

Court of Appeals No. 42982-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ACADEMY SQUARE CONDOMINIUM ASSOCIATION

Appellant,

v.

KEITH KAWAWAKI and NICOLE KAWAWAKI

Respondents

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a case of first impression. The issue is whether the Academy Square Condominium Board had authority to create a House Rule to enforce a rental restriction contained in the Declaration of Condominium.

Academy Square Condominiums is a 36 unit development in Vancouver, Washington. The completion and marketing of this condominium development coincided with the downturn in the real estate market. The developer created a marketing tool to jump-start the sale of units by allowing 25% of the condominiums to be sold as rental units on a first come, first served basis. The developer included the 25% rental cap so that financing was not jeopardized for prospective buyers. Lenders in the condominium market seem to prefer to make loans for owner-occupied units.

Respondents Keith and Nichole Kawawaki purchased their condo unit after 9 of the 36 units (25%) had already been sold and designated as rental units at Academy Square. After the purchase of their unit, Kawawakis immediately went onto the waiting list requesting a change of status for their unit from owner-occupied to a rental unit.

Within two years of their purchase, the Kawawakis began renting out the unit without Board approval and even though the 25% rental cap had already been reached at Academy Square.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering summary judgment in favor of respondents Kawawaki when it ruled that a unit designated as a rental under the 25% cap lost its rental status after it was transferred or sold.

A. Issues Pertaining to Assignments of Error

1. Whether the Board had authority under the Declaration to create a House Rule to enforce the 25% rental restriction cap at Academy Square Condominiums.
2. Whether the House Rule was reasonable under Washington authority.

III. STATEMENT OF THE CASE

A. Procedural Background

Simply put, the trial court ruled that a condominium unit at Academy Square lost its "rental status" upon sale. (CP 24). The trial court ruled that the Kawawakis could rent out their unit (immediately) because they were next on the waiting list. The court reasoned that during the time the Kawawakis had been on the waiting list, other units originally approved under the 25% rental cap had been sold. The trial court also ruled that Academy Square was required to release the notice of default recorded against the Kawawaki unit for violation of the rental restriction. The Kawawakis were awarded \$3,500 in attorneys fees against Academy Square. The entire ruling and judgment ordered by the trial court was stayed pending this appeal.

Academy Square and the Kawawakis both cited *Shorewood West Condo Assoc. v. Sadri*, 140 Wash.2d 47, 992 P.2d 1008 (2000), as the only case on point at the hearing on summary judgment. (CP 6, 15). Academy Square argued that *Shorewood* made it clear that Academy Square's Board could adopt House Rules to enforce the rental restrictions as long as the rules did not conflict with the recorded Declaration or the condominium statute. (CP 15). Academy Square argued that the trial court was required to uphold a use restriction contained in the recorded Declaration because the buyer was put on notice of

the restriction before purchase. (CP 14, 15). The Kawawakis argued that the rental units within the 25% cap should lose their status when sold and that they (Kawawakis) should be allowed as the next person on the waiting list to convert their unit to a rental unit (CP 5, 6). The Kawawakis argued that the Board did not have authority to adopt the House Rule implementing a procedure to enforce the rental restriction. (CP 5, 6). The Kawawakis also argued that the details of how the rental restriction would be enforced were not made clear to them when they purchased the unit. (CP 5.) Academy Square rebutted by arguing that the Kawawakis subjective belief about how the rental restriction would be administered is not relevant. (CP. 14).

B. Factual Background

The Condominium Declaration was recorded by the developer on June 8, 2005¹. (CP 14, 15). Section 13 of the original Declaration contained a 25% cap on rental units, acquired by purchasers on a first come, first served basis². (CP 14, 15). Section 12 of the original Declaration of Condominium empowered the Board to “pass, amend and revoke *detailed* reasonable administrative rules and regulations, or House Rules, necessary or convenient to insure compliance with the general guidelines of the use restrictions in Article 13³. (CP 14, 15).

The developer marketed and sold a limited number of rental units to create an incentive for purchasers to buy in first and acquire an investment property. After the initial 25% cap on rental units was reach (9 out of 36 units), the developer required other purchasers who wanted to convert from owner-occupied to rental status to go on a

¹ Declaration of Diane Sines, Ex 3.

² Appendix 1.

³ Appendix 1.

waiting list first come, first served. (CP 14).

On February 5, 2008, the Board at Academy Square recorded a House Rule implementing a procedure to enforce the rental restriction contained in Section 13 of the Declaration⁴. (CP 14). The House Rule required the owner to notify the Board when a unit was sold or transferred.⁵ (CP 14). If the unit was an approved rental unit and was going to remain a rental unit (not become owner-occupied), the process ended there. If the unit was not an approved rental unit and the owner was requesting to change status from owner-occupied to a rental unit, the owner was required to submit a tenant information sheet⁶. If the proposed tenant was a family member, the process ended there⁷. (CP 14). If the proposed tenant was not a family member and the 25% rental cap had been reached, then the owner would be placed on the waiting list⁸. (CP 14). Once an approved rental unit was sold to someone who intended to occupy the unit (rather than rent it out), the next unit on the waiting list became eligible to convert to a rental unit. (CP 14). The conversion under this procedure (to either a rental or owner-occupied unit) changed the status of a unit permanently, and any future change required the process to start over again.

