a whole. Thus, it seems best to put in place an 80% requirement for optional termination without the current 5% exception.

However, lowering the voluntary threshold does not complete the necessary changes to the termination statutes. The independent sections on economic waste and impossibility also need significant adjustment. Here, the task force makes another set of wise suggestions. It advises that the language for economic waste be rewritten to authorize termination if the construction costs exceed 15% of the market value of the improvements.¹¹⁰ And in cases where that condition is met, termination may be approved in one of three ways: (1) by 80% of the voting interests; (2) by the “lesser of the lowest percentage of voting interests necessary” to revise the declaration; or (3) by a number that the declaration provides.¹¹¹ The revision proposed by the task force is much more protective of residents than what is currently written and would be prudent to include.

The final change that must be applied addresses situations of impossibility. If for some reason the lowest percentage of voting interests needed to amend the declaration is close to 80% and the declaration is silent on the required approval percentage for termination, residents are stuck. They would need to get 80% approval to terminate when the building cannot even operate as originally intended. Instead, in situations of impossibility the number should be lowered to 70% or to whatever the declaration provides, if lower. Putting the percentage at 70% or whatever is agreed upon in the declaration allows residents who no longer see the building as a viable home to escape the stubbornness of a small minority of residents trying to force an unworkable solution.

4. THE WAIVER OF RESERVES

The ability to waive reserves near zero was one of the greatest problems with Florida condominium law. Residents often chose to underfund accounts because they would not be able to realize the

¹¹⁰ SKLAR ET AL., *supra* note 11, at 26.

¹¹¹ *Id.*

benefits.¹¹² And while saving money is almost always a valid consideration, slashing reserves for building maintenance and structural safety unfairly shifts the scales in favor of individual unit owners. That was perfectly exemplified by the Champlain Towers South collapse. In an examination of the condominium's reserves conducted in 2020, the amount of funds available totaled only \$706,460, and the financial preparedness of the building for an emergency was rated as weak.¹¹³ This left the building scrambling to gather the funds needed to complete the project and is the major reason why the repairs were put off for so long after the initial report was presented by the engineer reviewing the building.¹¹⁴ In an aim to rebalance the rights of each group, the most recent version of the statute eliminates the unit owner's right to waive reserves concerning certain items.¹¹⁵ This too is an incorrect approach. Instead, the residents should be able to waive reserves to 80% of the replacement cost or deferred maintenance cost of an item contingent upon three things: (1) updated pricing on the roof, structure, fireproofing and fire protection, elevators, the heating and cooling system, plumbing, electrical systems, swimming pool and spa equipment, seawalls, pavement and parking areas, drainage systems, painting, irrigation, waterproofing,¹¹⁶ windows and doors, and anything that would cost over \$10,000 to replace; (2) 80% approval from all voting interests on a yearly basis; and (3) satisfaction of all inspection requirements proposed here.

As of today, the statute provides that with every structural integrity reserve study, there should be estimates of certain items, and

¹¹² See Prashant Gopal, *In Florida, Petty Condo Politics Jeopardizes Residents' Safety*, BLOOMBERG CITYLAB (Oct. 12, 2021), <https://www.bloomberg.com/graphics/2021-florida-condos-winston-towers/>; see also *Why Some Owners Don't Want to Properly Fund Reserves*, FLA. RSRV. STUDY & APPRAISAL (Aug. 15, 2015), <https://reservestudyfl.com/why-some-owners-dont-want-to-properly-fund-reserves/>.

¹¹³ McCoy, *supra* note 85.

