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A plan for post-Surfside condo law reform | Opinion

By IRA LAMPERT AND DAVID WEISS
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Part of the 12- story oceanfront Champlain Towers South Condo in Surfside, Florida, with more than 100 units, that collapsed on June 24, 2021. (Amy Beth Bennett/TNS)

Imagine checking into a hotel tomorrow. You are greeted at the front desk and, after a night's stay, at checkout, you are presented with a bill that is $100,000 more than the standard room charge of $100 per night you were advised of prior to check-in. When you dispute the bill, the hotel manager explains by stating, yes, you did receive the same room that the hotel used to charge $100 a night for, but for the last 10 to 15 years, the hotel has had guests stay in that room [and all its other rooms at the hotel] at the rate of $100 per night, and the owners just learned they would need to invest funds to renovate your room and all the other hotel rooms next month due to 10 to 15 years of significant wear and tear. You were just unlucky in that you checked in when the renovation bill came due today.

The folly in this example is apparent as it relates to a hotel, but it exemplifies the pervasive (and perhaps even reckless) behavior of condominium associations. Most condominium boards and management companies operate under this premise: Live/fund for today, don't establish adequate reserves for maintenance and replacement requirements, and don't worry about paying the bill until its identified in the future — and even then, kick that can down the road for a few years until the board and the residents come to the realization there is no further road to kick the can down. Then they find themselves under the gun and must line up funding via special assessments, lines of credit or both.

That's the situation in which the Champlain Towers' board and association members found themselves.

Who's going to pay for it?

Ira Lampert is a business advisor.

On July 29, the New York Times [published an op-ed] written by David Haber, a Florida attorney specializing in condominium law. In the article, Haber reviewed the practical business reasons that led to the Champlain Towers board's failure to fund repairs and what, in hindsight, the public now knows: There were immediate and necessary repairs that could have reduced the likelihood of catastrophic failures at the Surfside oceanfront condominium.

We leave it to the engineering experts to forensically reconstruct precisely how the disaster occurred, while municipal officials throughout South Florida are now scrambling to identify and assess any crack or fissure in high-rise apartment complexes. We would suggest, as Haber did, that the real fissures and failures in this story are the lack of adequate disclosures in most condominium association financial statements. Specifically, these failures are found in the massive reserve deficits that continue to exist today among condo boards throughout Florida, as compared to the significant levels of funded reserves actually needed to meet basic, known maintenance and replacement requirements.

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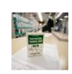

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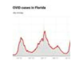
Compounding this issue is the vast numbers of condominium units/owners in Florida — 1.5 million of them, the largest number of condo owners in any state. Recent data from the Florida Department of Business and Professional Regulation reveals there are over 26,800 condominium associations and over 12,900 homeowner associations throughout the state. We have proposed practical and simple changes for these associations to fix the financial failures that led to the tragedy in Surfside.



Make reserve funding required

Florida should immediately require every condominium association and board, both those currently in existence and any formed in the future, and including developer-controlled condominium associations and boards, to conduct a structural [top to below ground] engineering review combined with an asset reserve study prepared by a licensed, insured and bonded professional qualified and experienced in such matters.

That asset reserve study would do two things. First, assign a lifespan to every significant asset (including the main building structure, balconies, pool(s), landscape, and other large dollar value assets), and then, from a prudent financial and accounting position, pair those assets with a targeted cash reserve fund account(s) to be funded ratably over the expected useful life of each asset.

Ideally, funding each of these targeted reserve accounts would begin once the building is completed and before the developer turns over the association to the residents. That way, on the day residents take control, the accounts are in place and can continue to be funded by the residents to conform with the asset values found in the study. In addition, the developer and unit owners would be required to disclose to potential buyers an estimate of the future reserve-funding requirements in total (including common area maintenance expenses) and estimates of how much each unit owes in future reserve funding.

Don't perform your own surgery

Of course, we don't live in an ideal world. Hundreds of condominium associations have already been turned over by developers to the unit owners, and unit ownership has changed hands many times over. In some cases, major assets are either near or past their expected useful life without reserves set aside in cash in an account waiting to be used for either maintenance of those assets or replacements.

For these latecomers, we recommend the condominium association establish a line of credit with a bank, which can be timely used for asset maintenance and replacement requirements, taking in consideration predictable future inflation. This would allow a board to stage assessments and increases in monthly maintenance to be paid by the unit owners over a reasonable time period, so that no unit owners are hit with a sudden, large assessment.

It is vital that skilled and educated professionals oversee targeted reserve fund accounts and the respective funding. Simply imposing fiduciary responsibilities over lay board members has proven to be an experiment whose failure cannot be permitted to occur ever again. Just because a board has been given the fiduciary duty to oversee condominium finances does not make board members professional fiduciaries. You don't perform your own surgery, and as the old saying goes, people who represent themselves in court have fools for clients. Similarly, reserving fiduciary authority over targeted reserve funds to skilled and experienced fiduciaries will result in safety and security for all condominium residents.

Unintended consequences

Mandatory reserve funding would result in a drop in the value of each unit, which, in turn, would have a significant negative effect on local and county property taxes. In other words, large special assessments and/or increased monthly maintenance fees invariably drive down the value of the units in a building, resulting in a consequential reduction in property values and resulting in lower property tax assessments and corresponding lower local and county property tax revenues.

David Weiss is president of the Hawks Landing Property Owners Association and a business executive and attorney.

To offset this, the state of Florida should provide statewide tax credit initiatives to cities and counties, which must then pass them on to condo unit owners. That way, they are incentivized to fund special assessments and increase monthly maintenance fees to a level necessary to properly fund appropriate and adequate reserves.

The offset, while not on a 1:1 ratio, should be significant enough to incentivize a drive to raise special assessments and monthly maintenance fees so that every association reaches targeted funding within a sufficient time to meet critical asset maintenance and replacement requirements. The effect of the tax credits should offset the devaluation in unit values and the negative effect on local and county property tax revenues.

In order to develop a framework for the changes we propose, we suggest convening a special commission composed of insurance, financial, banking and legal professionals; developers; and a bipartisan group of political leaders. Working together, we can develop real-world, practical and workable solutions that will result in avoiding the failures that caused the Champlain Towers catastrophe. Reining in the discretion presently afforded to condo
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