



Language on Architectural Changes Must Be Specific

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Q: Two years ago I purchased my home in a gated community. I have decided to refresh the landscaping and add several new shrubs and, hopefully, a large shade tree. I understand I must get approval before I install my new landscaping. I have spoken with the association president to find out exactly what I need to do, and she said that I might not be allowed to put a big shade tree in the front of my yard. When I asked the reason for her comment, she stated that the architectural review committee has identified over-grown trees, and mature trees that now appear to have been planted too close together, as a problem with the appearance of the community. Apparently, since I have a very small front yard and both of my neighbors on each side have large, mature trees, I might not be allowed to plant a tree in my yard. I want the neighborhood to look good too, but it seems unreasonable that I can't have a tree in my front yard. Can you advise how I should approach this issue? **T.L. (via e-mail)**

A: Historically, covenants and restrictions have typically authorized the formation of an architectural review committee and authorized the association to adopt design guidelines and other criteria that an owner must follow to make alterations to his home or lot. In many cases, the architectural review committee authority is couched in terms of language such as "in keeping with the general character of the neighborhood", or

to maintain "harmony" of appearance in the community. However, such broad, discretionary criteria might be viewed as giving an architectural review committee unlimited authority to approve or disapprove proposed changes on a whim. In fact, that has never been the case. The board of directors or an architectural review committee is always held to a standard of consistency in enforcing covenants and restrictions. The defense of "selective enforcement" has long been established and is frequently used by owners to challenge the decisions of a Board or a committee. Basically, selective enforcement involves the conclusion that one homeowner is unfairly being held to a different standard than other homeowners. If proven, selective enforcement is certainly a valid theory upon which to challenge board action.

In 2007, the Homeowners Association Act was amended to include Section 720.3035. It is not entirely clear what, exactly, this new statutory provision requires as it has yet to be tested in court, to my knowledge. However, the Statute provides that an association's architectural review authority to approve plans and specifications for location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement, must be specifically stated or reasonably inferred in the declaration of covenants

or in other published guidelines and standards that are authorized by the declaration of covenants. It is generally believed that this statute requires detailed specifications and guidelines to be in writing. A reasonable debate continues as to whether authority couched in terms of “in keeping with the general character of the community”, or “in harmony” with other improvements, is specific enough to meet the new statutory requirements. The conservative view is that something more specific is required.

Therefore, in your particular situation, it may be helpful to explore the written provisions of your community’s covenants or design guidelines that the association might have in place. If the association’s disapproval of any of your planned improvements is inconsistent with those written design guidelines, or if the restrictions and requirements that the committee places upon your lot are inconsistent with the restrictions and requirements enforced for other lots, then you may have a reasonable argument that you are entitled to make the improvements that you propose.

Q: My mother’s small condominium association (40 units) has a rule that an individual or corporation can only own two units. The Board controls this by giving pre-approval of unit sales. Are such restrictions on sales legal? **S.S. (via e-mail)**

A: I am aware of declarations of condominium that limit the total number of units that any person or single entity can own in the condominium. In my opinion, such a restriction is best placed within the declaration of condominium, not a board-made rule.

The standard for review of a restriction contained in a declaration of condominium is whether the restriction is wholly arbitrary, in violation of public policy or in violation of an individual’s constitutional rights. I do not believe that a

restriction prohibiting multiple unit ownership is wholly arbitrary or violates public policy or an individual’s constitutional rights.

There are several arguments that support the reasonableness of a limitation on the number of units that one owner may simultaneously own in a condominium. First, if one person or corporation owns multiple units, it is very likely that such an owner will be holding the units as a rental pool, and not owning the units for permanent occupancy. Obviously, a condominium, particularly a smaller condominium, which has a significant number of units held in a rental pool will not have the same character and living environment as a condominium with primarily permanent occupant owners. It is not wholly arbitrary for an association to want to establish and maintain an environment of primarily permanent occupants.

Secondly, experience shows that absentee owners with multiple units, as well as their guests and tenants, do not always take very good care of the units or the common element property.

Third, where one individual owns multiple units, particularly in a small condominium, any financial difficulties of that person or corporation that cause them to not be able to pay their assessments could have a devastating effect on the financial condition of the association.

Finally, again in particularly small associations, if one person owns several units, the voting balance in the community can be adversely affected. Obviously, a single owner with multiple units held as a rental pool will often have vastly different objectives or priorities than permanent occupant residents. That fact, together with substantially greater voting power than individual unit owners, might allow the multiple unit owner to dominate association operations.

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.

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