¹¹⁴ See *id.*

¹¹⁵ FLA. STAT. ANN. § 718.112(2)(f)(2)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

¹¹⁶ § 718.301(4)(p)(1–14) (Westlaw) (containing everything listed out just prior to the footnote).

that reserve funding should be based on those estimates.¹¹⁷ However, the issue with basing reserves on the structural integrity reserve study is that those studies are done every ten years.¹¹⁸ That is inadequate due to the constantly fluctuating cost of construction materials.¹¹⁹ And even if the pricing were adequate, the list of items under the requirements for the structural integrity reserve study leaves components out.¹²⁰ For the statute to be the most effective, reserve pricing should be updated every forty-two months and include all of the following items: (1) roof; (2) structure; (3) fireproofing and fire protection; (4) elevators; (5) the heating and cooling system; (6) plumbing; (7) electrical systems; (8) swimming pool and spa equipment; (9) seawalls; (10) pavement and parking areas; (11) drainage systems; (12) painting; (13) irrigation; (14) waterproofing;¹²¹ (15) windows and doors; and (16) anything that would cost over \$10,000 to replace. This allows any potential waiver of reserves to be made with a clear picture of total building health.

The second requirement, a threshold of 80% of the voting interests to waive reserves, should resemble the voting requirements necessary for termination.¹²² This strikes a balance between protecting unit owners while also not binding the property as a whole to the desires of a few. But even if a waiver is successful, it must be reaffirmed every year. If no vote is held on the waiver of reserves within thirty days of the annual date, the reserve funding level should automatically revert back to 100% with no opportunity to change for another three years.

The final requirement is the satisfaction of the proposed seven-year inspection procedure. For any waiver of reserves to be valid, all inspections must be conducted within forty-five days of the seven-year anniversary and uploaded to both the state and property-specific websites within ten days. While this posting requirement is not the responsibility of the unit owners, maintaining reserves must

¹¹⁷ See § 718.112(2)(f)(2)(a) (Westlaw).

¹¹⁸ § 718.112(2)(g)(1) (Westlaw).

¹¹⁹ Barzo, *supra* note 73.

¹²⁰ See § 718.112(2)(g)(1)(a-j) (Westlaw).

¹²¹ § 718.301(4)(p)(1-14) (Westlaw) (containing everything listed out just prior to the footnote).

¹²² See discussion *supra* Section III(A)(3).

take priority over the right to waiver, especially if the available numbers are inaccurate.

Together these suggestions preserve some right to waive reserves while also providing an avenue of funding for buildings that encounter unexpected deterioration. And if residents choose to waive reserves, records should be posted to both websites and distributed to all new building residents upon both the purchase of a unit and becoming a tenant.

5. STANDARDIZATION AND PLAIN LANGUAGE OF REPORTS

In the past, Broward County provided forms for the recertification process that analyzed certain systems, specifically structural as well as electrical, and noted the condition of those systems.¹²³ The forms were designed for submission to the municipality as a summation of the report by the design professional, and they clearly called out what repairs needed to be made.¹²⁴ To improve the recertification system, something similar should be implemented in the reports issued under the new statutory guidelines.

First, to encourage uniformity, there should be standardized forms issued by the state of Florida that provide a template for summaries of all of the following systems: (1) roof; (2) structure; (3) fireproofing and fire protection; (4) elevators; (5) the heating and cooling system; (6) plumbing; (7) electrical systems; (8) swimming pool and spa equipment; (9) seawalls; (10) pavement and parking areas; (11) drainage systems; (12) painting; (13) irrigation; (14) waterproofing;¹²⁵ (15) windows and doors; and (16) anything that would cost over \$10,000 to replace. The forms should succinctly provide the condition of each component in plain language, so even a layman can quickly surmise how safe the building is. One might suggest using the old forms as a base, but they only tackle two sys-

¹²³ BOARD OF RULES AND APPEALS, *supra* note 35, at 5.88f–5.89g.

¹²⁴ *Id.* (providing sections for cracking, chipping, and other items with spaces for further explanation and if repair is needed).

¹²⁵ § 718.301(4)(p)(1–14) (Westlaw) (containing everything listed out just prior to the footnote).

tems, and they use terminology written for those familiar with construction and building maintenance.¹²⁶ This makes them unhelpful to a nonexpert. Thus, the best course of action is to create forms with the addition of a plain language requirement. And the forms should also be provided in Spanish or any other language popular in a specific county. In practice, the forms should have a line item for something like structure and include subcategories such as columns, foundation, walls, and floors. There should then be a column noting the condition of that item as good, fair, or bad with those terms adequately explained somewhere on the form.

