



Clarity of Repair Tasks Important

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Today's column is the twelfth part of our series about updating the legal documents for your community association. In the first eleven editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendments, looked at rental amendments, considered guest-usage and transfer restrictions, and discussed condominium insurance and casualty repair requirements.

Today's topic, the allocation of responsibilities for maintenance, repair, and replacement of property within the community.

For homeowners' associations, the law and typical allocation of maintenance responsibilities is usually straightforward. In general, the association will maintain the "common areas", which are normally the areas deeded to the association for the common use and enjoyment of the residents of the community. These areas will typically include roadways, common landscape features (cul-de-sacs, entryways, etc.), and recreational amenities such as swimming pools, clubhouses, and the like.

The individually-owned property in an HOA is known as the "parcel." In most cases, the parcel consists of a deeded lot and the improvements constructed thereon, usually a single family home. There are some homeowner association communities with a different set-up, such as townhouse and "zero-lot-

line" projects, where the owner may be deeded only a "metes and bounds" area, sometimes the "footprint" of the residential structure.

The declaration of covenants for some homeowners' associations will designate maintenance, repair, and replacement responsibility for portions of the "parcel" to the association. The most common area of designation is landscape maintenance, usually involving lawn mowing, fertilization and pest control, and perhaps the care of shrubbery and trees. Some homeowners' associations go a step further and make the association responsible for the maintenance, repair, and replacement of certain portions of the homes themselves. For example, some associations will take care of roofs, paint building exteriors, or even assume condominium-like responsibilities for greater portions of the structure.

It is essential when updating a declaration of covenants to have a clear road map for how maintenance, repair, and replacement responsibilities are to be allocated in the HOA. It is generally preferable to specifically list those items where deviation from the normal rule (association maintains common area, owner maintains parcel) occurs. Further, thought must be given to what "maintenance" means. For example, if an association is responsible to paint the exterior of a building, who is responsible for replacement of rotted wood discovered when it is time to paint the building? Who will be insuring the item, and does that differ from the general maintenance obligations? These are

issues that can and should be addressed in a well-written declaration of covenants in the homeowners' association context.

For condominiums, the law is much more specific, but there is still room for choice, and still a need for clarity when drafting the documents. As a general rule, the association maintains, repairs, and replaces the "common elements", which are those portions of the condominium property located outside of the "unit." There is an exception for "limited common elements", which are defined in the law as portions of the common elements reserved to the particular use of a single unit or group of units, to the exclusion of other units. Typically limited common element areas include balconies/lanais, carports and garages, boat docks, and storage lockers. However, it is important to note that not all declarations of condominium uniformly describe such areas as limited common elements.

Conversely, the unit owner is generally responsible for the maintenance, repair, and replacement of the "unit", which is the individually-owned portion of the condominium property. It is extremely important to understand that this is not a one-size-fits-all situation, since each declaration of condominium may describe the unit boundaries somewhat differently. In most cases, the drafter of the declaration (the developer) will use the "interior shell" concept of unit ownership, wherein the unit owner owns the air space within the four boundary walls, the floor slab, and the airspace below the ceiling. However, there are many condominiums where the unit boundaries extend to the exterior of the building. Further, some declarations define the balconies/lanais as part of the "unit", while they are designated as "common elements" in other condominiums.

Accordingly, it is crucial to start with a basic understanding of the physical ownership within the particular condominium. For example,

condominiums where the units are described with the "interior shell" form of ownership will typically result in the windows in the building being "common elements." Conversely, where the unit boundaries extend to the exterior of the building, the windows would be part of the units. One can see how it is important to understand your community's particular legal structure before deciding how maintenance obligations should be allocated in the declaration of condominium.

Typical areas where many developer-drafted boilerplate documents leave room for interpretation include areas like windows, sliding glass doors, screens and screen frame assemblies, air-conditioner and heating apparatus (compressors, air handlers, and the lines between them), doors, and drywall. In my opinion, a well-drafted declaration of condominium will specifically call out areas like this, and others, and designate who is responsible for maintenance, repair, and replacement.