The Kawawakis purchased 1209 C. St., Unit B at Academy Square on October 26, 2005⁹. (CP 14). The 25% rental cap had already been reached, so the Kawawakis immediately put their name on the waiting list to convert their unit to a rental unit¹⁰. (CP

⁴ Appendix 1.

⁵ Appendix 1.

⁶ Declaration of Diane Sines, Ex. 6

⁷ Family members were not counted against the 25% rental cap. (CP 14).

⁸ Appendix 1.

⁹ Declaration of Diane Sines, Ex. 1.

¹⁰ Declaration of Diane Sines, Ex. 5.

14). In spite of never obtaining approval to rent out their unit, the Kawawakis began renting it out in September 2007¹¹. (CP 14). The Kawawakis received four notices from the Board that they were in violation of the 25% rental cap, but continued to rent out their unit¹². The Board placed a lien against the Kawawakis unit for the continuing violation¹³. (CP 14.)

IV. ARGUMENT

A. Standard of Review

In this case we review an order for summary judgment involving the interpretation of governing documents of a condo association (more specifically a House Rule promulgated by the Board).

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383, 1385 (1994); *Kitsap County v. Smith*, 143 Wn. App. 893, 910, 180 P.3d. 834 (2008). The appellate court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo.

¹¹ RCW 64.34.090 imposes a duty of good faith between parties subject to contracts, including declarations of condominium. RCW 64.34.070 principles of equity apply, i.e. parties asking for equity must do equity (no dirty hands).

¹² Declaration of Diane Sines, Ex. 4, 5, 6, 7.

¹³ Appendix 1; Declaration of Diane Sines, Ex. 9,

Although the reversal of an order granting summary judgment to one party does not necessarily mean that the other party's motion for summary judgment must be granted, that can be an appropriate remedy in a case where the two motions take diametrically opposite positions on the dispositive legal issue, and the material facts are not in dispute. *Weden v. San Juan County*, 135 Wn.2d 678, 710, 958 P.2d 273 (1998); *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 776-777, 27 P.3d 1233 (2001). Both parties in this case acknowledge that the material facts are not in dispute. This case poses a purely legal question, and if the summary judgment in favor of the Kawawakis is reversed, summary judgment should be granted in favor of the Association¹⁴.

B. The Board Had Authority to Create a House Rule to Enforce the Rental Restriction.

1. Board's Authority Under Governing Documents.

The Board of Directors of Academy Square had authority to create a House Rule provided it did not conflict with the Declaration or the condominium statute. RCW 64.34.216 states that the Declaration must contain any restrictions on use, occupancy or alienation of the units¹⁵. Section 13 of the Declaration contained the rental restriction and the 25% cap on authorized rental units¹⁶.

RCW 64.34.304 sets forth the powers of the Association to "adopt and amend bylaws, rules and regulations" that do not conflict with the Declaration. The House Rule adopted by the Board created a mechanism for the Board to be notified when a unit was

¹⁴ Both parties filed counter-summary judgment motions (CP 6, 15).

¹⁵ The recording statute (RCW 65.08.070) ensures that purchasers within condominium communities are put on notice of deed restrictions once a declaration of condominium been recorded.

¹⁶ Appendix 1. (The First Amendment to the Declaration recorded July 14, 2005 contains no relevant change to the issues of this case.)

transferred, and required Board approval for any unit which was not going to be owner-occupied. This procedure allowed the Board to monitor the number of rental units and ensure the 25% rental cap was maintained at Academy Square¹⁷.

The relevant sections for the rental restriction for Academy Square are attached in Appendix "1" (the Declaration, Bylaws and House Rules).

2. The Board's Authority to Create House Rules was Reasonable.

The *Shorewood v. Sadri*, 140 Wash.2d 47, 992 P.2d 1008 (2000), case follows a long line of expanding case law from many other states on use restrictions in deed-restricted communities. Since *Shorewood*, this Court has seen many variations of use restrictions and has deferred to the board's method of enforcement as long as the restriction is authorized by statute or the declaration. *Shorewood* made clear that property rights associated with condominium ownership are subject to the reservation of rights contained in a declaration, including the right to amend. The recording of the declaration puts the buyer on notice of the benefits and the burdens of owning property in a deed-restricted community¹⁸.

In *Shorewood*, Sadri purchased a condo unit governed by a declaration under the Horizontal Property Regimes Act¹⁹. The declaration contained a *use* restriction requiring the units be used for residential purposes only (no commercial, office or industrial use). After Sadri purchased his condo unit, the board of the association passed an amendment to the *bylaws* which added a component to the more general *use* restriction (no

¹⁷ Appendix 1.