Finally, two additional columns should be included, one answering the question of whether a repair is needed, in yes or no form, and another detailing how soon repairs need to start, with a timing estimate. Any item that requires immediate repair should be marked accordingly, and the box should be highlighted in red. Items that need repair but not immediately should be highlighted in yellow. This would allow even those with very little understanding of building construction and maintenance to grasp the urgency of certain problems.

6. ACTION BY THE ASSOCIATION BOARD AFTER A REPORT IS RECEIVED

After a report is received, such as the one obtained by the Champlain Towers South association,¹²⁷ a two-step approach should be applied. First, the board should be required by statute to hold a meeting within forty-five days of receipt of the report, and it should be required to make a short presentation on the status of building safety. Together with the standardized forms—written in plain language—as well as the state-run and building-run websites no reasonable person could remain unaware of the building's hazards unless they actively chose to. Second, items in need of repair should be separated into those that need to be addressed as soon as possible and those that do not immediately threaten building safety. For those items that need repair as soon as possible and fall under the categories of

¹²⁶ See BOARD OF RULES AND APPEALS, *supra* note 35, at 5.88i, 5.88k (using words like spalling and discussing elevator sheave beams, likely unfamiliar topics for a layman).

¹²⁷ See Baker et al., *supra* note 2 (noting that the report issued in 2018 described major structural flaws in parts of the property).

Florida Statutes section 718.301(4)(p), windows and doors, or items that cost more than \$10,000 to repair, the board should be able to contract for repair work without a vote of the residents. Items that are not an immediate threat should be put on a slower track, where they are discussed at the next board meeting and bid out to several contractors. As long as they fall under the sections discussed above, the board should be able to move forward with repairs in a timely fashion without a vote, but residents should be able to vote on the contractor doing the work if they desire. This allows some resident participation but limits the risk that maintenance will be deferred for years on important building systems or components. With the intermediate risks, an “expiration date” of 180 days should be imposed for how long different contractors’ proposals can be considered. The task force suggests a more drastic approach and recommends that for the maintenance of any item contained in section 718.301(4)(p) the building should be able to complete work without a vote, even if the item is not in dire need of repair.¹²⁸ While this system is acceptable, it seems preferable to get the residents involved in the less pressing issues if possible. This allows some level of balance to remain between complete board control and the residents’ power to have a voice in how their building is operated.

7. IMPACT FEES FOR BUILDING INSPECTIONS

Cost is always a concern in property development and maintenance, a fact that is highlighted throughout this paper. Reserves were often waived to save money and repair work was put off because the problem was not dire yet and no one wanted to spend funds on something that would not have a noticeable impact on their life.¹²⁹ This same concern over cost comes up again with inspections. And with the increased inspection rate suggested both here and by the task force report, inspection costs will likely be a topic of discussion.

Before getting into the possible impact fee solution, it is important to understand that building inspections do not cost one set

¹²⁸ SKLAR ET AL., *supra* note 11, at 10.

¹²⁹ See Gopal, *supra* note 112 (noting that many condominium owners put a premium on keeping costs down either because of a fixed income or to gain further profit as an investor).

amount because no two buildings are the same.¹³⁰ As one engineer notes, the price of an inspection is controlled by three main factors: (1) the size of the building both in terms of square footage and the number of units; (2) the overall complexity of the structure; and (3) the accessibility of the building.¹³¹ Factors one and two are self-explanatory, and one can generally assume that the greater the complexity or size of the building the greater the cost. Accessibility, on the other hand, has two different definitions in the case of inspections. In one sense, it means that the building's units should be accessible to the inspector.¹³² This is easily solved by coordinating with residents to make sure that their unit will be available.¹³³ The other is the accessibility of the building's components and systems.¹³⁴ The harder something is to access, the more likely the fee will rise. For instance, an inspector might have to rent a scissor lift to view a specific system because of where it is mounted on the building's structure. Some of the costs associated with this second definition can be mitigated through preparation, but not all of it. In weighing these factors together, some companies give estimates of \$300 per unit.¹³⁵ This would mean that an inspection of Champlain Towers South, which had 136 total units,¹³⁶ would have cost as much as \$40,800. If viewed in totality, this amount of money is not that significant when considering building safety. However, the funds will still be required, and residents might drag their feet if given the opportunity.

