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## RENTALS IN HOA'S THE NUTS AND BOLTS OF RESTRICTING RENTALS IN HOMEOWNER ASSOCIATIONS (HOAS)

Restricting an owner's ability to rent his property in a HOA is a topic of much discussion and debate. The rationale behind a HOA's ability to restrict rental activity within an HOA is rooted in the ability to amend the HOA's restrictive covenants to add further restrictions binding the property.

When an owner purchases a lot within an HOA, the owner is deemed to have been placed on notice that the HOA is a deed-restricted community subject to restrictive covenants, so long as restrictive covenants have been duly recorded with the county recorder in which the lot is located.

The vast majority of restrictive covenants contain an amendment provision, which would allow owners within the HOA to delete, alter, or add restrictive covenants. If restrictive covenants contain provisions that allow owners to delete, alter or add restrictive covenants, all current and future owners will be bound by any deletion, alteration or addition to the restrictive covenants, so long as the provisions of the amendment provision are met and the amendment is uniformly applied to all owners.

If a HOA's CC&Rs have a provision that allows them to be amended to add further restrictions on the property, then this fact places all current and future owners on notice that the CC&Rs may change, subsequent to his purchase of a lot, to add or remove restrictions placed on his property and as such, owners have no argument concerning a valid rental restriction imposed through a valid amendment to the CC&Rs. This sentiment was echoed in Duffy v. Sunburst Farms East Mutual Agricultural and Water Company, 124 Ariz. 413, 604 P.2d 1124 (1979) where the Court held that the members of an HOA had the right to amend their documents and all owners were bound by the amendment.

The above sentiment has been echoed in courts throughout the country. Said courts have uniformly held that so long as the restrictive covenants were properly amended, community HOAs may enact restrictions that effectively bar the ability of an owner to lease his lot, or place other restrictions on property. Please find below a list of cases that support the

HOA's ability to restrict rental activity within the HOA and other restrictions on activities on Lots in the HOA through a valid amendment to the CC&Rs:

1. *Woodside Village Condominium HOA, Inc. v. Jahren*, 806 So.2d 452 (Fla. 2002).

The Florida Supreme Court held that condominium owners were bound by amendment to declaration that restricted leasing of units.

2. *Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4<sup>th</sup> DCA 1976).

Florida appellate court upheld an amendment to the declaration of condominium prohibiting leasing of any units, except for limited periods in cases of hardship.

3. *Flagler Federal Savings & Loan Ass'n v. Crestview Towers Condominium Ass'n*, 595 So.2d 198 (Fla. 3d DCA 1992).

Florida appellate court upheld declaration amendment prohibiting leasing as applied to an owner who acquired title to a unit before the amendment was adopted. The court reasoned that the complaining owner had notice of the recorded declaration's amendment provision and, thus, was bound by subsequent amendment.

4. *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695, 700 (1978).

California appellate court held duly adopted amendment restricting occupancy binding upon unit owners who purchased their units before the amendment was effective.

5. *Four Brothers Homes at Heartland Condominium II, et. al., v. Gerbino*, 691 N.Y.S.2d 114 (1999)

Restriction establishing total prohibition on leasing is enforceable.

6. *Apple II Condominium Ass'n v. Worth Bank & Trust Co.*, 277 Ill.App.3d 345, 213 Ill.Dec. 463, 659 N.E.2d 93 (1995).

Illinois appellate court upheld validity of amendment to the declaration, which restricted leasing of units to no more than once during ownership with no lease exceeding twelve months as binding upon unit owners who purchased their units before the amendment was effective.

The appellate court further held that as purchasers of the condominium property, owners are charged with knowledge that the declaration governing their unit is subject to amendment.

7. *Shorewood West Condominium Ass'n v. Sadri*, 140 Wash.2d 47, 992 P.2d. 1008, 1012 (2000).

Washington Supreme Court held duly adopted amendment restricting leasing in a condominium complex. It is binding upon unit owners who purchased their units before the amendment was effective.

