

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES**

IN RE: PETITION FOR ARBITRATION

JACQUELINE SIMKIN,

Petitioner,

v.

Case No. 2013-04-0108

**NINE ISLAND AVENUE
CONDOMINIUM ASSOCIATION, INC.,**

Respondent.

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FINAL ORDER

Pursuant to notice, the undersigned arbitrator of the Division of Florida Condominiums, Timeshares and Mobile Homes conducted a final hearing in this case on March 4, 2014 and March 5, 2014. During the hearing, the parties presented the testimony of witnesses, entered documents into evidence and cross-examined witnesses. The parties have filed post-hearing memoranda. This order is entered after consideration of the complete record.

Appearances

For Petitioner:	Thomas F. Munro, Esq. Foley & Lardner LLP 2 South Biscayne Blvd, Suite 1900 Miami, FL 33131
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For Respondent:	Peter F. Valori, Esq. Damian & Valori LLP 1000 Brickell Ave., Suite 1020 Miami, FL 33131
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Statement of the Issues

1. Whether Nine Island Avenue Condominium Association, Inc. (the Association) violated Article VI, Section C, of the Association's Declaration of Condominium and Section 718.113(2), Florida Statutes, when it implemented without unit owner approval, the alterations, changes and additions alleged by Petitioner?
2. Are Petitioner's claims time-barred by the statute of limitations?

Findings of Fact

1. The Association is the corporate entity responsible for the operation of Nine Island Avenue, a condominium.
2. Jacqueline Simkin owns a unit in the condominium and therefore, is a member of the Association.
3. On September 25, 2013, Petitioner filed a petition for arbitration. On November 22, 2013, the Association filed an answer with several defenses. The specific allegations with the Association's response are as follows:

Common Element	Original Condition of Common Element as Alleged by Petitioner	Current Condition of Common Element	Association's Defense
Curbing and Walls of the Koi Pond	Grey in color	Blue in color	Original color was blue
Pool furniture cushions	Deep grey-blue and grey-blue plaid in color	Royal Blue in color	Color blue is similar to original color blue
Pool Deck	Cream in color	Discolored and streaky	Same color just discolored by residue from stormwater runoff
Gazebo	Grey/Natural wood in color	Dark brown in color	Original color was dark brown
Trellis	Grey/Natural wood in color	Dark brown in color	Original color was dark brown
Trellis	Constructed with Cypress	Constructed with Pine	Change in wood type is not material
Trellis	Trellis had a large footprint shaped in the Letter "L"	Trellis is missing one side altogether and has a smaller footprint on the remaining side.	Action is time-barred by the statute of limitations
Trellis	Single beam and double beam construction	Single beam construction	Action is time-barred by the statute of limitations

Common Element	Original Condition of Common Element as Alleged by Petitioner	Current Condition of Common Element	Association's Defense
Trellis	Design of trellis was tongue in groove	Design of trellis bolted with plates	Action is barred by the statute of limitations and design must meet current building codes
Observation Deck	Observation deck was installed	Observation deck was removed	Action is barred by the statute of limitations
Swimming Pool Steps	The stepping distance from the pool coping to the first step was 12 inches or less	The stepping distance from the pool coping to the first step is 14 inches	The stepping distance has always been 14 inches
Swimming Pool Ladders	The swimming pool ladders had 5 rungs that sunk deep into the water	The swimming pool ladders have 3 rungs and sinks shallow into the water	The rungs of the swimming pool ladders are not material
Landscaping	Landscaping adjacent to entrance driveway was lush with grass, shrubbery and palm trees	Most of the trees and shrubbery have been removed and the grass was replaced with landscaping stones	Business judgment rule
Filters for the Koi Pond	One filter at one end of the koi pond	Three filters installed at both ends and in the middle	Additional filters needed to properly maintain the koi pond
Water Filtration System	Building had a water filtration system to purify drinking water	Water filtration system has been disconnected	The water filtration system was not maintained and now it poses a danger to the health of the residents.

4. Article VI, Section C, of the Declaration of Condominium states:

Alterations by the Association. The Association shall not make any alteration of, addition to, or expansion of the Common Elements unless the alteration, addition or expansion has been approved by the Owners of Units to which at least 66 2/3% of the Common Elements are appurtenant; except however, the Association may convert the storage area by the kitchen on the third floor level to a Manager's Unit without the necessity of approval if the Board of Directors determines such course of action to be in the best interest of the Condominium and if the Developer has not already done so as permitted by Section D(3) below.

5. Article III, Section D, of the Declaration of Condominium states in pertinent part:

D. Common Elements. The Common Elements shall include:

1. all of the Condominium Property not included in the boundaries of a Unit;

...

5. all real property, personal property and fixtures now or hereafter owned by the Association;

...