To combat the concerns over inspection fees, one solution might be to have a developer pay an impact fee for building inspections. In the typical sense, an impact fee is defined as a charge "levied by local governments on new developments to pay for a proportionate share of the capital costs of providing public infrastructure to those

¹³⁰ See Greg Batista, *How Much Does A 40 Year Recertification Cost?*, G. BATISTA ENG'G & CONSTR., <https://askgbatista.com/how-much-does-a-40-year-recertification-cost/> (last visited Dec. 29, 2021).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Hernandez, *supra* note 105.

developments.”¹³⁷ These fees cover items like new roads, new stormwater facilities, and new public safety buildings, among many other things.¹³⁸ However, there have been some proposals to use impact fees in non-traditional ways such as to encourage more sustainable construction.¹³⁹ A non-traditional use also fits here. While a private inspection seems preferable in some cases, the local municipality may have to step in. Impact fees carried by the developer will allow the municipality to hire the professionals they need to deal with the increased inspection numbers. Alternatively, instead of the developer paying inspection-related impact fees to a municipality, the statute could require that the developer set up an account filled with inspection funds that transfer to the association upon the building turnover. This account could also be denoted in the internal governance documents drawn up in the formation of the condominium association and have statutory penalties if used in any other way than designed. In either case, there would at least be provisions to allow a board to contract for inspections at the first seven-year mark or earlier, if necessary.

8. RETROACTIVE APPLICATION OF SUGGESTED REVISIONS

The final step to ensure building safety is the retroactive application of the revised recertification protocols to existing buildings. For those uninspected condominiums that are under twenty-eight years old, a complete inspection must be done and a report must be filed within the calendar year of 2024. While admittedly most buildings are likely well-maintained and safe,¹⁴⁰ it is better to know the status of each building and if there are any failing components as the

¹³⁷ JULIAN CONRAD JUERGENSMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 9:9 (3d ed.), Westlaw LUPDRL (database updated Nov. 2021).

¹³⁸ *Id.*

¹³⁹ See Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENV'T. L. & POL'Y REV. 55, 73–74 (2009) (describing how developer fees on more traditionally constructed projects could be used to finance green building programs that encourage sustainable building).

¹⁴⁰ SKLAR ET AL., *supra* note 11, at 8 (noting that there is no data suggesting that a majority of the 912,000 thirty-years-old or older condominiums across the State are mismanaged or in a state of disrepair).

new recertification system gets implemented. This idea is supported by the most recent changes to condominium statutes, as those structures existing before July 1, 2022, must have a structural integrity reserve study by December 31, 2024.¹⁴¹

Additionally, the reserve requirements suggested above should be applied to existing structures. The task force suggests that associations be given until December 31, 2026, to gather the funds that equate to half the cost of each of the line items listed under section 718.301(4)(p).¹⁴² Given that the suggestion in this analysis is 80%, rather than the 50% recommended by the task force, that date should be extended by one year. For those communities that choose to carry reserves at 100%, the same deadline as 80% should apply.

The rest of the suggestions should be applied retroactively as appropriate. The only item that will definitely not apply is the proposed impact fee system for inspections because the developers of the existing buildings have completed the handoff of the building to the association.

B. *The Imperfections of the Solution Offered*

Any proposal to improve the housing situation of millions of people is going to involve some level of compromise. There is no perfect solution and even the system proposed here has its flaws. Three of the major ones are detailed below.

1. THE IMMEDIATE COST TO RESIDENTS

Battles over how money is allocated and collected are not uncommon for condominium boards.¹⁴³ Residents often do not understand the immediate cost of failing to fund reserves and that maintenance is a continuous process. In one board meeting regarding the structural issues facing Champlain Towers South, a question submitted to the board asked why the repairs were “so complicated and expensive.”¹⁴⁴ This type of question, while not unreasonable, signals

¹⁴¹ FLA. STAT. ANN. § 718.112(2)(g)(3) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2nd reg. sess.).

