

**Fronterra Village Multifamily
Community Association, Inc.
v. Pulte Home Corporation**



A CASE STUDY

*Perspectives from The Attorney,
Community Manager and Board President*

From the Attorney's Perspective

By Jeff Kerrane, Esq. and Duncan Griffiths, Esq.

When it rained, the common areas flooded. The homeowners had to fight off mosquitoes. The roofs leaked. Water would get behind the siding and wood trim. In the winter, the sidewalks became dangerous because of ice. Homeowners had to skate to their mailboxes to retrieve their mail. Strong winds caused roof shingles to blow off and siding to become loose. The concrete had deteriorated, heaved, settled, and cracked.

The board of directors of the young Fronterra Village Community Association realized that with each new weather event, the association was draining its funds to make repairs that were well beyond normal maintenance. Efforts to have Pulte make repairs were unsuccessful. Making matters worse, the new association's reserve account was insufficient to make the needed repairs.

In June 2007, with no relief in sight, the board hired Benson & Associates (now Benson, Kerrane, Storz & Nelson) to represent the association against

Pulte for their construction defect claims. As is typical for these types of cases, Benson & Associates entered into a written contingency-fee agreement with the association. The agreement stipulated that the firm would advance all litigation expenses, and would receive one-third of anything recovered as attorneys' fees. The contingency-fee arrangement assured the association it would not have to pay any fees or costs until the end of the case. Fees and costs would be paid out of the eventual recovery, and not from the association's reserves or special assessments.

To understand better the problems Fronterra was experiencing, we sent a team of architects and engineers to investigate the defects. Additionally, we mailed a questionnaire to the homeowners asking them to identify the problems they were experiencing in their units.

Upon learning the association had hired our firm to pursue construction defect claims, Pulte began scrambling to limit its legal liability. One of its vice presidents sent a letter to each of the homeowners promising to make any necessary repairs and telling them:

"We believe that homeowners associations who rely upon lawyers to resolve concerns they may have typically generate litigation in your community where only lawyers will be the winners. Rather than spending time making demands through lawyers, we simply ask that you call us if indeed there is an issue with the original construction of your home."

While the letter was intended to dissuade the Fronterra

homeowners from pursuing construction-defect claims, it seemed to have little effect. Homeowners were frustrated with the conditions in the common areas, supportive of the association's efforts to pursue its claims, yet suspicious of Pulte's motive in sending the letter.

Only a month after Pulte sent its letter to the homeowners, Pulte sent Fronterra's general counsel

attorney a draft release for multiple Pulte projects in order for Pulte to fund their reserve accounts. The release was broad and would have released all of the association's claims, even though it did not mention specific claims. Had the association signed this document, its entire case would have been over.

While investigating problems with vinyl siding, the association's architect made a startling discovery--the firewalls between the units at Fronterra were not properly constructed. Initial estimates were that the cost of needed firewall repairs could easily be in the millions of dollars, an impossibly expensive repair for the association. We contacted the local building official and fire marshall to set up a meeting to discuss interim measures to protect the residents. In response, Pulte's engineer met with the



building official and fire marshal and sent them a letter downplaying the firewall issues, stating: "Should an issue of non-compliance be determined with an important life safety component... [Pulte's engineer] has and will take action as required." As a result, both the building official and the fire marshal said that they viewed the matter as a civil dispute between the parties and would not take a position or meet with the association.

By January, 2008, our experts had completed their initial investigation, and we sent a formal notice of claim letter to Pulte. Under Colorado law, Pulte had 60 days to investigate the defects and send a formal response to the association. Because of the extent of the defects, the association agreed to give Pulte additional time to investigate.

Ultimately we agreed to enter into a "Plan B" agreement with Pulte. Under the Plan B agreement, the association's experts and Pulte's experts would meet to discuss an agreed-upon scope of repairs. The intent was that the agreed-upon scope would ultimately be sent out to contractors to bid, and the bids would form the basis for settlement. However, the Plan B negotiations fell apart and the parties could not come to an agreement, so this scope was never sent out for bid. Over the next several months, our experts and Pulte's experts performed inspections and testing on the property and met several times to develop a repair plan. At one point, we discussed with Pulte having a firewall built to simulate the firewalls at Fronterra and have the wall burn-tested at a laboratory in Texas. The test would have cost about \$20,000.00. Ultimately we were not able to agree upon the specifications for the wall to be tested, so the test never happened.

