



Condo Group Faces Hurdles in Adding Rules

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Question: Can a “55 and over” restriction for condominiums can be added “after the fact”? My association is talking about making our 16 unit condominium a “55 and over” community, even though it was not originally set up that way. S.J. (via e-mail)

Answer: The Housing for Older Persons Act of 1995 (HOPA) is the statute that permits “55 and over” communities. HOPA and related federal regulations contain several requirements for “55 and over communities”, the most notable being that at least 80% of the occupied units must be occupied by at least one resident who is 55 years of age or older.

Regulations published by the Department of Housing and Urban Development (HUD) in 1999 allowed communities that did not meet the 80% requirement at that time to prospectively enforce a “55 and over” restriction until May of 2000, in an attempt to reach the 80% requirement. Some observers have expressed the opinion that this transition period contained in HUD regulations was the “last chance” for associations to become a “55 and over” community. It is my opinion that the better view of the law is that the transition period was for associations which held themselves out as “55 and over” communities, but had not yet reached the 80% occupancy threshold. If your association currently exceeds the 80% threshold, I believe the law justifies the association moving forward to become a “55 and over” community. However, HUD has not addressed this issue.

There are other criteria that must be met, such as the housing must be intended and operated for persons 55 years of age or older, your association must publish and adhere to policies and procedures that demonstrate an intent to provide such housing, and you must comply with the rules issued by HUD for the verification of occupancy. Typically, this will require an amendment to your declaration of condominium to ensure that all future transfers (sales or leases) result in at least one of the “permanent occupants” being age 55 or older.

Further, the association will need to address “hardship” situations, such as the passage of title to units through inheritance. Most associations make provision for these situations in the amendment implementing the “55 and over” clause. Obviously, the association should enlist the services of a qualified attorney if it is planning to move forward in becoming a “55 and over” condominium.

Additionally, your association will have to register as “housing for older persons” with the Florida Commission on Human Relations. Your board of directors should consult with the association’s attorney for assistance with undertaking this transition.

Question: At a recent board of directors meeting, the board voted to adopt a new policy stating that owners who leave their cars on the ground floor of the parking lot while they are summering elsewhere must leave a set of keys to their cars with management. The basis of this edict was that, in case of a potential storm surge, management would move their cars to higher ground

so as not to be washed around under the condominium building during a storm surge and damage the structure. My two main concerns are that it seems management would open itself up to a liability situation if a car was moved and damaged, and that it seems tantamount to threatening owners who might not want their vehicles moved from under the building to a location that might be even more vulnerable than their particular parking spot. The board also stated that it will fine owners \$100.00 if they fail to comply with this policy. Does the board have the right to adopt this policy, and is a fining procedure enforceable? R.M. (via e-mail)

Answer: A board made rule is valid if the condominium documents properly provide the board with rule-making authority, if the particular rule adopted is reasonable, and if the rule does not conflict with any expressed provision in the declaration of condominium or right reasonably inferable from the declaration.

Assuming that your condominium documents give your board rule-making authority, the rule adopted by your association's board appears to be reasonable given that the board of directors has a duty to protect the condominium property. When a board of directors adopts such rules, the board's decision is generally upheld under the business judgment rule if the board acted reasonably and in good faith. In other words, if there is a reasonable basis for the fear that cars parked on the lower level parking area could be pushed about by a storm surge and damage the building, the rule will likely be upheld. Assuming that your board has general rule making authority, it is unlikely that there is any conflicting provision in the declaration that would invalidate the rule.

If such a rule is adopted, the board must evaluate whether the risk of a claim of damage to a car or claims for damage if the vehicle is not moved, outweigh the potential damage to the condominium property. In my opinion, the rule should be written to state that the board of directors has the authority, but not the

obligation, to move the cars. Obviously, there may be emergency situations where such an action cannot be performed in time.

I have also found that associations often require keys to be left to unattended vehicles for other reasons. For example, if the condominium parking lot is being seal-coated, or other maintenance is being performed, the car may have to be moved.

The association may levy a fine against a unit owner for failing to comply with rules of the association if your declaration of condominium or bylaws provide for the ability to levy fines. Fines are limited to \$100.00 per violation, per day in both the Florida Condominium Act and the Florida Homeowners' Association Act, and in the case of a condominium can be levied up to a total of \$1,000.00 for continuing violations. The fine in a homeowners' association can also total up to \$1,000.00 in the aggregate under the statute, but may exceed \$1,000.00 in the aggregate if the governing documents so provide. Under both laws, a lien cannot be filed for non-payment of a fine, resort to small claims court is typically necessary.

Question: I recently purchased a condominium in Cape Coral, Florida. When we purchased our unit, I do not believe the salesperson was entirely honest with me in the transaction. Is there a state agency where I can report this type of activity? S.B. (via e-mail)

Answer: The Department of Business and Professional Regulation is the state agency which regulates both condominiums and real estate sales professionals. The Florida Real Estate Commission (also known as "FREC") is located within the Department and it is the governmental body that is responsible for disciplining real estate brokers and sales associates. Florida law provides that a broker or sales associate may be disciplined if they have been found guilty of fraud, misrepresentation, or false promises in any business transaction in this state or any other state. You can

reach the Department by contacting them at 850-487-1395 or visiting www.myfloridalicense.com.

Question: Our condominium association has three board members, who are heavily lobbying many owners to build a new swimming pool and clubhouse. This is a very divisive issue in our community. One board member told me that he knows that the board cannot levy a special assessment to put in the new pool and clubhouse, but can raise the quarterly maintenance fees to avoid an owner vote. Is this run-around legal? C.W. (via e-mail)

Answer: Adding a new swimming pool and clubhouse to your condominium complex would clearly be deemed a “material alteration or substantial addition” to the common elements or association property.

The Florida Condominium Act states that there shall be no material alterations or substantial additions to common elements or association property except as provided in the declaration of condominium. If the

declaration of condominium contains no guidance, then you would need seventy-five percent of all voting interests (there is typically one voting interest per unit) to approve the construction. This is the most often case whether the funds are obtained from special assessment, an increase in your quarterly maintenance fees, use of reserve funds, or a bank loan.

Many condominium documents give the board of directors the authority to make material alterations or substantial additions to a certain dollar level, and then a unit owner vote is required. However, I have rarely seen condominium documents that would give a board authority, with no owner vote, to construct an improvement of the magnitude you are asking about.

Therefore, it is likely that some level of owner approval will be required. Whether it is seventy-five percent (the “default” level set forth in the Condominium Act) or some lower (or higher) level will depend on how your condominium documents are written. ■

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.