6. Petitioner called four (4) witnesses to testify: Richard Goldstein and Gretchen Marshall, both owners, residents and prior members of the Board of Directors of Nine Island Avenue; Isaac Sklar, the original architect for Nine Island Avenue; and Jacqueline Simkin, Petitioner. The Association called six (6) witnesses: Dr. Jeffrey Murray, Pond Doctors, LLC; Ashar Anwaar, a structural engineer with Pistorino & Alam Consulting Engineers; Jesus Strauss, Taylor Roofing; Tom Lesniak, an owner and resident of Nine Island Avenue; Carlos Sampedro, Chief Engineer of Nine Island Avenue; and Jeffery Stokols, owner and resident of Nine Island Avenue and President of the Board of Directors of the Association.

7. Petitioner offered twenty-three (23) documents into evidence, and all were admitted without objection by the Association. The Association offered 35 documents into evidence, and all but Exhibits 7, 31 and 34 were admitted without objection by Petitioner. Exhibits 7, 31 and 34 were excluded on the basis of relevancy.

8. During opening statements, the arbitrator toured the recreation deck, Petitioner's unit and the landscaping near the driveway entrance. The arbitrator also viewed a promotional video produced by the developer near the time of the original offerings and a video of the Association's board meeting held on November 2, 2004.

9. The original architect for Nine Island Avenue was Isaac Sklar, and Petitioner was the representative for the developer of Nine Island Avenue during the original design and construction process.

10. In 2011, the Board proceeded with a project for the structural repair and renovation of the recreation deck and underlying parking garage (renovation project) in order to address, among other things, water intrusion and resulting damage to the concrete structure.

11. The Association retained Pistorino & Alam Consulting Engineers to design the structural repair project concerning the recreation deck and underlying parking garage.

12. The recreation deck renovation project was completed in late 2012.

Waterways Koi Pond

13. Included within the project was the application of new waterproofing to the waterway koi pond located on the recreation deck.

14. Petitioner contends that the original color of the waterway walls and curbing surrounding the waterways was, and up to the time of the project has always been, light gray. The Association contends that the original color was bright royal blue, as uncovered during the demolition in preparation for applying new waterproofing.

15. The photographic evidence, the promotional video and the testimony of the original architect and Petitioner provide sufficient proof that the waterway walls and curbing were originally light grey. The blue discovered in the demolition was only an undercoating beneath the original light grey. As depicted in the photographs, the waterway walls and the curbing were subtle and understated, allowing the lush foliage to be the focus of the waterway koi pond. As stated by Gretchen Marshall, the current color of royal blue is “jarring” as it overwhelms the lush foliage around the waterway koi pond.

16. The Association's expert on koi fish and ponds, Dr. Murray, testified that the color of the waterproofing makes no difference in regards to the function of the waterway as a koi pond.

Pool Furniture Cushions

17. As depicted in the photographic evidence and the exemplars provided by the Association, the original color of the recreation deck furniture cushions was a very deep gray-blue and deep grey-blue plaid. The present royal blue color of the deck furnishings is a different shade of blue from the original furnishings.

18. The original color grey-blue was subdued and blended with the surrounding colors. The new color royal blue "pops" which means the color appears brighter or more striking in juxtaposition to the surrounding colors.

Pool Deck

19. The renovation project included the replacement of the waterproofing coating on the pool deck to protect the underlying concrete from water intrusion. The type of waterproofing for the pool deck was recommended by the Association's engineers. The color of the pool deck is the same as the original pool deck. Mr. Anwaar testified that the waterproofing is superior quality, is performing to manufacturer's specifications and the appearance of streaking is caused by mineral deposits left on the deck after the water evaporates. Mr. Anwaar stated most of the residue could be power-washed away but some fading is inevitable.

Gazebo

20. The photographic evidence, the promotional video and the testimony of the original architect and Petitioner provide sufficient proof that the wooden gazebo's

original finish was natural wood. Mr. Sklar testified that the original finish of natural wood would naturally weather when exposed to the elements. He purposely wanted the wood to weather to a natural grey to match the overall aesthetics of the concrete motif of the building.

21. Following the repairs performed on the gazebo during the project, the gazebo was stained the existing dark brown. The current dark brown now contrasts with the concrete grey of the building instead of complimenting it.

Trellis and Observation Deck

22. The photographic evidence, the promotional video and the testimony of the original architect and Petitioner provide sufficient proof that the original footprint of the trellises extended from the South entrance to the recreation deck out to Biscayne Bay, then along the Western edge of the recreation deck overlooking Biscayne Bay to the Northern edge of the recreation deck, then turning East back toward the gazebo. In contrast to this original footprint of the trellises, the rebuilt trellis occupies only a small portion of the original footprint from the South entrance out toward Biscayne Bay, and does not include any trellis along the Western or Northern edges of the recreation deck.

23. The original construction of the recreation deck also provided for a wooden observation deck over a portion of the waterways located on the recreation deck.

24. In or about 2004 - 2006, the Board of Directors ("Board") of the Association made the determination that the trellises and observation deck were in need of replacement and had them taken down. However, rather than immediately replacing them, the Board determined to defer the replacement until the anticipated renovation of

the recreation deck, which was scheduled to commence after the completion of an on-going project to restore the concrete and balconies of the building.

