



Updating Property's Look Difficult

Fort Myers The News-Press, December 1, 2005

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Today's column is the thirteenth part of our series about updating the legal documents for your community association. In the first twelve 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, discussed condominium insurance and casualty repair requirements and the allocation of responsibilities for maintenance, repair, and replacement of property within the community.

Today's topic, issues surrounding alterations within the community.

Remember mood rings, lava lamps, or pet rocks? If your community was developed when such items were in vogue, it's a safe bet that the community common areas were adorned with the same sense of style. From the green shag carpeting in the social room, to the burnt orange wallpaper in the lobby, developers have a tendency to follow current trends when establishing the "look" of the community.

In decades-old developments, it is also likely that non-aesthetic structural installations, such as the building's windows, no longer meet current building codes, cannot be replaced with like-kind, and would be foolish to install even if they were available, given new technologies. As folk balladeer Bob Dylan noted in one of his most famous pieces: "The times, they are a changin'."

As most everyone knows, the Florida condominium statute says that there can be "no material alteration or substantial addition" to the common elements, except as provided in the declaration of condominium. If the declaration of condominium is silent on the topic, seventy-five percent of all unit owners must approve material or substantial changes.

Therefore, one of the most important clauses in an updated declaration of condominium is the so-called "material alterations clause." As with many issues in the constituent legal documents, there is no "right way" to address this issue, but rather a range of choices that should reflect the collective will of the community in establishing parameters for authorizing material changes or additions. On the one hand, it is probably not a good idea to give every future board a blank check to make significant changes that could range from the trendy to the whimsical. On the other hand, the board should be given a certain degree of latitude to meet changing technology and products in the face of the need for maintenance and repair, without having to worry about the political fracas that sometimes permeates the decision-making process in condominium associations.

I typically recommend that a board be given the authority to authorize changes and additions up to a certain dollar amount. Many associations consider five percent of the annual budget as a good benchmark for setting the board's authority for alterations or additions, before a unit owner vote

becomes required. The board should also be given the discretion to perform necessary maintenance, regardless of cost.

The required level of membership approval set forth in the updated documents also presents a choice. Most associations that I have worked with feel that significant changes should be authorized by a super-majority of the membership, usually two-thirds or seventy-five percent. However, I am also a staunch proponent of the notion that voting in an association should be based upon those who actually vote (in person or by limited proxy), and not based on the total number of eligible voters. After all, we elect the President of the United States based upon those who take the time and effort to go to the polls, and those who do not vote do not count.

An issue closely related to alterations by the association is the scope of an individual unit owner's right to change the appearance of the condominium property. After all, the landmark case defining what alterations are material and what additions are substantial is a decision known as *Sterling Village v. Breitenbach*, which was decided by a Florida appeals court in 1971. That case involved an association challenging a unit owner's enclosure of a screened lanai with glass jalousie windows. In finding the change to be material, the court made the following pronouncement, which is still cited as the law today:

We hold that as applied to buildings the term "material alteration or addition" means to palpably or

perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its functions, use or appearance.

Clearly, any unit owner-requested change affecting the exterior of the community should have to be submitted to the board for approval, and the documents should specifically require this to be done. Further, because many people buy into condominium communities because of a desire for uniformity, many documents will also require unit owner exterior changes to also be approved by the association membership.

If an "approved" type of improvement is the standard for a community, such as a certain type of balcony enclosure, there is probably no need to submit successive requests to repetitive votes of the members.

The declaration should also provide that any duly-approved unit owner alterations, even if made on common element property, must be insured, maintained, repaired, replaced, and reconstructed after casualty by the unit owner who made the improvement, or their successors in title.

In the next installment of this series, we will look at other actions that associations occasionally take, and how the documents can draw the line between what may be approved by the board, and what must be approved by the members.

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.

‘Prescription Pet’ Murky area for Condo Regulations

Question: Our association has a “no pets rule” in the recorded documents, which is one of the reasons that I purchased in this condo. I am not an animal lover, and I do not like the noise or mess that goes along with living among animals. I also have allergies to most pets. Recently, I saw one of the other residents in the building with a dog in the elevator. I waited for the next trip when so I did not have to ride in the elevator with a dog. I asked the building manager why the board was allowing a violation of our rules. I was told that the resident had a note from her doctor, and that the board’s attorney told the board that they could not evict the pet. Could this be possible? Don’t I have rights too? A.M. (via e-mail)

Answer: Your situation probably involves a recent legal phenomenon known as the “prescription pet”. There are a growing number of advocates who feel that association pet restrictions should be illegal. These groups have internet sets complete with “sample doctor’s notes” for use by those who want to get around the pet restriction they agreed to when they bought into a no-pets community.

