

## Law Change May Create Confusion

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Today's column concludes a review of 2004 legislation affecting community associations, most of which became effective October 1, 2004. The first half of the series dealt with changes affecting homeowners' associations, with the remaining columns largely devoted to condominium issues. These reviews, as well as past editions of the column, are available on the Internet, free of charge.

One of the most controversial issues in condominium living has always been rentals. While I am aware of no research or studies showing that renters are inherently bad people, disputes between associations and tenants are a constant source of tension.

Perhaps human nature plays a role. If you rent a brand new car for a few days, would you really take care of it as well as a car you just bought and will spend the next five years paying off?

From the association's perspective, there are several ways renters can grate the collective nerves of the community. Moving trucks can damage the property, as can the constant hauling of furniture in and out the doors, up the elevators, etc. Condominium residents where short-term rentals occur often complain of a "hotel-like" atmosphere.

As a matter of economics, condominium developers rarely include significant rental restrictions in their original documents. After all, they want to attract as broad a buyer-base as possible, and that is certainly understandable. Most developers feel that the own-

ers can impose their own rental regulations, through the democratic process of amending the condominium documents, after the developer has sold out.

The 2004 legislation puts a serious crimp in how associations have historically addressed the ubiquitous "rental issue."

Effective October 1, 2004, a new provision has been added to the Florida Condominium Act. Specifically, a new Section 718.110(13) of the law (which deals with amendments to declarations of condominium) provides:

Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

There may be no single sentence found in the condominium statute that packs a more serious punch. The change in the law confers "grandfathered" status on anyone who purchases a condominium unit as to "rights relating to the rental of units", whatever that means. To the extent that the law is intended to bring consistency and predictability to association operations, this change will likely spawn great confusion and litigation.

First of all, there is a serious question as to whether the law can be constitutionally applied to any condominium in existence when the law was enacted.

After all, owners bought into the condominium with the understanding that by some type of vote, they could change things they do not like. That is a contract right, and the Florida Constitution prohibits the Legislature from retroactively impairing vested contract rights.

The rental amendment was not part of any originally-filed legislation, and as far as I know, was never even discussed in any committee of either the House or Senate. Rather, as unfortunately happens far too often with community association legislation (and probably all legislation), this amendment was tacked on at the “eleventh hour.”

For better or worse, constitutional or unconstitutional, the “grandfathering law” is now the law of the land.

Curiously, all of the news media involving the passage of the new law discusses abuses by boards of directors in “taking away rental rights.” Ironically, the new law does not apply to whatever rights a board may have, only amendments to a declaration of condominium. A declaration is supposed to be like a constitution, it addresses important rights and responsibilities, but can change with the times, through super-majority vote.

Sometimes I guess the tail wags the dog. ☺



**Question:** Your recent article regarding lender’s questionnaires (Lender surveys are tricky, August 5, 2004) hit home with me. Unfortunately, I am on the other side of the issue. The management company for the association has refused to state how many units are primary residences, second homes, or investment units. They have completed the rest of the questionnaire. Our mortgage is through a major lending institution, and we have been told that we cannot close without this information, since the bank will not be able to sell the mortgage on the secondary market. I think that associations which refuse to provide this information are doing a disservice to all of their owners, since the availability of financing will have a direct impact on the value of property in the condominium. M.L. (via e-mail)

**Answer:** There are certainly two sides to every story, and you certainly make a valid point.

In the situation you have described, it does seem that the association has made an effort to supply the information within its possession. Otherwise, why would the association bother to answer some, but not all of the questions?

Although your case may prove to be the exception to the rule, I have been told by many community association management firms that these deals find a way to close, even when the association is unable to supply answers to all of the inquiries contained in the lender’s questionnaire.

For better or worse, the law now clearly states that condominium associations are under no obligation to respond to inquiries of this nature, although the recent change to the law granting immunity for good faith responses will presumably entice more associations to do so.

**Question:** I own a unit in a condo complex that is starting to show its age. The association will soon need to replace all of the roofs on the condominium buildings. The original construction of the roofs is concrete tile. Some members have stated that the board should replace the tiles with asphalt shingle, because it will be cheaper. I feel that we should replace the old tile roofs with new tile roofs. Does the law require the association to maintain the property at the same standard to which it was built? W.G. (via e-mail)

**Answer:** Florida law, specifically Chapter 718.113(2) of the Florida Statutes, provides that there shall be no “material alteration” of the common elements of a condominium except as authorized by the declaration of condominium.

In my opinion, replacing tile roofs with asphalt shingles would be a “material alteration.” Therefore, it is necessary to look to the declaration of condominium. Most declarations require some type of super-majority vote of the members (often two-thirds or seventy-five percent) for material alterations of common elements. Some documents delegate this decision to the board. If the declaration is silent on the topic, then seventy-five percent of the entire voting interests (there is typically one voting interest per unit) must approve the change.

Florida has also developed an exception to the material alteration rule, which is sometimes called the “necessary maintenance doctrine.” For example, if the building’s siding was made of a product that has been recalled because it does not hold up to water, it would be ludicrous to replace it with the same thing. This is the type of situation where the necessary maintenance doctrine comes into play.

Absent some unusual factor in your case, it is likely that a change from tile to shingles would require a unit owner vote.

**Question:** My condominium is going to levy a special assessment for uninsured damages to one of the buildings that was caused by Hurricane Charley. I do not live in that building and am wondering why I have to pay. I believe you wrote in a previous column that only those owners in the affected building would have to pay. Is that correct? C.F. (via e-mail)

**Answer:** In most cases, assuming the damage was to the common elements, all owners in the condominium will have to contribute for the repair costs

not covered by insurance. The exceptions mentioned in my previous column involve a multi-condominium association, where a single entity (association) operates more than one condominium. This is the exception, and not the rule.

If uninsured damage involves the units (as opposed to common elements), then the declaration of condominium will determine who pays for the uninsured loss. In most cases, this is the responsibility of the affected unit owner (and not the other unit owners).

**Question:** We live in a subdivision on Pine Island. We have a voluntary homeowner’s association. Although the original developer recorded deed restrictions, he did not mention our association in the restrictions, or make membership mandatory. Is there any way we can make our association mandatory? R.N. (via e-mail)

**Answer:** A similar issue was addressed in a reported appeals court case from Florida called *Holiday Pines Property Owners Association, Inc. v. Wetherington*, 596 So. 2d 84 (Fla. 4th DCA 1992).

The court held that creating a mandatory membership association required unanimous consent of all lot owners. This opinion from the court is consistent with the view most attorneys have about the subject.

Therefore, unless there is something unusual about your case, the only way you could make membership in your association mandatory would be through unanimous consent of all existing property owners. You may need their mortgage holder’s consent as well. ⚖️

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