

# TITLE ISSUES

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## ***THE AGE OF AQUARIUS REVISITED: COMMUNAL LIVING TODAY***

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In the late 1960's, many young people hopped into their VW buses and headed to communes; and many more dreamed of it. Forty years later, many of these same people are heading toward a different kind of communal living: the condominium complex. While previously they searched for free love, now they are looking for a maintenance free lifestyle. Facing this new purchaser in a modern community association is a rather daunting challenge: interpreting the condominium documents and applying them to the changing needs of the community.

A condominium is an interest in real estate defined by statute. The Illinois Condominium Property Act (765 ILCS 605/1. et seq, hereinafter referred to as the Act) confers on each condominium owner exclusive ownership of and possession of an enclosed space (the unit) and an undivided interest in all other portions of the property except the units (the common elements). The unit is yours to own, maintain and decorate; whereas the common elements (exterior walls, recreational facilities, the land, et al.) are the common property of all who own a unit. Some of the commonly owned property such as parking spaces, balconies, etc., may be limited common elements. Limited common elements are those interests in land that benefit a particular unit, meaning the owner of that unit has exclusive use and control (but not ownership) over that portion of the property.

Administration and control of the condominium complex is vested in the condominium association, which is comprised of all unit owners (765 ILCS 605/18.3). The board of directors, (hereinafter referred to as the board) elected by the association membership, exercises the powers of administration.

The board derives its authority to administer and operate the condominium complex from the Act and three

principal documents: the declaration of condominium ownership, the bylaws of the condominium association and a set of rules and regulations adopted by the board. Under the Act, 765 ILCS 605/3, property becomes a condominium upon the recording of the declaration and its attached plats of survey. Declarations, generally drafted by the developer's attorney, are frequently submitted to a title company prior to recording. Title company staff will review the declaration and surveys and verify that the current statutory requirements and the current local recording requirements have been satisfied. The declaration's primary function is to provide a constitution for the condominium complex. It defines the units and common elements, including limited common elements if any, and sets the percentage of ownership interest in the common elements allocated to each unit. The declaration also sets out the easements, covenants and restrictions that affect the condominium property. Existing buildings that are converted to condominiums must comply with the provisions of 765 ILCS 605/30 (conversion condominiums).

The second controlling document, the condominium association's bylaws, deals with the administration and procedural matters relating to the complex. 765 ILCS 605/17 requires that "the bylaws be embodied in the declaration or in a separate instrument, a true copy of which shall be appended and recorded with the declaration". Furthermore, "no modification or amendment of the declaration or bylaws shall be valid unless the same is set forth in an amendment thereto and such amendment is recorded", 765 ILCS 605/17. The content of the bylaws is regulated by 765 ILCS 605/18, which requires that certain minimum information be included: 1) provisions for board meetings, 2) method of electing officers, and 3) method of adopting rules and regulations. See the Act for additional requirements.

The third instrument governing condominium conduct is the set of board-adopted rules and regulations. 765 ILCS 605/18.4 states that the board shall exercise for the association all powers, duties and authority vested in the association, by law or by the condominium instruments, except such duties and authority reserved by law to the members of the association. The powers and duties of the board include the right to adopt rules and regulations covering the details of the operation and use of the property, 765 ILCS 605/18.4.

This article is intended to acquaint the purchaser with basic condominium principles and assist him or her in analyzing the governing documents. Successful condominium living requires an ability to compromise and a willingness to follow the rules established by the community. Purchasers should be aware that numerous restrictions limit their free use of the land. These restrictions may be found in the original governing documents, in amendments enacted thereto, or in board-adopted rules and regulations.

The typical condominium declaration grants the board explicit responsibilities. It does not however, vest total control with the board. Certain acts require unanimous approval, super majority approval or majority approval of the association membership. Conflicts may arise involving issues of board authority, such as: did the board exceed its authority when it specified a certain action or prohibited a certain action? State statutes, condominium declarations, bylaws and board rules must be read carefully to determine which issues lie within the board's exclusive control and which actions require membership approval. Disputes often arise over the enforcement of restrictions set forth in the governing documents. Common disputes involve: age restrictions on ownership, leasing, pets, building improvements and parking spaces. Ambiguities in the governing documents, differing views on common ownership issues and personality conflicts within the community frequently lead to litigation. This article will address the source of the restrictions and their enforceability, and it will suggest appropriate methods of enacting changes to the governing documents.

