

Restrictions of Real Property Rights in a Homeowners Association community

At the Forest Lake Board meeting on March 13th it was apparent that many Association members had a number of misconceptions about the authority of the Board of Directors to restrict the rights of property owners. I will try to clarify these issues.

Rights of Real Property Ownership. When you purchase real estate you are actually buying a bundle of rights with respect to a particular property. If there were no restrictions, you would have the right to do just about anything with the property—set up a business, sell or lease it for any purpose, build any sort of structure on it, etc. If you are in a remote area there are probably very few restrictions on what you can do with it. In an urban area, however, there will be a number of restrictions, such as zoning use restrictions or easements for utilities. In Homeowner Associations and condos, there are even more restrictions. These are found in the HOA's Declaration. The developers draw up the original Declaration. The Declaration is filed with the County and is a public record that puts you on notice as to additional restrictions on your rights if you choose to buy this type of property. You are also on notice that the Declaration may be amended in the future so these restrictions can change. Why would someone buy property with even more restrictions on it use? Those who do buy into HOA communities apparently feel the additional restrictions are worthwhile in order to live in a community situation, perhaps a gated community with strict rules on maintaining a uniform appearance, no business activities, leasing restrictions, etc. So, your bundle of rights with respect to the property you bought in an HOA comes with a number of additional restrictions that you have agreed to in advance.

Ownership of property in an HOA makes you a member of the Association. In Florida the Association and its members are governed by Florida statutes (Chapter 720) and by the governing documents of the Association. The governing documents are the Articles of Incorporation, the Declaration of Covenants, the Bylaws, and the Rules & Regulations. The Declaration of a HOA takes precedence over the Bylaws or Rules and Regulations and itself is subordinate to State and Federal laws. The Articles of Incorporation sets up the Homeowners Association (HOA) and the Bylaws define how the non-profit HOA Corporation will operate. The Board of Directors, elected by the members, runs the corporation. The Declaration of Covenants, Restrictions, and Easements for Forest Lake Townhomes defines the powers of the Board, spells out a number of restrictions on property rights, and contains the Bylaws, and the initial Rules and Regulations. Your bundle of rights as a property owner in an HOA has now been limited by Federal and State laws and by the HOA Declaration. What rights have not been specifically limited or restricted are still your property rights.

FLT HOA. The FLT Board was given almost complete control over how to run the HOA in the Declaration, including the right to make Rules and Regulations (R&R) concerning use of the common facilities and to approve leases and tenants. About the only power the members have is to elect Board members and to amend the Declaration. The FLT Board was not given approval authority in the FLT Declaration with respect to an owner's right to sell his property to anyone on any terms he wants. And, those rights of property ownership that are not specifically restricted still belong to the owner.

The test of whether a Board-passed rule is valid is whether a rule contravenes an express or implied condition found in the Declaration and whether the rule reflects reasoned decision making.¹ Florida public policy disfavors unreasonable restrictions on the free alienability of property (an owner's right to sell or lease his property). For example there is an implied right to rent where the Declaration does not specifically prohibit or limit leasing.² (The FLT Declaration neither prohibits nor limits leasing.)

¹ *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143 (1984), DCA 4th Dist.

² *Mohnani v. LA CANCHA CONDO. ASS'N, INC.*, 590 So. 2d 36 - Fla: Dist. Court of Appeals, 4th Dist. 1991

Board Approval of Sales. We now take up one question raised at the March meeting. Does the Association through its Board of Directors have approval authority over sales of property in Forest Lake? Can the Board prevent you from selling your property to a willing buyer because it doesn't approve of the buyer? The answer is clearly no. The FLT HOA Declaration imposes no membership application process for a sale or purchase of lots in FLT. It does not give the Board authority to approve or disapprove new sales. Consequently, no Board motion or Bylaws amendment can change this. The only way to change this is to amend the Declaration. Such an amendment, however, would have to include a right of first refusal to be a valid restraint on alienation³. This is supported by Florida case law and by the opinion of the Board's attorney, Mr. Caves. It can be done, but this change would only be effective if the Association is willing and able to step into the shoes of the potential purchaser and itself buy the property on the same terms. Previous Boards have assumed approval authority over sales and required an extensive application process and fees. This authority was not granted to them in the Declaration and is invalid and unenforceable.