¹⁸ RCW 65.08.070

¹⁹ RCW 64.32 et seq.

commercial, office or industrial use contained in the declaration) and prohibited leasing entirely. The court of appeal upheld the board's authority to create a rental restriction under the bylaws. However, the Washington Supreme Court found that RCW 64.32.060 required all use restrictions (including rental) be included the declaration. In other words, a board has authority under the bylaws to make changes to a rental restriction as long as it does not conflict with the declaration. The Shorewood declaration did not restrict leasing, the amendment to the bylaws which restricted leasing was in direct conflict with the declaration. The *Shorewood* Court ruled that the leasing restriction challenged by Sadri required an amendment to the declaration to meet the requirements of the condominium statute.

The *Shorewood* Court included a lengthy analysis which incorporated the reasonableness standard from the appellate court and holdings from many other states on the issue of use restrictions. The Court recognized that a balance must be struck between an owner's rights to rent out a unit versus the possible affects on value and financing when rental restrictions are not in place. It acknowledged that the use of hardship exceptions or "grandfathering" may be necessary when implementing a rental restriction. One of the most quoted statements coming from the *Shorewood* case stated that owners "must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property. *Shorewood*, 140 Wn.2d at 53. Those rights given up by the unit owners are determined by the statute. The condominium statute makes all owners subject to the declaration and bylaws of the association.

Other states have followed in the similar direction. Many jurisdictions apply a "reasonableness" requirement. Rental restrictions in a deed-restricted community are

considered reasonable if they are imposed pursuant to language in an existing declaration and if they are enforced uniformly. To establish a prima facie to enforce a use restriction with condominium property, the plaintiff must first establish the existence and validity of the restriction and notice to the buyer. Generally, restrictions are valid if the imposition and enforcement of the restriction are within the authority of the governing documents (declaration, bylaws or rules & regulations) or the condominium statute and the restriction is reasonable. American Law Institute, *Restatement (Third) of Property: Servitudes* Section 6.13 (2000). Also, notice of the restriction and its alleged violation to the person against whom it is sought to be enforced. American Law Institute, *Restatement (Third) of Property: Servitudes*, Section 7.10 (2000).

While the reasonableness test offers some guidelines for courts to use when reviewing condominium restrictions, if the restriction is contained in the declaration and is in existence prior to the purchase of a condominium unit, the reasonableness test has less relevance. In such a case, it must be remembered that:

“It has long been recognized that persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom ‘is as fundamental to our society as the right to write and to speak without restraint.’ (citing *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 41 O.O.2d 250, 253, 231 N.E.2d 301, 305.) “Government interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts.” (citing *Nottingdale Homeowners’ Assn., Inc. v. Darby* (1987), 33 Ohio St.3d [***8] 32, 36, 514 N.E. 2d 703, 705-06.”

The Bluffs of Wildwood Homeowners’ Assn., Inc. v. Dinkel, 96 Ohio App. 3d 278, 282, 644 N.E.2d 1100, 1103 (12th Dist. Butler County 1994)²⁰. (In *Bluffs of Wildwood Homeowners’ Assn.*, the court found a restriction on parking trucks was enforceable

²⁰ Appendix 2.

because it was in effect when the owner signed the purchase agreement, the owner had read and was verbally advised of the restriction and he entered the condominium agreement knowingly and the restriction had been applied consistently and uniformly.)

“A declaration of condominium is the ‘condominium’s constitution’, it contains broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the condominium’s operation through the rulemaking process. It would be impossible to list all restrictive uses in a declaration of condominium. Parking regulations, limitations on the use of the swimming pool, tennis court and card room [***6] – the list is endless and subject to constant modification. Therefore, we have formulated the appropriate test in this fashion: provided that a board-enacted rule does not contravene either an express provision of the declaration or a right reasonably inferable therefrom, it will be found valid, within the scope of the board’s authority. This test in our view, is fair and functional; it safeguards the rights of unit owners and preserves unfettered the concept of delegated board management.”

Beachwood Villas Condominium v. Poor, 448 So. 2d 1143, 1144, 1984 Fla. App. LEXIS 12619²¹). (In *Beachwood*, the board was challenged by the unit owner after it passed a rule to regulate rental units and occupancy by guests during an owner’s absence. The court found that neither rule had violated the condominium act in Florida, and therefore the board was empowered under the bylaws which stated that, “the Board of Directors may, from time to time, adopt or amend previously adopted rules and regulations governing and restriction the use and maintenance of the condominium units...”)

“...a council of unit owners in a condominium may delegate its power of administration or management to a board of directors which may in turn make *reasonable* rules and regulations concerning conduct, not inconsistent with the Master Deed and Declaration and bylaws, including the regulation or prohibition of pets. The rule in question is reasonable and was adopted properly.” (Emphasis included.)