By July, 2009, the board of directors had grown frustrated that Plan B had not resulted in a resolution. Initially, the association filed a lawsuit against Pulte, but because of a contractual arbitration clause, the case was transferred to arbitration.

There is a common misconception that arbitration is more expedient and less expensive than a trial. In Adams County District Court, it costs \$224 to file a lawsuit. By comparison, the arbiter's fees, totaling more than \$66,000, far exceed the costs that would have been paid to the District Court. At the request of Pulte and the subcontractor defendants, the arbitration hearing was scheduled for January, 2011, more than a year and a half after the association had filed its lawsuit. This wait for the association was comparable to the length of time the association likely would have spent in District Court.

In April, 2010, the association changed management companies and began working with Silvia Gregory of Westwind Management Group. Almost immediately after Silvia took over management of the association, a severe hail storm caused damage to the roofs and much of the vinyl siding. Fortunately, the association had sufficient insurance to pay for a complete replacement of their roofs and much of the siding. The hail storm was a windfall to Pulte, since Pulte was no longer responsible for the roof defects or many of the siding defects after the insurance paid for replacement.

A few months before the arbitration hearing, Pulte

took the depositions of Silvia and of Chris Loffredo, the association's president. Depositions of managers and board members are one of the most difficult parts of a construction defect case because they require hours of preparation. Managers should always be compensated for their time performing exceptional tasks outside of their management agreement, such as preparing for a deposition. For board members, however, there is no compensation for their time, other than the benefits to the association of a good recovery.

While most depositions are friendly events, the deposition that Pulte took of Silvia was one of the most contentious depositions I have experienced. I can only imagine that for Silvia, it was two of the longest days she ever experienced as a business manager. Although it was a tough deposition, Silvia did an excellent job, and represented the association well.

During the course of the arbitration, the parties took depositions of about 40 witnesses and filed more than 600 motions, discovery requests and other pleadings, and produced hundreds of thousands of pages of documents. During one deposition late in the discovery process, we learned for the first time that Pulte had, on its own, performed a burn test of a firewall, and the wall failed the test. We thought that our discovery of the failed burn test was the "smoking gun" that would force Pulte to settle the case and pay the association for the firewall defects.

Pulte, however, seemed unfazed by its own failed test, offering only \$1,044,000.00 to settle the case. The association offered to settle its claims for \$7,524,000.00. With the parties so far apart, it was clear the case would proceed to a full arbitration hearing.

Our legal team for the arbitration hearing consisted of attorneys Jeff Kerrane and Duncan Griffiths, paralegal Juleen McGrane, and law clerk Allison Vetter. The arbitration hearing lasted about three weeks, with more than 30 witnesses. While the attorneys spent most of the time questioning and cross-examining witnesses, Juleen and Allison played critical roles. Juleen's job was to coordinate the witnesses and exhibits, making sure that witnesses showed up on time and that an entire room full of documents was organized and available for the attorneys as each witness testified. Allison's job was to review daily transcripts of testimony, prepare witnesses and perform legal research as issues came up during the hearing.

Both Silvia and Chris testified again at arbitration, looking like relaxed and experienced witnesses. They provided information critical to the association's case and did an excellent job.

In the end, the association received an award of \$6.8 million against Pulte, in addition to a separate confidential settlement for grading and drainage defects. Pulte paid the entire amount in full within days of the award.

The association is now in the process of interviewing contractors and engineers to make repairs.

Jeff Kerrane and Duncan Griffiths are attorneys with Benson, Kerrane, Storz & Nelson, P.C. (formerly Benson & Associates PC). Benson Kerrane, Storz & Nelson represents homeowners and homeowners' associations throughout Colorado faced with construction defects.

From the Manager's Perspective

By Silvia Gregory, CMCA, AMS

Westwind Management Group, Inc.

