



Exercise of Rights Can Mean Litigation

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Today's column is the eighth part of our series about updating the legal documents for your community association. In the first seven 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 considered guest usage restrictions, and began a discussion of transfer restrictions.

Today's topic: further discussion of sales restrictions.

As noted in last week's column, "restraints on alienation" are disfavored in the law. At least as to condominiums, and arguably as to homeowners associations, an association's approval rights will be upheld if the association is obligated to purchase the property, or furnish an alternate purchaser, in the event of disapproval of a transaction.

As was also discussed last week, Florida's courts have also stated that disapproval can be appropriate, without a corresponding right of first refusal, if the applicant "facially fails to qualify for membership" in the association.

The question that still begs to be answered is what type of "just cause" an association can establish for disapproval of a transaction, without triggering the right of first refusal. The following are common grounds cited in documents drafted by attorneys who represent community associations:

- **Criminal past.** As has been discussed at length in past editions of this column, a hot topic in community association law involves the role of an association when a sex offender plans to move into the community. In my opinion, a properly worded clause that states that registered sex offenders do not qualify for membership in the association (or residency in the community) is likely to be upheld. Conversely, trying to turn down someone who was convicted of drunk driving 20 years ago would probably put the association on the losing end of a lawsuit.
- **Financial capability.** There is some divergence of opinion on this issue. As stated in previous columns, I do not believe that a tenant's financial position has any relevance to review of his application. Admittedly, a buyer will have a financial relationship with the association, since he will be obligated to pay assessments. Some argue that if the buyer pays cash, the association is well secured, and if there is a mortgage, his financial strength has already been vetted by the bank, leaving no reason for the association to poke its nose into the situation.

Others will argue that the association has a vested interest in an applicant's financial wherewithal, since the association's right to collect assessments for services rendered is essentially a credit relationship. The Coquina Club discussed in last week's column suggests that disapproval for

financial reasons would trigger the right of first refusal. Nonetheless, many documents specify a history of financial instability as just cause for disapproval of an application.

- **Stated intent to violate the documents.** This is probably one area where a “just cause” standard would be upheld. After all, the court in the Coquina Club case held that an association could turn down a sale, without triggering a right of first refusal, when a family with children planned to move into an age-restricted community.

Presumably, this is still good law in “55 and over” communities, and could be extended to other areas where the application information indicates that the buyer intends to violate the governing documents. For example, if an applicant states he is buying a unit for rental purposes in a community which does not permit rentals, it is arguable that just cause is shown.

- **Unpaid assessments.** Many documents provide that a transfer will not be approved until all assessments against the unit are paid. While this would probably be upheld as just cause, this is rarely a stumbling block in the final analysis. Unpaid assessments are almost always cleared up at closing,

and when the unit owner is delinquent in the payment of assessments the association usually wants him to sell so the account can be paid up.

- **Incomplete application submittals.** Many documents require a copy of the purchase and sale agreement, as well as the association’s application form to be filled out. I believe that a well-written set of documents will state that the association’s approval obligations do not begin to run until all materials required are received. While refusing to approve an application is not necessarily the same thing as disapproving it, documentary provisions along these lines are usually quite effective in making sure that the parties to the transaction (as well as their real estate agents, who stand to earn the commission) cooperate in the process.

When all is said and done, transfer restrictions are fairly common in condominium documents, and not unusual in the governing documents of a homeowner’s association either. As a practical matter, the exercise of rights under these clauses has a tendency to generate litigation, or at least threats of it.

Next week, we will look at insurance clauses in the documents. ■

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.

Condominium Leasing Rights Frequently Amended

Question: Our condominium association is trying to limit the number of nonresident-owned units by changing our condominium documents. They are proposing to hold a “special meeting via proxy,” by a mail-in ballot, without a closing date. The amendment would ban annual leases and require a unit to sit empty for three months of every year, or be occupied by the unit owner during those three months. I have two questions. First, can a vote be held without a closing date for the mail-in ballot submission? Secondly, the new change would “grandfather” existing owners. This would seem to make the unit less valuable and thus a “taking without just compensation.” Is this legal? — H.S. (via e-mail)

Answer: Amendments to condominium documents addressing leasing rights are common. A couple of years ago, the Florida Supreme Court ruled that an association could, through proper amendment to the documents, substantially limit (if not eliminate) leasing rights.

