



## Pay Attention to Rental Restrictions (part 4)

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Today's column is the fourth part of our look at updating the legal documents for your community association. In the first three editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, and analyzed the required votes for amendment (Courts Err on Side of Homeowner, August 4, 2005; Amend Documents With Care, August 11, 2005; Use vote to amend papers, August 18, 2005).

Today, we will focus on what is always a hot-button issue in community associations, amendments regarding rentals. There is probably no topic that generates more dispute during amendments. There are a number of reasons for this.

First, developers rarely put meaningful rental restrictions in their documents. Understandably, they want to attract the largest pool of potential purchasers, including investor owners who buy units as a rental property, as well as working age out-of-staters, who often buy Florida properties with an eye toward rental now, and retirement later.

On the other side of the coin, renters are considered by many associations to be more likely to have loud parties, damage common property, or think that the rules do not apply to them. Most of us have been renters at some time in our life, and it might be argued that people who are bad tenants are just as likely to be bad owners, regardless of whether their name is on a deed or a lease.

In any case, it is clear that rentals do have some affect on property values, to the extent that mortgage financing is difficult to obtain in communities with a high percentage of rentals.

Therefore, it is no surprise that a prime area of focus in updating governing documents is to address the rental clause in the declaration of condominium, or declaration of covenants. The following are typical areas of concern:

- **Duration and Frequency of Permitted Rentals:** Associations which permit rentals of less than thirty days, more than three times per year, fall under Florida's hotel laws, and are also likely required to comply with the Americans With Disabilities Act. Many associations which consider their communities residentially oriented do not like the "revolving door" affiliated with short-term tenants, while resort properties expect heavy traffic. The establishment of minimum lease terms, as well as the frequency of permitted leases (such as the number of times per year a property can be rented) is a frequent amendment topic.
- **Prior Approval of Leases:** Many residential communities engage in some level of "screening" of potential renters, which typically involves a pre-occupancy application, a background check, and an approval process. If an association is going to have the authority to approve tenants,

the documents should set forth grounds for disapproval. In my opinion, a tenant's credit history is of little interest to an association, while criminal history may be of great concern.

- **Transfer Fees:** If an association is going to approve tenants, it should be entitled to reasonable compensation for the time and effort involved in the process. The condominium law permits tenant application fees of up to one hundred dollars per application, but the authority for the fee must be set forth in the documents. There is no counterpart in the law for homeowner's associations, although those HOAs which do engage in review of rental applications also typically charge a reasonable administrative processing fee.
- **Security Deposits:** One common complaint about tenants is damage they cause to common areas, particularly when moving in and moving out. The condominium law allows an association to charge tenants a security deposit equal to one month's rent. The authority for the charge must be set forth in the documents. Like the application fee, there is no guidance in the statute for HOAs about security deposits, although I am aware no reason why a similar deposit could not be authorized through a homeowners' association document.
- **Dealing with Bad Tenants:** One of the most frustrating situations faced by associations is when the problem of a bad tenant is exacerbated by an uncooperative unit owner. A well drawn set of documents will give the association some "teeth" in dealing with tenant problems, including the ability to initiate eviction proceedings on behalf of the owner, if the owner does not take timely and appropriate steps to address tenant problems. This can be very helpful in persuading owners to nip tenant problems in the bud.

- **Fining:** Both the laws for condominiums and homeowners' associations permit the levy of fines directly against tenants. However, the authority for the fine must be contained in the governing documents.

A common question which arises when considering rental amendments is how to enforce them against existing owners. For example, what of the working-age out-of-state owner who buys a Florida condo unit with the intention of retiring there in ten years, but is counting on rental income in the mean time to make the mortgage payments? This issue was definitively addressed by the Florida Supreme Court several years ago, in a landmark case called *Woodside Village v. Jahren*.

In the *Woodside* case, the high court reasoned that people who buy into condominium communities do so with notice that their rights are subject to change, through the amendment process. The court upheld retroactive application of an amendment which substantially limited leasing rights for existing owners, specifically by banning annual leases.

However, the *Woodside* case does not end the story. Apparently feeling that changing the rules in mid-stream is unfair, the 2004 Session of the Florida Legislature essentially "overruled" the *Woodside* case. Section 718.110(13) of the Florida Condominium Act now 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."

