



Material Alteration Common Condo Issue

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Q: In our “as built” drawing of our condominium, our roofing system is specified as SPF (sprayed polyurethane foam) with slope cut into the foam. Our current board wishes to change the roofing system to a single-ply (membrane) roofing system which is a less expensive project. Would this be considered a modification to the common elements which would require a vote of the membership, or can the board of directors vote on this at a board meeting? W.C. (via e-mail)

A: Your question involves the concept of a “material alteration”, which is a common issue for condominiums. You may know that the Florida Condominium Act provides that an association may not make material alterations or substantial additions to common elements or association property except as provided in the declaration of condominium, and if not so provided, by a vote of 75% of the members of the association. The purpose of the material alteration restrictions is to limit the board’s authority to materially change the appearance of the condominium or other aspects of the common elements that would significantly change the obligations or costs to the unit owners.

The well established definition of 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 function, use or appearance.” Over the years, case law, as well as arbitration decisions rendered by the Division of Florida Land Sales, Condominiums and Mobile Homes, have established several exceptions to the material alteration approval requirements, most notably with respect to “necessary maintenance”. One critical function of the board of directors is to maintain the condominium property, and it is well established that any projects that constitute “necessary maintenance” will not require a vote of the members, even if such a project might result in a “material alteration”. Cases and arbitration decisions have held that a board is authorized to upgrade or change improvements to comply with ordinance requirements, or to generally protect the common elements, or in the event an exact or similar replacement of an improvement is unavailable. Many cases have confirmed that the question of whether or not a repair or replacement constitutes necessary maintenance is a question of fact in every case, to be determined by the judge, arbitrator or jury.

Given all of this, there are a few cases and arbitration decisions that have addressed situations similar to your question. In one case, the court determined that a change from cedar shingles to

terra cotta tiles, which was made based upon cost considerations, constituted a material alteration because the change resulted in a change of the color scheme of the development and was therefore substantial and material. In another case, the board's decision to repair and replace cracked, concrete tennis courts with clay tennis courts was found to be a material alteration that went well beyond the maintenance function. In another case, the arbitrator determined that the re-routing of plumbing lines for an existing irrigation system was within the maintenance function of the board, and the relocation and addition of piping and valves did not constitute a material alteration.

As you can see, each case must be evaluated on its own facts. The answer to your question will depend upon the reasoning of your board and the basis for their decision. Certainly, if there is some established basis for preferring membrane over SPF roofing systems in the case of your condominium, the board may be justified in making the change without member approval. In any event, check your governing documents as the board may be granted the authority to make certain material alterations without the approval of the members, as is permitted by the statute.

Q: I am on the board of my condominium association. We have recently seen an increase in the number of units being rented. The board would like to require owners who rent their unit to pay a fee to the association as a way to raise some money for the association. Also, we have heard that some associations have a fee when a unit is sold. Can we implement those types of fees? C.S. (via e-mail)

A: A condominium may charge a transfer fee in connection with the sale or lease of a unit only if the association is required to approve the transfer and the fee for such approval is provided for in the declaration of condominium, the articles of incorporation, or the bylaws.

You will need to review your condominium documents and determine if there is any authority for the association to approve the sale or lease of a unit, and to charge a transfer fee. Some condominium documents require the association's approval prior to that type of a transfer, and other condominium documents take a "hands off" approach to transfers. However, the trend is for associations to approve such transfers.

If the condominium documents provide for a transfer fee, the fee may not exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant. However, if the lease is a renewal of a lease, with the same lessee, the association may not charge a transfer fee.

In addition, the Condominium Act permits the association to require that a prospective lessee place a security deposit, in an amount not to exceed the equivalent of one month's rent, into an escrow account maintained by the association. The purpose of the security deposit is to protect against damages to the common elements or association property. Payment of interest, claims against the deposit, refunds, and disputes must be handled in the same manner as provided in the landlord/tenant statute. In order to charge a security deposit, the authority to do so must be in either the declaration of condominium or the association's bylaws.

Q: My condominium association recently raised our regular assessments from \$250.00 per quarter to \$425.00 per quarter. There was no meeting held to accomplish this increase, just a letter taped to my front door telling me the new amount was due one week later. Is this legal? L.S. (via e-mail)

A: Your question raises a number of important issues. As you may know, your regular assessments are based on the association's annual budget. The first issue to look at is whether your board of directors has the authority to adopt and amend the

budget for the association. You will need to review your condominium documents to determine if the board is entitled to adopt and amend the budget, or if an ownership vote is required. For example, some condominium documents expressly provide that the board of directors adopts the budget, while other condominium documents provide that the board merely “proposes” the budget and that the owners must vote to actually adopt it. If your condominium documents require a vote of the owners, then the board cannot amend the budget without obtaining that vote.

The next issue to consider is proper notice of a budget meeting. The Florida Condominium Act provides specific notice requirements for budget meetings, and states that both notice of the meeting and a copy of the proposed budget must be given to each owner at least 14 days prior to the meeting by hand delivery to each unit owner, by mailing to each owner at the address last furnished to the association by the owner, or by electronically transmitting to the location furnished by the owner for that purpose. Also, an affidavit must be executed evidencing compliance with the notice requirement. The affidavit becomes a part of the association’s official records. You should note that this provision of the Condominium Act specifically

relates to the association’s annual budget, however the Florida Administrative Code states that the 14 day notice requirements also apply to meetings to amend the budget.

Finally, the Condominium Act states that if the board adopts an annual budget which requires assessments against unit owners which exceed 115 percent of the assessments for the preceding fiscal year, the board may have to conduct a special meeting of the unit owners to consider a substitute budget. The board would have to call such a special meeting of the owners if, within 21 days after adoption of the budget, it receives a written request for the special meeting from at least 10 percent of all voting interests. If a proper request is received, the special meeting must be conducted within 60 days after adoption of the budget. The 14 day notice requirement described above applies to the special meeting. At the special meeting, unit owners may consider and adopt a substitute budget, which will be adopted if approved by a majority of all voting interests, unless the bylaws require adoption by a greater percentage. If a quorum is not obtained for the special meeting, or if a substitute budget is not properly adopted, the budget previously adopted by the board will take effect as scheduled.

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.

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