“Common Elements Cannot Be “Colonized,” News-Press

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By: Joseph E. Adams

Q: Can the board of a condominium association allow unit owners of certain buildings to fence in areas that are defined as common areas per our declaration and plats? Once fenced, the areas would be exclusive to the respective unit owners, and not all buildings. Therefore not all members would be able to use the property. Is this a material change which would require a 75% vote from all members, and not simply board approval? (K.D., via e-mail)

A: This is a very complicated question. Before your board were to consider this, it should obtain the written opinion of an attorney who is qualified in Florida condominium law.

A material alteration or addition is one that palpably or perceptively varies or changes the form, shape, elements, or specifications of a building in such a manner as to appreciably affect or influence its function, use, or appearance. The fencing you describe would generally be considered a material change.

Section 718.113(2) of the Florida Condominium Act states there shall be no material alteration or substantial additions except in a manner provided in the declaration. If the declaration does not specify the procedure, 75 percent of the total voting interests of the association must approve.

Obviously, the declaration needs to be reviewed. Also, there is a question to be addressed as to who would do the work and how it would be paid for. In general, it is not desirable, nor perhaps even legal, to let owners make improvements to general common elements. This should be done through the association. Also, counsel should confirm that payment for this work would be a proper common expense. The facts you cite raise some questions in that regard.

Counsel should also review whether Sections 718.110(4) and (14) of the

Condominium Act come into play. In general, the interpretations of those statutes stand for the proposition that individual unit owners or groups of unit owners cannot “colonize” the common elements generally available for all owners, unless 100 percent of the owners agree.

Q: If a homeowners’ association has acknowledged that the primary contact for the property is local management, is providing official notices to the overseas address of the owner proper? (M.B., via e-mail)

A: The Florida Homeowners’ Association Act currently provides, in general, that official notices by mail must be sent to the address used by the county property appraiser. It is relatively easy to change a record address with the property appraiser’s office.

Q: My homeowners’ association has invited residents to apply to join a new “fining committee.” Who is eligible to serve on the fining committee and what is the purpose of the committee? (H.C., via e-mail)

A: The board of directors can impose a fine or suspension of certain common area use rights for violations of the governing documents. Before a fine or suspension becomes final, an independent committee must review the matter.

The committee (sometimes called the “fining committee” or “compliance committee”) must be comprised of at least three members of the association who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. “Members” of the association are generally the record title owners of homes. For example, a tenant, a spouse not on the title, or a community manager would not be eligible to serve on the committee.

Notice of the opportunity for a hearing before the committee must be sent at least 14 days in advance. At the hearing, the committee must afford basic due process and allow the “accused” to be heard, state his or her case, and challenge evidence against him or her. The committee must then either “confirm” or “reject” the fine or suspension proposed by the board.

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