Although these advocates cite the Americans With Disabilities Act as the basis for their position, the truth of the matter is that the ADA does not apply in most condominiums and homeowners’ associations, because they are not places of public accommodation. The law that does apply to associations is the federal Fair Housing Amendments Act of 1988 . This law prohibits discrimination on the basis of “handicap”, which is broadly defined in the law to include most physical or mental maladies that impair a major life function.

The Act also requires housing providers, including associations, to make “reasonable accommodations” in their policies and procedures so as to enable

handicapped persons to fully enjoy the premises. For example, there is no doubt that even with a strict no-pets rule, an association would have to permit a blind person to keep a “seeing-eye dog”, and no one would argue with this.

Where the law gets trickier involves so-called “emotional support animals.” Let’s say for example that Jane Smith is 75 years old. She suffers from several maladies not uncommon in people of that age, including arthritis, osteoporosis, and thyroid problems. She takes many medications, has trouble getting around, and stays home most of the time. Her daughter buys her a cute little dog as a companion. Jane’s condo association, citing the 20 year old no-pet rule, goes ballistic.

Jane then brings a note from her family doctor, Doctor Goodfellow. The good doctor scribbles a note on his prescription pad that Jane’s maladies make her feel depressed, and that the dog will “provide therapeutic benefit”. Jane files the note with the board, and threatens litigation if there is any further talk of removing the dog.

This is the classic prescription pet case, and your association is probably dealing with some permutation of this type of fact pattern. In my experience, many of these requests are entirely legitimate, and should be granted. Others are completely bogus. Of course, many fall in to the famous void that lawyers refer to as the gray area.

Where your association’s situation falls in that continuum is something your board has hopefully explored with legal counsel. If so, you are probably stuck with the situation. You could claim that your allergies are a handicap and that the board must somehow regulate the animal’s presence on the elevator or other common areas.

Of course, all for no pay, your board gets to be the judge of whose rights are more important.

Question: One of our owners just filed a request with the condominium board, which I chair, to install a satellite dish. We have a 7 member board, but one member was absent for the meeting at which the request was considered. Our documents say that no antennas can be installed on the common areas without approval of the board. The vote was 3 in favor and 3 opposed. We have a raging debate going on now. Some say the request failed and should be considered denied and final. Others say we should vote again with all 7 members. The “know it all” in our condo said that the owner can put up the dish without board approval. What do you say? F.A. (via e-mail)

Answer: The motion to approve the installation failed if the vote ended in a tie. As president of the board, I believe you have the power and discretion to put the matter on the agenda for another meeting, where the full board can be present.

However, you might want to give the association’s attorney a call, as your “resident expert” may be right. The federal Telecommunications Act provides that condominium associations can not prohibit, or even require prior approval of, certain “Over The Air Reception Devices”, the most common of which involves satellite dishes of one meter (39 inches) or less in diameter.

The Federal Communication Commission’s so-called OTARD Rule provides that condo dwellers have an absolute right to install these dishes in areas they own, or over which they have exclusive control. The association could not, for example, prohibit a dish completely within a private lanai, but probably could prevent (or at least regulate) puncturing the building. Conversely, the association could prohibit the placement of such a dish on the roof of a high rise building.

Question: Our building was damaged by Hurricane Wilma. Our documents say that the owner is supposed to care of the windows in the apartment. We were told, however, that the law changed in 2004, and that these are now the responsibility of the association. Can you explain? S.F. (via e-mail)

Answer: This is an urban legend that took hold after the 2004 hurricanes. Although the law was amended in 2003 (effective in 2004), the association has been responsible for insuring windows since the 1979 version of the condominium statute. The 2004 change did not substantially change who insures what portions of the property as between the association and the individual owner, but rather eliminated a series of confusing grandfathering dates found in older versions of the law.

Therefore, the association’s insurance should provide primary coverage for Wilma damage to the windows, even if the individual owner is responsible for their regular maintenance. ■

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.