



Overnight Visitors May Lead to Disputes for Associations

Fort Myers The News-Press, December 21, 2006

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Today's column is the third and final installment in our review of challenges faced by community associations when property in the community is occupied by non-owners. In the first installment, tenant rights were discussed (Clear Rules Help Resolve Issue About Tenant Use, December 7, 2006). Last week, we looked at non-overnight usage of community property by guests (Property Usage Poses Challenge, December 14, 2006). Today, we will dive into one of the greatest sources of dispute in associations, overnight "guests."

As with non-overnight guests, the topic of overnight guests can be broken down into two categories, those situations where the owner is in simultaneous residence with the guests, and those where the owner is not there.

As a practical matter, a high percentage of association-operated homes in local communities, particularly condominiums, are occupied by seasonal residents and retirees. Many of these folks purchased their property with the expectation that their children, grandchildren, and other relatives and friends would come to stay with them from time to time, to enjoy all that Florida has to offer. Typically, this does not present a problem unless excessive numbers of people are crammed into living accommodations not suited for high volume occupancy.

Overnight stays by minors often becomes controversial in "55 and over" communities, where the governing documents generally prohibit occupancy by children.

Another area where guest occupancies during the owner's simultaneous residence presents legal problems is where an owner wants to "rent rooms", or create a living environment where occupancy of the unit does not fit traditional notions of single family usage.

I recently reviewed one case where a man and woman purchased a condominium unit for their adult (college age) son, in the son's name. No problem, until the student invited four of his friends to share the pad with him. When challenged, the student's retort was that no condo association was going to tell him how many friends he could have stay with him, nor how long they could stay.

If the sauce is not spicy enough when the owner is in residence, let's turn to occupancy by "guests" when the owner is away. As with visiting friends and family, many people buy condo units for not only their enjoyment, but for use by friends and families as well. As in most other cases, this does not pose problems the majority of the time, but can become controversial in the right (or wrong) set of circumstances.

For example, think about the case of the unit owner who lets his grandson and seven fraternity brothers use the Florida condo unit every unit for spring break. Or how about that owner who skirts the association's rental rules by instructing tenants to "just tell them you are my friends and aren't paying rent." What about the unit owned by a business, which raffles a stay at the unit in their local charity auction?

In the final analysis, there is no one-size-fits-all solution to these issues. Constant comings and goings of strangers would likely have little impact in a beach-front resort condominium that permits weekly rentals. Conversely, “strangers” residing in a unit in an age-restricted community that prohibits rentals would certainly raise some eyebrows.

Starting with the basic premise that restrictions against the free use of property are disfavored in the law, it is generally safe to say that which is not prohibited is permitted. Accordingly, regulations addressing tenant and guest occupancies are best contained in the deed restriction (declaration of covenants or declaration of condominium) but will be enforceable if contained in a board-made rule, provided that the rule meets all of the legal “tests” discussed in my earlier column.

A good starting point is to define what a “single family” is. While most governing documents restrict the use of parcels to “single family” purposes, many documents do not describe what is meant by that term. In the absence of definition, a court will generally hold that any non-commercial residential use would be a “single family” use. For example, the five college students in our example would qualify as a “single family”, unless

the governing documents contained a more restrictive definition.

For age-restricted communities, occupancy by minors can be appropriately addressed by placing some type of time limit during which children can stay in the community. While everyone would typically expect the right to have their grandchildren visit, putting time limits for the maximum time children can stay in the community will assist the association in preserving its “55 and over” status.

When it comes to tenants and guests, there are many different philosophies about the appropriate scope of regulation. What works in one community may be considered too strict, or too lax, in another. In my opinion, at a minimum, associations should ask owners who are going to have people occupy the property while the owner is absent register the tenant or guest. Registration upon arrival works in some communities, registration in advance is preferable in others.

Beyond registration, many associations require prior approval. Some associations even ban or severely limit occupancy by guests, particularly in the owner’s absence, which is most appropriately addressed through amendment to the deed restriction, with the advice of competent legal counsel. ■

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.