25. When asked by unit owners, including Petitioner, when the trellises and observation deck would be rebuilt, both Mr. Goldstein and Ms. Marshall, as Board members at the time, advised that it would be done during the recreation deck renovation project.

26. Additionally, following the removal of the trellises and observation deck and in response to a question at the November 2, 2004 Board meeting as to whether the recreation deck, including the trellises and observation deck, would be returned to the way it was, the Board stated that the deck would be put back to its original, or better, condition during the renovation project.

27. Mr. Sklar testified that the original trellises were constructed with natural roughhewn cypress wood, which would weather to a more natural gray finish, and utilized "tongue and groove" construction with a combination of single beams and double beams, such that the wooden slates across the top were close together to provide the desired shade.

28. The Association provided no direction to Mr. Anwaar with regard to the design of the trellis, other than it should be sturdy and meet the code.

29. The design of the portion of trellises which was rebuilt is very different, from an architectural perspective, in that it only occupies a small portion of the original footprint, is constructed of southern pine timber, connected together with visible bolted fastener plates, with a very wide spacing of the top members such that no shade is

provided by the trellis, and is painted a dark brown, which, from an architectural aesthetics perspective, is different from natural, weathered gray.

30. According to Mr. Anwaar, while it was required that the area of the trellis that was rebuilt meet the current building code requirements as far as structural strength, the code does not dictate the current design or the use of type of wood, and there were options that could have been employed such that the construction of the rebuilt trellis would closer resemble the original trellis and provide the intended shade without relying upon the eventual growth of bougainvilleas to do so. Additionally, the code does not dictate the change in color from that of natural wood, to achieve a weathered natural gray appearance over time, to the current dark brown paint.

31. Although certain work was performed on the concrete pedestals during the renovation project in order to bring the concrete pedestals intended to support the observation deck up to the current code, the Board made the decision not to rebuild the wooden observation deck itself. According to Mr. Anwaar sometime in 2011, while in the design planning, the board determined that a lot of modifications were needed for the observation deck to meet current code and that would mean extra costs, so it decided at the time to only replace the pedestals.

Pool Stepping Distance

32. Included within the project were certain renovations to the swimming pool located on the deck. The Association contends that it made no changes which would increase the stepping distance from the top of the coping surrounding the swimming pool down to the first step, and in support of this contention presented, through Mr. Anwaar, a sketch of what it contends to be the pre-renovation measurements of the

stepping distance at 14 inches which is the current stepping distance. The sketch is not sealed, dated, or signed by Mr. Anwaar.

33. In support of Petitioner's contention that this stepping distance increased as a result of work done during the renovation, Petitioner, Mr. Goldstein and Ms. Marshall testified that they are frequent users of the pool, both before and after the renovation, and that the stepping distance is greater after the renovation such that they have difficulty getting into and out of the pool.

34. Mr. Anwar testified that the pool's coping was removed and replaced. Coping is defined as the cap on the edge of a swimming pool.

35. In further support of Petitioner's contention that the stepping distance increased during the renovation, the original construction drawings of the pool prepared by Bliss & Nitray, Inc. Consulting Engineers to Mr. Sklar, show that the stepping distance from the top of the slab adjacent to the pool coping to the top of the coping is six (6) inches, which shows the elevation of the top of the slab to be 19'2" and the top of the coping to be 19'8" for a difference of six (6) inches. This six (6) inch measurement from the top of the slab to the top of the coping is further supported by the renovation construction drawings prepared by Pistorino & Alam, which shows the elevation of the top of the slab adjacent to the coping to be 19'2" and the top of the coping to be 19'8" for a difference of six (6) inches.

36. The actual present measurement of the distance from the top of the slab adjacent to the coping to the top of the coping is approximately 8½ inches, or 2½ inches greater than reflected on the original construction drawings or the renovation construction drawings prepared by Pistorino & Alam. Such increase of 2½ inches from

the top of the slab to the top of the coping would result in an equal increase in the stepping distance from the top of the coping down to the first step. Upon the totality of the evidence presented, the stepping distance from the top of the coping down to the first step of the pool increased as a result of the work performed to the pool during the recreation deck renovations.

37. The City of Miami Beach has issued a notice of violation to the Association that the current 14 inch riser from the coping to the first step is in violation of Section 64E-9.005(2)(f), Florida Administrative Code, which states that “should resurfacing work affect the step riser heights, no riser shall exceed 12 inches.”

Pool Ladders

38. The pool egress ladders were replaced during the project.

39. Prior to the renovation, the egress ladders had five steps such that the steps extended far enough down into the water that you could put your foot on the bottom step and still be in the water, and it was easy to climb out. The first step of the new ladders, which consist of only three steps, is now so high in the water that according to Mr. Goldstein, “you have to be an acrobat or young kid in order to be able to climb out.”

Landscaping

40. Prior to the renovation project, the Association had an area of lush landscaping immediately adjacent to the entrance driveway.

41. The Association removed most of the trees and shrubbery and replaced the grass with landscaping stone. Mr. Stokols testified that this was done because unit owners’ dogs were urinating and causing damage to the landscaping.

