

PREPARED BY:  
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**NOTICE OF ELECTION TO OPT OUT  
OF SECTION 718.111(11)(i), FLORIDA STATUTES**

THE UNDERSIGNED, being the President and Secretary for CRECIENTE CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, do hereby certify that a resolution to opt out of the provision of Section 718.111(11)(i), Florida Statutes, for the allocation of repair and reconstruction expenses, and elect to allocate repair and reconstruction expenses in any instance where insurance proceeds have not been collected for any reason, including, but not limited to, the operation of the deductible, policy limits, or exclusions, and/or any other reason, in the manner provided in the Declaration of Condominium, as originally recorded in Official Records Book 849, Page 120, *et seq.*; Official Records Book 1056, Page 832, *et seq.*; Official Records Book 1242, Page 101, *et seq.*; Official Records Book 1977, Page 3546, *et seq.*; and as Instrument #2006000080549; and as later amended, all in the Public Records of Lee County, Florida, was duly approved, adopted and enacted by the affirmative vote of the majority of the voting interests in the Association at the Annual Meeting held on January 6, 2014, at which a quorum was present and for which due notice was given.

Dated this 14th day of January, 2014.

Witnesses (2):

CRECIENTE CONDOMINIUM  
ASSOCIATION, INC.

Sign: Howard W. Roy  
Print: Howard W. Roy

Sign: Gail Carpenter  
Print: GAIL CARPENTER

Sign: Michael McBride  
Print: Michael McBride  
Title: President

STATE OF FLORIDA  
COUNTY OF LEE

THE FOREGOING INSTRUMENT was acknowledged before me this 14th day of January, 2014, by Mr. Michael McBride as President of Creciente

Condominium Association, Inc., a Florida not-for-profit corporation, who (check one): ☒ is personally known to me OR \_\_\_\_\_ produced \_\_\_\_\_ as identification.

(Notary Seal/Stamp)



Notary Public -- State of Florida

Sign: [Signature]  
 Print: Gina T. Krauss  
 My Commission Expires: 9/4/2016

Witnesses (2):

CRECIENTE CONDOMINIUM  
ASSOCIATION, INC.

Sign: [Signature]  
 Print: Mercie Gagnon

Sign: [Signature]  
 Print: Nicole Fokker

Sign: [Signature]  
 Print: Joseph B. Michalec  
 Title: Secretary

STATE OF FLORIDA  
COUNTY OF LEE

THE FOREGOING INSTRUMENT was acknowledged before me this 15<sup>th</sup> day of January, 2014, by Mr Joseph Michalec as Secretary of Creciente Condominium Association, Inc., a Florida not-for-profit corporation, who (check one): ☒ is personally known to me OR \_\_\_\_\_ produced \_\_\_\_\_ as identification.

(Notary Seal/Stamp)



Notary Public -- State of Florida

Sign: [Signature]  
 Print: Gina T. Krauss  
 My Commission Expires: Sept 4, 2016

January 6, 2014  
Annual Meeting

5 Amendments Vote Buildings Tally

Unit #	In Person/ At Meeting	Limited Proxy Received	Q#1 Yes	Q#1 No	Q#2 Yes	Q#2 No	Q#3 Yes	Q#3 No	Q#4 Yes	Q#4 No	Q#5 Yes	Q#5 No
South			37	7	35	9	35	9	41	3	32	12
North			48	6	46	7	44	9	52	1	47	6
East			19	4	16	7	19	4	23	0	16	17
Total			104	17	97	23	98	22	116	4	95	35



Updated Results: "Opt Out" Vote Tally, 1/6/2014 Creciente Annual Owner's Meeting

Here are the votes in excerpt from the Limited Proxy, vote tally and official recording copy following.

**1. Proposed Amendments to Declaration: Section 12**

A. Whether to approve the proposed amendment to Section 12 of the Second Consolidated Amended and Restated Declaration of Condominium of Creciente Condominium South, A Condominium, Creciente Condominium North, A Condominium, and Creciente Condominium East, A Condominium, regarding insurance, as shown on the attached.

