



Document Update Common As Condo Ages

Fort Myers The News-Press, September 28, 2008

By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Q: I have been appointed by my condominium board of directors to serve on a committee to rewrite the condominium documents. Several committee members have canvassed the neighborhood to ask what issues are important to the members. Surprisingly, many members have asked why we need to rewrite the condominium documents and I explained that they had not been updated, except for minor amendments, in the 18 years since they were initially recorded. One member was adamant that, due to his experience in the last condominium he lived in, the documents be amended by crossing through deleted language and underlining new language. He stated that his prior condominium association tried to amend the documents completely, without underlining new language and crossing through deleted provisions, and the members were very frustrated because they could not tell what had been changed. Can you provide information so that I can convince the membership that rewriting the documents is beneficial? Also, can you give me your opinion on the best way to present the amendments, either using the cross-through or underline method or a completely new document? D.S. via e-mail

A: A governing document amendment/update project is a fairly common event in the life of a condominium that is the age of your condominium. The main purposes of these endeavors are to remove any references to the developer that are no longer necessary, to incorporate new statutes that have been enacted since the condominium was

established, to consolidate prior amendments into one concise document, and to add or enhance specific provisions based upon experience and case law that has evolved over the years. In many cases, associations come to their attorney for a document rewrite because they have had several instances where their documents were unclear or not helpful in important situations.

The Florida Condominium Act permits the amendment of condominium documents by either using the underline and cross-through method, in which new language is underlined and deleted language is crossed out, or by the “substantial rewording” format, in which the proposed, amended document is presented as a totally new, clean document. As you can appreciate, the overall format, as well as the specific language used in these documents, has continued to evolve over the years. The contrast between a set of condominium documents drafted in the last two years as compared to documents drafted twenty years ago is obvious to even the most casual reader. Even modern day provisions that accomplish essentially the same purpose as their predecessors are written differently in order to bring clarity and certainty to their meaning. Therefore, there is a general preference among many lawyers to completely rewrite the documents. Alternatively, the underline and cross-through method could be used, but the result in many cases would be a nearly incomprehensible document full of underlined and crossed-through

provisions. When a document is rewritten using the “substantial rewording” format, a member who is determined to understand all of the changes simply needs to read the new, amended and restated documents in their entirety. While this task may require several hours, I submit that it is likely no more difficult than trying to decipher underlined and crossed-through provisions and interpreting the meaning of those changes.

Q: I live in a neighborhood of single family houses where everyone has a clay tile roof. Unfortunately, many of the owners have not regularly cleaned the roofs which have become very unsightly. We had our roof cleaned recently by a contractor we located ourselves. The board is finally taking some action to encourage people to clean their roofs. The board has contacted another contractor and arranged to get discounts for owners who agree to use the association’s contractor. I am happy that the other owners are being encouraged to clean their roofs, and maybe I should leave all of this alone, but it seems a little unfair that I had to find my own contractor and pay full price and now the association is using its resources to find a contractor for others and to get them a reduced price. Also, what can the association do if some owners don’t elect to participate in the association’s roof cleaning project? **N.L. (via e-mail)**

A: I assume from your question that you live in a homeowners’ association where the members own their own detached homes and are responsible to maintain those homes, including the roofs. That is a fairly typical arrangement in a single family homeowners’ association. Even though the individual owners are responsible to arrange and pay the cost of roof cleaning, there are likely covenants in the governing documents of the community that require the owners to keep their property neat and clean. Obviously, such a covenant increases the value of the properties in the community and raises the level of enjoyment of the property for current owners.

It is not unusual for an association to assist its members in efficiently and economically completing the members’ obligations under the governing documents. It is not clear exactly how

your association is involved with the roof cleaning contractor that they are presenting, but if they have merely identified a contractor who is willing to extend a discount to members if a certain number of members elect to hire the contractor, and if the contracts for the roof cleaning services are directly between the members and the contractor, then I see no problem with the association assisting the members in this manner. It is important that no association funds nor resources be spent on cleaning the roofs of individual owners. Owners should also be told that any concerns about the unit must be addressed directly with the contractor, and not the association.

In answer to your last question about how the association can enforce the roof cleaning requirement for owners who do not voluntarily participate, the association would have to undertake some form of covenant enforcement. Some declarations of covenants include an “enforcement of maintenance” provision, which allows the association to demand that an owner comply with some covenant, and if the owner fails to comply, the association has the right to complete the maintenance and charge the cost of that maintenance to the owner. Obviously, associations are often reluctant to undertake such enforcement of maintenance because the member may object and a confrontation may occur. The association may also need to lay out money of its own and then attempt to collect it from the member. Further, if the association or its contractors enter upon a member’s property, there is always a risk that the member may claim that the association’s contractor damaged the property or committed some other damaging act.

If there is no “enforcement of maintenance” provision in the declaration, or if the association elects not to utilize that provision, then the association would need to bring a legal action seeking an order requiring the owner to clean the roof. In a Florida homeowners’ association, it is necessary to satisfy the statutory mediation procedures before going into court. If the association prevails and obtains an order in its favor, the association will have a claim to recover all of its reasonable costs and attorney’s fees incurred in such an enforcement action.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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.