Water Filters

42. Prior to the renovation project, the water filter for the waterway koi pond was located out of sight in the corner of the recreation deck.

43. The original filter was removed during the project and replaced with a total of three (3) new filters. Each of these new filters was white/light beige in color, was placed on a new concrete slab and positioned in new locations on the recreation deck where they are clearly visible. The filter locations were close to the ends of the pond and one in the middle.

44. The original waterway was just a reflection pond but sometime afterwards koi fish were added to the pond. Both parties stipulate that adding the koi was a material alteration but the statute of limitations does apply. The original filter was designed to support a reflection pond and not fish.

45. Dr. Murray testified that the additional filters and new locations were necessary to support the number of fish in the pond. Petitioner supplied no experts to contradict Dr. Murray's testimony.

46. Although contending in its Answer to the Petition for Arbitration that the filters are "unobtrusive, contained within the foliage and consistent with the surroundings", and without indicating that any additional work was contemplated with regard to concealing these waterway filters, since the filing of the Petition for Arbitration, the Association recently painted the filters a dark green and added landscaping planters in an attempt to conceal them. Since the filters have been painted and when the plants grow out, the filters should be as unobtrusive as possible.

47. One of the original amenities provided to the unit owners, and one of the selling points for the building, was the Culligan water filtration system which serviced the building water supply to reduce the amount of chlorine and lime in the city drinking water.

48. The Association has admitted that due to the failure of prior Boards to properly maintain the building's water filtration system, in 2011 it bypassed the system such that there is presently no water filtration provided to the building's drinking water supply. The Board determined that the current state of the filtration system was causing health concerns for the residents.

49. The Association's answer averred that the system was antiquated and was a health hazard therefore the Association was not required to maintain it. However at the hearing, the Association made an *ore tenus* motion to amend its answer to allege that the Association was still investigating replacement of the system. The motion to amend was denied.

50. The Association neither sought nor obtained unit owner approval for any of the subject alterations or additions to the common elements.

51. After consideration of all the evidence, the arbitrator makes the following findings:

Common Element	Original Condition of Common Element as Alleged by Petitioner	Current Condition of Common Element	Association's Defense	Arbitrator's Findings of Fact
Curbing and Walls of the Koi Pond	Grey in color	Blue in color	Original color was blue	Color has been changed
Pool furniture cushions	Deep grey-blue and grey-blue plaid in color	Royal Blue in color	Color blue is similar to original color blue	Color has been changed

Common Element	Original Condition of Common Element as Alleged by Petitioner	Current Condition of Common Element	Association's Defense	Arbitrator's Findings of Fact
Pool Deck	Cream in color	Discolored and streaky	Same color just discolored by residue from evaporating water	Discoloration and Streaks are due to residue
Gazebo	Grey/Natural wood in color	Dark brown in color	Original color was dark brown	Color has been changed
Trellis	Grey/Natural wood in color	Dark Brown in color	Original color was dark brown	Color has been changed
Trellis	Constructed with Cypress	Constructed with Pine	Change in wood type is not material	Wood type has been changed
Trellis	Trellis had a large footprint shaped in the Letter "L"	Trellis is missing one side altogether and has a smaller footprint on the remaining side.	Action is time-barred by the statute of limitations	Footprint has been changed
Trellis	Single beam and double beam construction	Single beam construction	Action is time-barred by the statute of limitations	Design has been changed
Trellis	Design of trellis was tongue in groove	Design of trellis bolted with plates	Action is barred by the statute of limitations and design must meet current building codes	Some but not all design changes were required under the current building code
Observation Deck	Observation deck was installed	Observation deck was removed	Action is barred by the statute of limitations	Observation deck was removed
Swimming Pool Steps	The stepping distance from the pool coping to the first step was lower before	The stepping distance from the pool coping to the first step has increased	The stepping distance has not been changed	The stepping distance has increased
Swimming Pool Ladders	The swimming pool ladders had 5 rungs that sunk deep into the water	The swimming pool ladders have 3 rungs and sinks shallow into the water	The rungs of the swimming pool ladders are not material	The ladders have been changed
Landscaping	Landscaping adjacent to entrance driveway was lush with grass, shrubbery and palm trees	Most of the trees and shrubbery have been removed and the grass was replaced with landscaping stones	Business judgment rule	Landscaping has been removed

Common Element	Original Condition of Common Element as Alleged by Petitioner	Current Condition of Common Element	Association's Defense	Arbitrator's Findings of Fact
Filters for the Koi Pond	One filter at one end of the koi pond	Three filters installed at both ends and in the middle	Additional filters needed to properly maintain the koi pond	Additional filters are needed to properly maintain the koi pond
Water Filtration System	Building had a water filtration system to purify drinking water	Water filtration system has been disconnected	The water filtration system was not maintained and now it poses a danger to the health of the residents.	Water filtration system has been removed

Conclusions of Law

The undersigned has jurisdiction of the parties and this dispute pursuant to Section 718.1255, Florida Statutes. Petitioner alleges that the Association has made alterations to numerous common elements that require approval of the unit owners pursuant Article VI, Section C, of the Condominium Declaration and Section 718.113(2)(a), Florida Statutes. Section 718.113(2)(a) states:

(2)(a) Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions. This paragraph is intended to clarify existing law and applies to associations existing on October 1, 2008.

