



Carpports Divisive Issue For Condo Owners

All pay maintenance; not all can use them

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Q: I live in an older condominium complex with 66 units. We have a common parking lot with 42 carport spaces. The rest of the owners have to park in uncovered spaces that are assigned to them by the association. We have several issues concerning the carports. First, people that do not have carports think it is unfair that the entire association pays to maintain the carports. Wouldn't it be more fair if the carport owners paid to maintain their own carports? Second, several carport owners are interested in selling their carports to other owners, but the association board has informed them that they are not permitted to sell a carport to another owner. This makes absolutely no sense to me. Finally, there has been a proposal to add carports so that everyone who wants one can have one, but the association board informs us that the attorney says that 75% of all the members of the association must vote to allow the construction of new carports. The board is concerned that the people that currently have carports will not vote in favor of this addition because it will cost them money and they will have no additional benefits. Can you give some advice or suggestions to address these carport issues?

M.P. (via e-mail)

A: All three of your questions can be answered by reference to provisions in the Condominium Act and related provisions that may or may not exist in

your declaration of condominium. First, it is necessary to determine whether the carports are limited common elements that were assigned to each individual unit at the time the developer sold the units initially, whether the carport spaces are separately deeded parcels of property that are owned by the unit owners, or whether the rights in the carports are conferred by some other type of instrument, such as a lease. In my experience, at least as to carports that were part of the original construction, it is most common that such carport spaces are limited common elements that are appurtenant to the ownership of the unit, and I will assume that is the case for purposes of answering this question.

The Condominium Act specifically allows the declaration of condominium to require the association to be responsible for the cost of maintaining common elements, including limited common elements, or to specifically require the unit owners who own the units to which the limited common elements are appurtenant to pay the cost of maintaining those limited common elements. Therefore, you need to check your declaration of condominium on this important point. Given the facts you described in your questions, I would expect that you would find a provision that requires the entire association to pay the cost of maintaining the carports. If that is the case, that is

simply the way the developer set it up to begin with, probably in an attempt to make the carports more attractive to purchasers as an additional item to purchase. However, a provision can be added or changed to require the owners who have carports to pay the cost of carport maintenance. This can be accomplished by amending the declaration of condominium according to its amendment provision. However, as a practical matter, your declaration probably requires super-majority approval for amendment, and many of the carport assignees may find no incentive for them to take on a greater share of the maintenance costs.

With respect to the ability to transfer carport spaces, Section 718.106(2)(b) of the Florida Condominium Act specifically addresses this point and provides that, if the declaration of condominium as originally recorded, or as amended, permits limited common elements to be transferred, then they can be transferred in conformity with the procedures set forth in the declaration. If the declaration contains no such clause, the rights in the carport pass with title to the unit, as a matter of law, assuming they are designated as limited common elements. Therefore, just like with the cost of maintaining the carports discussed above, the association is able to customize the transferability of the carports according to the wishes of the members.

Finally, you may know that, as a general principle, any perceptible change to the use, function or appearance of the common elements of the condominium is termed a “material alteration”. By statute, a material alteration of the common elements may only be made in accordance with any provisions of the declaration of condominium, and if the declaration of condominium does not address the issue, then the approval of 75% of all of the members of the association is required in order to perform a material alteration. Therefore, it is necessary for you to review your declaration of condominium to determine if there is a material alteration vote provision. If there is not, the board and the association attorney are correct that 75% of all the members must vote in favor of adding carports to the common elements. Presumably,

your association’s counsel has also reviewed whether the manner of adding new carports would be deemed a “material modification of unit appurtenances”, which triggers a requirement for unanimous unit owner approval in some circumstances.

Perhaps the owners who already have carports could be convinced to vote for new carports under the theory that the new carports will raise the value of other units, and that will have a positive effect on the entire community.

Q: The bylaws of our homeowners’ association state that all payments received by the association “will be applied to the oldest dues, fees, fines, charges or assessments in the order of the date.” When a fine becomes the oldest outstanding obligation, and is paid from the next maintenance fee payment received from the member, can the member then be considered in arrears on their maintenance fees? **J.K. (via e-mail)**

A: Your question indicates that you are involved in a homeowners’ association, not a condominium association. For condominiums, the answer is clear. The Condominium Act has provided for many years that a fine cannot become a lien against the unit. Therefore, the “application of payment” language found in your bylaws would clearly be improper in the condominium setting.

In the homeowners’ association setting, the law is a bit more complex. Prior to 2004, the governing documents for many HOAs permitted fines to be secured by a lien against a parcel. The law was changed in 2004, and Section 720.305(2) of the Florida Homeowners’ Association Act now states that “a fine shall not become a lien against a parcel.”

Accordingly, at the most basic level, the law for homeowners’ associations is now the same as it is for condominiums, and you could not use the “application of payment” language in your bylaws to collect fines, since you would essentially be securing the collection of your fine through lien rights.

There are some who argue that a homeowners' association which exists prior to 2004, whose governing documents permit liens for fines, may still secure the payment of fines through liens. Such an argument is based upon constitutional principals regarding the retroactive application of

legislation affecting community associations, and constitutional provisions which prohibit the impairment of contracts (and your governing documents are a contract) by state legislative action. These theories have not, as yet, been tested in the appeals courts, at least to my knowledge.

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.