Property Usage Poses Challenge

Fort Myers The News-Press, December 14, 2006

By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Today's column continues our look at the challenges faced by community associations in regulating the use of condominium and HOA community property by non-owners, specifically tenants and guests. As we explored last week, Clear rules help resolve issues about tenant use, dated December 7, 2006, tenant rights are addressed by the law, at least to some degree, by the condominium statute. Conversely, homeowners' associations are largely left with their governing documents for guidance.

Guests of owners also present a source for debate in many communities. After all, we are all engrained with that American notion that our home is our castle, and the courts have routinely found that restrictions on the free use of one's property are not favored in the law. What is a more basic right than to decide who can visit you, how long they can stay, and even whether they can use your property while you are not there. Of course, these rights can clash with the rights of others in the community association setting, where so much of what we consider as part of our home is shared in common with others.

I remember a dispute I was called in to a few years ago. A young mother would have some pre-school children spend every Wednesday visiting her child at their condo unit. Simple enough. However, when the weekly event turned into fifteen 5 year old kids swimming at the community pool, while the moms visited pool-side, the folks in the Wednesday water aerobics class at the pool were less than overjoyed.

In another case, an owner bought a unit at a local condominium to use as a rental property. This owner targeted seasonal tenants, and would rent the property out to 5 or 6 different groups during the course of the year, mostly between Christmas and Easter. When the association changed the rules to permit only annual rentals (prior to the 2004 rental grandfather law), this owner felt that the new rules should not apply to him. The "loophole" he decided to use was to tell his tenants not to register with the association, and if asked, simply tell the management that they were family friends who were visiting for a couple of weeks. Of course, the scheme became transparent when the "guests" did not know the name of their dear family friend, and referred all questions to a real estate agent.

You get the picture.

Many associations have attempted to strike some semblance of balance by regulating guest occupancy. Such regulations are afforded the greatest weight when contained in the deed restriction (declaration of condominium, or for homeowners' associations, the declaration of covenants) but can also be contained in board made rules. If restrictions are contained in board made rules, there are many hoops that must be jumped through to ensure their validity. The initial hurdle is that the recorded documents must grant the board the authority to make rules regarding use of the home (unit or parcel), and not just common areas. For both condominiums and HOA's, a 14 day public

notice process is also required before rules regarding unit/parcel use can be enacted.

Further, board-made rules cannot conflict with any right that is contained in the deed restriction, nor any right which is "inferable" from the deed restriction. Finally, board made rules must be reasonable, which is in the eyes of the beholder. Believe it or not, restrictions contained in a deed restriction do not have to be reasonable to be enforceable; the legal test is that they simply must not be "arbitrary or capricious".

Let's take a look at the types of guest occupancies that are most often at issue. There are two basic types of guests for the purposes of illustrating these points, overnight guests and non-overnight guests. Guest usage also can be analyzed from the perspective of whether the unit owner is in simultaneous residence, or whether the owner is absent.

Non-overnight guests while the owner is in residence rarely present a problem, perhaps with the exception of communities where parking is scarce, or those party-hardy neighbors whose idea of a good time is to have 40 people crammed into their apartment until three in the morning. These problems can usually be stemmed through other sections of the governing documents, including a nuisance regulation, and reasonable parking rules where that is the main concern.

Non-overnight guests while the owner is absent seems almost a contradiction of terms. However, I have seen many cases where an owner of a beach-front resort condo, for example, tells one of her local friends to feel free to stop by any time, park in her spot, use the pool, go to the beach, and even play a set of tennis if they are up to it. I have found that most associations frown on this practice, and this is an area where a specific policy may be in order. Of course, owners should be free (or even encouraged) to have someone stop by their property while they are away to check for water leaks, etc., but that does not necessarily translate to free reign to use the shared amenities while the property owner is not there to accompany them or be responsible for their conduct.