Article VI, Section C, of the Declaration states in pertinent part:

Alterations by the Association. The Association shall not make any alteration of, addition to, or expansion of the Common Elements unless the alteration, addition or expansion has been approved by the Owners of Units to which at least 66 2/3% of the Common Elements are appurtenant; except however, the Association may convert the storage area by the

kitchen on the third floor level to a Manager's Unit without the necessity of approval if the Board of Directors determines such course of action to be in the best interest of the Condominium and if the Developer has not already done so as permitted by Section D(3) below.

In *Sterling Village Condo., Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971), the court stated:

(A)s applied to buildings the term "material alteration or addition" means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.

The court in *Tower House Condo., Inc. v. Millman*, 410 So. 2d 926 (Fla. 3d DCA 1981), determined that the *Sterling Village* definition applied equally to changes in all common elements. The Association's Declaration is even more restrictive than the statute because it states that any alteration of, addition to, or expansion of the Common Elements must be approved by the unit owners.

Color Change is a Material Alteration

Petitioner alleges that the Association has changed the color of the curbing and walls of the waterway koi pond, the pool furniture cushions, the pool deck, the gazebo and the trellis. A change in the color scheme of a condominium is a material alteration of the common elements. *Islandia Condo. Ass'n., Inc. v. Vermut*, 501 So. 2d 741 (Fla. 4th DCA 1987).

The change of color of the curbing and walls of the waterway koi pond, gazebo and trellis is a material change to the common elements. The pool deck's color has not been altered in any way. The streaking with residue is a natural result of the

evaporation of water and is actually a sign that the waterproofing is performing as designed.

While the original and the current pool furniture cushions are both shades of blue, they are perceptively different. While the original shade of grey-blue is subdued and blends with the surroundings, the current shade of royal blue pops and contrasts with the surroundings. Article III, Section D, of the Declaration of Condominium defines the Association's common elements as including "all real property, personal property and fixtures now or hereafter owned by the Association." As the pool furniture is personal property owned by the Association, a change in the color scheme is a material change that must be approved by the unit owners.

Trellis and the Observation Deck Statute of Limitations

Petitioner alleges that the changes to the trellis and the removal of the observation deck are material alterations that require unit owner approval. The Association alleges that the statute of limitations precludes Petitioner's claims, the changes are not material, and the changes are required by the new building codes.

The Association alleges that the petition is barred because Petitioner failed to take any action to timely institute legal proceedings, as set forth in Section 95.11(2)(b), Florida Statutes. In considering the defense of the statute of limitations, the period begins to run when the action may be brought. See *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579 (Fla. 5th DCA 2003)(Unit owner alleged condominium association failed to enforce the declaration against five unit owners who erected screen enclosures in violation of the documents. Trial court required removal of two of the five enclosures based upon the five year statute of limitations. Appellate court found either

one year or five year limitation period could apply, but court applied longer five year period concluding that when there is a reasonable question as to which limitation period should apply, resolution should be in favor of longer limitation period.). Therefore, the applicable limitations period is five years.

Before a claim accrues for purposes of the statute of limitations, a claimant must be aware of his or her right of action. *Pawley v. Brickell Bay Tower Condo. Ass'n, Inc.*, Arb. Case No. 2004-00-6973, Summary Final Order (August 12, 2004). The period for the statute of limitations begins to run when the facts giving rise to the cause of action were discovered or should have been discovered through the exercise of due diligence. *Id.* While both the trellis and observation deck were removed sometime between 2004 and 2006, the Association made assurances that they would be rebuilt after the anticipated renovation of the recreation deck, which was scheduled to commence after the completion of an on-going project to restore the concrete and balconies of the building. Mr. Anwar testified that the Board decided not to rebuild the observation deck during the design discussions in 2011 because of a fiscal concern. The first time Petitioner could have possibly discovered the changes was in 2011, when the plans were being designed and made a record of the Association. Since that was less than three years before she filed her petition, her action is not time-barred.

Trellis and Observation Deck Current Building Codes

The change in color, the footprint, the single beam construction of the trellis and the removal of the observation deck are material changes as defined by *Sterling Village*. The change in the type of wood for the trellis is also a material change in this case, because the original cypress wood was chosen for its color after it weathers.

