



Vendor vs. Board Member: Who Is Right?

by Gary A. Poliakoff, J.D.

Q I am a window and door contractor in Brevard County, specializing in retrofitting condominium complexes. I need your assistance in determining some issues with a board about glass color. The original documents basically state no owner can change the appearance of the outside of the facility. The facility is 30-plus years old. The original glass color is bronze. Currently there are five different colors and the board added two more this week. One board member doesn't like the energy, turtle compliant glass I installed because it has a bluish hue. He is demanding it be removed. My feeling is they have waived their right to

enforce. Is there a case law about this? I realize there is always more to the story; this is the short version.

B., Cocoa Beach

A It is not clear from the facts given why it is that you feel the board waived its right to approve the glass color selection that are acceptable. As a general rule, assuming that the original bronze color is still available, changing to any other color hue would be deemed a material alteration requiring member approval. From what you said, somewhere along the way the board has allowed five different additional colors and now has added two additional on top of the five permitted. What this is going to come down to is a question of whether the board, by formal action, has adopted acceptable glass colors and has published that information to all unit owners. If the board is just acting arbitrarily and capriciously, you would probably have a valid claim, but is it worth the expense to fight this battle?

Q Who is responsible for the repair of my driveway pavers if the HOA damages them while removing roots from overgrown oak trees? My HOA maintains all trees, bushes, and grass on both common grounds and private property. Over the last few years, the HOA has been grinding unlevelled concrete sidewalks where oak tree roots have caused uplifting, but they have failed to excavate and remove the troubled root system until now. I have recently been

informed that the HOA will begin removing these destructive root systems, but should any of my driveway pavers be damaged in the process, I will be responsible for the cost of repairing or replacing them. Is that correct?

J.L., Palm Beach Gardens

A Incidental damage caused to a unit or common elements by the association during the course of maintenance should be repaired by the association and charged as a common expense.

Q Our documents state that painting of the homes is the responsibility of the homeowner. In March of this year, the owners voted to turn the painting over to the HOA. My question is shouldn't this change in our documents be recorded so future owners will be informed of the changes?

A Yes. A change in the CC&Rs, shifting responsibility for painting the exterior of the homes from the homeowners to the association, must be done through an amendment of the CC&Rs. That will require notice of a special meeting, setting forth the purpose of the meeting, and the requisite vote of the members sufficient to amend the covenants. Assuming approval, the amendment must be recorded in the public records of the county where the HOA is located so all owners and potential owners are on notice of the regulation.

Q A unit owner in our condominium recently changed all windows and single out-swing doors. These doors originally—and in all other units—are affixed to the far right of each balcony section. The doors in the

subject problem unit are sliding on center. Additionally, all ventilation windows have been removed in this unit. Consequently, there is a noticeable change in the window/glass/door framing configuration vis-à-vis all other units. Consistent with most condominium documents, ours state that no change is to be made to any unit that will affect the outside appearance or structure—which has now been violated for the first time in the history of the building. Despite preliminary claims to the contrary, unsubstantiated indications thus far point to a unilateral decision made by one member of the board (most likely the president) authorizing this unprecedented action. The question is what legal action can practicably be applied against the responsible parties?

W.T.



A A change of the nature described is clearly a material alteration of the nature that will require the prior written consent of a super majority of the unit owners; generally, 75 percent approval. The board should require the unit owner to restore the windows to the original architectural style or present the question to the unit owners to determine if such an alteration should be allowed.

Q This question relates to parking spaces. Are parking spaces assigned by Tallahassee? When a unit owner sells his unit, does the assigned space go to the new owner? Can a director change the space?

F.H., Fort Lauderdale

A Tallahassee is not involved in parking space assignments. If the developer assigned a parking space to the initial unit(s) sold, and the documents provide the parking space is an “appurtenance” of the

unit, then it belongs to the unit and cannot be transferred without the approval of the unit owner(s).

Q I am a unit owner in a condominium that maintains a common entrance, which is used in conjunction with the adjoining HOA pursuant to a recorded easement agreement. Years of dispute as to the proper sharing of the expenses resulted in a protracted litigation settlement of which resulted in an agreement to a formula to be used to determine the amount for which the HOA (and its members) would be responsible. After execution and recording of the supplemental agreement, our management company sent bills that, unfortunately, were in an amount less than that required per the amendatory agreement. The error was discovered recently and the difference due requested, but the HOA refused payment. The incorrect billing commenced as of July 1, 2005. The principal amount of the arrears is far from being de minimus. Is the condominium board, in its fiduciary capacity, required to pursue reasonable efforts to collect the arrears, especially in light of the provision that all legal expenses incurred in connection with any litigation undertaken to enforce compliance with the agreement, including reasonable attorney’s fees connected thereto, shall be due the prevailing party?

J.S.

A Given the history of the relationship as you have described it, and, in particular, the resulting agreement

spelling out the obligations of each of the respective parties, it would seem to me that the HOA should pay what it is obligated to pay, and if it continues to refuse to do so the condominium association should consider taking legal action to collect the past due obligation. In litigation of this sort, the parties generally ask the court to reserve jurisdiction to enforce the settlement. Hopefully that occurred in this case; it would make it more expedient and cost effective.

Q We live in a 55-plus condominium unit. We have louvered windows which are rusting out. We want to know who is responsible for repairing or replacing them, the unit owner or the section which has 100 percent reserve.

H.K., Delray Beach

A Within the declaration of condominium is a section that delineates maintenance responsibility between the unit owners and the association. It will state unit owners are responsible for the maintenance and repair of certain improvements defined as being "within the unit," that all other improvements being the maintenance responsibility of the association. Now here is the key. To ascertain that which is "within the unit," and thus the unit owner's responsibility, and that which is part of the common elements and thus the association's responsibility, one must go to a separate section

of the declaration, which defines the boundaries of the unit. Within this section it will give you the upper (usually the unfinished ceiling slab) and lower (usually the unfinished floor slab) and the exterior boundaries including the apertures (windows and doors). Thus, a reading of the sections which I referenced is essential to be able to answer the question whether the unit owner or the association is responsible for replacement of the rusting louvered windows.

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