

Spell Out Allocations for Upkeep

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Today's column involves the issues typically encountered by homeowners' associations in updating governing documents regarding maintenance, repair and replacement of the property in the community.

This is one area where condominium law and the parallel concepts in HOA's differ substantially. As discussed in last week's column, the allocation of maintenance in condominiums is set primarily by state law, with some room for deviation in the documents.

Conversely, the law applicable to homeowners' associations does not mention maintenance, repair, or replacement. Rather, the division of responsibility between the parcel owner and the association is entirely dependent on the governing documents, typically the deed restrictions (which is often called a declaration of covenants, declaration of covenants, conditions, and restrictions, deed of restrictions, or something similar).

In HOA's, the community's property is broken down into two segments, the common areas and the parcels. Typically, the common areas (unlike condominiums) are deeded to the association, and are also usually dedicated to the use of the parcel owners (or the association) on the plat map which creates the community. Nearly without exception, as to common areas available for use by all parcel owners, the governing documents require the association to maintain, repair, and replace the common area.

Allocation of maintenance responsibilities for the parcels is a bit trickier. The parcel is the individually-owned property in the community. The parcel may constitute anything from a deeded single family lot with a traditional home to a "zero lot line" townhouse community where the parcel owner only owns the building structure, and may also share ownership of a party wall with a neighboring unit.

Understanding the parcel's boundaries is the first step to creating a helpful set of documents. For example, some areas that service the parcel (such as a driveway or mailbox) may actually be located on common areas. This is a situation where the documents may need to delegate responsibility to the individual owner.

The next area that requires careful attention is grounds maintenance. There are many HOA's where the individual owns the lot, but the association mows the grass. Whether the association's responsibility would extend to keeping trees healthy (or replacing them if they die), trimming and fertilization of shrubs, pest control, and similar services will depend upon how the documents are worded. This is again an area where carefully worded documentation always trumps generic boilerplate clauses when a dispute arises.

Finally, the trickiest issue of all is how to allocate responsibility for the structure of the home itself. This is one area where there is no one size fits all form that will assist in nailing down who pays for what. In many traditional single family subdivisions, the property owner is responsible for maintenance of the home, in its entirety. Conversely, many zero-lot line townhouse communities are quasi-condominiums as far as maintenance allocations go. Most HOA's fall somewhere between these two extremes.

A well-written set of documents will also dove-tail the concept of aesthetic controls, insurance, and repairs after casualty when looking at maintenance allocations.

Although the cliché may be beaten to death, having clear governing documents on maintenance allocations is an area where an ounce of prevention is worth a pound of cure. ⚖️

Condo Manager may be Overstepping his Authority

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QUESTION: Our condominium association manager recently took time off to take a state test on condo laws to affirm his accreditation with the state association management board. Our condo board relies on the condo manager exclusively to advise them on legal or illegal condo actions and all procedures, such as ballot handling; and the association manager has also stated to me that it is his job to know the state condo association laws and explain them to the board. Our board rarely uses an attorney, and the last regular consultation was apparently in 1996 when the owners' manual was updated. Is a major part of the association manager's job to advise the condo board on state condo laws? J.W. (via e-mail)

ANSWER: A community association manager is not qualified to advise anyone on state condo laws, or any other laws. When they do so, they are committing a crime known as Unlicensed Practice of Law ("UPL"). UPL is punishable by up to a year in prison and a \$1000 fine.

As to community association managers, the Florida Supreme Court has specifically held that the following, when conducted by a non-attorney to constitute the unauthorized practice of law:

1. Completing the Department of Business and Professional Regulation Frequently Asked Question and Answer Sheet;
2. Drafting Claim of Liens and Satisfaction of Claim of Liens.
3. Modifying Proxy and Meeting forms as well as preparing amendments to the documents;
5. Drafting Limited Proxy forms;
6. Drafting a Notice of Commencement form.
7. Drafting such documents as are required to exercise the community association's right of approval and/or right of first refusal.
8. Determining the timing, method and form of giving notice of meetings to unit owners and board members;
9. Determining the votes required to take certain actions;

10. Responding to an association's query concerning the application of law to a particular matter being considered and/or advising an association that a particular action or course of action may or may not be authorized by statute, administrative rule or the community association's governing documents.

When a community association manager performs the functions of an attorney, they are providing services that could seriously imperil your community's legal rights, not to mention their CAM licenses. Even licensed attorneys who do not regularly practice in the area of community association law find themselves confused by this field of law.

QUESTION: Please address the problem of barking dogs disturbing condominium residents. The problem has been reported to president and manager who have sent a letter but state that otherwise nothing has been done. Do residents who have paid hundreds of thousands of dollars have to let dogs, i.e., negligent residents, rule? Please give us some direction to solve this dilemma. Thank you. A.L. (via e-mail)

ANSWER: There appears to be fewer subjects more contentious than that of nuisance animals in a community. The association's governing documents most likely contain a "nuisance" provision. If so, the association has the power to file a petition for arbitration against the offending unit owner to seek an injunction preventing them from allowing this disturbance to continue. Additionally, your documents may specifically address the issue of nuisance animals, and may provide for removal procedures in the event that an animal becomes a nuisance.

If your board of directors does not wish to take action against the offending unit owner, you, as an individual, have the right to file an individual complaint against the offending owner in order to seek a similar injunction. You may need to proceed in court instead of arbitration. Additionally, most counties have an ordinance prohibiting animal-created nuisances, including excessive barking (for example, Lee County has such an ordinance). You may be able to solve your dilemma by contacting Animal Control in the appropriate jurisdiction.

QUESTION: I have read your articles on the Florida Clean Indoor Air Act and condo associations. I am in a condo with an upstairs tenant who smokes on her

lanai and the cigarette smoke travels into my condo below. Do I have any recourse with condo association or tenant? Do I need a lawyer to handle this situation? Thank you for your advice. J.S. (via e-mail)

ANSWER: The Florida Clean Indoor Air Act would not govern this specific situation, as it does not appear that the tobacco use is taking place in an enclosed indoor work place.

Your neighbor's conduct may constitute a "nuisance" to you. Your condominium association most likely has a "nuisance" clause in its governing documents, which could be invoked to restrain this behavior. If your board does not wish to get involved, you may have an individual cause of action against this neighbor for "nuisance." If it is important enough to you, competent legal representation would seem to be a wise investment.

QUESTION: Our neighbors removed some palm trees that were between our homes, which completely deprives us of the privacy we once had in our backyard. The board met in private session and voted in favor of removing the palms. We then sent a letter to the board appealing their decision, and they told us to work it out with our neighbors. What is your opinion of this? W.R. (via e-mail)

ANSWER: Generally speaking, you do not have a "right to a view" in Florida. Additionally, since plant growth is always in a state of flux, there is no clear right to have landscaping maintained at the same level as when you moved in. Nevertheless, it appears that your board may have violated the sunshine provisions of the Homeowners Association Act by meeting in private. That being said, "working it out with the neighbors" is often difficult, but is always the best solution. ⚖️

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.