

Presented at the Board of Directors meeting July 20, 2006

This is a compilation of our Attorneys responses to the Boards request for counsel (via emails from/to Frank) concerning the windows situation. The Board felt the best way to disseminate her guidance was to publish her own words in an effort to eliminate confusion in the translation. Should anyone have questions concerning the content herein please direct them to Frank Bosela for clarification.

From: Donna Berger
Date: June 29, 2006 6:30:26 PM EDT
To: Frank Bosela
Subject: Re: Island Club Condo's

Dear Frank,

I have reviewed all of the pertinent provisions in your governing documents regarding windows...

Your Declaration clearly defines the unit boundaries as including windows. Therefore, the windows are not common elements, they are part of the unit. It's not atypical for window styles to no longer be available or up to code so that alone would not constitute a material alteration if you could no longer purchase the previous type and style. In any event, the windows are not common elements, they are part of the units so changing their appearance would not trigger a unit owner vote.

The Board could and certainly should mandate the type of window permitted. You could conceivably make the window replacement mandatory and the costs of replacing same a common expense by having a majority of your members agree that the costs of a window replacement program would be a common expense...

From: Donna Berger
Sent: Wednesday, July 05, 2006 2:45 PM
To: Frank Bosela
Subject: Re: Island Club Condo's

The section of your documents "Declaration [3.2(g)(2)(ii)] states, the apartment owner shall not paint or otherwise decorate or change the appearance of any portion of the exterior of the apartment building." would allow you to regulate the types of windows installed since they impact the appearance of the exterior of the building. The Board is allowed to regulate use of the units in addition to the common elements so the fact that the windows are not common elements does not defeat your ability to control your building's exterior appearance.

Since windows do have to be replaced occasionally, the owners need to be advised of the type and kind of window (i.e. white impact glass, etc.) that they must use when replacing their current windows. You are not able to "make the windows a common element" since changing the type or nature of common elements would require the approval of 100% of your owners and approval of all lien holders of record (lenders, etc.) which is nearly an impossible feat. What I suggested if you wanted to make the window replacement program mandatory was to have a membership vote on adding window replacement to the list of approved common expenses and amending the section regarding repairs.

If you leave the window replacement as a voluntary program (i.e. when you need to replace them here is what you must install) it would not be on a "case by case" basis. It would be the Association policy. There are never assurances that subsequent boards can't change policies or amend the documents because that often does happen. Even if you amended the documents to make the program mandatory a subsequent board could ask the membership to amend it back to the way it was. Hopefully, you would not be flopping back and forth like that but the possibility does exist. You can certainly take a survey of your community members to see how they want this issue handled and then respond accordingly.

Lastly, the Division (of Florida Land Sales which regulates condominiums) takes a completely different position than that held by association attorneys statewide inasmuch as the Division disregards the provisions in your private governing documents. With regard to regular maintenance issues, your governing documents would still control and owners would be responsible to maintain, repair and replace broken or failing windows. However, in the aftermath of a casualty (hurricane, windstorm, fire) the Association would have to pay to replace the windows regardless of the fact that the windows are part of the unit and not common elements. It is becoming increasingly difficult if not impossible for unit owners to obtain coverage for windows, doors, screens and balcony railings as a result of both the changes to 718.111 (11) and the Division's position on point as codified in the Plaza East decision.

Your easiest option at this point is to allow the window replacement program to remain voluntary payable by each owner when he or she replaces their current windows with the Board-approved window type and style. You should also ensure that your master insurance policy covers windows, doors and any other item as originally installed by the developer other than those specifically excluded under Section 718.111(11) such as wall, floor and ceiling coverings, cabinetry, appliances, etc.

If you have further questions, please let me know.

Regards,
Donna

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Becker & Poliakoff, P.A.