(*Dulaney Towers Maintenance Corp. v. O’Brey*, 46 Md. App. 464, 471, 418 A.2d 1233, 1238 (1980) where a unit owner challenged a board’s power to enact administrative rules

²¹ Appendix 3.

prohibiting pets *in an individual unit* versus *in the common area*. The unit owner contended that the bylaws contained no use restriction for pets, and therefore pets could not be restricted by adopting an administrative rule. However, the Maryland condominium statute stated that use restrictions were “permissible” in bylaws but the statute did not require that use restrictions were “mandatory” in bylaws.)²²

Courts have even gone as far as holding that use restrictions in the governing documents may be unreasonable to a certain degree and still be valid, unless the person challenging the restriction can show that the restriction is wholly arbitrary in its application, that it violates public policy, or that it abrogates some fundamental constitutional right. The reason stated is that the unit owner had constructive knowledge of the restriction at the time of purchase, and other unit owners may have paid a premium to procure what is seen by some as a beneficial restriction. *Noble v Murphy*, 34 Mass. App. Ct. 452, 453, 612 N.E.2d 266, 270 (1993)²³. In *Noble*, a bylaw restricting pets was challenged along with a daily penalty for the violation. The court found in favor of the association and that the owners had ample notice and opportunity to comply with the bylaw which restricted pets, the rule was administered without discrimination and that the fines were proper within the bylaws.

“A condominium use restriction appearing in originating documents which predate the purchase of individual units may be subject to even more liberal review than if promulgated after units have been individually acquired. The substance of the pet restriction in issue was part of the originating documents of the Weymouthport condominium. The master deed expressly made unit ownership subject to attached rules and regulations that contained the restriction. The 1979 incorporation of the restriction into the by-laws was undertaken primarily to better

²² Appendix 4.

²³ Appendix 5.

accommodate future enforcement. Constructive knowledge of the regulatory scheme of the condominium was chargeable to Murphy and Wilson as of the time they acquired their unit. See *Tosney v. Chelmsford Village Condominium Assn.*, 397 Mass. 683, 688 (1986).

There is sound basis for treating restrictions in the originating documents as being 'clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land [***13] and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. . . . Indeed, a use restriction in [the originating documents] may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.' *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d at 639-640. See also *Natelson, Law of Property Owners Associations* § 4.4.4, at 34 n.17 (1989 & Supp. 1991) (questioning the appropriateness of reasonableness review when the regulation in question was enacted prior to its opponents' acquiring ownership and was known by them at the time of acquisition). Also, unit owners, upon purchase, may pay a premium to procure what they regard as a beneficial restrictive scheme. Note, *Judicial Review of Condominium Rulemaking*, 94 Harv. L. Rev. 647, 653 (1981). Under this formulation, the value of meeting the reasonable expectations of original unit owners and enforcing their right to freely associate by contract with persons of like expectations outweighs the possibility that some owners [***14] may purchase into a condominium regime without actual notice and full understanding of its restrictions. Our appellate decisions appear to recognize the validity of this approach. See *Tosney v. Chelmsford Village Condominium Assn.*, 397 Mass. at 688; *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. Ct. at 533. (developers may impose reasonable restrictions on condominiums under c. 183A "and persons who contemplate acquisition of a condominium unit can choose whether to buy into those restrictions").

(Cited by *Lake v. Woodcreek Homeowners Ass'n.*, 142 Wn. App. 356, 174 P.3d 1224 (2007) and *Shorewood West Condo. Ass'n v. Sadri*, 92 Wn. App. 752, 966 P.2d 372 (1998).)

Courts have also dealt with the argument that rental restrictions are a restraint on alienation. In *Breezy Point Holiday Harbor Lodge - Beachside Apartment Owners'*

Association, Respondent, vs. B.P. Partnership, 531 N.W. 2d 917, 1995 Minn. App.

LEXIS 709 (1995)²⁴, a rental restriction was challenged as a restraint on alienation. The Breezy Court ruled it was not. The Court found that the power of alienation is affected only when an owner cannot convey title in absolute fee and found that restrictions on leasing or renting units affects only use of units, not the right to alienate units. The Court found that the concept of property interests or ownership is separate and distinct from lawful restrictions on the use of property. And, that while owners are entitled to exclusive possession and fee simple absolute ownership for their unit, those rights are subject to the condominium statute or governing documents.

The *Shorewood* case involves the same issue as Academy Square - the Board's authority to enforce rental restrictions. However, the authority relied on by the Academy Board fits squarely within what the *Shorewood* court would have allowed. The Academy Square governing documents were recorded on June 8, 2005 *before* the Kawawakis purchased their condo unit (October 26, 2005). The Kawawakis were put on notice of the 25% rental cap and requirement to go onto a waiting list to convert to a rental unit under the Declaration. And, the both the Declaration and the Bylaws allowed the Board to adopt "detailed" rules implementing all of the use restrictions in the Declaration (including the rental restriction). There were no guaranties when the Kawawakis purchased their unit that it would ever be eligible to be used as a rental unit. The Kawawakis were placed on a waiting list immediately after they purchased the unit because the 25% cap had reached before they purchased. (CP 14).