## **AGE RESTRICTIONS**

As young people moved to their communes in the 60's looking for peace, the elderly moved to senior citizen

housing looking for peace and quiet. Certain areas of the country have become a haven for retirees. There are now several of these senior-oriented condominium complexes in Illinois. Many of these communities have enacted restrictive covenants regarding age, typically limiting the occupancy to persons over fifty-five.

The Act, at 765 ILCS 605/4.1( c) expressly allows age restrictions to be incorporated into the initial declaration provided, however, that in a conversion condominium, no one under the age limit residing in the unit prior to the recordation of the declaration shall be deemed to be in violation of the age restriction. Court decisions in the 1970's and 1980's indicate a willingness to allow associations, whether enacted by board rule or membership vote, to adopt amendments to an originally unrestricted declaration that restricted the age of their occupants provided existing underage occupants were "grandfathered in" (no pun intended). However, passage of the Fair Housing Act of 1968, Title VII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. Sec. 3601 et seq. (the Fair Housing Act) has changed the focus of the litigation. Whereas, previously the issue was: board or membership authority, after the passage of the Fair Housing Act, the issue became whether the association followed the provisions of the federal statute. Therefore, see federal regulations for guidelines.

## **PET RESTRICTIONS**

Pets often result in conflict within a condominium setting. While your neighbor may appreciate your desire for the companionship of a pet, he may be offended by the odors, noise, clean up and maintenance problems caused by them. Courts have clearly held that pets can be prohibited or restricted by provisions in the declaration or bylaws. See *Chateau Village North Condominium Association v. Jordan*, 643 P 2d 791 (Colo. App. 1982) (rule barring all pets appended to recorded bylaws is enforceable). This view arises from the fact that each purchaser has knowledge of the restriction at the time of purchase and has consented to the restriction by closing on the purchase notwithstanding that knowledge.

The issues become thornier, however, when the board subsequently adopts a rule prohibiting or restricting the presence of pets. In *Board of Directors of 175 East Delaware Place Homeowners Association v. Hinojosa* ,

287 Ill App 3d 886, 679 N.E. 2d 40 (1<sup>st</sup> Dist. 1997), the court held that the board had the power to promulgate a reasonable “no dog rule” when the declaration and bylaws were silent on the issue. Scrutinizing the dog ban to determine if it was reasonable in its purpose and application, the court examined the problems pets caused in densely urban settings, areas devoid of recreational areas and grass. Noting that the restriction was uniformly applied, the court upheld the dog ban. Obviously there would have been a different result if the rule had been applied in a discriminatory fashion. The majority of courts have applied the reasonable rule approach and have held that if board rules are reasonable and consistent with the law and enacted in accordance with the bylaws, they will be enforced. The requirement of reasonableness is designed to fetter the discretion of the board. By imposing such a standard, the board is required to enact only rules that are reasonably related to the goal of promoting the health, happiness and peace of mind of the unit owners.

The board authority issue was likewise dealt with in *Meadow Bridge Condominium v. Bosco*, 187 Mich. App. 280, 466 N.W. 2d 303, (Mich. Ct. App. 1991). The bylaws specified that a unit owner could not maintain an animal on the premises without board approval. Thereafter, due to numerous complaints, the board adopted a rule prohibiting new dogs. The question before the court was whether the ban constituted a board rule or an amendment to the bylaws. Amendments change existing bylaws and must be voted on by unit membership (generally 2/3); whereas rules which implement or manage existing bylaws have been found to be appropriate exercises of board authority requiring no membership vote. Characterizing the board decision as the management of a restriction contained in the bylaws, the court held that the regulation passed by the board was a proper exercise of board authority and was therefore valid.