Yes \_\_\_\_ I approve      No \_\_\_\_ I do not approve      (104 yes votes, 17 no)

**Update: Amendment #1 Failed to Pass.**

**2. Proposed Amendment to Declaration: Section 9.11**

B. Whether to approve the proposed amendment to Section 9.11 of the Second Consolidated Amended and Restated Declaration of Condominium of Creciente Condominium South, A Condominium, Creciente Condominium North, A Condominium, and Creciente Condominium East, A Condominium, regarding negligence and damage caused by the condition if a Unit, as shown on the attached.

Yes \_\_\_\_ I approve      No \_\_\_\_ I do not approve      (97 yes votes, 23 no)

**Update: Amendment #2 Failed to Pass.**

**3. Election to Allocate Uninsured Losses in Accordance with the Declaration.**

C. Are you in favor of opting out of the provision of Section 718.111(1)(j), Florida Statutes for the allocation of repair or reconstruction expenses and to allocate repair and reconstruction expenses in any instance where insurance proceeds have not been collected for any reason, including, but not limited to, the operation of the deductible, policy limits, or exclusions, and/or any other reason, in the manner provided in the Declaration as originally and as thereafter amended?

Yes \_\_\_\_ I approve      No \_\_\_\_ I do not approve      (98 yes votes, 22 no)

Update: Amendment #3 Approved to Pass.

Your Board of Directors urges you to vote in favor of the above changes to our governing documents that would update and clarify the Association's insurance obligations with current law as well as allow the Association to opt out of treating uninsured losses as a common expense.

**4. 2013 Excess Revenue Rollover Membership Vote** (116 yes votes, 4 no)

D. Are you in favor of approving that Creciente rollover the anticipated \$40,000 and any excess revenues occurring in 2013 into the 2014 Budget as presented, thusly lowering the monthly maintenance assessment to \$550 owing per unit for year 2014?

Yes \_\_\_\_\_ No \_\_\_\_\_

Update: Amendment #4 Approved to Pass.

**5. Whether to waive the fully funding of mandatory Reserves for capital expenditures and deferred maintenance for 2014.**

Yes \_\_\_\_\_ I vote to waive the mandatory fully funding of reserves

No \_\_\_\_\_ I do not vote to waive the mandatory fully funding of reserves

(95 yes votes, 35 no)

**WAIVING OF RESERVES, IN WHOLE OR IN PART, OR ALLOWING ALTERNATIVE USES OF EXISTING RESERVES, MAY RESULT IN UNIT OWNER LIABILITY FOR PAYMENT OF UNANTICIPATED SPECIAL ASSESSMENTS REGARDING THOSE ITEMS.**

\_\_\_\_\_  
Printed Name of Owner

Update: Amendment #5 Approved to Pass.

PROPOSED AMENDMENTS CONTEXTUAL INFORMATION:

To Creciente Condominium Association Inc,

From & prepared by: Association Counsel, Christopher J. Shields, Pavese Law Firm

This correspondence is in response to your request for proposed amendments to the Creciente Condominium Association, Inc.'s ("Association") governing documents that would update and clarify the Association's insurance obligations with current law as well as allow the Association to opt out of treating uninsured losses as a common expense.

First and foremost, Section 718.111(11), Florida Statutes, requires that the Association use its best efforts to insure every element of the condominium property against damage by fire, windstorm and other hazards except for:

1. The owner's personal property;
2. Floor, wall and ceiling coverings;
3. Electrical fixtures, appliances, water heaters and water filters;
4. Built-in cabinets and countertops; and
5. Window treatments, including curtains, drapes, blinds, hardware and similar window treatment components

In addition, the Statute requires that the Association make and pay for the repair and replacement of all the elements of the property with the exceptions listed above. The expense is a common expense. The fact that the Association cannot get insurance, the loss falls within a deductible, or the insurance company fails to pay for any reason makes no difference.

