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Board of Trustees
Doverbrook Estates Condominium Trust
c/o Rosemary Costa
50 Doverbrook Road
Chicopee, MA 01022

RE: Moving Doors and Windows to a Different Location

Dear Ms. Costa:

Regarding the Trustee's concerns about moving windows and doors from where they are presently located on a Unit to another location on the Unit, I have the following opinion:

M.G.L.A. c. 183A sec. 5(b)(1) states: "The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected expressed in an amendment to the master deed duly recorded"... (emphasis mine). (Prior to 1998 5(b) read as follows: "(b) The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is affected, expressed in an amended master deed duly recorded." The previous language had been interpreted to mean that a unit may not be given exclusive rights to a portion of the common area without an amendment to the master deed consented to by all unit owners whose percentage interest changed. Strauss V Oyster River Condominium Trust v. Zussman, 416 Mass. 505 (1993)).

The Condominium Enabling Act as amended in 1998 (ST. 1998 c. 242, now, M.G.L. A. 183A sec. 5) recently has been interpreted to mean that the Act "now allows...the percentage of interest of a unit owner to be

changed without the consent of all unit owners if such interest is not materially affected and the master deed permits." (28 Mass. Practice, Real Estate Law sec. 14.S, 4th edition, current through 2007, Arthur L. Eno, Jr. and William V. Hovey, both of the Massachusetts Bar, Chapter 14, Condominiums, enclosed herewith). Section 9 of the Doverbrook Estates Master Deed permits the Board to grant waivers to unit owners to allow modifications as spelled out in Section 9 of the Master Deed, enclosed herewith.

It is my opinion, therefore, that M.G.L.A. c. 183A sec. 5(b)(1) together with Section 9 of the Master Deed for the Doverbrook Estates Condominium gives the Board the authority to grant a waiver to the unit owner to allow the unit owner to relocate the doors and windows on his unit, because I do not believe that the relocation will "materially affect" the percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the Doverbrook Estates Condominium Master Deed. Additionally, while it is clear that the changes would alter the exterior of the condominium unit and, hence the common area, other unit owners would not be prohibited from using any of the condominium common area as would be the case if the unit owner erected a fixed, irremovable object on the ground of the common area such as a fence or brick barbecue that was to benefit less than all of the unit owners.

In writing this opinion, I have considered, in addition to the already cited foregoing documents: Trustees of Chestnut Hill Condominium Trust v. Jacobs et al., Superior Court at Middlesex, Mass. Super. Lexis 386 (2006), and Lallo et al. v. Szabo, et al., 22 Mass. L. Rep. 696 (7/9/2007), enclosed herewith. Both of these cases were decided after the 1998 changes in the Condominium Enabling Act. In both of these cases unit owners sought the approval of the Trustees to make structural, exterior changes to their units. In neither case did the court hold that Chapter 183A prohibited making the changes requested. If Chapter 183A was an express prohibition on making any exterior changes, the respective courts would have undoubtedly so declared, and that would have been the end of the matter. Neither court did so.

I also considered another case that was decided in Ohio in 1991 as persuasive but not mandatory authority in Massachusetts, The Claridges of Walden Condominium Association v. Philip S. Wenk et al., 1991 Ohio App. Lexis 3910, enclosed herewith. In that case a subcontractor built a fireplace in the den of a residence. The contractor cut a hole in the roof of the condominium and installed a galvanized metal pipe. The pipe extended above the roof of the condominium approximately eight feet. The Court, duly noting that Ohio State Law requires that the percentage of interest that unit owners have in the common area could not be

altered except by an amendment to the condominium declaration approved by all unit owners affected, held following:

“In attempting to apply the language of section (D) to its case, appellant argues that when appellees added the chimney, their actions altered the percentage of interest of the remainder of the unit owners in the common areas. Under this argument, appellees would not be allowed to install the chimney unless the condominium declaration was amended.

...

In this case, appellees' actions simply had no effect upon the percentage of interest each owner had in the common areas. While their actions changed the appearance of one part of the common area in which each owner had an interest, it did not diminish the amount of that interest in relation to the other unit owners. Accordingly, the provisions of R.C. 5311.04(D) simply have no application to the situation in this case. See O'Neil v. Atwell (June 21, 1991), Portage App. No. 90-P-2239, unreported.

...

Moreover, as a practical matter, appellant's contention that the condominium declaration must be amended whenever a unit owner wants to make a minor alteration to a common area like a roof is illogical. Such a procedure does not comport with that followed by the board in this case and is also inconsistent with the prior decisions of this court. See, e.g., Big Turtle Condominium Unit Owners' Assoc. v. Burke (July 27, 1990), Lake App. No. 89-L-14-039, unreported. Thus, appellant's first argument is not well taken.”

...


It is my opinion that, that as provided by statute, master deed, condominium declarations, and by-laws, that individual owners generally may make changes, additions or improvements to their units where the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed is not materially altered. If the changes, additions or improvements to their units would materially alter the percentage of the undivided interest of each unit owner in the common area, the consent of all unit owners whose percentage of the undivided interest is materially affected would be necessary.

As provided in the Master Deed and By-laws, the unit owner would have to obtain the necessary written authorization from the Board of Trustees prior to making the changes.

Under a "rule of reason", the condominium trustees must demonstrate that they acted reasonably in approving or denying structural changes to a unit, and that would include modifications to the common area that would blend architecturally with the balance of the existing units in the complex, and where the modifications do not materially alter the percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in Chapter 183A sec. 5 and the Master Deed. Clearly, each case must be decided on its own merits with the Board exercising due diligence.

If you have any questions regarding this opinion, or desire a further explanation, please do not hesitate to contact me.

Very truly yours,



Victor H. Ascolillo

VHA/pac
Encl.