



April 9, 2021

RE: Common Wall Maintenance and Easements

Dear Members of the Board:

Pursuant to your request I am writing to address the issues as presented covering the association rights with regard to common property walls, their easements, and enforcement thereof when a homeowner has placed plant materials and/or other items within the easement. I've addressed in more detail below the specifics of each item but in short, the only path forward is for the association to treat any encroachment on a perimeter wall or its easement by a homeowner as any other covenant violation and thereby follow the defined covenant violation process to rectify the issue. If no remedy is taken, the association is well within their rights to pursue legal action and correct the violation, if needed, through a "self-help" scenario whereas any costs incurred by the association for work performed will be attached to the homeowner's account.

The research of state laws and your covenants did address the points documented in your email. Specifically, to each point:

Allow them to have the vines but they must sign a waiver that they now have full liability for the wall.

This approach would seem like the most direct to resolve any issue with the perimeter wall and its easement, but the association cannot pursue entering into

an agreement like this for a few reasons. First, the perimeter wall is considered common property managed by the board and any subordination of usage and thereby ownership rights would require a community vote. Even with a successful vote, it would not be in the best interest of the association to follow a path as maintaining the wall would be subject to the homeowner to manage and could potentially create cases were walls were not being maintained in a uniform manner that supported the overall best aesthetics for the community. Moreover, violations for lack of proper maintenance of the wall would again fall to the association to enforce under the covenant violation process – same as it would be if ownership rights were kept with the association as it is today.

Tell the homeowner they do not own the wall and the Board has responsibility to maintain our common property and insist they remove the plant material or the HOA will and charge them for the work including "self-help".

This is the approach that should be taken to address the wall issues as presented. The Palm Lake covenants clearly detail under Article II – Objects and Purposes the purpose of the association along with the necessity to maintain the overall look and image of the community for current homeowners along with creating the responsibility for common property conveyed by the developer to the association for on-going maintenance. The association has a legal right to access common property to perform its duties and thereby can ingress and/or egress any homeowner property to directly accomplish this in looking at your perimeter walls. The state of Florida upholds easement rights and defines all pertinent details in FS 704 – Easements. A homeowner can think of the walls and their associated easements as property of the homeowners' association much like the front gates, sidewalks, etc. The maintenance of these items is rarely, if ever, disputed and the perimeter walls should be well maintained for the betterment of the community and protection of home values within Palm Lake.

What happens when they refuse to remove the plant material and refuse to sign anything acknowledging their and any future owners' liability of damages done to the wall.

From personal experience I can assure you a homeowner will refuse to make changes and/or allow the association onto their property to address plant material or other structures. The association should proceed with treating this matter like any other covenant violation and follow the defined process for notices and the pursuit of legal action (i.e. self-help) if necessary. Homeowners need to understand that any plant materials or structures placed within the easement would be defined as adverse possession for encroachment from a legal perspective. Even in the event the association has not enforced their easement rights heretofore, any ownership of the easement runs in perpetuity starting with the developer and then to the association once the developer conveys their rights in the handover of the community. Many court cases regarding this are associated with common area trees but a case in 2016 regarding encroachment on HOA owned property affirmed the land ownership rights of the association from homeowner encroachment either on direct common area property or any associated easements (Nellie Gail Ranch Owners Assn. v. McMullin, (2016) 4 Ca. App. 5th 982.) Moreover, the rights of the Palm Lake HOA of easements are clearly defined in your covenants under Article IV- Easements with Section 6.6 specifically detailing the ability of the association to enter property “for the purposes of installing, maintaining, inspecting, repairing and replacing any and all privacy systems, walls, landscaping...”

In addition, if there is a need to access a perimeter wall leveraging another homeowner's property in order to gain access, the association has the full rights under the law to do this if required. A recent court case (Goldman v. Lustig, Case No. 4D16-1933 (Fla. 4th DCA January 24, 2018)) affirmed the rights of using other properties to access common areas. While using another property to gain access to common property of an owner who refuses to comply is not the best “look” for an association, the law clearly supports the ability of the easement owner to reasonable use whatever methods necessary to access the property and it's easement.

Accessing a common property through a homeowner's property is not an easy issue to deal with for the board. I dealt with this issue multiple times during my time as HOA president and there was always some level of contentiousness from homeowners who did not want to reconcile themselves to the fact that the association has property owner rights that are protected by law in order for that property to be maintained, replaced or upgraded as necessary. I would recommend a strong communication plan to all homeowners detailing the need to assess and repair all community owned walls and that any plant material will have to be removed – either by the homeowner or by the HOA with any costs being applied to the homeowner's account. The process around covenant violations should be reaffirmed to all homeowners as so there is a documented baseline of when and how the homeowners received communication. Hopefully, the above points can be leveraged to cement the need for the association to follow this path as this is part of the fiduciary duty the board is charged with executing.

Please let me know if there are questions or needed clarification on the above items.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Kulich', with a long horizontal flourish extending to the right.

Michael Kulich
President
iD8 Solutions Group, LLC