



Guest Rights can Become Contentious (part 6)

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Today's column is the sixth part of our series about updating the legal documents for your community association. In the first five editions we learned some basic definitions, discussed the functions of the constituent documents, considered the procedures for presenting proposed amendments, analyzed the required votes for amendment, looked at rental amendments and began a discussion of guest usage restrictions (Courts err on side of homeowner, Aug. 4; Amend documents with care, Aug. 11; Use vote to amend papers, Aug. 18; Pay attention to rental restrictions, Aug. 25; Guest usage can become contentious condo issue, Sept. 1).

Today's column continues a review of guest usage issues, with a focus on two of the more contentious items — tenants' rights and guest usage while the owner is not in residence.

- **Tenant guest rights** When one party rents property from another, it is often said that the entire "bundle of rights" that goes with property ownership passes to the tenant during the term of the lease. In community association living, this is not entirely true.

The Florida Condominium Act does provide that tenants must be afforded the same use rights with respect to common elements generally available to the owners. This would include most recreational amenities. For example, an association could not adopt a rule that

permitted tenants to only have three guests at the swimming pool at a time, with no limit for unit owners.

Conversely, the condominium law does permit differential treatment of unit owners and tenants with respect to use of the units (apartments), as distinguished from common element use, where no distinctions are permissible. For example, one decision from the state's condominium arbitration program upheld a restriction which permitted unit owners to keep pets, but not tenants. The law on these points for HOAs is less developed.

As applied to guest occupancies, I see no reason to treat tenants differently than unit owners while the tenant is in residence, provided that the documents adequately restrict use of all units to single-family purposes (more on that topic in a later edition). The rub usually arises when the tenant is away and wants to have "guests" use the unit. These situations frequently arise when there is an attempt to avoid sub-leasing restrictions in the documents. Although perhaps considered harsh by some in its application, it has been my experience that most associations which study this issue find it best to require that if a tenant is going to have guests, the tenant must be in simultaneous residence.

- **Guest occupancy in the absence of unit owners** As mentioned in last week's column, a substantial number of properties in Southwest Florida

sit vacant for much of the year, while the owner is in residence elsewhere. This typically occurs during the summer months that we refer to as “off-season,” and usually involves units owned by seasonal retirees.

Most owners in this category consider one of the benefits of ownership being the ability to have friends or family come enjoy the property, even if they are not there. In most cases, this creates few problems, but in some cases, contention abounds.

I have handled more than one case over the years where a company or businessperson from “up North” purchases a unit as a “perk” for good customers, well-performing employees, etc. In communities with strict rental policies and a general residential nature, friction is likely to develop.

In my experience, most associations find it consistent with the will of its membership to place minimal restrictions on visitation by family members, even though the unit owner is absent. There may be special challenges in “55 and over” communities, which will be discussed in a future edition of this series.

Restrictions involving guest usage by nonfamily members when the owner is absent is a topic commonly addressed in an updated set of community association legal documents. Some associations prohibit it altogether, some allow a set number of nonfamily guest usages in the owner’s absence.

- **Registration of guests** While most boards and community association managers have little desire to act as police officers, I think it is entirely appropriate to require that guests who will be staying in an owner’s home, in the owner’s absence, to register with the association prior to their arrival. This enables the association to ensure that density limitations in the documents (the number of people permitted to stay in a unit) are being adhered to, and can serve an important security and safety function in the event of a catastrophic occurrence in the community, such as a fire or hurricane.

- **Drafting tips** As promised, here are some drafting tips to consider when addressing the guest usage issue. First, the more significant restrictions (such as limitations involving guest usage in the owner’s absence) should be contained in the declaration of condominium or covenants, as opposed to a board-made rule. While a board rule might withstand a legal challenge, the courts in Florida have held that properly enacted amendments to declarations of condominium or declarations of covenants are presumed to be valid. However, the details of implementation, such as registration procedures, are best left to board-made rules, as conditions and needs of an association frequently change.

