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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

RECLASSIFYING PROPERTY as LIMITED COMMON ELEMENTS for MAINTENANCE PURPOSES

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One of the most common issues that condominium associations address is determining whether the association or individual unit owners are responsible for the maintenance and repair of a particular part of the condominium property. In many cases, unit owners and associations alike assume that each unit owner is responsible for the property and utilities that serve only their individual units. Examples of this type of property often include air conditioning equipment, plumbing, and dryer vents, to name only a few. However, depending on the particular provisions included in a community's declaration of condominium, these assumptions are often incorrect, which can result in legal disputes when repairs are needed.

Under Florida's Condominium Act, condominium associations are generally responsible for maintaining all common elements within each condominium community. Based upon the basic definition of units and common elements, this means that every portion of the condominium property which exists beyond the boundaries of each individual unit (as defined in the declaration of condominium) is the maintenance responsibility of the association.

However, the Condominium Act also provides certain exceptions to association's general common element maintenance responsibilities. If a condominium's declaration specifically identifies certain portions of the common elements as "limited common elements," which are reserved for use by certain units to the exclusion of other units, the declaration can also assign the maintenance responsibility for those "limited common elements" to the units which have exclusive use rights.

So what if your declaration doesn't define air conditioning equipment as a limited common element, which are almost always located beyond the defined boundaries of each unit? What if the plumbing which serves a single townhome condominium unit runs beyond the unit boundary, and connects to a water meter located on the general common elements? Can the declaration be amended to make these portions of the common elements the maintenance responsibility of individual unit owners? The short answer is yes. However, as with all amendments, care must be taken that the changes are done correctly.

In order to reclassify a portion of the common elements which serves only one unit or group of units, Section 718.110(14) of the Condominium Act requires that the amendment be approved "upon the vote required to amend the declaration as provided therein," or if no method of amendment is provided, by the approval of not less than two-thirds of the units. However, it is important to note that such amendments can only be approved in this manner if the common elements in question serve only one unit or group of units. If the common elements in question are "designed and intended to be used by all unit owners," then the unanimous consent from all record owners in the condominium would be required.

In addition to reclassifying the property as limited common elements, the actual maintenance provisions in the declaration regarding the property in question would also need to be amended in order to transfer responsibility. Making one change within the other is insufficient. Finally, the declaration also needs to be reviewed by counsel to ensure no other provisions within the declaration contain conflicting language regarding the property being reclassified as limited common elements.

Reviewing maintenance responsibilities for condominium property, while common in practice, can often result in surprising answers for an association. Depending on the circumstances and property involved, it is possible for an association to amend its governing documents to reflect the expectations of the community.

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Material Alteration to a Common Element vs. Material Alteration of Appurtenance to Units

Material Alteration to a Common Element vs. Material Alteration of Appurtenance to Units, these two terms sound similar but are very different concepts. These concepts are not always the simplest concepts, and sometimes they are made more complicated and confusing by the Courts who misconstrue the two concepts.

A "material alteration" to a common element has been defined by Florida courts to mean "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 influence its function, use or appearance." Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 687 (Fla. 4th DCA 1971). This definition has been very broadly interpreted. For instance, the installation of a pool heater, the changing of the exterior paint color on a condominium building, the construction of a golf cart path, and the substitution of a concrete slab for stepping stones have all been interpreted by the Division of Condominiums to be "material alterations."

Section 718.113(2)(a), Florida Statutes, requires that material alterations of the Common Elements be approved by at least seventy-five percent (75%) of the voting interests, unless the Condominium s Declaration provides otherwise. In most instances, the Condominium Declaration will address this issue and provide otherwise. Therefore, the Association needs to look at the Declaration for direction as to what is required to materially alter the Common Elements.

In certain cases, in addition to constituting a material alteration to the Common Elements as described above, a proposed change may also alter the appurtenances to the unit, and the requirements of Section 718.110(4), Florida Statutes, may come into play, which requires 100% approval of the unit owners and lien holders. Section 718.110(4), Florida Statutes, provides in part as follows:

> "Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any unit in any material fashion, **materially alter or modify the appurtenances to the unit**, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment. The acquisition of property by the association and material alterations or substantial additions to such property or the common elements by the association in accordance with s. 718.111(7) or s. 718.113, and amendments providing for the transfer of use rights in limited common elements pursuant to s. 718.106(2)(b) shall not be deemed to constitute a material alteration or modification of the appurtenances to the units. . . " (Emphasis Added).

Generally speaking, a material alteration of the appurtenances to a unit occurs when the unit owners use of the Common Elements is foreclosed altogether, such as where a Limited Common Element is extended onto the Common Elements, thereby resulting in a smaller portion of the Common Elements being available for use by the unit owners. For example, in Lindback v. Sand Pebbles of Islamorada Association, Inc., Arb. Case No. 2004-02-2086, Summary Final Order, (June 21, 2005) citing Kamfjord v. Harbour Green Condominium Association, Inc., Arb. Case No. 93-0173, Summary Final Order (October 28, 1993), the arbitrator noted that the proposed patio extension would result in a smaller portion of the common elements being available for use by the unit owners, thereby diminishing the common elements appurtenant to the units.

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Further, in In re Petition for Declaratory Statement Hawthorne Residents Cooperative Association, Inc., Case No. 89L-188 (February 28, 1991), a proposed amendment to create 20 units on undeveloped property has been held to materially alter the right to use a common area of a cooperative, which right was appurtenant to each member of the cooperative. In Ladolcetta v. Carlton Condominium Association, Inc., Arb. Case No. 94-0499, Summary Final Order (April 24, 1995), the arbitrator stated, "where a common element area is utilized in a way that essentially forecloses its use by unit owners generally, a material alteration of the appurtenances to the units occurs."