¹⁴² SKLAR ET AL., *supra* note 11, at 21.

¹⁴³ McCoy, *supra* note 85.

¹⁴⁴ *Id.*

bigger issues. At the very least there has been a failure in communicating the seriousness of the building's decay, and at worst there is mistrust in the board. The hope is that with the statutory revisions already made and those proposed here that residents can understand the issues facing their building. However, an understanding does not make the problems more affordable, and some residents simply do not have the money. But there is no real alternative to increasing inspections, holding reserves to at minimum 80% of the replacement cost, and allowing the board to make the ultimate decisions on those items that immediately impact building safety. Champlain Towers South indicated quite clearly that the current system is not working and that those serving on the board, who are almost always volunteers,¹⁴⁵ should not be forced to put off essential repairs simply because residents are unwilling or unable to contribute the necessary funds.

2. THE POTENTIAL EFFECTS OF TERMINATION ON FLORIDA'S HOUSING MARKET

As noted in Part III(A)(1) of this analysis, Florida is in the midst of a housing crisis.¹⁴⁶ More specifically, multiple cities in Florida lead the nation in rising rent,¹⁴⁷ and the city of Miami is one of the most cost-burdened places in the United States.¹⁴⁸ With these facts in mind, there is some concern that the revised termination language proposed here will only exacerbate that problem.

The basic mechanics of a condominium termination that might impact the housing crisis are as follows. A real estate developer

¹⁴⁵ *Id.*

¹⁴⁶ Hudson, *supra* note 94.

¹⁴⁷ *Id.* (“Monthly rents are rising faster in Miami, Orlando and Tampa than almost any other area of the country.”); *Florida Cities Dominate the List of Largest U.S. Rent Increases*, FLA. DAILY (June 7, 2022), <https://www.florida-daily.com/florida-cities-dominate-the-list-of-largest-u-s-rent-increases/> (noting that multiple cities across Florida place in the top fifteen when it comes to the largest rent premium).

¹⁴⁸ Rob Wile, *Miami-Dade Is One of the Most Expensive Areas for Renters in the Nation*, MIAMI HERALD (Aug. 4, 2019), <https://www.miamiherald.com/news/business/real-estate-news/article229131929.html> (defining cost burdened households as those “that spend more than thirty percent of their gross income on housing” and noting that 60% of renting households fall into that category in Miami-Dade County).

looks for aging condominiums in a prime location, often waterfront or beachfront properties in Miami.¹⁴⁹ The developer then approaches the owners of the condominiums offering large amounts of money, typically well over market, for their unit.¹⁵⁰ Over an extended period of time, the developer employs the same approach to all or most of the building's units until they can successfully bring a termination vote.¹⁵¹ Once the termination vote is approved, the developer ties up any remaining loose ends and then demolishes the structure to build a brand new building with high-end amenities for a more affluent clientele.¹⁵²

The circumstance described above has two effects. The first is that the original residents, though they have the opportunity to make a substantial profit, are more than likely now priced out of the area. In some cases, the area might mean the neighborhood those individuals have lived in for years, or it may mean relegation to the outskirts of the town. In either situation, if a developer can pay a \$600,000 premium on a property bought just six months prior,¹⁵³ then the sale price of the new condominium is likely far above the previous sale price of a condominium in the old building. There would be no purpose in asking the same price they bought the unit for, as there would be no profit in that. The first effect then leads into the second. Because these individuals who have just sold their condominium can likely no longer afford to live in the same area or because there is no longer enough housing stock in their price range, they then start pur-

¹⁴⁹ See Rene Rodriguez, *Real Estate Developers Ran Out of Waterfront Property. Now They Might Want to Buy Yours*, MIAMI HERALD (Mar. 6, 2018), <https://www.miamiherald.com/news/business/real-estate-news/article203613084.html>.