Many courts, however, draw a distinction between properly adopted rules enacted by representative boards and restrictions set forth in the original recorded condominium documents. In *Natore Nahrstedt v. Lakeside Village Condominium*, 8 Cal. 4th 361, 878 P 2d 1275, 33 Cal. Rptr. 2d 63 (Sup. Ct Calif. 1994), the court reviewed a challenge made by a cat owner to vacate the pet prohibition contained in the recorded bylaws. The court cited the principle that restrictions in the declaration are enforceable equitable servitudes which are binding on all

living within the development. They are deemed enforceable unless the harm caused by the restriction is so disproportionate to the benefit produced, that the restriction ought not be enforced. The general rule in applying this principle is that use restrictions appearing in the original documents are entitled to great deference and should be insulated from attack except on constitutional or public policy grounds.

In contrast with the more deferential standard of review afforded to restrictions contained in the original recorded documents, some courts have concluded the more restrictive reasonableness standard should be applied in cases involving amendments to the bylaws. An access case, *Ridgely Condominium Association Inc v. Smyrnioudis*, 105 Md. App. 404, 660 A. 2d 942, (Ct of Sp App Md. 1995) (there is no pet case on point) held that the more restrictive standard is appropriate because owners did not have notice of the restrictions when they purchased their units. In applying the reasonableness test, the court reviewed whether the bylaw amendment treated all owners equally and whether its purpose was properly related to the health, happiness and enjoyment of the unit owners. The court struck down the bylaw amendment because it had a discriminatory impact on certain unit owners. The court emphasized that the deferential standard of review is particularly inappropriate when the use restriction has a discriminatory impact.

It appears that while there is a considerable amount of pet litigation, there is arguably no property interest to be protected. Thus, courts seem predisposed to enforce reasonable pet restrictions when the declaration and bylaws are silent on the issue, regardless of whether the restriction was enacted by a membership vote or board resolution. One could say that if a pet owner wants the court to enforce his right to keep a pet, he is barking up the wrong tree. There is just one possibility of a different outcome. Courts are likely to view amendments as discriminatory when they affect pets residing on the premises before the amendment is enacted; thus, new no-pet restrictions may be unenforceable unless the amendment or rule makes an exception for such existing pets to remain under a “grandfather provision”. However, it should be remembered that people become very attached to their pets and may be willing to engage in protracted litigation to keep their four-legged companions. Associations therefore should proceed very cautiously when adopting or enforcing pet restrictions.

## LEASING RESTRICTIONS

The ability to lease a residential unit is an important economic right. In recreational areas, the owner may purchase his unit specifically with the leasing option in mind, knowing that the rental income will offset the cost of this second home. Or the unit owner may be an urban investor, purchasing multiple units for investment and rental income. On the other hand, resident owners may resent short-term tenants who they feel do not take proper care of the facilities. Resident owners have a greater tendency to participate in the association affairs and therefore have greater influence on decisions, such as adopting restrictions on leasing. Court opinions in dicta have stated that leasing restrictions, whether passed by board vote or membership vote, may be enforceable (see Apple II below). However, I have found no appellate cases addressing the enforceability of board-enacted leasing restrictions when the governing documents were silent. The thrust of litigation involves membership amendments to the governing documents. The board authority cases I have reviewed all involved board management of restrictions found in the governing documents. There is no clear rule, therefore on the enforceability of board-enacted leasing prohibitions when the governing documents are silent. Clearly, however, if the original governing documents specifically allowed owners to rent their units, a leasing restriction enacted thereafter, would only be enforceable if it were passed by membership vote.

An Ohio court, in *Worthinglen Condominium Unit Owners Association v. Brown*, 57 Ohio App. 3d 73, 566 N.E. 2d 1275, (Ct of App. Ohio 1989), held that the validity of condominium restrictions would be measured by whether the rule was reasonable under the surrounding circumstances. If the rule was unreasonable, arbitrary or capricious, it was invalid. The court concluded that an amendment, enacted by a membership vote and prohibiting leasing of units, was not per se unenforceable against an owner who purchased the unit prior to the amendment. The court said to determine the reasonableness of condominium amendments, the court must weigh whether the restriction: 1) promoted the safety and enjoyment of usage of the complex 2) was nondiscriminatory and even-handedly applied 3) was passed in good faith for the common welfare of the owners 4) did not create a hardship on the owners and 5) was reasonably implemented. Thus, the Ohio court

imposed a duty to evaluate the reasonableness of amendments on a case by case basis.