Thus, in the event of a "casualty loss", the Association becomes responsible to pay for what is necessary to repair these items such as air conditioners, screens and other elements of the property even though, absent a casualty event, are the unit owner's responsibility to repair and replace under your governing documents and any portion of the cost that is not covered by insurance proceeds becomes a common expense shared by all unit owners cannot be charged back to the individual unit owner involved who suffered the loss. The Association pays these costs unless the Association has "opted out" of the provision of the statute. The "opt out" provision of the condominium statute in Florida Statute, Section 718.111(11)(k) states:

An association may, upon the approval of a majority of the total voting interests in the association, opt out of the provisions of paragraph (j) for the allocation of repair or reconstruction expenses and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded or as amended. Such vote may be approved by the voting interests of the association without regard to any mortgagee consent requirements.

The Association cannot opt out of its statutory obligation to use best efforts to obtain "adequate" insurance for "full" replacement cost for all the elements of the property that it is obligated by F.S. 718.111(11) to insure. It can only opt out of treating uninsured losses as a common expense



where the governing documents provide that the maintenance, repair and replacement of that element of property is a unit owner responsibility.

If the Board adopts a resolution to opt out then, it must also be approved by a majority vote of the unit owners and it is not effective until notice that the "opt out" has been approved is recorded in the Public Records of Lee County. If the "opt out" is approved, the Association must still use its best efforts to buy insurance, but the responsibility for any uninsured loss will be determined by your governing documents rather than the statute.

For example, if a unit owner's screens wear out, the unit owner has to replace those screens, at the owner's expense, because the statute only applies to casualty losses and insurance only applies to casualty losses. If the screens are damaged by fire, the statute controls and the Association would have to replace the screens and try to collect whatever insurance is available. Any uninsured loss would be a common expense shared by or borne by all unit owners. If the opt out is in place, the unit owner would have to replace the screens and pay for the expense but would be reimbursed for any amount the Association can actually collect from its insurance carrier.

Keep in mind that the Statute also allows the decision to opt out to be reversed by the same vote of a majority of the total voting interest of the Association.

Separate and apart from the Association's decision to opt out of the requirement to pay for repairs as a common expense and the requirement to pay for the deductible as a common expense, is amending the Declaration to impose additional obligations on unit owners to prevent casualty events (i.e. water leaks) and how negligence affects the analysis of who must pay for the repairs.

A finding of negligence by one party may allow the other party burdened by the repair cost (i.e. the Association or another unit owner), to recover those losses. For example, assume a 20 year old water heater that should have been replaced years ago bursts and causes damage to other units, drywall, and the common elements. If the unit owner is found to be negligent for failing to timely inspect and replace the water heater, the other unit owners may have claims to recover their losses against the negligent unit owner for damage to their units, and likewise, the Association may have claims for damages to the drywall and other affected elements that it insures.

With that in mind, I recommend using this as an opportunity to also amend your governing documents to 1) impose additional affirmative obligations on unit owners to maintain certain components that can be reasonably be anticipated to cause damage to the condominium property if not properly maintained; and 2) to create a rebuttable presumption of a unit owner's negligence should a listed component fail. To that end, I have also prepared proposed amendments that strengthen the language already contained in Section 9.11 of the Declaration entitled "Negligence. Damage Caused By Condition of Unit."

In light of the above, I have prepared the following documents for the Association's review and use:

1. Proposed Amendment to Section 12 of the Declaration
2. Proposed Amendment to Section 9.11 of the Declaration
3. Notice of Election to Opt Out of Section 718.111(11)(j), Florida Statutes

*Association Added: 2013 Excess Revenue Rollover Membership Vote*

Please note that if the statutory insurance opt out is approved by the members at the annual meeting, the decision to opt out is effective upon the date of recording of the notice in the public records by the Association. Therefore, once the membership approves the opt out, please execute the attached Notice of Election to Opt Out and return same to our office to record each in the Public Records of Lee County, Florida.

\*Pursuant to Section 18.3 of the Declaration, the approval of at least 66-2/3 (115) of the designated voting interests of the Association is required to approve the amendments.

Finally, the Amendments are not effective until a certificate stating that they were duly adopted, and such Amendments are recorded in the Public Records of Lee County, Florida.

**Christopher J. Shields**

*Florida Bar Board Certified Real Estate*

*Attorney*

1833 Hendry Street, Ft. Myers, FL 33901