**Please note, however, that the ability of Condominium HOAs to restrict rental activity may be curtailed. Arizona Revised Statutes (A.R.S.) §33-1227 states:**

**Except to the extent expressly permitted or required by other provisions of this chapter, an amendment shall not create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the allocated interests of a unit or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.**

**Therefore, if a Condominium's CC&Rs currently allow a unit to be rented, then included in the allowed "uses" of the unit is rental activity. As such, any change to that "use" may be subject to the restrictions of A.R.S. 33-1227(D) requiring the approval of 100% of the unit owners to amend the CC&Rs to remove the ability to rent a unit (please note that this applies to Condominium Association subject to the Condominium Act meaning, the Condominium was established after January 1, 1986).**

When considering how to best restrict leasing in a HOA, the most important aspect concerns what to do with those Lots that are currently being leased. One option is to "grandfather" any existing lease agreement while stating that once the lease agreement expires or the Lot is sold, the Lot can no longer be leased. Such a provision contained in the HOA's CC&Rs would read:

**Leasing Restrictions: After the recording of this Amendment, no more than twenty percent (20%) (or any other percentage desired by the Board) of the Lots of the HOA may be leased at any given time to a Third Party. For purposes of this provision, "Third Party" shall be defined as any person who is not an Owner as that term is defined in the Declaration. Notwithstanding the above, any lease or sublease or tenancy arrangement in existence on the date this Amendment to the Declaration of Covenants, Conditions and Restrictions is recorded may continue until its expiration or the Lot is sold to a Third Party, whichever comes first. Any Lot Owner engaged in leasing or subleasing activity must, upon the sale or conveyance of said Lot, notify any potential buyer or person**

**taking title that no more than twenty percent (20%) (or any other percentage desired by the Board) of the Lots of the HOA may be leased at any given time to a Third Party.**

Keep in mind, however, that the grandfathered Lots must count toward the twenty percent (20%) (or any other percentage desired by the Board) limit on Lot rentals. Thus, if the HOA currently has more than twenty percent of the Lots rented, no more Lots may be rented until the grandfathered Lots are no longer being rented.

Another approach is to allow the Owner who is currently leasing his Lot to continue to Lease the Lot, regardless of the terms of the lease agreement, until the Lot is sold. Once the Lot is sold, the Lot may no longer be leased. Such a provision would read:

**Lease Restrictions: After the recording of this Amendment, no Lot may be leased at any given time to a Third Party. Any Lot Owner engaged in leasing or subleasing activities as of the date of this Amendment shall be allowed to continue leasing or subleasing activities until said Lot is sold or conveyed to a Third Party. Any Lot Owner engaged in leasing or subleasing activity must, upon the sale or conveyance of said Lot, notify any potential buyer or person taking title that no Lot within the HOA may be leased at any given time to a Third Party. For purposes of this provision, "Third Party" shall be defined as any Person who is not an Owner as that term is defined in the Declaration.**

Many HOAs, after adopting a rental restriction amendment, become mired in the “how do we enforce this?” problem. It is never easy. Some HOAs go further and amend the CC&Rs to require the few Owners who are still capable of leasing to provide copies of leases, file tenant registration forms with the HOA and provide security deposits for leased Lots. Such an additional provision to the above-proposed sections might read as follows:

**All lease agreements must be submitted to the HOA prior to execution by the Owner. Owners shall also submit a “tenant registration form” to the HOA for each existing tenant/lease, in a form prepared for the HOA by the Board of Directors, no less than thirty (30) days prior to executing or extending a lease. The HOA may charge a reasonable review and processing fee concerning the above. Additionally, any Owner wishing to lease his Lot must submit to the HOA a security deposit in an amount to be determined by the Board of Directors (the "Security Deposit"). The Security Deposit shall be debited should any tenant of the Owner or the Owner fail to abide by the provisions of this Declaration.**

**Additionally, if an Owner fails to provide the “tenant registration form” to the HOA as outlined above, the HOA may impose reasonable monetary penalties as determined by the Board, in addition to other remedies available under the Declaration and Arizona law. The HOA may also suspend an Owner's ability**

**to Lease his Lot for a period of twelve (12) months. This rental restriction provision takes precedence over any inconsistent language in the Articles or Bylaws or Rules of the HOA.**

Also, the HOA may limit the term of any lease to either nine or twelve months.

