

Be Precise with Owner Restrictions

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Today's column concludes our eleven part series involving tips for condominium and homeowners' associations when updating the community's governing documents. Today, we will explore the fine line between individual property rights and an association's right to control the use of one's property.

Architectural review and control disputes spawn more litigation in the homeowners' context than any other aspect of HOA governance. At tension are two competing principles of law. The first is engrained in our national psych beginning in grammar school. We are taught that America is a country where we are free to do as we please, whether others like it or not, unless we are violating some law created by society.

On the other end of the spectrum, the modern practice of imposing and enforcing restrictive covenants through homeowners associations has resulted in a private form of government, where every member has theoretically given up some of his or her property rights for the purpose of promoting the collective health, safety, welfare, and preservation of property values for those in the community.

These lofty legal principles are often slugged out in relatively unglamorous settings, ranging from whether a fence can be kept in someone's back yard, to the color of one's house.

While well drafted governing documents will not eliminate human conflict, they will often provide certainty to the parties in the event of a legal dispute. The guiding principle is that if there is a doubt in the eyes of a court, the free use of property will always trump a restriction.

Therefore, the first order of business for a homeowner's association when looking at the governing documents

is to make clear what is permitted, or perhaps more specifically, what is prohibited. While it is always necessary to leave some room for interpretation, a specific clause is always better than a general restriction. For example, if the association does not wish to permit free standing buildings (such as detached garages) in the community, or wishes to limit those buildings to a certain type (height, style, etc.), the association stands a much better chance of surviving a legal challenge if the restriction is clear, and in writing. While there are some reported court cases which have upheld general schemes of development, associations with loose restriction lose their cases as often as they win them.

Obviously, there is no one-size-fits-all set of restrictions. What may be acceptable in a single family subdivision containing 3,000 square foot homes may be entirely inappropriate in a townhouse community with party walls, where the association maintains the exterior of the buildings.

It is equally important that once restrictions are established, that there be a procedure for homeowners to make sure what they want to do will be acceptable. In my opinion, a well-drafted set of governing documents will have a clear application process, including what materials must be submitted, who has the right to review the submissions, deadlines for responses, and perhaps an appeal process.

Many homeowners' associations use a committee for reviewing exterior change requests, which is often known as an "ARB" (architectural review board), "ARC" (architectural review committee), or "ACC" (architectural control committee). Remember, the ARB is a "sunshine committee" under Florida law, meaning that the committee must operate by the same rules as the board of directors.

Ideally, the details of the architectural review and approval process will be contained in written guidelines promulgated by the ARB, and approved by the board. For example, if the community association has approval rights regarding landscaping, it is helpful to have a list of both recommended and prohibited plantings. This takes the guess-work out of things for the homeowner, and definitely cuts down on disputes between

the homeowner and the ARB as to what “good” and “bad” plantings are.

When all is said and done, even a perfectly written set of documents (if there is such a thing) will not solve every controversy, that is the nature of human nature. However, a little forethought can certainly make life a bit easier for all concerned. ⚖️

Absentee Board Members are Common in Florida

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Question: Our condominium association board appointed a five-member landscape committee. The landscape committee does not have the authority to make decisions, only recommendations to the board. Are the meetings of this committee subject to the sunshine rules? T.D. (via e-mail)

Answer: It depends. The committee you have described is what is commonly called a “non-statutory” committee, because it has not been granted the authority to take final action on behalf of the association or make recommendations to the board regarding the association budget. Committees which can take final action or make budget recommendations are often referred to as “statutory committees.”

Statutory committees are always subject to the sunshine rules of the law, including the posting of meeting notices, unit owners’ right to attend and speak, minute-keeping, and the like. Conversely, non-statutory committees are subject to the sunshine rules unless the bylaws exempt their operation from the sunshine requirements. Therefore, if your bylaws exempt the committee from the sunshine rules, they do not apply. If the bylaws do not address the subject, then the committee must follow the sunshine rules until the bylaws are amended.

Question: I live in a homeowner’s association, which has various governing documents including bylaws. Our bylaws state that a quorum is a majority of our members, although I learned on the Internet that the Florida State statutes sets a thirty percent quorum for homeowners’ associations. What percentage should we use? J.W. (via e-mail)

Answer: Your question is a common one, and has not been answered by the courts.

The Florida statute applicable to homeowners’ associations was amended in the mid-1990’s to state that a quorum for the conduct of HOA business is thirty percent of the parcel owners unless a lower number is stated in the documents, implying that thirty percent is the highest quorum permitted for homeowners’ associations. However, many associations that existed prior to the change in the law specified a majority for a quorum, as is your case.

Most attorneys I have discussed the issue with feel that the change is “procedural,” which means that it can be applied retroactively to existing associations. However, most also feel that if the HOA documents set a specific quorum requirement for a particular action (as many do for special assessments), then that quorum would need to be followed.

The best thing for your association to do is update the bylaws to conform to current state law, which would basically eliminate that question.

Question: I recently purchased a unit that is within a community with a mandatory homeowners association. The association’s management company has asked that I provide it with a copy of my warranty deed and the settlement statement from my closing. They state that the reason they need this information is to assure correct billing of future assessments and for accounting purposes. The deed is available through the Lee County Property Appraiser’s website. The settlement statement includes financial information relevant to the purchase of my home

which I feel is an invasion of my personal privacy. Am I required to provide this information? D.B. (via e-mail)

Answer: There is nothing in Chapter 720, the law governing homeowners' associations, which would require you to provide this information. There may be something in the association's governing documents that would require this information to be provided after a parcel has been sold, but without reviewing the governing document, I could not say for sure. Even if not specifically required by the documents, you may have an obligation to assist the association in carrying out its duties. For instance, it is important that the association know who the record owners of the unit are for purposes of billing and collecting the assessments if they were to become delinquent and to determine who is eligible to vote for the unit. This information is best determined through the warranty deed and it is not unreasonable to ask that it be provided by the new owners. Regarding the settlement statement, it will usually show whether any outstanding assessments were collected at closing and also if any assessments were paid through a certain date. If the monthly or quarterly dues were collected at closing, the association will not want to bill you for those assessments. I would recommend that you talk to the management company to determine what information they are looking for on the settlement statement. If there is some personal information that you feel is not relevant, you could black out that information.

Question: My condominium association recently determined to replace the spiral staircases at the rear of each

unit. However, the association has not decided whether to specially assess the members for the cost or fund the project with reserve funds. I am currently trying to sell my unit. If the association has not decided how to fund the project by the time I sell, or if I sell the unit before the special assessment is due, am I responsible for paying the assessment since the decision to pursue the project was made while I was an owner? Do I need to disclose this information to the buyer? L.S. (via e-mail).

Answer: In regard to your first question, you are not responsible for payment of any special assessment until the association actually levies the assessment. Just because the association decided to move forward with the project while you were an owner, does not obligate you to pay the assessment. If the assessment is levied after the sale of your unit is concluded, the new owner is responsible for payment.

As to whether you must advise prospective purchasers of the possibility of the assessment, I recommend that you disclose the information to save yourself from future aggravation. Particularly relevant to your inquiry is a 1985 Florida Supreme Court case called *Johnson v. Davis*. In its opinion, the Florida Supreme Court stated that "where a seller of a home knows of facts materially affecting the value of the property, which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." While the courts have not, to my knowledge, extended the concept of this duty to condo re-sale disclosures, I think the potential exposure to a seller warrants a conservative approach, which your buyer may well appreciate too. ⚖️

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.