¹⁵⁰ *Id.* (offering an example of one resident who purchased a condominium for \$500,000 in Brickell and then was offered \$1,100,000 six months later by a real estate developer looking to build a new structure where the existing building was).

¹⁵¹ See *id.* (providing that in one instance a real estate developer bought out sixty-one units in an eleven-story building to tear it down and re-develop the area); see also Oscar R. Rivera, *Condo Terminations Take Hold as an Exit Strategy for Owners of Aging Towers*, MIAMI HERALD (Feb. 10, 2022), <https://www.miamiherald.com/news/local/community/article258196528.html> (describing how developers buy out the units in an aging building in order to terminate the condominium and redevelop the land).

¹⁵² Rodriguez, *supra* note 149.

¹⁵³ *Id.*

chasing some of the more “affordable” housing. And the trend continues downward for those who are already cost burdened, forcing them into worse rental situations, to areas far away from where they work, or both. While this trend will not necessarily happen in every case, one can easily see it repeating. However, the major motivation behind revising the current termination language is to allow those who cannot afford building upkeep to have a way out, while keeping buildings safe throughout the state. If the current system is maintained, there could be a repeat of the Champlain Towers South collapse.

One way to potentially combat this problem would be more affordable housing initiatives. More specifically, the vehicle of impact fees discussed in Part III(A)(7) could be employed here as well. If the current rate of upscale housing is to continue, then developers could pay into an affordable housing fund managed by the state. This would allow those who have lived in their community for years to remain there or at least nearby, while preserving the profitability of the Florida real estate market.

3. THE POTENTIAL COST TO THE ENVIRONMENT

A third flaw with the system proposed here links back to the process of termination. However, this flaw concerns the negative environmental effects of new construction and existing building demolition. According to the United States Green Building Council, construction waste makes up 35% of the non-industrial waste in landfills, at over 136,000,000 tons per year, and construction accounts for 40% of the raw materials used globally every year.¹⁵⁴ Figures provided for the United Kingdom show that construction ac-

¹⁵⁴ MARA BAUM, USGBC, GREEN BUILDING RESEARCH FUNDING: AN ASSESSMENT OF CURRENT ACTIVITY IN THE UNITED STATES 7 (2007), <https://www.usgbc.org/sites/default/files/Green-Building-Research-Funding.pdf>.

counts for 60% of the country's material use and 45% of carbon dioxide gases emitted into the atmosphere.¹⁵⁵ In short, while construction is a massive economic driver,¹⁵⁶ it is also harmful to the environment in terms of the hazardous materials produced and the amount of raw materials used. The main concern with numbers like this is the effect on sea level rise, especially in a state like Florida. In 2019, projections for Southeast Florida predicted that sea levels will rise in the area between seventeen and thirty-one inches by the year 2060.¹⁵⁷ To continue new construction at the current rate could potentially increase sea-level rise even more.¹⁵⁸ This would mean that a state already facing a housing crisis would then be faced with another major challenge. However, some buildings may choose not to terminate and instead keep up with their building maintenance, along with large-scale code changes. And even though frequent termination does pose a threat, not all building locations will be so desirable that they can be bought for less than the cost to redevelop the land. Regardless of what happens it is worth noting that in revising the recertification system in Florida, there should also be a review of green building practices.

A potential solution might be to require green building certification for any condominium termination initiated by a developer. The most popular system for certifying green buildings is called the LEED system, which has four certification levels.¹⁵⁹ Under the requirements proposed here, developers would not necessarily have to

¹⁵⁵ Olly Wainwright, *The Case for . . . Never Demolishing Another Building*, THE GUARDIAN (Jan. 13, 2020), <https://www.theguardian.com/cities/2020/jan/13/the-case-for-never-demolishing-another-building>.

¹⁵⁶ See Ken Simonson, *The Economic Impact of Construction in the United States and Florida*, ASSOCIATED GEN. CONTRACTORS OF AM. (Sept. 23, 2020), <https://www.agc.org/sites/default/files/Files/Construction%20Data/FL.pdf> (“In Florida, construction contributed to \$58.7 billion (5.4%) of the state’s GDP of \$1.1 trillion.”).

