



‘Material Alterations’ Have Broad Interpretation Under the Law

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Q: Our condominium has twenty, two story buildings. The lower breezeways of the first five buildings are constructed of a combination of concrete and dirt. The breezeways in the remaining fifteen buildings are constructed with all concrete. The partially finished breezeways pose a continuing maintenance issue. Can you provide your opinion whether completing the first five breezeways with concrete to match the other fifteen breezeways constitutes a material alteration? **S.W. (via e-mail)**

A: As you apparently know, a condominium association board is limited in the alterations it may make to the common elements. The Florida Condominium Act requires the approval of 75 percent of all unit owners in order for the board to make a material alteration to the common elements, unless the declaration of condominium provides otherwise.

The concept of “material alterations” has long been broadly interpreted in the law. Seemingly insignificant alterations have been determined in the law to be “material alterations.”

There is an exception to the rule known as the “necessary maintenance” exception. Even if an alteration perceptively changes the use,

appearance, or function of a common element, unit owner approval is not required if the alteration is necessary to perform a maintenance function of the association. Unfortunately, most of the legal guidance in this area comes from prior arbitration decisions of the Division of Florida Condominiums, Timeshares, and Mobile Homes, and many of those arbitration decisions are not easily reconciled. There is also some case law on point, but some of the cases are not easily reconciled across different appellate districts.

In one arbitration case, a board was permitted to replace “Chattahoochee” (river rock) pool deck material with brick pavers, based upon future maintenance considerations, and also the language of that association’s documents. However, in another case, an association was not permitted to replace concrete pool decking with brick pavers. Similarly, one appeals court case has held that replacing a cedar shingle roof with terra cotta roof material, due to future maintenance concerns, was a material alteration that required member approval. But in another court case, the addition of rip-rap to shore up an eroding shoreline was permitted without member approval given the necessity to preserve the condominium property.

As you can see, the cases are all over the spectrum, and the ultimate issue is a question of fact to be determined in each case. Given this uncertainty, it is usually the most conservative advice to obtain a vote of the members unless you have an unequivocal written opinion from the association's legal counsel that a membership vote is not required.

Q: I live in a condominium association that, up until recently, allowed owners to have pets. The Board, however, apparently decided that pets (mainly dogs) cause too much trouble in our complex and that we should be a "pet free" condominium. The Board called a special membership meeting to approve an amendment to our Declaration which states that no owners may have pets. The amendment contains language stating that the restriction applies to all owners. The amendment was approved by our unit owners and now the Board is demanding all owners to get rid of their pets. Can the Board do this? Aren't the previously existing pets "grandfathered-in?" I have

had my dog for over 8 years and this doesn't seem fair. **R.R. (via e-mail)**

A: I agree that this is not fair. Luckily, however, the law will protect you here. There are several arbitration and district court opinions which provide that when an association adopts a more restrictive rule, policy or amendment that prohibits pets, the association is required to allow those owners who already had a pet on the date the restriction becomes effective (and thus do not comply with the newly adopted pet restriction) to retain the pet until the pet expires or is otherwise permanently removed from the condominium property.

With the exception of the "grandfather" issue, the restriction is enforceable against all owners, if properly adopted. Therefore, an owner, who did not own a pet prior to the effective date of the amendment, would not be permitted to thereafter violate the rule and claim a "grandfathering exemption."

Joe Adams has focused his practice on the representation of community associations since 1987, and has provided legal counsel to well over one thousand community associations throughout the state. Joe has served as Chairman of the State Advisory Council on Condominiums and has written this column since 1995.

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.