The House Rule required the transfer of any unit for sale or lease required

²⁴ Appendix 6.

notification to the Board (as is commonly required in community associations with shared and restricted parking areas). Any unit that had already been approved under the 25% rental cap had no further requirement than to notify the Board of the transfer. All requests by unit owners desiring to convert to rental status were reviewed by the Board. If the unit was going to be rented to a relative, the owner was required to deliver a tenant information packet identifying the name of the tenant and relationship to the owner²⁵. (CP 14). If the proposed tenant was not a relative, the unit owner would be put on the waiting list until one of the existing and approved rental units (within the 25% cap) was sold to someone who intended to live in the unit rather than continue to use it as a rental (thereby converting a rental unit to an owner-occupied unit). The procedure adopted by the Board was easy to administer and no more intrusive than necessary to meet the stated objectives under the rental restriction.

C. Attorney Fees.

RAP 18.1(a) provides for attorney fees and costs on appeal. Article XI, Section 9(m) of the Declaration states: “ The prevailing party shall be entitled to recover any costs and reasonable attorneys’ fees incurred in connection with the collection of delinquent Assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the prevailing party shall be entitled to recover costs and reasonable attorneys’ fees if it prevails on appeal and in the enforcement of a judgment.”²⁶

²⁵ Declaration of Diane Sines, Ex. 6

²⁶ Appendix 1.

V. CONCLUSION

Obtaining financing for condos has been difficult in the past and the challenge has increased significantly with foreclosures and bankruptcies. Lenders have taken the position that their security is impaired and less resistant to economic challenges with condominium ownership. Rental caps generally protect all condominium owners obtain financing from Federal lenders like Freddie Mac and Fannie Mae who have owner-occupied ratios tied to their lending requirements. Rental caps also help property values remain in line with local markets because buyers want to live in owner occupied communities. Community associations retain and improve the standard of living and property values within a community. While owners many times wish that a particular restriction did not apply to them, most are grateful that the restrictions apply to their neighbors. Governing documents are drafted without specifics and allow for broad interpretation for a reason. It leaves room for a board to adopt rules and regulations tailored for the shared community and deed restrictions as long as they do not conflict with the declaration.

Academy Square condominium units are designed for entry level buyers and qualifying for institutional financing has been difficult. The pricing of these condominiums falls within the qualifications of FHA traditional or spot financing. The developer at Academy Square restricted rentals to 25% from the time the first unit was sold. He created an incentive to be the first to purchase into the development and secure a rental unit on a first come, first served basis. Academy Square buyers purchased into a deed-restricted community which imposed restrictions on their use by the recorded Declaration and the Washington condominium statute. The Declaration specifically gave

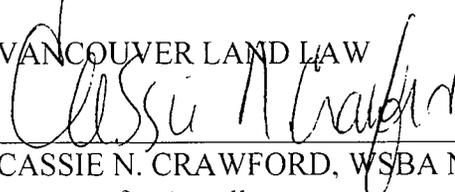
the Board the authority to adopt rules & regulations to enforce the covenants. The House Rule adopted by the Board to enforce the rental restriction was reasonable. The tenant information packet gave the Board contact information on residents, including the move-in & move-out dates, the number of occupants, pets, license plate information for the parking area, and emergency contact information. The tenant information packet allowed the Board to regulate the number of rental units and ensure the 25% rental cap was not exceeded. The Board acted within its authority under the Declaration and its actions should be upheld by the Court.

This Court should reverse the trial court's judgment, enter judgment as requested in the cross-motion for declaratory judgment filed by Academy Square and award attorneys fees and costs to Academy Square as the agent enforcing the governing documents on behalf of all of its condominium unit owners.

DATED this 11 day of July, 2012

Respectfully Submitted,

VANCOUVER LAND LAW


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Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that on July 12, 2012, I delivered a true and correct copy of the foregoing Appellant's Opening Brief by depositing in the U.S. Mail, postage prepaid to the following persons(s) at the addresses listed below:

Grant C. Broer
8904 NE Hazel Dell Avenue
Vancouver, WA 98665

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STATE OF WASHINGTON
BY ~~DEPUTY~~



Karen Winchell
Legal Assistant

APPENDIX 1

The **original Declaration of Condominium** was recorded on June 8, 2005. Article X, Section 12 & 13 of the Declaration states:

“Section 12. House Rules. The Declaration, Board or the Association membership is empowered to pass, amend and revoke detailed reasonable administrative rules and regulations, or House Rules, necessary or convenient from time to time to insure compliance with the general guidelines of this Article. Such House Rules shall be binding on all unit Owners, lessees, guests and invitees upon adoption by the Board or Association.”

“Section 13. Rental Units. The Leasing or Rent of a Unit for its Owner shall be governed by the provisions of this Article X, Section 13. No more than twenty-five (25%) of the Units may be used as a rental Unit at any time. In the event an Owner desires to rent a Unit and at least twenty-five (25%) of the Units are then being used as rental Units, such Owner shall be added to a waiting list, first-come, first-served. All Owners desiring to rent a Unit must submit an Association-approved credit and background application completed by the prospective party who desires to rent the Unit prior to entering into any rental agreement.”

House Rule was recorded on February 5, 2008.

