



A Panda Walks Into A Bar - “Eats, Shoots and Leaves”¹ Revisited



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The 2004 statutory amendments to Ohio Condominium Law, O.R.C. 5311.081(A)(1) dealt with mandated funding for capital improvements reserves and whether that mandate may be waived annually, among other issues. The problem that inspired the 2004 changes regarding condominium reserves was explained by a leading Ohio law firm that limits their practice to Condominium & Homeowner Associations²:

The history of Ohio condominiums has been plagued by “special assessments”... Pressure on boards to keep maintenance fees low too often resulted in bare bones budgets with only basic necessities being paid. Many associations failed to build up savings, known as “reserves,” for large future expenses ... Because the costs of long-term replacement projects were not included in association budgets, condominiums across Ohio experienced devastating budget shortfalls.... Ohio condominium owners faced large special assessment bills with little or no time to pay... often resulting in foreclosures and always resulting in ownership dissatisfaction.³

THE PURPORTED 2004 LEGISLATIVE SOLUTION

In 2004 the Ohio Legislature amended O.R.C. 5311.081(A)(1) to read: Duties and authority of [Condo] association and board...

(1) Adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments, provided that the amount set aside annually for reserves shall not be less than ten per cent of the budget for that year unless the reserve requirement is waived annually by the unit owners exercising not less than a majority of the voting power of the unit owners association.⁴

STANDARD OF CARE FOR CONDO BOARDS TO FUND CAPITAL RESERVES

The 2004 statutory amendments refer to financial “reserves” but give little guidance beyond the language in the sub-paragraph. Standards for funding capital “reserves” in condominiums have been defined by the International Capital Budgeting Institute:

Reserve studies are long term capital major repair and replacement budgets that are the financial reflection of the long term maintenance plan...

4. It is considered fiscally prudent to provide for regular periodic interim funding to a separate reserve fund to accumulate the monies necessary for the estimated future expenditures...⁵

Kaman & Cusimano detail the standard of care set by the statute:

Condominium living suffered from the tendency not to budget long-term, but instead to special assess owners for major repair projects... we have a state mandated standard of budgeting, that is, budgeting “...for... reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments.”⁶ [emphasis added]

WHEN MAY OWNERS WAIVE RESERVE FUNDING?

Similar to directives by Kaman & Cusimano⁷, Criterium (a company that specializes in performing reserve studies for condominiums) adds a few commas and misstates the statutory requirement for waiver of full reserve funding⁸:

Ohio House Bill 135 Summary:

On July 20, 2004, Ohio enacted Ohio Revised Code Section 5311.081(A)(1) that indicates:

1) “unless otherwise provided in the declaration or bylaws,” the board must adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations, without the necessity of

special assessments,

2) provided that the amount set aside annually shall not be less than ten percent (10%) of the budget for that year,

3) unless the reserve requirement is waived annually by the unit owners exercising not less than a majority of the voting power of the unit owners' association.

The actual language and grammar in O.R.C. 5311.081(A)(1) gives a different perspective on the availability of an annual vote by condominium owners to waive the reserve requirements. Compare the statutory language regarding funding of reserves for a “Planned Community” under Revised Code Chapter 5312; both condos and “planned communities” may be governed by homeowners' associations, but they are controlled by separate chapters in the Ohio Revised Code:

§ 5312.06(A) Powers of [Ohio Planned Community] owner's association:

(1) Annually adopt and amend an estimated budget for revenues and expenditures. Any budget shall include reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments, unless the owners, exercising not less than a majority of the voting power of the owners association, waive the reserve requirement annually...

There is no provision in ORC § 5312.06 limiting waiver by majority of owners in a “Planned Community” if an annual reserve budget is less than 10% of the operating budget. ORC § 5312.06 allows waiver of reserve requirement for any reason on annual basis, and does not include any language similar to “provided that the amount set aside annually for reserves shall not be less than ten percent of the budget for that year unless...”

The omitted language is significant. The condominium reserve statute was passed in 2004, while the broader homeowners association statute was passed in 2010, indicating that the legislature knew (or reasonably can be assumed to have

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known) what it was doing when it changed the language in the later statute.