Some people felt that this could be harsh on people who counted on rental income when purchasing, so the law was changed in 2004 to create a “grandfathering” situation. Specifically, 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.”

Accordingly, the amendment which provides for “grandfathering” appears entirely appropriate, and is not an “illegal taking.”

Typically, amendments are considered at meetings. The form you are referring to is probably what is called a “limited proxy,” which serves the same function as an absentee ballot. There is no requirement for a “closing

date,” as long as all proxies are submitted by the time the meeting is called to order, or at any lawful adjournment thereof.

Question: Can you tell me when the next association seminar is going to be held?

Answer: The Law Firm of Becker & Poliakoff, P.A. will be hosting a seminar on Tuesday, Oct. 4, titled, “Hurricane Recovery and Rebuilding Seminar.” The seminar will be at the Seven Lakes Auditorium, 1965 Seven Lakes Boulevard, Fort Myers. The seminar is free and runs from 8:30 a.m. until 12:30 p.m. You can register at (239) 433-7707 or at www.becker-poliakoff.com/seminars.

Question: I was interested in knowing how to find the “sunshine law” for condominium associations and how I can get a copy of the condominium law. — F.M. (via e-mail)

Answer: The so-called “sunshine law” for condominium associations is found in Section 718.112(2)(c) of the Florida Statutes. I would recommend going to the Web site of Florida’s Department of Business and Professional Regulation, the state agency which regulates condominiums. The Web site is www.myflorida.com/dbpr/. Then, go to the link to “Land Sales, Condominiums and Mobile Homes.” Click on “Condominiums.” There, you will find a wealth of information, including a link to Chapter 718, the Florida Condominium Act.

Question: I am new to condominium living, and want to know if the association’s board is out of line, or whether I am being overly sensitive. My unit was in very bad condition when I bought it. It has been under construction ever since, unfortunately a matter of months. After two months, complaints started. A member of the board has started contacting me to check on the status. Does the law give them the right to tell me what to do in my house? I also did not like the landscaping around

my home, and bought some better landscaping and had it installed. What do you think? — P.R. (via e-mail)

Answer: Condominium living is an eye-opener for some. Florida's courts have consistently said that although we are the kings of our castle, our fiefdom must yield in condominium living for the collective good.

While the association normally has no concern about what happens behind closed doors, remodeling jobs are a frequent source of contention. After all, your neighbors may be affected by noise from your contractors, workers coming and going, dust and dirt, etc. Many associations regulate interior renovations for these reasons, and some even prohibit extensive remodeling during certain times of year (such as the holidays and winter "season" months).

As to the landscaping, even though you thought you might be "improving" the area, the outside area is typically "common elements," even if it is near your home. This is within the exclusive jurisdiction of the board of directors, unless the documents state that the area is a "limited common element" and give you the privilege to improve it.

Question: I have what may be a unique situation. There is a retention pond in our neighborhood, which is designated as a common area. There is approximately three feet of land between the edge of each lot and the water's edge. I like to fish in the pond, and the board of directors does not have a problem with it. One of the neighbors tells me I am trespassing and has threatened to call the police. What is your opinion? — C.R. (via e-mail)

Answer: It depends. Most documents confer easements of enjoyment on every parcel owner in the common areas, for the purposes for which they are intended. Since the lake is intended for water management, it is doubtful that your documents confer the absolute right for you to use it for any other purpose. If the association's regulations permit fishing, then you should be permitted to fish in the lake, as long as you do not go onto someone else's property. Unless there is an access strip that allows you to get to the lake, or unless you yourself own a lakefront lot that would allow you to get to the lake, you could not access the lake without trespassing. You would not have the legal privilege to cross a neighbor's lot. ■

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