The Association's engineer testified that modifications of the design of the trellis are required to be made because of the changes to the building codes. The Association is entitled to rely on the recommendations of a licensed engineer to make necessary changes to restore and maintain common elements. *Krebs v. Dunes Club Ass'n, Inc.*, Arb. Case No. 2013-02-2515, Summary Final Order (August 28, 2013). However, the Association provided no direction to Mr. Anwaar with regard to the design of the trellis, other than it should be sturdy and meet the code. The Association was required to instruct its engineer to produce a design of the trellis to be as close to the original design as reasonably possible while complying with the current building codes. See *Newfield v. Aliko Tower Condo. Management Ass'n, Inc.*, Arb. Case No 2004-05-8013, Final Order (December 18, 2006)(Where an association could have reasonably replaced a defective component of the common elements with one that is comparable in form and function and which would not materially alter the appearance of the common elements, it must do so unless the material changes are appropriately approved.).

Swimming Pool Steps and Ladders

Petitioner alleges that the Association does not have the authority without unit owner approval to alter the stepping distance from the pool coping to the first step in the pool and the number of rungs of the pool ladders. The evidence clearly shows the pool is now more difficult to use. The older residents find it difficult to enter and exit the pool. Therefore, the Association has materially altered the functionality of the pool steps and ladders without unit owner approval.

The City of Miami Beach has stated that the current stepping distance of 14 inches is in violation of the building code. Thus, the unit owners may not approve an

alteration that is in violation of the building codes. The Association must return the stepping distance in a manner consistent with the current building codes.

Landscaping

Petitioner alleges that the Association has materially altered the landscaping adjacent to the entrance driveway by removing most of the trees and shrubbery and replacing the grass with landscaping stones. The Association alleges that landscaping decisions are generally not considered material alterations citing *Girsch v. Whisper Walk Section E Ass'n, Inc.*, Arb. Case No. 97-0305, Order Dismissing Arbitration Petition (November 26, 1997). The arbitrator in *Girsch* stated in pertinent part:

Board decisions regarding what shrubbery to plant or how to replace existing shrubs particularly implicate the business judgment decision of the board, and rarely grow to the dimensions necessary to implicate the provisions of the documents or statute regarding material alterations to the common elements. On occasion, as where a board arbitrarily determines to radically remove or change the use of the landscaping adorning the common elements, it is possible that a material alteration may result and that a vote of the owners may be required.

Petitioner concedes that a landscaping decision generally falls within the business judgment rule, but she objects to the almost complete removal of the landscaping. In the instant case, the Association has not alleged there were no reasonable alternatives to remedy the damage by the unit owner's dogs to justify radically removing the landscaping adorning the area adjacent to the driveway entrance.¹ Therefore, a unit owner vote is required.

¹ The Association has alleged that unit owners' dogs are causing damage to the area. An association's board of directors may properly install security measures without a vote of the owners if a convincing factual predicate exists such that the board's action was necessary to protect the common elements or inhabitants from a known danger. *Southridge Homeowners Association, Inc. v. Barbieri*, Arb. Case No. 94-0382, Summary Final Order (December 27, 1994). In *Williams v. Sky Harbour Condo. Apartments, Inc.*, Arb. Case No. 93-0334, Final Order (June 24, 1994), the arbitrator held that unit owner approval was not required for the construction of a fence on the condominium property where the condominium building, located on busy Tampa Bay, was vulnerable to intrusion by persons without any legitimate

Filters for the Koi Pond

Petitioners allege that the Association does not have the authority to install additional new filters for the koi pond without unit owner approval. The Association cites the maintenance doctrine as its defense. The maintenance doctrine is a well-established exception to the requirement that unit owners approve material alterations where the alteration is necessary to maintain or protect the common elements. See *A.N. Inc. v. Seaplace Ass'n, Inc.*, Arb. Case No. 98-4251, Final Order (November 19, 1998) (citing *Ralph v. Envoy Point Condo. Ass'n Inc.*, 455 So.2d 454 (Fla. 2d DCA 1984)).

The waterway koi pond was designed as a reflection pond. Koi fish were added later. The Association's expert on koi fish and ponds recommended the number and placement of filters to properly maintain a waterway pond that contains koi fish. Petitioner provided no expert testimony other than her bare contradictory conclusions. Therefore, unit owner approval is not required to install the new filters. *Krebs v. Dunes Club Ass'n, Inc.* Arb. Case No. 2013-02-2515, Summary Final Order (August 28, 2013).

However, as discussed *supra*, the Association must design a necessary alteration to a common element so that it remains as close to the original condition as reasonably possible. When Petitioner filed her petition, the filters were white/light beige in color, placed on a new concrete slab and positioned in new locations on the recreation deck where they are clearly visible. After receipt of the petition, the filters were painted green and placed behind landscaping, which is the best the Association

connection to the condominium. The incidents ranged from potentially serious attacks on persons, to trespass on the property and in the pool, to theft of property, and to unauthorized fishing. See *also Ortega v. Mirador 1200 Condominium Association, Inc.*, Arb. Case No. 2012-02-5636, Final Order (February 5, 2013)(Unit owner approval was not needed to install a water intrusion detection system after leaks in the condominium plumbing caused approximately \$2 million in damages). But see *Delgotta v. West Coast Vista Condo. Ass'n, Inc.*, Arb. Case No. 2013-02-7351, Summary Final Order (October 4, 2013)(Unit

can reasonably do to properly maintain the koi and the koi pond and remain close to the original design of the waterway.

