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Leasing Restrictions

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Often investors will purchase a dwelling purely for the purpose of renting the dwelling. The common understanding among owners is that a high number of rental dwellings and the subsequent reduction in the number of owner-occupied dwellings within a community may adversely affect resale values, the maintenance of the property and the availability of certain mortgages. In response to these concerns, community association boards routinely ask us what can be done to limit the number of dwellings in their community that may be leased.

After the real estate boom from 2000-2005, we have seen an increase in the number of community associations that are asking our attorneys to draft leasing restrictions for their community. Before any association implements any leasing restrictions there are a few key issues that an association's Board and residents should consider.

First, the association's Board should discuss with legal counsel whether the association's governing documents allow for the implementation of leasing restrictions. In most cases, the implementation of a leasing restriction requires the association membership to approve an amendment to the association's founding documents (i.e. its Declaration or Bylaws).

Second, the association's Board should discuss with legal counsel the court decisions (largely from other jurisdictions) that have invalidated leasing restrictions on the basis that they are unduly burdensome or unfair to certain owners.

Specifically, the common argument against leasing restrictions is that they restrain an owner's right to convey the title or possession of their dwelling. Consequently, most leasing restrictions must include economic hardship exceptions to ensure that owners who can establish that they are harmed by the application of the leasing restriction may be granted a limited exception to allow them to lease their dwelling.

Third, the association's Board should discuss with legal counsel whether the implementation of a leasing restriction may give rise to a claim under the Fair Housing Act. Recent cases (from other jurisdictions) have alleged that leasing restrictions are discriminatory because they limit the pool of rental housing available to certain protected classes. Specifically, the lawsuits allege that minorities, single mothers, and handicapped individuals are statistically more likely to rent rather than own housing. Consequently, the lawsuits allege that association imposed leasing restrictions limit the housing available to these individuals and as such the restriction may be discriminatory in its impact upon certain minorities, single mothers and handicapped individuals.

Fourth, the Board should consider the actual problem that it seeks to address. In many instances where our attorneys have been asked to draft leasing restrictions, we have been able to work with our clients to develop a less restrictive means to address and resolve the problems caused by certain tenants and investor-

owners. For instance, leasing policies that require all owners as well as their tenants to abide by the association's rules and regulations and that hold owners responsible for the costs of any enforcement action necessitated by their tenants have worked for some of our association clients to alleviate problems with tenant misconduct.

Fifth, the mortgage lenders that previously required community associations maintain certain levels of owner-occupancy to be eligible for certain mortgage financing (i.e. the Secretary for Veterans Affairs, Fannie Mae, Freddie Mac, etc.) now allow 50% of the dwellings in a particular community association to be rented before the lender will consider removing the community from its list of communities approved for certain mortgage financing.

In closing, the process of adopting and implementing leasing restrictions is often difficult for many associations to accomplish. Moreover, there are often other, less restrictive, ways for association boards to address tenant issues without the necessity of limiting those units available for lease. If your Board is interested in reviewing the possibility of adopting a leasing restriction or other restriction, please contact any one of our community association attorneys.