

5 Policy Changes To Prevent Another Surfside Tragedy

By **Michael Polentz and Daniel Abram** (October 25, 2021)

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In June, Champlain Towers South — a 40-year-old, 12-story condominium complex in Surfside, Florida — partially collapsed, representing one of the deadliest structural building failures in U.S. history. This article discusses five policy changes that will likely arise as a result of the tragedy to help ensure such a catastrophe never happens again.

1. Building regulations will be strengthened and more strictly enforced.

At the time of the Surfside disaster, Florida's building regulations were considered to be among the strictest in the nation since the 1950s.

One major reason is that many high-rise condominium complexes were built along Florida's coast and officials wanted to make sure they could withstand the recurring hurricane winds, flooding and rainstorms.

Nevertheless, some experts have identified several major holes in Florida's current building inspection regime, which may have contributed in part to the Surfside tragedy.

Length of Recertification Deadlines

First, there has been a public outcry advocating that building safety recertification deadlines should be shortened and that periodic audits of a building's conditions should be required prior to such certification.

While there is no statewide post-occupancy structural inspection requirement in Florida, the counties of Miami-Dade and Broward do require that a building be inspected at 40 years after initial certification and then reinspected every 10 years thereafter.[1]

A professional engineer or architect registered in the state of Florida must recertify the building for occupancy. Such recertification involves reviewing maintenance records and original plans and performing structural and electrical on-site inspections. Sometimes the buildings will need to make repairs before they can get recertified.



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Although these recertification rules were considered the strictest in Florida, clearly additional measures are needed as the 40-year recertification process was underway when Champlain Towers South, in Miami-Dade County, partially collapsed.

In July, in response to the Champlain Towers South destruction, Surfside announced that owners of buildings 30 years and older and at least three stories high must hire a structural engineer to begin assessing their properties in advance of their 40-year recertification.[2] And in August, Boca Raton, in Palm Beach County, also passed a new ordinance that requires certain buildings to submit an inspection report at their 30-year mark and every 10 years thereafter.[3]

Political Resistance

Second, building codes are adopted locally and, as a general rule, politicians with term limits often face staunch opposition to new regulations. Local jurisdictions sometimes delay or avoid implementing new, more restrictive building codes because influential lobbyists and trade groups representing condominium associations, fight regulations that would subject such associations to greater scrutiny or require them to impose higher fees on their unit owners.[4]

According to William Sklar, task force chair of the Florida Bar's Real Property, Probate and Trust Law Section, "There are many areas of the state, on barrier islands, there are many 30-, 40-, 50-year-old buildings, and they don't have a recertification standard, or if they do, it's very discretionary on the part of the building official." [5]

Lax Enforcement

Third, there have been reports that Florida's building inspection codes have been enforced haphazardly and sometimes not at all.

These reports allege that it took the Surfside tragedy to prompt Miami-Dade County officials to prioritize the review of 24 multistory buildings that either had failed major structural or electrical inspections required after 40 years, or had not even submitted the required recertification reports. An audit in Broward County, completed in July, was reported to have found that many cities last year did not even send out any of the 40-year notices.[6]

In August, a group of local Miami-Dade County, state and federal officials convened its first of a series of meetings to discuss potential policy changes needed to better safeguard the public, including a proposal to shorten the safety recertification timeline to 30 years.[7]

The mayor of Miami-Dade County said the group discussed a range of options for the safety recertification timeline, including whether coastal buildings would be subject to a more stringent standard.[8]

We expect such discussions to progress and for more towns and cities to consider passing similar new ordinances on the safety recertification deadline, as Surfside and Boca Raton recently did. While there have been some calls for a new statewide safety recertification standard to create a uniform and comprehensive safety inspection program, we believe the statewide consensus needed to make this happen will be very challenging to achieve — and unlikely.

Finally, we also expect the insurance industry to play a role in the debates, as they evaluate stricter underwriting requirements, including more frequent inspections and better

maintenance reports as a condition of policy coverage, especially for older high-rises on the Florida coast. All the foregoing considerations will continue to have a ripple effect on local governments across the country.