*Apple II Condominium Association v. Worth Bank & Trust Co.*, 277 Ill. App.3d 345, 659 N.E. 2d 93, 213 Ill. Dec 463 (1<sup>st</sup> Dist. 1995), proposed the same result when evaluating rules enacted by the Board. The court there, however, concluded that reasonableness was not the appropriate test for evaluating amendments to the governing documents enacted by membership vote. While declining to make a blanket pronouncement approving or condemning leasing restrictions, the court looked outside the state and concluded that a better reasoned approach was employed in *Hidden Harbour Estates v. Basso*, 393 So 2d 637. In that case, the Florida Appellate Court recognized two categories of restrictions. Category One restrictions, those found in the declaration, are presumed valid and will not be invalidated unless they are wholly arbitrary in their application, violate a public policy or violate a fundamental constitutional right. Category Two involves restrictions enacted by the board. These restrictions will be upheld by the courts if they are found to promote the health, happiness and peace of mind of the unit owners. The Illinois court in *Apple II*, reiterated support of restrictions passed by the membership ( 2/3 vote here, but see documents governing your association) and concluded that membership voted amendments should be treated as Category One restrictions and elevated to the same high level of deference. Clarifying the approach to Category Two restrictions, the court stated restrictions passed by board vote alone will be upheld only if the board can “affirmatively” show that the rule is reasonable in its purpose and application. Since the leasing prohibition was enacted by a 2/3 membership vote, it was valid and enforceable against all owners regardless of when they purchased their units. Most courts have held similarly. Obviously, in jurisdictions following this bifurcated approach, petitioners will find it easier to invalidate leasing restrictions enacted by board rule than to avoid those passed by unit membership.

## COMMON ELEMENTS: USES, IMPROVEMENTS AND INTRUSIONS

Condominium declarations generally refer to two kinds of common elements: general common elements and limited common elements. Limited common elements (appurtenant balconies, patios, storage lockers and

parking spaces) are owned in common, but are designated in the declaration as reserved for the use of a certain unit. General common elements are all the nonexclusive use portions of the property, shared and owned by all. Condominium statutes typically provide that each owner owns the percentage of the common elements set forth for that unit in the declaration governing his complex, 765 ILCS 605/6.

The declaration vests control over management of the common elements (general and limited common elements) with the board. 765 ILCS 605/18.4(a). Most condominium declarations vest architectural control over the common elements with the board of directors. The board is given authority to preserve the symmetry, beauty and general building scheme for the benefit of the whole community. In furtherance of this goal, most bylaws prohibit the painting of outside doors, shutters etc. without prior board approval. Unit owners are often frustrated by their inability to freely make changes to the outside of their unit. They are then further frustrated by the exasperating job of interpreting the governing documents to determine whether the board action or prohibition was within its authority or whether a membership vote is required to make changes in the physical improvements to the property.

The following is a brief review of three main areas of common element disputes: 1) access driveways 2) balconies and 3) parking spaces. It is interesting to note the change in approach used by the courts with respect to this type of use restriction. Some courts continue to apply the reasonable test, described heretofore, while the majority of jurisdictions focus solely on the language of the applicable state statutes and the governing documents.

## **DRIVEWAYS**

Driveways are general common elements. Disputes arise when a unit owner's access is impinged upon or limited by the granting of easements over the common driveway. Some courts have held that granting a non-exclusive easement over the common elements does not constitute a taking, and thus does not require unanimous consent. In *Schaumburg State Bank v. Bank of Wheaton*, 197 Ill. App. 3d 713, 555 N.E. 2d 48, 144 Ill Dec. 151 (2d Dist. 1990), the board recommended that the membership grant a reciprocal non-exclusive easement over part of the

common area to an adjoining landowner. Concurrently, the adjoining owner granted an easement over his land for the benefit of the complex. The grants jointly created greater physical access to a major road. Seven of the 8 unit owners approved the easement grant. The court reasoned that if the easement grant to a third party were an exclusive use easement, each owner would be deprived of a portion of the common element to which he previously had access, this type of action would require unanimous consent. However, since the adjoining owner did not receive an exclusive easement, the unit owners here could still utilize the common elements in the same fashion that they could have before the easement was granted; their ownership rights were not diminished. Therefore, the court held, the amendment was properly enacted by membership vote. Clearly, a different result would have occurred had the association granted an exclusive use and access right in favor of an individual unit owner, or in this case, the adjoining landowner. That type of action would have required unanimous approval of all owners. See 765 ILCS 605/4(e).