Therefore, based on this analysis, if the contemplated change to the Common Element would amount to essentially foreclosing the use of the area by the unit owners, a material alteration of the appurtenances to the units would occur, and 100% member approval plus 100% approval of all lien holders would be required. However, if only the use of the Common Element is changed, and the new use is still available to **all** the unit owners, then, such change would constitute a material alteration to the Common Elements, which can be accomplished as provided in the Declaration, or if not provided for in the Declaration, by the approval of 75% of the voting interests.

"Our High-Rise Building Opted Out Of Fire Sprinklers, Now We Have To Do What?!"

STATE FIRE MARSHAL CLARIFIES ENGINEERED LIFE SAFETY SYSTEM REQUIREMENTS AND DEADLINES

Many articles, seminars and correspondence from B&P and others have addressed the looming December 31, 2016 deadline for high-rise condominium and cooperative buildings to vote to opt out of the fire sprinkler retrofit requirements in the Florida Fire Prevention Code, and many communities have taken advantage of the opt-out process. However, many communities are unaware that there may be other fire safety obligations with which they must comply. In a recent Declaratory Statement issued by the Florida Department of Financial Services, Division of State Fire Marshal, the State Fire Marshal provided additional clarity on this issue for high-rise buildings. In In re David Woodside, President Florida Fire Marshals and Inspectors Association, Case No. 189152-16-DS (May 4, 2016), the President of the Florida Fire Marshals and Inspectors Association filed a petition with the State Fire Marshal, essentially requesting guidance on whether certain high-rise buildings that are not protected throughout by an approved automatic fire sprinkler system must instead have an approved Engineered Life Safety System ("ELSS"), and if so, what the deadline to comply with the ELSS requirement would be.

As supporting authority, the State Fire Marshal noted in the Declaratory Statement that the Florida Fire Prevention Code adopted the NFPA, including the Fire Code (NFPA 1) and Life Safety Code (NFPA 101), with certain Florida-specific amendments. The Fire Marshal referenced FFPC 101:31.3.5.11.1, which provides that all high-rise buildings, other than those meeting 31.3.5.11.2 or 31.3.5.11.3, shall be protected throughout by an approved, supervised automatic sprinkler system in accordance with 31.3.5.2. The State Fire Marshal stated that FFPC 101:31.3.5.11.2 provides that an automatic sprinkler system is not required where every dwelling unit has exterior exist access in accordance with 7.5.3. The Fire Marshal further stated that FFPC 101:31.3.5.11.3 provides that a "sprinkler system shall not be required in buildings having an approved, engineered life safety system in accordance with 31.3.5.11.4." In addition, the Fire Marshal referred to FFPC 1:13.3.2.26.2.4, which provides that all existing high-rise apartment buildings shall be subject to the provisions of sections 718.111 and 718.112, Florida Statutes, which shall "supersede the requirements for an automatic sprinkler system."

The Fire Marshal concluded that an ELSS would still be required in high-rise buildings if compliant automatic sprinkler systems were not present or if all of the dwelling units do not have exterior exit access. Specifically, the State Fire Marshal concluded that although a Florida-specific amendment to the Fire Code permits the fire sprinkler opt-out process from the general sprinkler retrofitting requirements, another Florida-specific amendment, FFCP 1:13.3.2.26.2.3, clarifies that if the entire high-rise building is not protected by an approved automatic sprinkler system, it must comply with the ELSS requirements if there is not an exterior exit access for every dwelling unit. Concerning the deadline for implementing an approved ELSS when required, the State Fire Marshal stated that the deadline would be December 31, 2019, pursuant to FFPC 1:13.3.2.2.26.2.3 of the Florida Fire Prevention Code.

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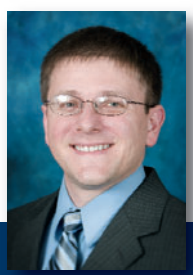

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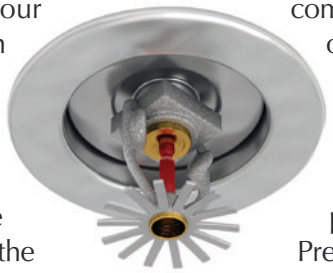
Therefore, if your condominium or cooperative community is a high-rise building that has previously voted to opt out of fire sprinklers or your association plans to do so before the opt-out deadline, but otherwise is still subject to ELSS upgrade requirements, your community should begin preparing for any changes to your building's current ELSS, if any, to comply by the December 31, 2019 deadline. The Florida Fire Prevention Code states that the ELSS, where required by relevant sections of the Florida Fire Prevention Code, must be developed by a registered professional engineer experienced in fire and life safety system design, approved by the Authority Having Jurisdiction (i.e. the local fire marshal), and shall include some or all of the following: partial automatic sprinkler protection, smoke detection systems, smoke control systems, compartmentation, and "other approved systems." Of course, if your building currently has compliant automatic fire sprinkler systems throughout, or your community chooses not to opt out of the retrofitting requirements and plans to perform the fire sprinkler retrofit, then an approved ELSS will not be required, pursuant to the Florida Fire Prevention Code. Not sure if your building may be subject to additional ELSS requirements or how they may impact your community? We suggest contacting a registered professional engineer experienced in fire and life safety system design, and consult with your association's counsel for legal guidance when needed.



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