Additionally, the HOA may want to place in any rental restriction amendment a hardship clause. This would allow an Owner to petition the Board to allow the Owner to rent the Lot in the case of hardship. Such a clause would read:

**Owners may apply for a hearing before the Board for temporary or special variances in case of hardship. Permission to lease will be granted in the sole discretion of the Board of Directors.**

Finally, below please see a sample of both amendments, in final combined form.

**OPTION 1 – PERCENTAGE OF RENTALS:**

**No more than twenty percent (20%) (or any other percentage desired by the Board) of the Lots of the HOA may be leased at any given time to a Third Party. Any Owner engaged in leasing or subleasing activities as of the date of this Amendment shall be allowed to continue leasing or subleasing activities until said Lot is sold or conveyed to a Third Party. Any Lot Owner engaged in leasing or subleasing activity must, upon the sale or conveyance of said Lot, notify any potential buyer or person taking title that no more than twenty percent (20%) (or any other percentage desired by the Board) of the Lots of the HOA may be leased at any given time to a Third Party. For the purpose of this provision, “Third Party” shall be defined as any person who is not an Owner as that term is defined in the Declaration.**

**All lease agreements must be submitted to the HOA prior to execution by the Owner. Owners shall also submit a “tenant registration form” to the HOA for each existing tenant/lease, in a form prepared for the HOA by the Board of Directors, no less than thirty (30) days prior to executing or extending a lease. The HOA may charge a reasonable review and processing fee concerning the above. Additionally, any Owner wishing to lease his Lot must submit to the HOA a security deposit in an amount to be determined by the Board of Directors (the "Security Deposit"). The Security Deposit shall be debited should any tenant of the Owner or the Owner fail to abide by the provisions of this Declaration.**

Additionally, if an Owner fails to provide the “tenant registration form” to the HOA as outlined above, the HOA may impose reasonable monetary penalties as determined by the Board, in addition to other remedies available under the Declaration and Arizona law. The HOA may also suspend an Owner's ability to Lease his Lot for a period of twelve (12) months. This rental restriction provision takes precedence over any inconsistent language in the Articles or Bylaws or Rules of the HOA.

No owner may lease a Lot for fewer than or greater than twelve (12) months. (This can be changed to a term determined by the Board)

Owners may apply for a hearing before the Board for temporary or special variances in case of hardship. Permission to lease will be granted at the sole discretion of the Board of Directors.

#### **OPTION TWO – ELIMINATION OF RENTALS**

No Lot within the HOA may be leased at any given time to a Third Party. Any Owner engaged in leasing or subleasing activities as of the date of this Amendment shall be allowed to continue leasing or subleasing activities until said Lot is sold or conveyed to a Third Party. Any Lot Owner engaged in leasing or subleasing activity must, upon the sale or conveyance of said Lot, notify any potential buyer or person taking title that no Lot within the HOA may be leased at any given time to a Third Party. For the purpose of this provision, “Third Party” shall be defined as any person who is not an Owner as that term is defined in the Declaration.

All lease agreements must be submitted to the HOA. Owners shall also submit a “tenant registration form” to the HOA for each existing tenant/lease, in a form prepared for the HOA by the Board of Directors, no less than thirty (30) days prior to executing or extending a lease. The HOA may charge a reasonable review and processing fee concerning the above. Additionally, any Owner currently engaging in leasing activity must submit to the HOA a security deposit in an amount to be determined by the Board of Directors (the "Security Deposit"). The Security Deposit shall be debited should any tenant of the Owner or the Owner fail to abide by the provisions of this Declaration.

Additionally, if an Owner fails to provide the “tenant registration form” to the HOA as outlined above, the HOA may impose reasonable monetary penalties as determined by the Board, in addition to other remedies available under the Declaration and Arizona law. The HOA may also suspend an Owner's ability to Lease his Lot for a period

**of twelve (12) months. This rental restriction provision takes precedence over any inconsistent language in the Articles or Bylaws or Rules of the HOA.**

**No owner may lease a Lot for fewer than or greater than twelve (12) months. (This can be changed to a term determined by the Board)**

**Owners may apply for a hearing before the Board for temporary or special variances in case of hardship. Permission to lease will be granted at the sole discretion of the Board of Directors.**