Next week, we will wrap this topic up by looking at what is undoubtedly one of the greatest sources of discord in community associations, overnight guests. We will examine overnight occupancy while the owner is in residence, and perhaps the greatest challenge of all, overnight guests while the owner is away. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representingcondominium, 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**.*

Reader Seeks Clarification of President's Authority

Question: I am a vice president of a condominium association and have become increasingly distressed with the recent actions taken by the association's president. I am afraid the president has overstepped her authority. The board has taken actions to give certain board members authority, but the president has later overridden those decisions. Can you clarify the executive powers of the president and the extent of that officer's authority? I could communicate with the association's legal counsel directly, but it is not clear whether there would be attorney client privilege with me, or whether the attorney would be required to share our communication with the board. L.P. (via e-mail)

Answer: As you may know, association officers and board members have only that authority granted to them by provisions in the Florida Statutes or in the governing documents of the association. The Florida Condominium Act indicates that the bylaws shall describe the title of officers and shall specify the powers and duties of those officers. Similarly, the Florida Not for Profit Corporation Act provides that each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of any officer authorized by the bylaws or the board of directors to prescribe the duties of other officers. Unfortunately, many bylaws simply provide that the president shall perform those duties "customary for such office." Obviously, such a grant of authority to the president does not provide much guidance for your question.

As a general matter, the board of directors is the policy making body for an association, and the officers implement that policy in their day to day activities. Any specific power granted to an officer in the bylaws cannot be modified or taken away by the board without an amendment to that specific bylaw provision. Given all of this, it is most often necessary to review situations on a case by case basis to determine whether or not the president has authority to act independent of a vote of the board of directors. In any event, the president, like all officers, serves at the discretion of the board. If the president conducts herself in a manner with which the board does not agree, a majority of the quorum of the board may remove the president and put another person in her place.

With respect to your question about contacting association counsel and the confidentiality of that communication, I can confirm that association counsel represents the association and is obligated to report to the president any and all information and communications of which legal counsel is aware concerning the association. Any individual board member who seeks to communicate with association counsel in a confidential, personal manner, should be immediately advised that such communication is not possible.

Question: Does Florida law permit a member of a committee of the board of directors of a homeowner's association to attend a committee meeting by telephone? M. J. (via e-mail)

Answer: Unless the articles of incorporation or bylaws of the association state otherwise, a committee member may attend and participate by telephone in a properly noticed committee meeting. When doing so, the means of communication (i.e., via speaker phone) must allow all committee members to simultaneously hear each other during the meeting. A committee member participating in the meeting by such means is deemed to be present in person at the meeting.

Question: I live in a neighborhood with a homeowners' association. Our board has recently appointed an "appeals committee" to comply with the law dealing with fining. As chair of this committee, I was told that the appeals committee can only approve or disapprove the board's

decision to levy a fine and/or suspension. I disagree, and believe that being restricted to either a yes or no vote can lead to unintended consequences and takes away any form of mediation in an attempt to protect both the individual and the community as a whole. Can you further enlighten me on this point? R.R. (via e-mail)

Answer: The Homeowners' Association Act states that a fine or suspension may not be imposed without notice of at least fourteen days to the person sought to be fined or suspended and an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. If the committee, by a majority vote, does not approve a proposed fine or suspension, it may not be imposed. There have not been any cases, to my knowledge, interpreting these fining provisions in the Homeowners' Association Act. There are some arbitration decisions dealing with fining decided by the condominium arbitration program within the Division of Florida Land Sales, Condominiums and Mobile Homes. The condominium fining statute is similar to the homeowners association fining statute. Although arbitration decisions are not binding on a court of law, they might be considered persuasive. These arbitration decisions state that the owner must be given "due process". Therefore, I believe that if a fining committee is limited to only approving or disapproving the board's decision to levy a fine and/or suspension, there would be no real "due process" to the owner. For example, once the fining committee has had an opportunity to hear all of the facts and consider the arguments of the homeowner, it might determine that the homeowner should be fined, but not at the level proposed by the Board. If the fining committee is limited to a yes or no vote, its hands would be tied and it would not be able to recommend the fine that the committee determines is justified, after hearing all of the evidence. Therefore, the fining committee must have the ability to affirm, reduce, suspend, or throw out the proposed fine. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representingcondominium, 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**.*