2. More laws will be passed to ensure condominium associations maintain sufficient reserve funds.

Florida state law requires condominium associations to include reserve accounts for certain capital expenditures and deferred maintenance in their annual budgets.[9] The reserve amount is determined using a formula based on a building's remaining useful life and the estimated replacement cost or deferred maintenance expense for each item covered.

When a condominium association is short on reserves to pay for unexpected repairs to common areas, it has to impose special assessments on owners, which are charges separate from monthly association dues, or defer needed repairs.

However, a condominium association in Florida can waive the reserve requirement or reduce the required funding of reserves if a majority of a quorum, which could be fewer than a third of the condominium owners, elects to do so.[10] This loophole may encourage association members to kick the can down the road to future owners.

Consider that Champlain Towers South had only approximately \$800,000 in reserves when its board eventually approved the approximately \$15 million repair cost to address its engineer's 2018 report that had identified major structural damage to the complex.

There are 39 states, including California, which do not even have a statutory requirement for a condominium association to fully fund reserves.[11] It has also been reported that as much as a third of condominium and homeowners associations nationwide have less than 30% of the necessary reserve funds to prepare for major capital repairs.[12]

Presumably in an effort to avoid political pitfalls, part of this problem is currently being indirectly addressed by the financing side instead of the regulatory side. After all, if reserves are very low, it is often very difficult, if not impossible, to get a condominium financed. This at least places some pressure on existing owners, who may want to sell but cannot find a non-all-cash buyer, to ensure its building has adequate reserves.

Ultimately, however, it is likely that some states that currently do not have any reserve account requirements will eventually institute them. Similarly, other states that have reserve funding statutes, like Florida, will eliminate or weaken certain loopholes, especially when the reserve funds would be earmarked for structural expenses affecting the life safety of residents.

3. More laws will be passed to ensure that reserve studies are conducted at regular intervals by licensed professionals.

Only nine states — California, Colorado, Delaware, Hawaii, Nevada, Oregon, Utah, Virginia and Washington — require condominium associations to perform a reserve study to determine how much money should be set aside in an association's budget for capital repairs.[13]

For example, in California there are two aspects to the reserve study requirements for condominium high-rises.

The first is a physical inspection of the common areas at least once every three years to identify those improvements with less than a 30-year useful life, and to estimate the probable remaining useful life and cost to repair, replace or maintain same.[14] Significantly, the foregoing law does not stipulate that the inspector have a particular professional license.

The second aspect is a safety inspection that checks on whether certain load-bearing components, supported substantially by wood or wood-based products, that extend beyond the exterior walls of the building (e.g., decks, balconies and stairways) are safe or require any future repair or replacement. This safety inspection must be performed every nine years by a licensed structural engineer or architect and is incorporated into the reserve study of the common areas.[15]

By contrast, a condominium association in Florida is not required to procure a professional reserve study.[16] This is problematic because the decision makers for the associations — the board of directors or governors — are merely homeowners themselves with typically no particular qualification or expertise in building maintenance and engineering.

Moreover, they are volunteers juggling time on the board with other daily commitments and are being asked to make important decisions regarding reserve amounts for large, aging buildings.

In response to the Champlain Towers South collapse, several states are expected to soon mandate that reserve studies be conducted by licensed professionals at regular intervals (e.g., every three to five years) after a building reaches a certain age and, perhaps more importantly, that the inspection results be filed immediately with the local building department to promote more accountability, especially for building conditions that affect the life safety of residents.

4. Certain states may require condominium associations to publicize reserve studies.

In many states, the outcomes of a condominium association's reserve studies and the status of its reserve funding levels are largely private. According to Evan McKenzie, a professor of condominium and HOA law at the University of Illinois at Chicago, in most states a prospective buyer is only able to procure a copy of the reserve studies after the buyer is under contract to purchase a unit.