## **ENCLOSURE OF THE BALCONY**

In 1981, the Illinois Appellate Court upheld the construction of an improvement onto a limited common element by the owner entitled to that limited common element. In *Parillo v. 1300 Lake Shore Drive Condominium*, 103 Ill. App.3d 810, 431 N.E. 2d 1221, 59 Ill. Dec. 464 (1<sup>st</sup> Dist. 1981), the plaintiff asked board permission to turn his terrace into a bedroom, but the board refused. Litigation ensued and on appeal the court reasoned that since the plaintiff already possessed an exclusive right to use the terrace, the rights in the common elements available to the other unit owners would not be reduced by the construction of a bedroom. It is interesting to note, however, that the board failed to raise an obvious issue : the loss of their right to architectural control. Architectural control was the fundamental issue in *Cohen v. Riverside Park Place Condominium*, 123 Mich. App. 743, 333 N.W. 2d 574, (Ct of App. Mich. 1983). There the court granted an injunction prohibiting the plaintiff from enclosing his balcony (a limited common element) without board approval. Likewise, in *Sterling Village Condominium v. Breitenbach*, 251 So. 2d 685, (Fla. App. 1971), the plaintiff was prohibited from installing glass jalousies in place of wire screening on two balconies. The court noted that board architectural control extends to changes of:

function, use and appearance of the building. It is unclear from reading the Parillo opinion why this issue was not raised.

### **EXPANSION OF THE BALCONY**

Note however how protective the courts are when the physical improvement of one unit owner restrains others from unfettered use of the common elements. In *Carney v. Donley*, 261 Ill App 3d 1002, 633 N.E. 2d 1015, 199 Ill. Dec 219 (2d Dist. 1994), a unit owner proposed to extend the balconies outside his unit onto the common elements. Following a  $\frac{3}{4}$  vote by the membership, the board approved the action and the balconies were enlarged. The association relied on language in the declaration authorizing the board to approve alterations or improvements onto the common elements. However, the court found that the relevant section of the declaration necessitated unanimous approval whenever the board granted exclusive use over some part of the common elements. The court held that the plaintiff's ownership rights were diminished in that the erection of the balcony extension precluded the plaintiff from using a portion of the common area to which he previously had access. The court required the balconies be removed and the property be returned to its original condition. This approach is called the "equal access to common elements" rule and is cited frequently in driveway, balcony and parking right cases.

Likewise in result, *Posey v. Leavitt*, 229 Cal App.3d 1236, 280 Cal Rptr.568, (Ct of App. Cal. 1991) which held that a deck expansion was an encroachment onto the common element that impaired the easement rights of other owners over the common areas and therefore required the consent of all homeowners. The deck was an obstruction to the free use of the common area and was found to be a nuisance.

Similarly, see *Kaplan v. Boudreaux*, 410 Mass. 435, 573 N.E.2d 495, (S. Ct. Mass, 1991) in which a  $\frac{3}{4}$  membership vote amended bylaws granting one unit owner a patio over the common elements. The Massachusetts court struck down the bylaw. The court reasoned that a conversion of the general common elements to exclusive use of one owner constituted "a taking" of the other owners property without authority; the court noted that this action is qualitatively different from amending generalized use restrictions in which a reasonable

restriction or regulation is imposed on all owners. The granting of exclusive use to one unit owner is sufficient to change the relative interest of the unit owners in the common area. This percentage of undivided interest in the common elements cannot be altered without the consent of all unit owners. But, see *Lake Barrington Shores Condominium Association v. May*, 533 N.E. 2d 814, in which the board was denied a mandatory injunction requiring the unit owner to remove his deck as expanded. It is questionable however, how much emphasis this ruling should bear on future cases. The evidence showed that other owners had previously expanded their decks in the same manner as the defendant. Thus it appears that the court was possibly trying to prohibit the board from singling out this owner for different treatment, perhaps applying a ratification, laches, estoppel or other equitable principle; however, that sentiment is not specifically spelled out in the case.