Next week, we will take a look at restrictions involving the transfer of units, the approval process, and the issue of “screening.” ■

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.

Do HOAs have right to restrict short-term rentals?

Question: I am very confused regarding the issue of rental restrictions imposed by HOAs, as opposed to condos. My wife and I purchased a house in Florida a year ago. The house was purchased with the intention of renting the house to subsidize our expenses until we are older and will be able to spend more time there.

Inquiries were made at the time prior to purchase, to the management company for the HOA, as to whether short-term rentals were permitted, and we were informed that there were no restrictions in the association's documents. However, the HOA recently passed an amendment to restrict rentals to a minimum of one year, to eliminate vacation rentals.

We now don't really know where we stand legally, and would really appreciate some guidance. — S.B. via e-mail

Answer: Florida's courts have not, as yet, had the opportunity to address the extent of a homeowners' association's ability to amend covenants regarding rental rights.

As has been explored at length in previous editions of this column, Florida's Supreme Court held that a condominium association, through properly enacted amendments to the declaration of condominium, could substantially limit (perhaps eliminate) rental rights. The Florida Legislature subsequently tempered the high court's decision by enacting a provision in Florida Condominium Act, which provides that amendments restricting rental rights cannot be applied retroactively to condominium unit owners, unless they consent to the amendment.

Florida's law applicable to homeowners' associations currently provides that only particular amendments require unanimous approval, such as amendments that change how expenses are shared. Rental amendments

are not on that "protected list." A previous version of the HOA law said that "vested rights" could not be taken away.

There are two sides to the argument. Folks in your position would argue that you bought into a set of rules and you should be entitled to rely on them. Others would argue that the rights created by your covenants are amendable by a vote of the members of your association, and are therefore subject to change from time to time.

I cannot predict how Florida's appellate courts would address this issue if it reaches them, but my guess is that the right to amend rental rights would be upheld, even if applied retroactively.

Question: When a gas grill has been donated to a condominium association to be used by those who want, should the association supply the propane gas when it is empty? My main thought is that everyone does not use the grill and would this cause a problem using condo funds? Thank you for any consideration you give this.
— S.R. via e-mail

A: There is nothing in the law which would prohibit the association from accepting, as a gift, a barbecue grill. However, once the association accepts the property, it becomes the property of the association. I think that if the grill is available for everyone to use, the association can pay for the costs of operating it.

Therefore, I believe the association would become responsible for buying the gas, and would also be responsible for the proper care of the grill, as well as ensuring that it is maintained in a safe and proper condition.

Question: We have lived in our town house for a number of years, in relative peace and quiet. My husband and I both work, and we are busy with our children

in their after-school activities. We stay out of community politics, and like to be left alone. Unfortunately, the classic “neighbor from hell” just bought the town house next to ours and moved in. He hosts parties that last until all hours of the night, and the ruckus has become unbearable. I called the management company to complain and they said there is nothing they can do since none of the other neighbors has complained. What can we do?— G.B. via e-mail

Answer: I would start by calling your neighbor and explaining to him that his lifestyle is negatively affecting you and your family. While an unfortunate minority of people in our society feel that the rules do not apply to them, or are made to be broken, it may be that your neighbor is simply oblivious to your concerns. Hopefully, he will make a genuine effort to tone things down if you approach him directly and amicably.

If that does not work, you should review the governing documents for your homeowners’ association. They

probably contain a restriction against nuisances. While your neighbor certainly has the right to host social functions, he does not have the right to interfere with your quiet enjoyment of your property.

The role of the association in cases like yours is a difficult question. Many associations do not feel that they should intervene in neighbor-to-neighbor disputes, unless a sufficient number of neighbors complain.

I would write a letter to the association, and ask the board to formally address this issue at a meeting of the board. Whether to intervene should be a decision for your board, not the management company.

If the association chooses not to get involved, you have rights under your community’s governing documents and the law that you can pursue on your own. This may entail the expense of hiring an attorney — you will have to decide if it is important enough for you to do so. ■

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