Water Filtration System

Petitioner alleges that the Association may not disconnect the water filtration system without unit owner approval. The Association avers in its answer that the system was inoperable and was becoming a health hazard. The maintenance doctrine does not permit an association to fail to maintain a common element and then discontinue use because the system became inoperable. In 2011, when the Association realized that the state of system was now causing a health hazard, it was reasonable to temporarily bypass the system. However, it is obligated to replace the water filtration system in a reasonable time period, unless the unit owners approve discontinuing the service.

Request for Relief

Petitioner's requested that the arbitrator issue an order that the Association return all the material alterations to their original condition. Petitioner alleges that since the Association violated Section 718.113, Florida Statutes, and Article VI, Section C of the Declaration of Condominium, the Association should not be afforded the opportunity to obtain after-the-fact approval from the unit owners.

While the arbitrator appreciates Petitioner's sentiment, the arbitrator will not punish the unit owners for the violations committed by the Association's board of directors. The unit owners will be afforded the opportunity to approve the material alterations. However, the arbitrator is mindful of encouraging Associations to ask for forgiveness rather than permission. The approval process shall be more restrictive than

owner approval was required to install security cameras because the cameras only record damage and do not prevent harm or protect the common elements).

if the Association had complied with the Section 718.113, Florida Statutes, and Article VI, Section C of the Declaration of Condominium before proceeding.

However, the swimming pool steps will not be included in the unit owner vote. The City of Miami Beach has determined that the new stepping distance is a violation of the building codes; therefore, the unit owners may not give the Association permission to violate the building codes. The local building official is responsible for determining the violation and any steps necessary to obtain compliance. *Son v. The Gardens of Key Biscayne-Alhabmbra Condo. Ass'n, Inc.*, Arb. Case No. 94-0351, Summary Final Order (June 13, 1995)(arbitrator declined jurisdiction on a petition for mandatory non-binding arbitration seeking enforcement of the South Florida Building Code with respect to their desire to install a stairway from their unit to the roof of the condominium).

In conclusion, whether unit owner approval is required is summarized as follows:

Common Element	Original Condition of Common Element as Alleged by Petitioner	Arbitrator's Findings of Fact	Unit Owner Approval Required?
Curbing and Walls of the Koi Pond	Grey in color	Color has been changed	Yes
Pool furniture cushions	Deep grey-blue and grey-blue plaid in color	Color has been changed	Yes
Pool Deck	Cream in color	Streaks are due to residue	No
Gazebo	Grey/Natural wood in color	Color has been changed	Yes
Trellis	Grey/Natural wood in color	Color has been changed	Yes
Trellis	Constructed with Cypress	Wood type has been changed	Yes
Trellis	Trellis had a large footprint shaped in the Letter "L"	Footprint has been changed	Yes
Trellis	Single beam and double beam construction	Design has been changed	Yes
Trellis	Design of trellis was tongue in groove	Some design changes were required under the current building code	Yes

Common Element	Original Condition of Common Element as Alleged by Petitioner	Arbitrator's Findings of Fact	Unit Owner Approval Required?
Observation Deck	Observation deck was installed	Observation deck was removed	Yes
Swimming Pool Steps	The stepping distance from the pool deck to the first step was lower before	The stepping distance has increased	Not available
Swimming Pool Ladders	The swimming pool ladders had 5 rungs that sunk deep into the water	The ladders have been changed	Yes
Landscaping	Landscaping adjacent to entrance driveway was lush with grass, shrubbery and palm trees	Landscaping has been removed	Yes
Filters for the Koi Pond	One filter at one end of the koi pond	Additional filters are needed to properly maintain the koi pond	No
Water Filtration System	Building had a water filtration system to purify drinking water	Water filtration system has been removed	Yes

Based upon the above, it is ORDERED:

1. As stated above, Petitioners' requests for relief are GRANTED, in part.
2. Petitioner's requests for relief regarding the pool deck color and the filters for the waterway koi pond are DENIED.
3. No later than December 31, 2014, in full compliance with the applicable building codes, the Association shall lower the stepping distance from the top of the coping to the first pool step to be no greater than 12 inches.
4. Pursuant Article III of the Association's Articles of Incorporation, the Association shall send a notice of a special meeting of the membership of the Association to be held no later than June 30, 2014, for a vote of the membership to approve or reject the material alterations to the Common Elements.

5. The Association shall mail or deliver to the eligible voters at the addresses listed in the official records a notice of the election with a ballot. The notice shall include:

- a. "NOTICE IS HEREBY PROVIDED that pursuant to the order of the Arbitrator of the Florida Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares and Mobile Homes in Arbitration Case 2013-04-0108,[insert footnote] resulting from the Association's violation of Section 718.113, Florida Statutes, and Article VI, Section C of the Declaration of Condominium, a Special Meeting of the Membership of Nine Island Condominium, Association, Inc., will be held on [and meeting time]."
- b. The footnote shall read, "A free copy of the Order may be found at [physical location where members access the Association's records] or on the internet at: [internet website address]." This order shall be made available at the above locations on the same day as the notice.
- c. The notice and accompanying documents shall not contain any communication by the board that endorses or disapproves, or otherwise gives an opinion regarding the unit owner vote.