¹⁵⁷ Alex Harris, *New Projections Show That South Florida Is In for Even More Sea Level Rise*, MIAMI HERALD (Dec. 5, 2019), <https://www.miamiherald.com/news/local/environment/article237997454.html>.

¹⁵⁸ See *Why The Built Environment?*, ARCHITECTURE 2030, <https://architecture2030.org/why-the-building-sector/> (last visited Nov. 21, 2022) (noting that construction accounts 20% of the world’s greenhouse gas production, which in turn causes global warming and sea level rise).

¹⁵⁹ *LEED Rating System*, UNITED STATES GREEN BLDG. COUNS., <https://www.usgbc.org/leed> (last visited Aug. 9, 2022).

meet the highest level but there could be an incentive written into the termination statute. For each green building level that the developer satisfies there could be tax credits issued. This would, much like impact fees for affordable housing, preserve the Florida real estate market while also offsetting some of its negative impacts.

4. A CONCERN ABOUT GOVERNMENT STAFFING

The proposed revisions outlined in Part III necessarily entail increased government involvement. This means already existing staff will have to do things like run the state website for each property's documents, enforce violations if necessary, and verify or even conduct their own inspections. The most obvious choice for these new responsibilities is local building departments with some sort of state oversight, but there is a major issue with handing those departments the new responsibility. All across the country a shortage of building code officials, a major component of building departments, is on the horizon.¹⁶⁰ A survey done in 2015 by the International Code Council and the National Institute of Building Sciences showed that, within five years, 30% of active building code officials plan to retire and, within fifteen years, that number jumps to 80%.¹⁶¹ In many building departments, these officials wear several hats at once, including being a department manager, inspecting plans, and making sure buildings are up to code.¹⁶² These skills would also apply well to much of what is involved with the recertification of old buildings. However, if all these individuals leave the workforce as planned, building departments will struggle to keep up with the already existing workload. This leaves a big question as to who will take over the new recertification responsibilities. One solution is to hire more staff, but

¹⁶⁰ See Jake Blumgart, *The Building Code Profession Is Dying Out, and That's a Problem*, BLOOMBERG CITYLAB (Feb. 8, 2017), <https://www.bloomberg.com/news/articles/2017-02-08/there-s-a-looming-shortage-of-building-safety-officials>; see also Bureau of Lab. Stat., U.S. Dep't of Lab., *Job Outlook, Occupational Outlook Handbook*, <https://www.bls.gov/ooh/construction-and-extraction/construction-and-building-inspectors.htm#tab-6> (Modified Apr. 18, 2022) (projecting that the market will need 14,300 new construction and building inspectors every year for the next decade).

¹⁶¹ Blumgart, *supra* note 160.

¹⁶² *Id.*

at a certain point there are either not enough individuals with adequate experience, or there are not enough funds to hire the necessary amount of people. Another solution may be further privatization of the already heavily privatized recertification system, but there will likely always be a need for some level of government oversight. There is no definite answer to this concern, but it is worth noting as revisions to the recertification system begin to get implemented.

CONCLUSION

The changes that have already been made are an improvement to what was a dangerously inadequate recertification system. But the process can evolve further to improve the lives of Floridians all across the state. The suggestion most closely linked to typical recertification is the increase in inspections. However, recertification is not an isolated process, and it impacts other statutes concerning condominium governance as well. The two primary statutes at issue relate to condominium termination and the waiver of reserves. Altering these statutes will be a balancing act between the individual rights of condominium owners and the benefits of the system as a whole. And in a more global sense, any change to a statute will affect millions of citizens as Florida has over 2,000,000 residents living in aging condominiums.¹⁶³ With each modification, there must be an effort to preserve the economy of the state while keeping citizens both safe and involved. The analysis above attempts to do that while also acknowledging the potential flaws of each step proposed.

¹⁶³ SKLAR ET AL., *supra* note 11, at 4.