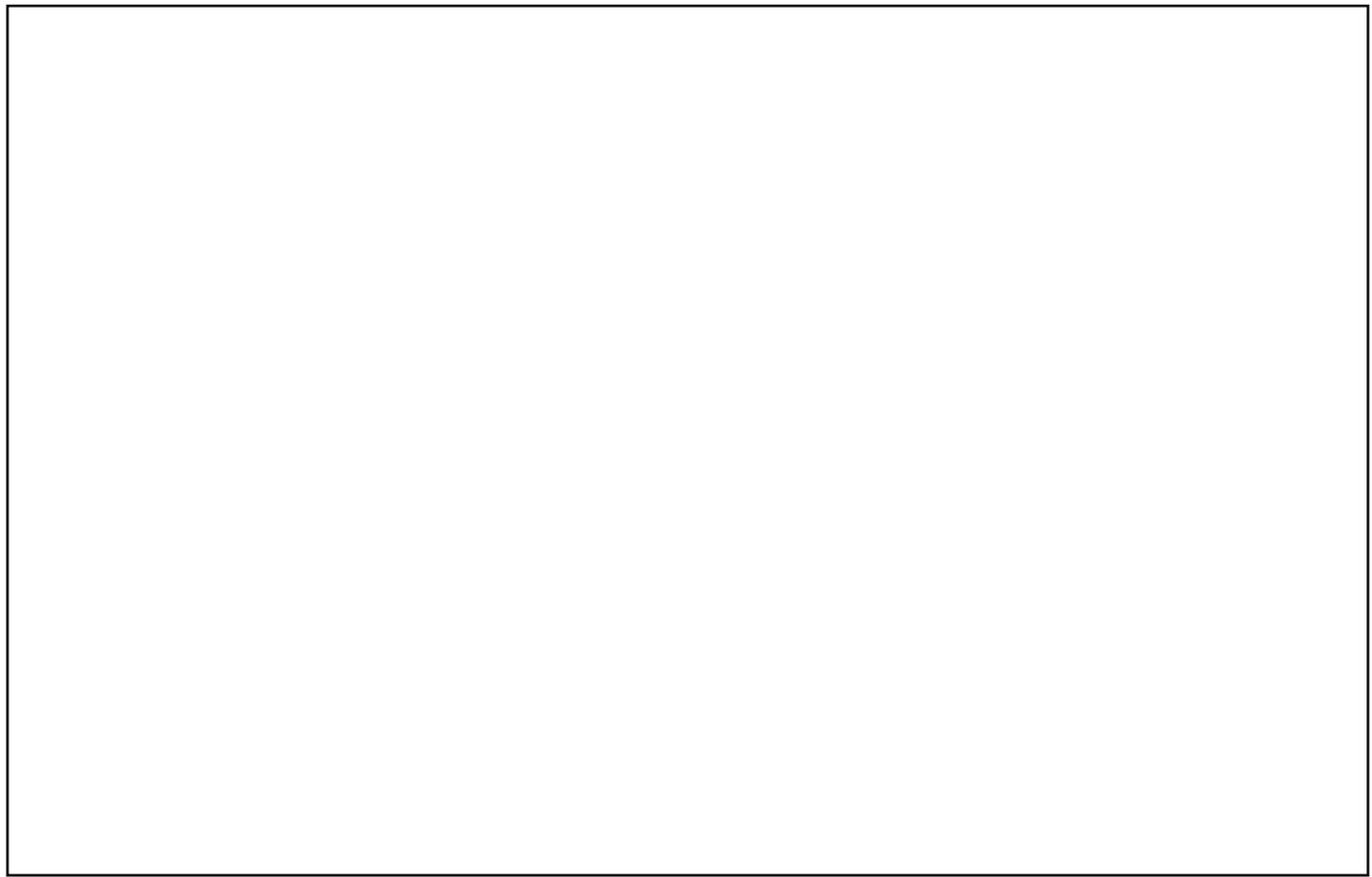
I became the association business manager for the Fronterra Village Multifamily Community Association in April of 2010. At that time, the construction defect case was already in progress. This article describes my role as the manager from April of 2010 through today.

After the dust had settled from the management transition, the first event for me in Fronterra Village's construction defect case was to meet with the attorneys from Benson and Associates. I met with Jeff Kerrane to go over what items were considered part of the construction defect case so that I would know how to handle them in my day-to-day management of the community. Due to their volume, I do not think I had a complete understanding of all the issues the community was facing because of the defects, especially the inadequate firewall construction. As time went on, I gained a better understanding of the defect issues, but even after meeting with Jeff, I did not realize how involved I would be in the case. I had only worked on a small construction defect case in another association, but it was settled before any type of court proceedings occurred.

Approximately a month into managing Fronterra Village, the community was pounded by a hail storm that caused

over \$1.2 million in damages. Much of the north-facing siding was replaced and each building received a new roof through an insurance claim. Due to the hail damage, the roofing claims were removed from the construction defect case.