In light of these cases, the prevalent view appears to be that the declaration creates a real property interest in the common elements that shall not be diminished without unanimous approval of the unit owners. See also 765 ILCS 605/4(e).

### **PARKING SPACES**

Similarly, the courts are quite protective of a unit owner's interest in common elements parking rights. Generally, these cases involve the power of the board to regulate parking versus the unit owner's expectation of parking rights as they existed when the owner purchased his unit. Facts and circumstances may change after purchase, and the board may be prompted to enact regulations involving the reassignment of spaces. Examples include accommodation for the handicapped or remediation of unsafe conditions. Litigation results when an owner is forced to move to a different space or pay higher parking fees for the right to park.

In *Sawko v. Dominican Plaza One Condominium Association*, 218 Ill. App 3d 521, 578 N.E.2d 621, 161 Ill. Dec 263, (2d Dist. Ill.) a unit owner filed suit after the board passed a regulation assigning some spaces in the parking garage, which previously had been common area. This regulation deprived the plaintiff of his right of non-exclusive parking. The Court, relying on the same analysis established in *Schaumburg State Bank v. Bank of Wheaton*, held that the plaintiff's property right had been

diluted by taking a non-exclusive area and assigning it for the exclusive benefit of others. That action, the court said, required unanimous consent. Thus, the general rule in Illinois is: unanimous approval by the membership must be obtained before the board can assign individual spaces in what was originally a non-exclusive common element parking area.

Large high rises may face the additional problem of too many units and too few parking spaces. Boards wrestling with this issue have on occasion enacted regulations giving preferential treatment to one group of owners. *Lyman v. Boonin*, 397 Pa. Super. 543, 580 A.2d 765 (Pa. Super. Ct. 1990) involved a complex that faced such a parking shortage. To alleviate the problem, the board enacted a rule giving preferential treatment to resident owners. Thereafter, non-resident owners commenced suit after they experienced difficulties securing a tenant for their unit because parking privileges could not be provided. The Court emphasized that all unit owners have an undivided interest in the common parking facilities and that associations do not have the authority to expropriate the property interest of some, for the benefit of others. However, under these facts, when it is not possible for all owners to be primary users of the property held as a common element, it is reasonable for the board to allocate use based on residency, provided, the owners that are deprived of their parking rights receive economic compensation for their loss.

*Thanoaoulis v. Winston Towers*, 100 N.J. 650, 542 A.2d 900, (S. Ct. N.J. 1988) involved a complex that had plentiful parking. Nonetheless, the board enacted a rule requiring a higher fee schedule for non-resident owners. The court explicitly rejected the standard of review used in other restriction cases (i.e. reasonableness). Rather, the court's analysis focused on the property rights guaranteed by state statute and the declaration. That is to say, the plaintiff purchased a property interest which included a proportionate undivided interest in parking facilities and that included within this right was the right to rent the parking space for economic benefit. That property interest was permanent and inseparable from the unit and could be diminished or altered only with the unanimous consent of all owners. In reviewing these facts, the court said the board rule had the effect of confiscating a portion of the property the unit owner purchased, thereby denying him the economic value of a portion of his unit. Thus, the court struck down the board regulation charging higher

parking fees for non-resident owners, emphasizing that the board's action violated the "equal interest in common element" principle noted above.

## CONCLUSION

In conclusion, purchasers of condominiums should realize that the governing structure of the community in existence at time of purchase may not continue indefinitely; changes in the declaration may take the form of restrictions on the owner's rights of use. How these changes may be created, whether enacted by board rule or requiring membership vote, depends on a precise reading of the state statutes and governing documents. I hope I have assisted you in analyzing that complicated body of materials and have provided you with some guidelines for determining how certain restrictions should be enacted. Keep in mind, however, that this article should only be used as a guide and that the definitive answers lie in your governing documents, state statutes and case law.

We welcome your topic suggestions for future TITLE ISSUES. If you are interested in submitting your ideas, please e-mail us at [glewiczw@ctt.com](mailto:glewiczw@ctt.com) or complete this form and return to:



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