

REPORT: The need for an amendment to the Master Deed of ROTPOA to remove fences as a financial burden on the Association

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ABSTRACT:

An error in the framing of the Master Deed has cost the Association many thousands of dollars over the years. It is a subtle error that hinges on the use of the term “fences” and its unintended application where a more specific term should have been used. It is the purpose of this report to identify how it was misused and to suggest a method for correcting this misuse and thus avoid unnecessary expense for the Association in the future.

PROBLEM:

Article VIII, 8.1. (a) of the Master Deed states the following:

By the Association. Except to the extent caused by the negligence or intentional act of the Apartment owner or his guests or invitees as set forth in Paragraph 17.2 hereof, the Association shall maintain, repair and replace at the Association’s expense:

(ii) Patios, courtyards, fences, decks, garages, walkways, and the painting thereof.

Clearly, and as stated, the maintenance, repair and replacement of fences are to be paid for by the Association. It is here that the framers of the Master Deed have made an error in the use of the term “fences”. When the Master Deed was written, “fences” had a very specific meaning in light of the vision that the developers had that the Trace would consist of multi-family structures as was usual with condominium communities. If one examines condos 1 through 5 (these units would have been the first instance of the original vision), it is clear that “fences” refers to short runs of fencing to create privacy barriers, or partitions, between the units. Unfortunately, the framers used the generic term “fences” to apply to a more specific construct—these privacy barriers.

Had the Trace evolved as a series of multi-family units, “fences” would have been a proper term to use as it would have referred to the privacy barriers described above. Ironically, the Trace evolved atypically as mostly a collection of single-family structures. It is here that “fences” takes on a much broader meaning and one unintended by the framers. For a single-family unit a fence is a much larger, and more expensive, affair; they are much longer and are built to enclose a considerable amount of yardage.

The problem, plainly, is that Boards of Directors have always interpreted the term “fences” in its broadest sense. Had the framers been more exacting in their terminology by using a more functional description for the separators between condo units, Boards would have treated fences quite differently by seeing them as the financial burden that they are. Further evidence that the Master Deed framers saw “fences” as only small partitions between units of a multi-family structure is they never put into place a funding mechanism to capture the added expense of those “fences”. The small partitions that they envisioned were relatively inexpensive and could be absorbed into the shared expense, and subsequent fees, of the adjoining homeowners. Had the framers seen fences in the larger sense—as a large capital expense comparable to decks, patios, etc.—they would have devised a way to capture that expense and assign it to the fence owner. The foregoing did not happen

CONCLUSION:

It is clear that the Association has been paying for fences unnecessarily for many years. Many, perhaps most, condominium associations do not permit fences as they are considered luxuries and encumber large portions of the common elements. It would be appropriate to amend the Master Deed to more clearly define the term “fences” (in the smaller sense) and craft a separate policy for fences (larger sense) that is more equitable for Association members.