

FW Waterford Point - Point Rail Replacement ProjectObligations to Pay Assessments.txt
From: Stan Mikulski [Stan.Mikulski@linderco.com]
Sent: Thursday, May 15, 2008 1:50 PM
To: Vinnie; Ron Miller; Todd Troutman; Stan Connie; Burt DuBois;
dgillich@bellsouth.net; joe Barbera
Cc: Joe Vito
Subject: FW: Waterford Point - Point Rail Replacement
Project/Obligations to Pay Assessments

Attachments: bp_logo_putty_90px.gif

I think this is what we are looking for.

From: de Haan, Ellen [mailto:EDEHAAN@becker-poliakoff.com]
Sent: Thursday, May 15, 2008 1:10 PM
To: Vinnie
Cc: Stan Mikulski
Subject: Waterford Point - Point Rail Replacement Project/Obligations to Pay Assessments

May 15, 2008

Dear Board of Directors:

This letter is in response to your inquiries, regarding the point rail replacement project, and the special assessment required to pay for it. It is my understanding that an owner has challenged the Board's right to make the necessary repairs, and that there have been comments made that assessments will be withheld in protest.

Please note the following:

POINT RAIL REPLACEMENT PROJECT:

1. Florida Statutes, Section 718.111(1)(a) provides that the Board of Directors runs the Association, which is responsible for maintaining, repairing and replacing all portions of the Common Elements; for operating the Association; and for enforcing the Governing Documents. (Also, Florida Statutes, Sections 718.111(2) and (3); 718.112(1)(a); 718.112(2)(f) and (g); 718.114; 718.115; and 718.116) The obligation of the Board of Directors to fulfill all of its duties and exercise of powers is called Fiduciary Duty (see Section 718.111(1)(a), Florida Statutes).

2. The Board's obligation to maintain, repair and replace is also set forth in the Governing Documents (Declaration of Condominium, Article III; Articles of Incorporation, Article III, Section 2.c.; By-Laws, Article IV., Section 3.)

3. There are certain maintenance, repair and replacement functions which render the Association subject to the Building Code in place at the time of the work. This would include window and door replacements, and of course, the replacement of the point rails.

Whenever such work is being done, the Board of Directors has no option but to comply with the then current Codes, even if the exterior appearance of the Common Elements is altered in the process. In that situation, the work would be considered as maintenance, repair, and replacement, and is automatically out of the material alteration category.

4. In addition, there are times when a governmental agency or State, Federal or Municipal Laws or Codes require the work to be done by the Association. This would include things like Fire Safety modifications, and other work related to health, safety and welfare of the residents.

For example, the Association was required to retrofit every unit with a hard-wired smoke detector, with a battery back-up, even though the Association ordinarily has no obligation or authority to do work within the boundaries of the individual units.

In summary, the point rail replacement project is part of the maintenance, repair and replacement function of the Board of Directors. The choice of the type of point rails is not discretionary, but is required to comply with the current Building Code. Therefore, it would not be considered to be a material alteration, and would not require a vote of the membership.

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ASSESSMENT TO PAY FOR POINT RAIL PROJECT - OBLIGATION TO PAY

1. Section 718.116(1)(a), Florida Statutes, provides, in pertinent part, as follows:

A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner . . .

2. The Declaration of Condominium, Article XI, Section 1., provides that each "Apartment Owner shall be liable for his share of the Common Expenses, and this share shall be equal to the percentage that each Apartment bears to the Common Elements as set forth in Exhibit A, . . .

3. The Common Expenses are paid through the assessment process. The Board's obligation to assess to assess to pay for all Common Expenses is also addressed in the Articles of Incorporation, Article III, Sections 2.a. and b.; By-Laws, Article IV., Sections 1 and 2.)

4. Failure to pay assessments subjects an owner to the lien and foreclosure process. (Florida Statutes, Section 718.116; Declaration of Condominium, Article XI, Sections 10. and 11.)

5. Under the Florida Case Law, allegations that the Board has failed to maintain, or is improperly maintaining, the Condominium Property, or is otherwise outside of the scope of its authority, are not grounds for refusing to pay assessments and are not defenses in a foreclosure action. The only recognized defense to a claim for failure to pay assessments is that the assessments were not properly levied. (See: Sandles v. Sheridan Lakes Condominium, Inc., 388 So.2d 1096 (Fla. 4th DCA 1980); Abbey Park Homeowners Association v. Deborah Bowen., 508 So.2d 554, 555 (Fla. 4th DCA 1987); Ocean Trail Unit Owners Association, Inc. v. States Mead and William Brister, as representatives of a class of unit owners at the Ocean Trail Condominiums, 650 So.2d 4, 7 (Fla. 4th DCA 1994).)

In summary, as long as the special assessment is adopted at a duly-held meeting of the Board of Directors, for which the 14 days' notice was sent to each owner, and posted on the premises, then, if an owner withholds an assessment payment, or otherwise fails to pay the full amounts due, the Association will have the authority to place a lien and foreclose that lien against the Apartment in question. The owner's disapproval of the point rail replacement project will not be a defense against the foreclosure.

When you have had the chance to review this letter, please let me know if you have questions, or if I may be of additional assistance.

Very truly yours,

Ellen Hirsch de Haan

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Ellen Hirsch de Haan, J.D.

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