



Condominium Law Q&A

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Question - Since the homeowners took control of our association approximately 4 years ago, the board of directors has consistently denied all requests to waive any portion of our CC&Rs. Recently our board turned down a request to install a wooden fence along the common property line between one of our homeowners and an adjacent property in another association. Homeowners in the adjoining association on both sides of the property in question have wooden fences. The homeowner making the request essentially wanted to close the gap with a like-style fence. The architectural criteria in our CC&Rs state that “all fence material shall be of white wood aluminum or PVC.” The word, “wood,” was struck out in a recorded amendment that was instituted while the developer still controlled the association. As it turns out, the developer approved an identical request for a wooden fence after the amendment was recorded. The board turned down the request with the following justification. 1) The CC&Rs only permit the installation of aluminum or PVC fencing, 2) the developer’s actions do not represent a precedent that the board must consider, 3) the board does not have the authority to waive a requirement that requires approval of two-thirds (2/3rds) of the voting membership to amend, and 4) waiving any requirement or restriction would represent a dangerous precedent that could result in more requests for waivers. I have been told by an acquaintance in another HOA governed community that “variances” to governing documents can be approved. I have not been able to find anything in

the statutes that provides guidance in this matter. Is it ever permissible for the Board to waive any part of the Association’s governing documents? Is there any pertinent case law? G.J., Merritt Island

Answer – For the most part, I totally concur with the board’s position; changes to the CC&Rs should be approved by the members, not as a result of the board’s inaction, waiver or selective enforcement.

Question – The parking lot for my condominium is full of rust spots from the water feed to the grass in the dividers. The side of my car is covered with rust. Seeking help from the administrators was no help, as they said it was my problem. Could you help solve this problem? Should I take the amount of money it would take to have the rust removed from the monthly building maintenance? R.J., Palm Beach

Answer – Whatever you do, do not deduct the cost of cleaning the rust from your car or from the parking lot from your maintenance payment. The courts have held that the obligation to pay common expenses and the duty of the association to maintain the common elements and association property are independent covenants and a unit owner cannot refuse to pay their assessments as an off-set to the association’s failure to maintain the property. The logic behind this is self-evident, if you stop and think about it. If every unit owner withheld payment of their assessments as leverage to force an

association to maintain the property, the association would not have the money required to do so – a Catch 22! So pay your assessments timely, and if the association or board isn't performing its job, seek other remedies.

Question – We are members of a homeowners association in Ormond Beach. It is a planned development, which is approximately 25 years old. To the best of my knowledge, our CC&Rs and rules

and regulations have never been amended or updated. Is it necessary to do so? D.H., Ormond Beach

Answer – The great concern is the realistic possibility that your community's CC&Rs will be extinguished by Florida's Marketable Record Title Act (MRTA), if nothing is done in the next few years to extend them.

Gary A. Poliakoff is a founding principal of [Becker & Poliakoff, P.A.](#) and has served as its President since the inception of the Firm. He is on the Board of Governors of the Shepard Broad Law Center of Nova Southeastern University where he is an Adjunct Professor, teaching Condominium Law and Practice.

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