One of the lessons learned from the 2004 and 2005 hurricanes is that it is also important to ensure that the repair after casualty clause in the declaration of condominium (see *Assigning Costs After A Calamity*, November 10, 2005) lines up with the maintenance, repair, and replacement section of the declaration. This can be particularly complex in that the insurance of various areas is mandated by state law, whereas maintenance, repair, and replacement is typically addressed by contract (i.e., the declaration of condominium). For example, in most condominiums, the interior unit doors (such as a bedroom door) are the maintenance, repair, and replacement responsibility of the unit owner. However, by state law, the association is obligated to insure interior doors against casualty damage, such as a fire. It is important to specifically spell out how insurance proceeds will be distributed in such situations, and how shortfalls will be handled, such as those occasioned by a deductible.

Another challenge typically encountered in this arena is the level of the board's discretion in deviating from the original construction when the association must execute its maintenance, repair, or replacement responsibilities. Windows are a classic example, since many buildings' older windows cannot be obtained in today's market, and would not meet current building codes. What is the board to do when it is time to change-out the buildings'

windows, and the only available options may constitute a "material alteration" of the common elements? Again, careful drafting can provide clear guidance on points of this nature.

In the next installment of this series, we will further explore the concept of alterations of the condominium property, both those undertaken by the association and alterations requested by unit owners. ■

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.

Board has Discretion in Landscape Work

Question: Hurricane Wilma destroyed most of the trees at our condominium. Our board of directors is unsure what the rules are regarding the replacement of trees. Does the board have the right to decide to plant different types of trees, or must we replace the trees with what was destroyed? If a change in the landscape plan is desired, does the board have the authority to approve it, or does the new plan need to be submitted to a vote of the unit owners. C.J. (via e-mail)

Answer: The issue you raise is whether a change in the landscape plan would be deemed a “material alteration or substantial addition to the common elements.” In general, Florida law provides that a condominium association can only make material alterations or substantial additions to the common elements in the manner provided in the declaration of condominium, and if the declaration of condominium is silent on the issue, seventy-five percent of all unit owners must approve.

“Material alterations” and “substantial additions” are those which perceptively alter the function, use, or appearance of the condominium property. For example, changing the color of a condominium building’s exterior paint has been deemed a “material alteration.” Obviously, replacing (for example) a ficus tree with a palm tree would also be a “material alteration.”

However, there is an exception to the “material alteration rule” known as the “necessary maintenance exception.” The necessary maintenance exception has developed from court cases which recognize that a board of directors must be given some latitude in authorizing changes to condominium property, when it is necessary for the preservation and maintenance of the property. For example, if maintenance work would require a new product to comply with applicable building codes, the board would have latitude in that regard.

Disputes regarding whether alterations are “material” or whether additions are “substantial” are submitted to resolution through a mandatory arbitration program sponsored by the Division of Florida Land Sales, Condominiums and Mobile Homes. In general, the arbitrators tend to find many changes to be “material” or “substantial” but nonetheless exhibit fairly wide latitude toward boards with respect to landscaping decisions.

In one of the most often cited arbitration decisions, the arbitrator ruled that changes in landscaping may have altered the common elements somewhat, but that such alterations were made pursuant to the association’s duty to maintain the landscaping, and no vote of the unit owners was required. The arbitrator noted that a different result may have been reached if the landscaping scheme was radical. The arbitrator stated: “For instance, a change from a South Florida landscape look to a Japanese Water Garden would most likely result in a material alteration to the common elements.”

Question: What would reasonable liability coverage for an association board member be? T.D. (via e-mail)

Answer: I believe you are referring to what is commonly called directors and officer’s insurance (sometimes D&O insurance) or errors and omissions insurance (sometimes called E&O insurance). This is the insurance policy that provides coverage to the association if the board members are sued for acts or omissions arising from their service to the association.

I would say that the most common level of coverage under D&O policies is one million dollars. However, it is my understanding that three million dollars’ worth of coverage can normally be obtained for a few dollars more, and in my opinion would be

well worth the extra expense. These days, a million dollars does not buy what it used to, and I would recommend minimum coverage of three million dollars, perhaps more if the association has any unique exposures.

Question: Our condominium association is set to hold its annual meeting in December. Our documents call for a seven member board. However, only five people put their names into nomination. Do we have to start the election process over again? H.N. (via e-mail)

Answer: No.

Under Florida law, the five people who automatically submitted their names will be elected to the board.

The law is a bit fuzzy about those whose terms expire, but who did not seek re-election. The law states that directors serve on the board until their successors are duly elected and qualified. Presumably, any incumbent who did not re-run does not wish to serve, and should submit a written resignation for the purposes of properly documenting the association's files, and avoiding liability for themselves.

The remaining five directors would have the authority to fill the two vacancies on the board, by appointment. ■

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