Punctuation is important in analysis of the statute. Grammar locks in the "intent" of the legislature, and a court may not otherwise interpret the "real" meaning of the legislation. If there are multiple possibilities to interpret what should be accomplished according to a statute, one of which is defined by the grammar used and is not otherwise absurd, a court may not merely say that the intent of the legislature must be different without any other basis for such decision.

Had the legislature inserted a comma after "year" and before "unless", then the waiver vote might well apply to the general reserve funding requirement. See, *Vill. of W. Jefferson v. Cammelleri*, 2015 Ohio 2463 (Ohio App., 2015) [court must read words and phrases in context and construe them in accordance with rules of grammar and common usage; interpretation of ordinance where a comma was inadvertently omitted between the phrase "motor vehicle" and the word "camper."]

Interpreting O.R.C. 5311.081(A)(1) in accordance with normal grammar rules does not lead to an absurd result, as mandatory funding of appropriate capital reserves without the ability to waive annually is a rational approach to the problem. If not mandatory, then an association could conceivably perpetuate the problem by continuing to underfund reserves, kicking the financial can down the road, as *Kaman & Cusimano* warn.⁹ If anything, the interpretation put forth to allow annual waiver of reserves is the absurd result.

The rare situation where a condo association budgets for reserves in an amount less than ten percent of its operating budget could conceivably occur when there is an excess in reserves, an unlikely scenario when projecting a reserve budget over a thirty-year period. In the absence of such a situation, there is an absolute obligation ("shall" generally means "mandatory") for a condo association board to budget reserves "adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments".

"Compliance with the law means avoiding liability. The easiest way for the board to avoid liability is to obtain a professional reserve study; immediately share the results of the reserve study with all owners and either:

- 1) adopt a budget that is in accordance with the reserve study recommendations or
- 2) obtain a majority vote of the ownership waiving the reserves requirement for that particular year¹⁰."

Contrary to *Kaman & Cusimano's* implication that an annual vote to waive the reserve requirement is always available, analysis by counsel for the Ohio Valley Chapter of the Community Association Institute is consistent with this article's interpretation of the statutory grammar:

[July 21, 2004, interpreting 5311.081(A)(1)]
7. The Association, through the Board, must adopt and amend budgets for revenues, expenditures, and reserves in an amount adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments. The amount set aside annually for reserves must not be less than ten percent (10%) of the budget for that year unless the reserve requirement is waived

annually by the owners exercising at least a majority of the voting power of the Association.¹¹

CONCLUSION

Condominium Boards must follow the explicit language and grammar of the reserve funding statute which requires:

- 1) a condominium association board to adopt a reserve budget without the necessity of special assessments, and
- 2) any waiver of such mandate by annual majority vote of unit owners is available only when reserve funding is under the threshold of ten percent of operating funds.

Endnotes:

- ¹Lynne Truss, "Eats, Shoots & Leaves." London: Profile Books, 2004 ISBN 1-86197-612-7.
- ²<http://ohiocondolaw.com/the-firm/>
- ³http://www.ohiocondolaw.com/articles/budgets_new_reserve_req.htm
- ⁴[http://codes.ohio.gov/orc/5311.081v1 - verbatim](http://codes.ohio.gov/orc/5311.081v1-verbatim)
- ⁵International Capital Budgeting Institute Professional Reserve Study Standard, [shttp://www.capitalbudgeting.org/index.php/8-standards/6-generally-accepted-reserve-study-standards](http://www.capitalbudgeting.org/index.php/8-standards/6-generally-accepted-reserve-study-standards)
- ⁶http://www.ohiocondolaw.com/articles/budgets_new_reserve_req.htm
- ⁷Id.
- ⁸Criterion statement of requirement: <http://ohioreservestudies.com/Ohio%20House%20Bill135.htm>
- ⁹http://www.ohiocondolaw.com/articles/budgets_new_reserve_req.htm
- ¹⁰id., ohiocondolaw
- ¹¹<http://www.caiohiovalley.org/page/10391~29197/Summary-of-House-Bill-135>



5 for the Kids Race
Fri. May 27th, 7:00pm
Brixx Ice Co.
Register Online: 5forthekids.org

Come out and join the YLD of the DBA
"GET BEHIND THE BAR" to benefit CareHouse
Fri. May 6th | Brixx Ice Co. | 5:30-8:30pm