6. The Association shall use the same voting procedure as prescribed in Rules 61B-23.0021(8),(10)and (11), Florida Administrative Code.

7. Eligible voters shall include any unit owner whose voting rights have been suspended pursuant to Section 718.303(5) after September 25, 2013.

8. The Association shall use the form of the written ballot that is attached as Exhibit A to this Order. The ballot may be translated into other languages by a certified interpreter. The Association may add information regarding the date of the meeting, the process of returning the ballot and the location of the meeting.

9. Unless the alteration is approved by 66 2/3% of the unit owners, no later than December 31, 2014, the Association shall:

- a. Return the color of the recreation deck waterways and curbing to the original light gray, and return the color scheme of the deck furnishings to original grey-blue, or something substantially similar;
- b. Rebuild the trellises to the original footprint, design intent, appearance, and natural weathered wood finish, subject to current code requirements;
- c. Return the gazebo to its original natural weathered wood finish;
- d. Rebuild the wooden observation deck over the waterway;
- e. Replace the pool egress ladders with ladders substantially similar to original, such that the steps extend farther down into the water and can be used as a means of egress from the pool by unit owners;
- f. Return the entrance drive landscaping to its original, or substantially similar, condition; and

- g. Repair or replace the building water filtration system with a comparable system utilizing current technology.

DONE AND ORDERED this 1st day of May, 2014, at Tallahassee, Leon County, Florida.

Terri Leigh Jones, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1030
Telephone (850) 414-6867
Facsimile (850) 487-0870

Trial *de novo* and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed in accordance with section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes, the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Rule 61B-45.048, F.A.C.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and email to the following persons on this 1st day of May, 2014:

Thomas F. Munro, Esq.
Foley & Lardner LLP
2 South Biscayne Blvd, Suite 1900
Miami, FL 33131
Email: tmunro@foley.com
Attorney for Petitioner

Peter F. Valori, Esq
Russell Landy, Esq.
Damian & Valori LLP
1000 Brickell Ave., Suite 1020
Miami, FL 33131
Email: pvalori@dvllp.com
Attorneys for Respondent

Terri Leigh Jones, Arbitrator

Exhibit A

Nine Island Condominium Association, Inc.

Ballot

Pursuant to the order of the Arbitrator of the Florida Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares and Mobile Homes in Arbitration Case 2013-04-0108, unit owner approval is required for certain material alterations to the Common Elements.² Florida law and the governing documents of the Association required that 66 2/3 % of the unit owners approve the material alterations listed below.

Failure to timely return this ballot to the Association will be considered a vote "No" for all line items. Failure to vote for a particular line item will be considered a vote "No" for that line item.

Line Item #	Material Alteration	Vote
	Unit owner approval is required to change the color of a Common Element	
1.	Should the color of the waterway koi pond curbing and walls be changed from light grey to bright royal blue?	☐ Yes ☐ No
2.	Should the color of the pool furniture cushions be changed from grey-blue to bright royal blue?	☐ Yes ☐ No
3.	Should the color of the gazebo be changed from a grey natural wood to dark brown?	☐ Yes ☐ No
4.	Should the color of the trellis be changed from grey natural wood to dark brown?	☐ Yes ☐ No
	Trellis and Observation Deck	
5.	Should the type of wood used to construct the trellis be changed from cypress to pine?	☐ Yes ☐ No
6.	Should the location footprint of the trellises which extends from the South entrance to the recreation deck out to Biscayne Bay, then along the Western edge of the recreation deck overlooking Biscayne Bay to the Northern edge of the recreation deck, then turning East back toward the gazebo, be changed to a smaller footprint which occupies a smaller portion of the original footprint from the South entrance out toward Biscayne Bay only, and does not include any trellis along the Western or Northern edges of the recreation deck?	☐ Yes ☐ No

² A free copy of the Order may be found at [physical location where members access the Association's records] or on the internet at: [internet website address].

7.	Should the trellis's combination of single beams and double beams, such that the wooden slates across the top were close together to provide shade, be changed to single-beams only which are further apart with bougainvillea used to provide shade?	☐ Yes ☐ No
8.	Should the tongue-in-grove design of the trellis be changed to bolted plates?	☐ Yes ☐ No
9.	Should the observation deck be removed from the recreation deck?	☐ Yes ☐ No
Other alterations		
10.	Should the swimming pool ladders which have five rungs be changed to pool ladders with three rungs that drop shallow in the water?	☐ Yes ☐ No
11.	Should the landscaping adjacent to the entrance driveway be changed so that most of the trees and shrubbery are removed and the grass is replaced with landscaping stones?	☐ Yes ☐ No
12.	Should the Association discontinue the service of providing water filtration for the city's tap water?	☐ Yes ☐ No