1. Article X, Section 13 shall be interpreted and applied as follows:

“The Leasing or Renting of a Unit by its Owner shall be governed by the provisions of this Article X Section 13. No more than twenty-five (25%) of the Units may be used as rental Units at any time. In the event an Owner desires to rent a Unit and at least twenty-five (25%) of the Units are then being used as rental Units, such Owner shall be added to a waiting list, first-come, first-served. All Owners desiring to rent a Unit must submit an Association-approved background application completed by the Owner and any prospective party who desires to rent the Unit prior to entering into any rental agreement. *Any Unit that qualifies as an approved rental unit hereunder may be transferred, conveyed and/or sold to a third party as a “rental unit” by such Unit Owner without further Board review or approval provided such new owner provides the Association with any information otherwise required under this Declaration.*” (Emphasis added.)

The **Public Offering Statement** for Academy Square also outlined the rental restriction for prospective buyers.

"Section 8. Brief Description of Restrictions on Rent or Leasing Condominiums. No more than twenty-five (25%) of the Units may be used as rental Units at any time. In the event an Owner desires to rent a Unit and at least twenty-five (25%) of the Units are then being used as rental Units, such Owner shall be added to a waiting list, first-come, first-served."

(Declaration of Diane Sines, Ex. 2)

Declaration, Article IX, Section 4 provides:

"(xi) Impose and collect charges for late payments of assessments and after notice and an opportunity to be heard by the Board or by such representative designated by the Board and in accordance with such procedures as provided in the Declaration or Bylaws or rules and regulations adopted by the Board levy reasonable fines in accordance with a previously established schedule thereof adopted by the Board and furnished to the Owners for violations of the Declaration, Bylaws, and rules and regulations of the Association."

APPENDIX 2

THE BLUFFS OF WILDWOOD HOMEOWNERS' ASSOCIATION, INC., Appellee, v. DINKEL, Appellant

No. CA94-02-036

Court of Appeals of Ohio, Twelfth Appellate District, Butler County

96 Ohio App. 3d 278; 644 N.E.2d 1100; 1994 Ohio App. LEXIS 3365

August 1, 1994, Decided

SUBSEQUENT HISTORY: [***1] Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1994), 71 Ohio St.3d 1421, 642 N.E.2d 386.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant condominium owner appealed a decision of the Butler County Court of Common Pleas (Ohio), which found in favor of plaintiff condominium association and permanently enjoined the owner from parking his pickup truck in the common areas of the condominium property. The trial court earlier vacated a summary judgment for the owner under Ohio R. Civ. P. 60(B) on the association's motion based on excusable neglect.

OVERVIEW: The association filed an action against the owner for an injunction to prevent him from parking his pickup truck in common areas of the property in violation of the condominium declaration and bylaws. The owner's motion for summary judgment was granted after the association failed to respond. The trial court granted the association's motion to set aside the summary judgment due to excusable neglect. After a trial, a permanent injunction was entered in favor of the association. On appeal, the court affirmed, finding no error in the trial court's construction of the association's motion to "set aside" summary judgment as a motion for relief from judgment and that the owner was barred from challenging the order vacating the judgment because it was a final order and he failed to appeal. The court ruled that the restriction on parking trucks was enforceable because it was in effect when the owner entered his purchase agreement and closed on his unit, he had read and was verbally advised of the restriction and entered the condominium agreement knowingly, and the restriction had been applied consistently and uniformly.

OUTCOME: The court affirmed the trial court's judgment permanently enjoining the owner from parking his pickup truck in the common areas of the condominium property.

CORE TERMS: summary judgment, condominium, declaration, common areas, pickup truck, assignments of error, parking, decision granting, reasonableness, truck, condominium unit, order granting, order vacating, excusable neglect, final orders, present case, credible evidence, unenforceable, enforceable, captioned, freely, bylaws, void, passenger cars

LexisNexis® Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Supporting Materials > Memoranda of Law

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN1 ↓ A motion to set aside summary judgment constitutes a Ohio R. Civ. P. 60(B) motion for relief from judgment where it requests that the trial court set aside its previous order granting summary judgment, incorporates by reference an affidavit of the movant's counsel setting forth particular facts tending to show excusable neglect and motions and memoranda that tend to demonstrate that the movant has a meritorious claim to present if relief is granted, and the motion is timely made.

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

Civil Procedure > Appeals > Reviewability > Preservation for Review

HN2 ↓ An order vacating a judgment pursuant to Ohio R. Civ. P. 60(B) is a final order. A party forfeits his right to assign as error the trial court's order vacating its prior judgment where he does not timely appeal.

