

Leasing Restrictions

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Recently, many Condominiums and Home Owners Associations (“HOAs”) we represent have inquired about their right to impose leasing restrictions when none exist in their By-Laws and/or Declaration (“Governing Documents”). These inquiries have emerged due to the leasing of units to tenants who are not qualified based on income, background, etc. These issues have recently become more prevalent due to an Owner’s inability to sell his/her unit given present financial and marketplace conditions.

Typically, a community’s Governing Documents permit leasing without restriction provided all common charges and assessments are paid (current). Since many Boards have the power to enact house rules, Boards often wonder why they cannot merely enact leasing restrictions by adopting new house rules. Although a Board’s enactment of house rules not contained in the Governing Documents will be protected by the Business Judgment Rule (which limits judicial review of decisions made by a Board), a Board cannot restrict presently existing rights which already exist in the Governing Documents.

This issue has recently been decided by the Appellate Division of the State of New York, Second Department (second highest court in New York State) in the case of *Yusin v. Saddle Lakes Home Owners Association, Inc.* (73 A.D.3d 1168, 2010). In that case, an HOA board enacted a rule that required all owners to curb their pets and that all pets must be walked on the streets (and not on the common areas). The Court held that such a rule was unauthorized without a formal amendment to the by-laws because the by-laws permitted home owners to walk their pets over common areas. Essentially, since the subject matter of the rule which the board attempted to enact was already covered by the by-laws, the board could not unilaterally revise this rule by circumventing an amendment to the by-laws and enacting a house rule instead.

This case was recently cited in another Appellate Division case entitled *Board of Managers of Village View Condominium v. Donata Forman* (78 A.D.3d 627, 911 N.Y.S.2d 378, 2010). In that case, the board tried to prohibit pets where no such prohibition existed in the governing documents of the condominium. The Court held this was not a proper restriction (i.e. house rule) and since the by-laws were not amended, same was unenforceable.

As such, if a Board wants to impose leasing restrictions, same must be accomplished by amending the Governing Documents. This usually requires the community to hold a special meeting at which anywhere between 66% and 80% of all Owners must approve said restrictions. You will need to check your Governing Documents for the exact requirements and should consult an attorney if you consider this process.

Some of the types of controls, procedures and restrictions that we have seen communities adopt and recommend include the following:

1. Leasing will only be permitted by Owners who previously resided in the Homes for a specific period of time before being able to lease the home. (This will avoid having the community turn into a “rental” community).
2. Owners will be required to submit an application package for approval by the Board.
3. A security deposit will be required to protect against any damages to the common areas as well as any default by the Owner or tenant under the Governing Documents.
4. Restrictions on the use of the amenities so that if an Owner leases a Home, only the tenant will be permitted to use the amenities.
5. A limit on the number of years an Owner is permitted to lease the unit.
6. A requirement for the tenant to attend an interview with the Board.
7. A requirement to maintain certain insurance.
8. A provision requiring payment of a fine for violation of the leasing provisions. A schedule and procedure for fines would need to be included (e.g. \$100 for first offense, \$250 for second offense, etc.).
9. A requirement of the tenant to pay all rent to the Association if the Owner fails to pay all monthly charges, and/or other amounts due to the Condominium.
10. The right to evict the tenant for non-compliance with the Governing Documents.

While the above restrictions may seem more like restrictions in place at a Co-op regarding subleasing, many Condominiums and HOAs and their Owners are now realizing the significant benefits which outweigh the detriments of leasing restrictions.

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