As explored in previous editions of this column at some length, the new rental law has wreaked havoc in many associations, due to its expansive wording, and its contradiction of previous court rulings which have disfavored associations having different

classes of owners. However, until the new law is either again changed by the Legislature, or stricken by a court, many associations are grappling with it by “grandfathering” all existing owners when creating new rental restrictions. After all, it seems rather unfair to punish those owners who cooperate with the association and vote for the amendment, while rewarding those who vote against it (or do not vote at all) with grandfathered status.

Neither the governing statute nor reported court cases lend any guidance whatsoever on the issue of retroactive application of rental amendments in homeowners’ associations. Many simply follow the old condominium laws (Woodside) for guidance, others argue that an entirely different set of rules should apply.

Next week, we will take a look at establishing guest restrictions in your documentation update. ■

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*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto: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](http://www.becker-poliakoff.com).*

## Board-Made Rule on Tenant Restrictions can be Tricky

**Question:** I read your recent article regarding sex offenders. My question is whether the board of a condominium association can pass a rule to implement the screening of tenants, or whether the community’s documents need to be amended? D.R. (via e-mail)

**Answer:** It depends. In order for a board-made rule to stand up, it must meet several stringent tests. One requirement is that the rule cannot contravene rights which are “inferable” from the recorded documents. Since most recorded documents mention the right to lease in some fashion, it is typically better for the right to approve tenants to be contained in the declaration of condominium, either as originally recorded, or through a proper amendment.

However, you should also read my other column of today, regarding the need to “grandfather” current unit owners regarding any amendment which “restrict unit owners’ rights relating to rentals”, which would likely include the implementation of a screening procedure.

More associations need to bring this problem to the attention of their Legislator. While I can live with grandfathering owners regarding changes to minimum

lease terms (and that is how the amendment to the law started out), the current version of the law is a tremendous disservice to condominium associations.

**Question:** I live in a single-family neighborhood. Our community’s recorded covenants are over twenty years old, and say nothing about pets (other than that livestock cannot be bred in the community). Our board has said that they do not have the authority to make rules, and that amending our recorded covenants is too difficult.

One of my neighbors exercises very poor pet management, including her dog entering my yard and leaving a mess behind. The dog often also runs unattended. Will Lee County help me with this? S.A. (via e-mail)

**Answer:** Section 6-38 of the Lee County Code states that it is unlawful for any person to allow their animal to become a nuisance. The code specifically provides that the owner of every animal is responsible for the removal of any excreta deposited by the animal on public or private property. Further, unless you have given your neighbor permission to bring the dog onto your lot, it is private property, and the entry of the animal may constitute trespass.

Lee County's Code further provides that it is unlawful for pets to make unreasonable noises (including barking or howling), for pets to roam at large, or for pets to turn over garbage containers.

I would suggest that you call your neighbor and express your objections, and you might even want to follow up with a letter. If that does not do the trick, you may want to call the animal control authorities.

**Question:** I live in a "55 and over" adult community. I am in the process of selling my home. The association, which is still under control of the builder, says I have to get the person that I sell to approved. They also said that my buyer has to be age 55 or over.

I thought there was a Florida law that twenty percent of the population can be under 55. Could you give me some direction on this? J.P. (via e-mail)

**Answer:** It depends on how the covenants and restrictions applicable to your community are written. In order to qualify as "55 and over" housing, federal law requires

that at least 80% of the occupied units be occupied by at least one person age 55 or over. Ownership of the units is not important, occupancy is what counts.

Although the law was up in the air for a number of years, the United States Department of Housing and Urban Development issued its final rule several years ago, stating that HUD did not care how the twenty percent was treated.

Some documents are written so that the 20% is a "set aside", meaning that owners can sell to whomever they wish, as long as the 80% threshold is met

The more common approach is for the 20% to be treated as a "cushion", to deal with situations where non-age qualifying persons may move into units, such as inheritance situations, the death of an age-qualifying spouse, or the purchase of a unit for a healthcare giver.

The answer in your case will depend entirely on how the documents are written. ■

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