Real Property Law > Common Interest Communities > Condominiums > Management

HN3 ↓ Compliance with condominium declarations and bylaws is required under Ohio Rev. Code Ann. § 5311.19 where the restrictions are reasonable. Ohio courts apply a three-part test to determine if a condominium restriction is reasonable. Under the reasonableness test, a reviewing court must determine (1) whether the decision or rule is arbitrary, (2) whether the decision or rule is applied in an evenhanded or discriminatory manner, and (3) whether the decision or rule is made in good faith for the common welfare of the owners and occupants of the condominium.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness

Contracts Law > Defenses > Illegal Bargains

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

HN4 ↓ Where a restriction is contained in a condominium declaration and is in existence prior to the purchase of a condominium unit, the reasonableness test has less relevance when the restriction is challenged. Persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom is as fundamental to our society as the right to write and to speak without restraint. Government interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > Management

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

HN5 ↓ Where, prior to closing on his condominium unit, an owner receives and reads a copy of a condominium declaration containing a parking restriction and is advised by the condominium association's president that he cannot park his pickup truck on the common areas, the owner was aware of the restriction before entering into a contract to purchase the condominium unit, and the restriction is applied consistently and uniformly, the restriction contained in the declaration is reasonable because the owner freely and knowingly entered into the contract with the association and failed to demonstrate that the contract is unenforceable as against public policy. Thus, the parking restriction in the

declaration is enforceable. Ohio Rev. Code Ann. § 5311.19.

COUNSEL: *Barron, Peck & Bennie* and *Rex A. Wolfgang*, for appellee.

Patrick P. Connelly; Millikin & Fitton and *Keith M. Spaeth*, for appellant.

JUDGES: Jones, Presiding Judge. Koehler and Walsh, JJ., concur.

OPINION BY: JONES

OPINION

[*279] [**1101] On August 6, 1991, plaintiff-appellee, The Bluffs of Wildwood Homeowners' Association, Inc., filed a complaint in the Butler County Court of Common Pleas against defendant-appellant, Gregory P. Dinkel. Appellee requested a permanent injunction to prevent Dinkel from parking his 1989 GMC pickup truck in the common areas of The Bluffs of Wildwood in violation of Section 7.1(C) of the Bluffs of Wildwood Declaration and Bylaws of Condominium Ownership ("Declaration").

[*280] Under the trial court's January 27, 1993 pretrial order, the deadline for filing motions for summary judgment was February 15, 1993. On February 16, 1993, Dinkel filed a motion for summary judgment. Appellee failed to respond to the motion and no hearing was held. The trial court filed a decision [***2] granting Dinkel's motion on March 16, 1993. The following day, on March 17, 1993, appellee filed a "Motion to Allow Answer to Summary Judgment Out of Time." In addition, appellee filed a "Memorandum in Opposition to Defendant's Motion for Summary Judgment and Countermotion for Summary Judgment." On March 18, 1993, appellee filed a "Motion to Set Aside Summary Judgment." Dinkel filed a motion in response to appellee's motion to set aside summary judgment and to allow summary judgment out of time on April 16, 1993.

On May 11, 1993, the trial court filed an "order granting appellee's motion to set aside summary judgment and for leave to respond out of time to * * * [Dinkel's] motion for summary judgment." In its order, the trial court stated that it had considered appellee's motion to set aside summary judgment to be a motion for relief from judgment pursuant to Civ.R. 60(B). The trial court found that appellee's failure to respond to the motion for summary judgment occurred because of excusable neglect. The court denied both parties' motions for summary judgment on July 12, 1993. The matter proceeded to trial on October 15, 1993. Finally, on January 28, 1994, the trial court [***3] entered judgment permanently enjoining Dinkel from parking his pickup truck on the common areas of the condominium property.

On appeal, Dinkel raises the following two assignments of error:

"Assignment of Error No. 1:

"The trial court denied the defendant due process when it improperly reconsidered and reversed summary judgment granted to the defendant.

"Assignment of Error No. 2:

"The trial court erred when it held the condominium restriction at issue enforceable."

In his first assignment of error, Dinkel argues the trial court abused its discretion and denied him due process when it *sua sponte* construed appellee's motion to set aside summary judgment as a Civ.R. 60(B) motion for relief from judgment and reversed the grant of summary judgment. Dinkel, relying on *Consol. Rail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App.3d 333, 588 [**1102] N.E.2d 263, essentially argues appellee's motion was an invalid motion to reconsider and that all judgments or final orders by the

trial court that flow from the motion are void. Dinkel also argues the trial court erred in not holding a hearing on the motion.

[*281] *Forest* is factually distinguishable from the present [***4] case. In *Forest*, the trial court was presented with a motion captioned "Motion for Reconsideration and Motion for Extension of Time in Which to File a Reply Brief." The motion did not request "relief pursuant to Civ.R. 60(B) or request the trial court 'vacate'" its prior orders. *Id.* at 339, 588 N.E.2d at 267. Thus, the motion was not considered a Civ.R. 60(B) motion. The court found the motion to be a nullity and found all orders flowing from the trial court's decision granting the motion void.

In the present case, although the **HN1** motion to set aside summary judgment is inartfully drafted, we find that it constituted a Civ.R. 60(B) motion for relief from judgment. Appellee's March 18, 1993 motion was captioned as a "Motion to Set Aside Summary Judgment." In the motion, appellee requested that the trial court set aside its previous order granting summary judgment. The motion also incorporated by reference an affidavit of appellee's counsel and appellee's motions and memoranda filed on March 17, 1993.

