



## Restrictions can Limit Sales of Property (part 7)

Fort Myers The News-Press, September 15, 2005

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Today's column is the seventh part of our series about updating the legal documents for your community association. In the first six 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 amendments, looked at rental amendments and considering guest usage restrictions (*Courts Err On Side of Homeowner*, August 4; *Amend Documents With Care*, August 11; *Use Vote to Amend Papers*, August 18; *Pay Attention to Rental Restrictions*, August 25; *Guest Usage Can Become Contentious Condo Issue*, September 1, and *Guest Rights Can Become Contentious*, September 8).

Today's topic, amendments restricting the sale of property, with a focus on pre-sale applications, screening, and association approval.

American law derives its roots from the English system, known as common law. Common law is based on rules developed by appellate courts. Well embedded in Florida's common law is the notion that unreasonable "restraints on alienation" are impermissible. Restraints on alienation are agreements which unduly restrict a party's ability to transfer his or her property.

When updating the community's constituent legal documents, many associations ask about the pros and cons of pre-sale approvals. While every association has a legitimate interest in knowing who its members are (and therefore obtaining information after

a sale has occurred), there is some debate as to the legal underpinnings for a pre-sale application and approval process. After all, the right to approve implies the right to disapprove, which is a restraint against alienation. The question still left open in the law is whether it is an unreasonable restraint.

Many (if not most) declarations of condominium contain a pre-sale application and approval process. Although less common in homeowners' associations, a significant number of HOAs also have similar requirements in their governing documents.

In the 1970's, there was a substantial amount of litigation in Florida as to the validity of pre-sale application and approval clauses in the condominium context. Basically, the courts found that an association's pre-sale application and approval process would not constitute an unreasonable restraint against alienation if the documents also required the association to furnish an alternate purchaser, or itself purchase the unit, if the application was denied. This has become known as the "right of first refusal", and it seems well settled that rights of first refusal are valid in the common law.

However, as a practical matter, very few associations can find an alternate purchaser or secure the funds to purchase property in the short time-frames typically allotted in the community's legal documents. The question that is asked by many associations is whether an approval right (and accordingly an ability to disapprove a sale) will be upheld if the association

does not have to line up an alternate purchaser, and if so, under what circumstances.

The answer seems to be “maybe.” In an often-cited case arising from Naples, a Florida appeals court held that an association’s duty to furnish an alternate purchaser was not triggered until the buyer/applicants “facially qualified” for membership in the association. The 1977 case of *Coquina Club v. Mantz* arose prior to the 1988 amendments to federal law which generally outlawed “adults only” housing. At the time of the prospective purchaser’s application, the Coquina Club Condominium was a lawful “adults only” condo. When someone with children wanted to buy a unit, the association turned down the application.

The frustrated seller of the unit argued that although the association could turn down the applicants, the association was obligated to supply an alternate purchaser to close on the same terms and conditions. The appellate court held that the right of first refusal was not triggered unless a bona fide application was presented, otherwise, there was a possibility for collusion that could frustrate the purpose of the approval clause.

Therefore, at least in the condominium context, the common law provides that an association may reject a

proposed purchaser, without a corresponding obligation to furnish an alternate purchaser, if the applicant fails to “facially qualify.”

On the other end of the spectrum, Florida’s Fourth District Court of Appeal analyzed a pre-sale application and approval clause in a 1993 case called *Camino Gardens Association, Inc. v. McKim*. The declaration of covenants for Camino Gardens prohibited the sale of a home in the subdivision to anyone who had not pre-qualified as an approved member of the association. The association’s bylaws required applicants to be “of good moral character” and to establish that they were of “sufficient financial responsibility to maintain a house and property of the character to be purchased” and further that the applicant “shall not have been convicted of a felony involving moral turpitude.”

The court attempted to distinguish the holding of its sister court in *Coquina Club*, and found the clause to be an unreasonable restraint against alienation, and therefore invalid.

Next week, we will continue the discussion of the pre-sale application and approval process, with a focus on typical pre-sale screening requirements, and what grounds for rejection of an application may pass legal muster. ■

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*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](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).*

## Condo's New Owner may be Entitled to Refund

**Question:** Our condominium association has finally completed the clean-up and reconstruction of damage caused by Hurricane Charley. Our board levied two assessments for clean-up and repair, and is in the process of reaching a final agreement with the association's insurance carrier. I have heard that the association may be getting more insurance money than it thought, and that a refund of part of the assessment may be in the works. I am planning to sell my unit, and want to know if I would be entitled to the refund after closing, since I paid the assessment. L.M. (via e-mail)

**Answer:** That is a tough call, and may to some extent depend upon what the assessment was for, and the language in your condominium documents. However, as a general matter, an association's excess proceeds are known as "common surplus" and typically pass with title to the unit. Therefore, the buyer of your unit would likely be the party entitled to a refund. You are free to make provision for this issue in your Purchase and Sale Agreement, and ask for a post-closing credit from the buyer to you. This would need to be addressed directly between you and the buyer.

**Question:** Our condominium holds its annual meeting in December of each year. Many seasonal residents, including myself, are unable to attend. The minutes of each year's annual meeting are not approved until the following year.

It seems unreasonable that I cannot be informed of what has occurred at the annual meeting and have to wait a whole year, until the previous year's minutes are approved. I requested a copy of the unapproved minutes and was denied access to that document by the association. Our bylaws require minutes from all meetings to be drafted within thirty days of the meeting. Are unapproved minutes part of the "official records" and am I entitled to inspect them? R.L. (via e-mail)

**Answer:** Both the statutes for condominiums and homeowners' associations contain a broad "catch-all" clause which states that "all other records" of an association are subsumed within the definition of "official records." In my opinion, this clearly includes unapproved minutes.

While the association cannot guarantee you that the minutes will not be changed or corrected when they submitted to a vote for approval at the next year's annual meeting, they should be made available to you for your perusal in the meantime.

**Question:** I was reading one of your recent columns about dissolved homeowners' associations. My question is if a homeowner's association is administratively dissolved for failure to file an annual report, can the board reinstate the association without a vote, and bind the other residents? J.W. (via e-mail)

**Answer:** Dissolution for failure to file an annual corporate report is an administrative process, and really does not have anything to do with whether or not you are bound to deed restrictions and membership in your association.

Membership in a homeowner's association typically derives from a recorded deed restriction, such as a declaration of covenants. As long as that document is still in force and valid, the administrative reinstatement of the association appears to be entirely appropriate.

**Question:** In a previous column, you mentioned the new phenomenon of "prescription pets." Will you please expound on how this affects a "no pet rule" for a condominium association. R.B. (via e-mail)

**Answer:** State and federal fair housing laws generally require the provider of housing (including a condominium association or homeowner's association) to make

reasonable accommodations in its policies and procedures so as to enable handicapped persons to fully enjoy the premises.

For example, it is clear that a condominium association with a “no pet rule” would have to permit a blind person to keep a seeing-eye dog.

The area where the law continues to develop is in the area of so-called “companion animals.” A seventy year old person with arthritis might feel depressed

about their lack of mobility. Many doctors are willing to write a note saying that a pet will “make them feel better.”

There is some disagreement in the courts as to whether an “emotional support animal” needs to have discernable skills in order to trigger the fair housing laws. Associations faced with requests for “prescription pets” should take the matter up with their legal counsel. There are potentially significant exposures for failure to follow the applicable laws. ■

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