

Hard to Stop Condos From Going Rental

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Summertime is project time for community associations.

As we approach another summer, many associations are working on amendments to their governing documents, in the hopes of being ready for a membership vote when “season” (generally considered to be the period between Thanksgiving and Easter) once again arrives.

In my opinion, every association should, at some point, tackle the project of updating its governing documents. Over the next several weeks, this column will look at some typical issues confronted by associations in updating the community’s governing documents. Today, two hot issues that are on many associations’ minds: fractional ownership and preventing investor takeover of the community.

As was reported in a recent News-Press article (Timeshare Trend Raises Questions, March 7, 2004), the concept of “fractional ownership” has been getting more popular in the United States, particularly in luxury housing and resort areas.

The concept is fairly simple. A group of people buy a condo unit or home as “tenants in common” (where all of their names are placed on the deed), or they buy it in the name of some entity, such as a trust, corporation, partnership, or limited liability company.

The operating documents for the entity or investor group usually name all of the investors as co-owners for occupancy purposes. Typically, there is a side agreement between the investors where use rights are split up. For example, Investor A (and his family) gets to use the unit from Christ-

mas through New Years, while Investor B gets the months of January and February, Investor C gets Spring Break, and so on.

Although the Florida Condominium Act prohibits amendments to a declaration of condominium that “time-share” a unit (unless the amendment is approved by one hundred percent of the unit owners), most fractional ownership situations do not involve an amendment to the declaration of condominium.

Many associations are surprised, when confronted with this scenario, that there is little that they can do, especially if the community is operating under developer-generated documents, which rarely address such issues.

The investor domination issue usually arises in communities with more moderate price-points, or those which are a target for redevelopment. The typical case involves an investor group buying up units or blocks of units, until they own enough units to control the board of directors. While not every such case turns out badly, many involve rental dominated uses, which is typically considered to place increased maintenance strain on the property.

Since the units are investments and not their homes, the investor owners are often known to skimp on maintenance, causing many resident owners to bail out before property values plummet. Those who cannot or will not leave often find themselves in an undesirable situation.

When investors take over condominium communities, there are usually one of two strategies involved. The first involves operation of property as a rental complex. In many cases, this will make mortgages more difficult to obtain, and

disenfranchise resident-owners who no longer have enough political clout to elect members to the board.

Secondly, some investors seek to buy out the whole community for redevelopment. The acquisition for redevelopment usually involves an effort to acquire aging infrastructure in areas prime for re-development, such as beachfront property or large tracts bordered by navigable water bodies. In most cases, unanimous approval of the owners is required to terminate the existing ownership structure and tear down the existing infrastructure for redevelopment. This can often present a win-win situation.

Association has to Bill Fees Monthly or Quarterly

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QUESTION: Florida Statute 718 states that maintenance fees must be assessed “not less frequently than quarterly.” What does this mean? D.Y. (via e-mail)

ANSWER: It means that the association could not, for example, require maintenance fees to be paid once per year or once every six months.

Rather, a condominium association must bill its annual assessments periodically, which is typically either monthly or quarterly. The condominium documents should also be examined, as many condominium documents also specify the frequency of assessments. For example, if your condominium documents require monthly assessments, the board could not choose to levy quarterly assessments.

For homeowners’ associations, there is no similar law. The governing documents control. Many HOA’s do levy their assessments on a yearly basis.

QUESTION: I am the president of a condominium association, which operates a single building. Each of the buildings in our Community has its own association. Each association appoints a representative to a self-created group that we call the “President’s Council.” My question is whether the sunshine laws apply to such a group. J.P. (via e-mail)

ANSWER: No.

The “sunshine” provisions of the Florida condominium statute (Chapter 718) and the statute to HOA’s (Chapter 720) only apply to quorums of the board of directors and certain specified “committees,” as de-

Too often, associations wishing to address potential problems through amendments feel that a “one size fits all” form of “boilerplate” amendment will address their problems. This is rarely the case. This is one area where investment in a moderate amount of attorney’s fees will usually pay dividends in the long run. Preparation of amendments by community association managers is considered the unlicensed practice of law. The use of amendments generated by volunteer board members usually creates problems when it comes time to enforce the amendment. ☺

fined in each of the relevant statutes. The President’s Council you have described does not appear to fall into either of those categories.

QUESTION: Our neighborhood was turned over to us in November of 2000. The homeowner’s association paid property taxes on the common area in 2001 and 2002. We found out in 2003 that, since we are a not-for-profit corporation, we do not pay property taxes. We were told by the developer that all of the pertinent paperwork and documentation would be put in our possession at transition of control (“turn-over”). This did not happen. What is your take on this? D.S. (via e-mail)

ANSWER: Contrary to popular belief, homeowner’s associations (even though not-for-profit corporations) are not exempt from paying real property taxes (commonly referred to as ad valorem taxes).

In most cases, the county’s Property Appraiser assigns a nominal value (or sometimes a “zero value”) to the common areas of subdivisions operated by a residential HOA. In such cases, the tax obligation is minimal or there is no payment due at all.

The deeding of common areas is one of the issues that commonly “falls through the cracks” in HOA turnovers, and that is why it is important for an association to invest in legal representation when accepting control of the community from the developer.

The law has changed effective January 1, 2004, and for future years most common areas of residential subdivisions will no longer be subject to ad valorem taxes.

QUESTION: In one of your recent columns, you stated that the “sunshine law” applicable to homeowners’ associations applied to architectural review boards.

Our ARB does not give notice of its meetings, nor are members invited to attend. Is this legal? G.S. (via e-mail)

ANSWER: The law for homeowner’s associations includes within its “sunshine” provisions, “any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel.”

Assuming that your ARB has approval/disapproval rights (and is not merely advisory to the board), then the “sunshine” laws apply. In general, this requires 48 hours posting of notice of ARB meetings in a conspicuous location in the Community (or alternatively, seven days advanced mail notice) and permitting parcel members to attend meetings of the ARB.

QUESTION: Our homeowner’s association charges owners of unimproved lots (lots with no homes built on them) a different amount than what we charge for improved lots (lots with homes). Is this legal? W.T. (via e-mail)

ANSWER: Assuming that your association is not governed by the condominium laws, then the arrangement you have described is not illegal.

However, it is very important that the authority to charge differential assessments be contained in the

deed restriction, sometimes called a “declaration of covenants” or “declaration of covenants, conditions, and restrictions.”

If the deed restrictions simply provide that each parcel owner pays an assessment, then it is probably not proper to charge differing amounts. If the document specifically permits differential assessments, then the laws applicable to HOA’s would not preclude that practice.

QUESTION: Our association charges a processing fee when a unit is leased. Recently, a new owner decided he did not have to pay the fee for his winter renters, since they had rented last year. He feels that once they were “screened,” it is unfair and unreasonable for the association to charge a second processing fee. What is your opinion? J.W. (via e-mail)

ANSWER: In my opinion, it is perfectly appropriate for an association to charge a separate processing fee each time a new application is processed. The purpose of the fee is to compensate the association for some of the administrative time required. Although the association may not need to once again engage in per se “screening” of the tenants, the association does gather information for use in the event of an emergency, vehicle information, and the like.

The condominium statute prohibits charging a separate processing fee for the extension or renewal of a lease. However, the situation you have described appears to involve separate leases, since there is a hiatus (where the unit could be made available for rent to another party) between this tenant’s occupancies. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.