Once all of the hail damage was repaired, it was time to focus on the construction defect case itself. Benson and Associates had set up a client portal on its website to help inform residents of the status of the case and on which homeowners could view certain documents. This was an extremely helpful resource, as I used this access to become better acquainted with the main reports from each side of the case. I also had a resource to send homeowners to when they called Westwind Management for an update. Homeowner calls were minimal due to the fact that Jeff and the board had previously held homeowner meetings and fielded questions in relation to the case. I also had to know how to respond to potential buyers in the community and to make sure the construction defect case was properly disclosed. I often referred to Jeff for the correct wording for these types of inquiries and responses. A positive and open communication style between the attorney and the manager is a must, and I would say, through this entire process, most helpful for me.



A few weeks before depositions were to start, the settlement discussions began. The board did not accept a settlement offer from Pulte, and decided it would be best for the homeowners—and have the best chance of getting the repairs to the community completed—if the legal process were continued.

The next step was deposition testimony. In my seven years of association management, I have never participated in a deposition. In order to prepare for my testimony, I had to learn and fully remember over seven years of work orders, as well as meetings with the board and with contractors that I did not attend because I was not the original manager. This speaks to the importance of good work order management and taking proper meeting minutes. Understanding the work orders was extremely valuable, since they helped the board at the initial time of discovery determine there was an issue with the construction of the condominiums. I have a general understanding of gutters, roof leaks and soffits, but in my preparation for the deposition, I learned much more than I ever thought I would. Looking back on it now, the knowledge I gained about the construction side of the industry has helped me immensely in managing all my associations.

I went through two days of being questioned, under oath, on all that had occurred since the inception of Fronterra Village. Think of being in a room with over ten attorneys, which included the attorney for the builder and for every sub-contractor that ever set foot in the community. They are all there to ask you, as the association's representative, why the gutter failed or why you did not clean a drain that ran uphill. You also have the association's attorney next to you questioning why the opposing counsel is asking you a certain question, which you are still obligated to answer. You are truly on the hot seat. After two days of deposition,

the arbitration started. Now instead of deposition, I was on the witness stand giving testimony. Many of the questions had already been asked in deposition!

From my viewpoint, all of the preparation and review could not prepare me for the burden I felt to the association and the board. I understood that I needed to answer these questions to the best of my ability, because the homeowners were depending on me. I wanted to do the very best for them. I kept thinking, "What if I answer this incorrectly and it negatively impacts the association?" This was a stress I did not expect.

The other aspect for the portfolio manager is the time involved for the preparation and actual deposition or testimony for one association, while still having six other associations that require attention during the focus on the one association's construction defect case.

After Fronterra Village was awarded funds to make the needed repairs, as a manager who participated in the proceedings, I had a sense of excitement to notify the board and homeowners that an award had been received. I felt a sense of accomplishment in knowing I did my part as a strong, confident association business manager.

Now that there are funds to make the repairs, I can help the board decide how to make the repairs and who to hire. I can also inform the homeowners that, because of the board's hard work and diligence, their units will be safe and finally complete.

My suggestion is that managers educate themselves on construction defects. As a manager, you do not realize what a vital role you will play. This education needs to include what will occur before, during and after a case, in order prepare you for the mental and physical road upon which you are about to travel.

From the President of the Board's Perspective

By Chris Lofredo,
President, Fronterra Village Multifamily Community Association, Inc.

We moved in in April of 2009. We were not informed of the lawsuit at that time. After realizing how the association was being run, I decided to work with or on the board to make the association a better place in which to live.

I came on the board around August of 2009. This is when I started working with Benson and Associates on the lawsuit and when things really started moving. The board realized that keeping the homeowners informed without breaking any confidentiality is a very difficult task.

The most important things that I had to deal with were keeping the homeowners informed, and working with the attorneys. Also, we kept the homeowners apprised as to all construction people on-site.

As things progressed, one important task was making sure the attorneys had all the information that they needed to proceed with the case. I had to be available a number

of times to talk to the attorneys, be at meetings, give depositions and the like.

One day I had to walk around with an attorney and a person from the construction company, and take and record over 700 pictures. This alone took all three of us over eight hours. I even had to teach the attorney how to shovel snow!

For two days it was necessary for us to spend time in an attorney's office downtown and one of those days all we did was stare at the clock! This took time out of my normal schedule and, on one of those days, the attorney had a flat tire in the cold, blowing snow.

Finally the arbitration was at hand, and the attorneys helped prepare me for my testimony. With their help, I was able to get the 700 pictures into evidence.

The most important thing that I have to say is that attorneys are hired for a reason, and it is important to listen to them and follow their advice. ⬆