Proxies in Director Elections Not Ruled Out by Statutes

Question: I am on the board of directors of a homeowners' association. Can we use a proxy for the election of directors to be held at the annual meeting? Also, I believe that the wording in the homeowners association statute regarding proxies is vague and imprecise with respect to the substitution of proxy. Can you please explain? G.W. (via e-mail)

Answer: Chapter 720 of the Florida Statutes, often called the Homeowners Association Act, does not prohibit proxies from being used in the election of directors. This is unlike the Condominium Act, which prohibits proxies from being used to elect directors (unless the condominium association has taken the appropriate vote to "opt out" of the election requirements in the Condominium Act).

Some governing documents for homeowners' associations, such as the bylaws, include language prohibiting the use of proxies for the election of directors. In that case, the association would have to follow its bylaws and use a balloting system rather than a proxy to elect the directors.

The Homeowners Association Act does not dictate a specific form for the proxy that must be used (although in order to be valid the proxy must be dated, must state the date, time and place of the meeting for which it was given, and must be signed by the authorized person who executed the proxy). The Act also does not require that limited proxies be used. Therefore, general proxies can be used, unless prohibited by the governing documents.

Most proxy forms are prepared by the association, and will provide a place for the parcel owner to designate the person who will act as his or her proxy. The proxy form will also typically include the name of a board member to act as the proxy in the event the owner does not choose a proxy. This is different than the

substitution of proxy. The purpose of a substitution of proxy is to allow the proxy holder to substitute somebody else to act in his or her place. This typically will come up if the proxy holder cannot attend the meeting, for whatever reason, and wants to substitute someone else to act in his or her place.

The Homeowners' Association Act states that if the proxy form expressly so provides, the proxy holder may appoint, in writing, a substitute to act in his or her place. Therefore, it is a good idea to include a statement in the proxy expressly permitting the substitution of proxy. Some proxy forms will actually include a separate form at the bottom of the proxy to allow the proxy holder to name a substitute and sign the form. If the proxy does not include a separate form for the substitution of proxy, the proxy holder would need to file something in writing naming the substitute, presuming that a substitute is permitted.

Question: We own a condo and it has been one year since turnover. We are still waiting for accounting records from the developer. How are these statutes that you write about weekly enforced?

Answer: The Condominium Act provides a laundry list of items that the developer must deliver to the association in conjunction with transition of control of the association, commonly called "turnover." Not more than ninety days after the transition meeting, the developer must provide the financial records (including financial statements of the association, and source documents from the incorporation of the association through the date of turnover), and provide an audit of the financial records, either for the period of time from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation.

It is not uncommon for developers to miss this statutory deadline. When this happens, there are different courses of action that can be taken. I suggest that you first communicate in writing with the developer to advise that the deadline has passed and demand a written response that the audit is being performed, an estimated time of completion, and when it will be provided along with the financial records. If the developer fails to properly address this problem, other possible remedies are filing a complaint with the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation, or filing a lawsuit to compel the developer's compliance with the statute.

Question: Since Hurricane Wilma, my condominium has had difficulty locating affordable insurance. Our board of directors has discussed the topic of self-insurance. Is that legal?

Answer: The Condominium Act requires that an association use its "best efforts" to obtain adequate insurance. The recent and well publicized increases in insurance rates have made affordable policies for condominiums almost impossible to find. However, the law does not require insurance to be "affordable."

As a result, many associations have explored the possibility of "self-insurance." Florida Statutes allow a group of not less than ten condominium associations to form a commercial self-insurance fund for the purpose of pooling and spreading the liabilities of its group members. It is an unfortunate reality that the organizational, administrative, and financial hurdles of the current law are too high for nearly every condominium association that would contemplate a self-insurance solution, and I believe the law is illusory.

There are various statutory changes being discussed that could make self-insurance a viable option in the future. Stay tuned. ■

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