Board Authority to Limit Leases. At the March meeting a motion to rescind rule S12 that restricted any owner from leasing more than 3 properties in Forest Lake was also entertained. This was a rule passed by the previous Board and incorporated into the R&R. Can the Board make and enforce such a rule? The answer is again no. It contravenes the inferred right of a property owner to lease his property. The FLT Declaration provides that owners may lease their units subject only to the leasing restrictions in Article XIII, Section 11 and in Article XIV. The Declaration states that leases shall be subject to the prior written approval of the Association, which shall not be unreasonably withheld. However, the Declaration has no limitation on the number or percent of units that can be leased and contains no limitations on the length of the rental term or the number of leases an owner may enter into in a given period of time. Because neither provision contains an express limitation on the number of units that may be leased, the S12 rule exceeds the Board's authority. The same reasoning applies to some other leasing restriction rules passed by the previous Board, all in disregard of the opinion of the Board's own attorney.

This issue was discussed at length in a memo provided to the previous Board on December 29, 2011, by attorney Joseph Adams of Becker & Poliakoff. This memorandum argued that the least defensible rules (3 lease limit (currently rule S12) and the 62 unit total lease limit (Rule S12, since rescinded) put the Board at risk. "Accordingly, while the Association may make the calculated risk to continue to enforce these restrictions against the objecting property owners, if this matter were to be presented to a court, successfully defending these restrictions would at best be problematic. The Association would be exposed to potential damages, and an award of the other party's attorney's fees if it were to lose a challenge to these rules.

These types of property rights restrictions can only be accomplished if at all by amending the Declaration. If you advocate amending the FLT Declaration, consider this. The Florida Supreme Court stated the conditions under which a Declaration could be amended to restrict leasing. In the *Woodside Village*⁴ case it stated:

An amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

³ Aquarian Foundation, Inc., v. Sholom House, Inc. 448 So. 2d 1166 - Fla: Dist. Court of Appeals, 3rd Dist. 1984

⁴ WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC. V. JAHREN, Florida Supreme Court, 806 So. 2d 452 (Fla. 2002)

The same reasoning that applies to the 3-lease limit rule (S12) also applies to current rules S5, S6 and S9. While the motion to rescind the 3-lease limit rule failed at the March meeting on a 2:2 vote, the rule is still invalid and unenforceable.

Finally, I quote from “Restrictions A Matter of Preference” by Joseph Adams posted in Reader Q&A, in the Florida Condo and HOA Law Blog.⁵

In order for an association board to adopt valid rules and regulations, four basic tests must be met. First, the superior governing documents (the declaration, the articles of incorporation, or the bylaws) must grant the board the authority to adopt and amend rules and regulations. It is important to ensure that the board’s rule-making authority extends to both common property (known as common areas in homeowners’ associations and as common elements in condominiums) as well as the individual homes (known as parcels in homeowners’ associations and units in condominiums).

Secondly, a board-made rule cannot conflict with any right contained in the superior documents nor any right which is “inferable” from those documents. Thirdly, the rule must be “reasonable.” Finally, the rule must be adopted in a procedurally correct fashion, and in accordance with both the applicable statute and additional procedural requirements contained in your governing documents themselves.

Amending the FLT Declaration. The amendment process requires an affirmative vote or written consent of at least 2/3 of the members or 166 votes of 248 (Article XXI Section 6(a)). This is a significant hurdle to overcome. No amendment has been successful since the owners got control of the Board in 2005. Furthermore, amendments to give the Board approval authority over sales or to restrict an owner to no more than 3 leases would probably only apply to owners who voted for these amendments and to new owners who bought after these amendments were passed.

Ken Callahan, Secretary FLT HOA
March 15, 2013

⁵ <http://www.floridacondohoalawblog.com/2012/08/articles/qa/restrictions-a-matter-of-preference>