



Community Challenge Is To Balance Interests

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Q: My community includes a common area with basketball and tennis courts. I have young children, and unfortunately, the basketball court is a bit too far for them to go and play by themselves. I have considered buying a portable basketball hoop for my driveway, but have learned that portable hoops are prohibited by the association. We have a nice neighborhood, so I can understand why restrictions like this are in place, but there are many families with younger children living here, and I suspect most owners would not object to a basketball hoop. How can I change this restriction to allow basketball hoops? **J.P. (via e-mail)**

A: Your question reflects one of the biggest challenges in shared ownership communities; the need to constantly balance and resolve competing interests. As I have mentioned previously in this column, associations are unique and it is up to each, individual association to determine the types of restrictions, if any, that it will have in place. If the developer put the basketball hoop rule in place and none of the owners who purchased the homes really care, then you may have an easy time achieving your goal (pun intended). But, if this restriction was in the original, developer documents, it is possible some of the owners bought in partial reliance on this and other similar restrictions. Or, this restriction may have been added by the members after turnover of control of

the association from the developer, in which case you might have an uphill battle.

Obviously, the prohibition of basketball hoops serves an aesthetic interest because a street lined with portable basketball hoops and other recreational equipment is, at least in some peoples' minds, less attractive than a street without such equipment. In addition, particularly in communities where the homes are built in very close proximity to one another, a basketball game that is taking place next door can sound as if it is in your own living room. So there are some compelling reasons for some people to want to restrict basketball hoops in driveways. On the other hand, few people would argue with the premise that children should be given the opportunity to regularly engage in appropriate recreational activities.

Your options are to either live with the rule, try to have it changed, or to challenge its validity. Your efforts to change the restriction will depend on whether the restriction appears in the declaration or is a board-made rule. If the restriction appears in the declaration, it is almost certainly valid, and your efforts should be focused on having a declaration amendment proposed and passed pursuant to the amendment provisions in the declaration. Obviously, your biggest job would be

to conduct a grass roots campaign to get support for your proposed amendment.

If the restriction is in the form of a board-made rule, then the board of directors, alone, may change the restriction. Again, your biggest challenge, presumably, will be to get support from the members and demonstrate that support to the board of directors.

There may be a couple of angles for challenging the restriction. First, if the restriction is a board-made rule, you can check to make sure that all of the procedural requirements were met when the rule was adopted. This would require looking at the statute, which requires 14-days notice of any board meeting at which a rule restricting lot use is adopted, as well as the governing documents of the association to determine the scope of the board's rulemaking authority and the procedures required to adopt valid rules. However, if you were to find a deficiency in the procedures used to adopt the rule, your victory would likely be short-lived as the board could readopt the rule using proper procedures.

If the restriction is contained in the declaration, there is very little you can do to challenge that restriction, unless the provision was added by amendment and the amendment procedures were not followed. One other possible argument, which is a real stretch in my opinion, might be to challenge the restriction as discriminatory. An association that has a multitude of restrictions that actively tells the world "no kids allowed", may be susceptible to a claim of "familial status" discrimination, which is illegal discrimination against families with children. However, I do not believe that a single restriction prohibiting basketball hoops would come anywhere near the level of proof needed to establish such discrimination, especially in a situation like yours where the community does in fact provide a common area basketball court.

Therefore, your best bet is to get involved in your community, poll your neighbors, and do some old-fashioned politicking. In the end, the majority, or

whatever percentage is set forth in your association documents, rules.

Q: We are a small, self managed condominium. Our community is not gated. We have a swimming pool that is unlocked during the day. Occasionally, especially in the summer when there are few members in residence, un-invited people from the apartments down the street come and use our pool. What is our association's liability if one of these people is injured on our property? **L.A. (via e-mail)**

A: The nature of your question requires a brief discussion regarding the law of negligence. Generally, to prove negligence, one must show a legal duty of care was violated and that the violation of the legal duty proximately caused the injury and damage alleged. In the context of a landowner (in this case, the condominium association), the legal status of the person on the property will determine the duty of care owed. A greater duty of care is owed to those individuals who are residents or have specific permission to be on the premises as opposed to trespassers. Generally, a landowner owes no duty to a trespasser other than to not intentionally injure the trespasser.

However, this analysis changes with respect to pools and children. Florida law recognizes a legal concept referred to as the "attractive nuisance doctrine." The attractive nuisance doctrine may impose liability upon a landowner with respect to injuries arising from children in relation to pools whether they are trespassing or not. In a general sense, the law presumes that children do not recognize the danger or risk associated with pools and, therefore, landowners should take reasonable precautions to protect wandering children. What is reasonable will vary by circumstances. At the least, the association should confirm that the pool and surrounding areas (fences, gates, etc.) comply with all applicable local, state and federal standards.

Another important player in this issue is the association's insurance agent. Your agent will be

able to provide advice as to proper insurance coverage, and may also be able to have your insurers or a third party assist in making risk management recommendations.

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.