However, reserve studies are otherwise not publicly available when prospective buyers are shopping for condominiums. This structure often results in condominiums being transferred under false assumptions that associations are adequately funded.

Some condominium experts have noted that if such information were public, it could create market pressure on boards and residents to maintain sufficient reserves. In such a situation, prospective condominium purchasers may steer away from buildings with underfunded reserves and be more inclined to buy a condominium at a building with sufficient reserves.

5. Condominium associations will face significant climate change-related infrastructure challenges.

The Surfside disaster also highlights the infrastructure challenge that climate change poses to condominium associations and their residents, especially on Florida's coastline.

In a July 2 Op-Ed piece for The Washington Post, McKenzie noted that Champlain Towers South "was built 40 years ago on reclaimed beachfront wetlands, where the proximity of a rising ocean, saltwater and gradual land subsidence have been constant threats to structural integrity."

According to McKenzie, most construction still does not account adequately for the impacts of sea-level rise. During a storm surge, ocean water can flow underneath properties or flood parking garages, which can erode the buildings' steel and destabilize structures.

Inevitably, condominium boards already burdened with ordinary course issues will become increasingly ill-equipped to properly safeguard an aging building from the triad of sea-level rise, more frequent and severe storms, and extreme heat. Legislation mandating that reserve studies considering the impact of climate change on building conditions be periodically conducted by licensed professionals will be one step in the right direction.

Ultimately, because some of the most basic functions of government are public safety and control over land use, we expect and hope that state and local governments in Florida and the rest of the country will work hard to help devise creative and workable solutions to tackle these challenges.

Clarification: This article has been updated to clarify that there are two aspects to the reserve study requirements for condominium high-rises, including a safety inspection.

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[1] According to the July 21, 2021 Miami Herald article "Does your aging condo building need to get recertified? You can keep track of that"; "Exempt in Miami-Dade are single-family homes, duplexes and buildings with a capacity of 10 or fewer occupants that are 2,000 square feet or less. Exempt in Broward are one-and-two family homes, government buildings, public schools, buildings on Indian reservations, and any building under 3,500 square feet."

[2] 7/9/2021 Miami Herald, "Fall of Surfside condo unleashes frenzy of enforcement action by building departments."

[3] According to the August 26, 2021 Palm Beach Post article "In Boca Raton, 242 buildings will get immediate inspection under city's new ordinance": "It does not include single-family homes and duplexes. The law will affect buildings that stand more than three stories high or ones that measure more than 5,000 square feet and hold more than 500 people."

[4] 8/12/2021 NBCNews.com, "How Florida condo associations wielded political power before Surfside collapse."

[5] 7/7/2021 Law360, "Condo Collapse a 'Wake-Up Call' for Fla. Regulatory Overhaul."

[6] 7/23/2021 Sun Sentinel, "Unsafe condo evacuated."

[7] Per Local 10 News: <https://www.local10.com/news/local/2021/08/31/officials-start-to-consider-ways-to-prevent-another-deadly-building-collapse-in-miami-dade-county/>.

[8] Ibid.

[9] Florida Statutes, Section 718.112(2)(f).

[10] Florida Statutes, Section 718.112(2)(f)2.a.

[11] According to the Community Associations Institute (CAI), an international trade association for community associations (including condo associations, co-ops and homeowner associations), "Reserve Requirements and Funding" report found at www.caionline.org/Advocacy/Priorities/ReserveStudy.

[12] According to data from advisory firm Association Reserves as reported by The New York Times and The Washington Post.

[13] "Reserve Requirements and Funding" report found at www.caionline.org/Advocacy/Priorities/ReserveStudy.

[14] CA Civil Code §5550(a).

[15] CA Civil Code §5551.

[16] While Florida passed a law in 2008 requiring condominium boards to obtain a professional study of their reserves every five years, such law was repealed in 2010 (as reported in the July 23, 2021 Sun Sentinel article "Unsafe condo evacuated" and the July 8, 2021 yahoo.com article "Repealed Florida law would have required faster repairs at collapsed tower, experts say").