The affidavit of appellee's counsel sets forth particular facts tending to show excusable neglect due to personal and family illness. The motion was timely made. In addition, [***5] the supporting memoranda incorporated by reference into appellee's motion tended to demonstrate that appellee had a meritorious claim to present if relief was granted.

As a result of determining that appellee's motion was a valid Civ.R. 60(B) motion, we are unable to reach the merits of the trial court's decision granting the motion. **HN2** An order vacating a judgment pursuant to Civ.R. 60(B) is a final order. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113, paragraph one of the syllabus. Dinkel forfeited his right to assign as error the trial court's order vacating its prior judgment because he did not timely appeal. See *Bates & Springer, Inc. v. Stallworth* (1978), 56 Ohio App.2d 223, 230, 10 O.O.3d 227, 231, 382 N.E.2d 1179, 1185. Accordingly, Dinkel's first assignment of error is overruled.

In his second assignment of error, Dinkel argues that appellee failed to set forth competent, credible evidence to carry its burden of establishing reasonable grounds for enforcing the condominium restriction contained in Section 7.1(C) of the Declaration. Dinkel argues that the condominium restriction is *per se* unreasonable because it [***6] does not promote any common scheme or plan.

Section 7.1(C) of the Declaration provides:

"No part of the common areas or limited common areas and facilities shall be used for parking of any trailer, truck, boat, motorcycle, scooter or anything other than operative automobiles. * * * The word 'truck' shall include and mean every type of motor vehicle other than passenger cars and other than any pickup truck [*282] which is used as the sole automobile vehicle by a family occupying one of said units."

HN3 Compliance with condominium declarations and bylaws is required under R.C. 5311.19 where the restrictions are reasonable. See *Monday Villas Property Owners Assn. v. Barbe* (1991), 75 Ohio App.3d 167, 171, 598 N.E.2d 1291, 1294; *Worthinglen Condominium Unit Owners' Assn. v. Brown* (1989), 57 Ohio App.3d 73, 75-76, 566 N.E.2d 1275, 1277-1278; *River Terrace Condominium Assn. v. Lewis* (1986), 33 Ohio App.3d 52, 57, 514 N.E.2d 732, 737. Ohio courts have applied a three-part test to determine if a condominium restriction is reasonable. Under the reasonableness test, a reviewing court must determine (1) whether the decision or rule is arbitrary, (2) whether the decision or rule [***7] is applied in an evenhanded or discriminatory manner, and (3) whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium. *Brown, supra*, 57 Ohio App.3d at 76, 566 N.E.2d at 1277.

The reasonableness test offers some guidelines for courts to use when reviewing condominium restrictions.

However, ^{HN4} where [**1103] the restriction is contained in a condominium declaration and is in existence prior to the purchase of a condominium unit, the reasonableness test has less relevance. In such a case, it must be remembered that:

"It has long been recognized that persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom 'is as fundamental to our society as the right to write and to speak without restraint.' *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 41 O.O.2d 250, 253, 231 N.E.2d 301, 305. Government interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts. * * *"
Nottingdale Homeowners' Assn., Inc. v. Darby (1987), 33 Ohio St.3d [***8] 32, 36, 514 N.E.2d 702, 705-06.

Dinkel stipulated at trial that he is the fee simple owner of a condominium at The Bluffs of Wildwood and that he is bound by all legal restrictions imposed by appellee. Dinkel also stipulated that his family owns a passenger car and a pickup truck. Dinkel concedes that by parking his pickup truck in the common areas he is in violation of the plain language of Section 7.1(C) of the Declaration. Dinkel, however, argues that Section 7.1(C) is unenforceable because it discriminates against his family status and his right to own a pickup truck.

The record supports the trial court's finding that ^{HN5} prior to closing on his condominium unit Dinkel received and read a copy of the Declaration containing the restriction and that he was advised by appellee's president that he could not park his pickup truck on the common areas. Further, the trial court found that Dinkel was aware of the restriction before entering into a contract to purchase [*283] the condominium unit. Finally, the trial court found that the restriction has been applied consistently and uniformly.

We find that the restriction contained in the Declaration is reasonable. See *Brown*, [***9] *supra*. In addition, there is competent, credible evidence supporting the trial court's finding that Dinkel freely and knowingly entered into the contract with appellee. See *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 411, 461 N.E.2d 1273, 1276; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. Dinkel has failed to demonstrate that the contract is unenforceable as against public policy. Thus, Section 7.1(C) of the Declaration is enforceable. *Darby, supra*; R.C. 5311.19. Accordingly, Dinkel's second assignment of error is overruled.

The judgment of the trial court is affirmed.

Judgment affirmed.

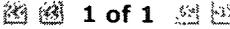
Koehler and Walsh, JJ., concur.

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APPENDIX 3

BEACHWOOD VILLAS CONDOMINIUM, Appellant, v. EARL S. POOR and IRIS E. POOR, his wife, and
SANFORD I. KARTZMAN and FRANCINE L. KARTZMAN, his wife, Appellees

No. 83-188

Court of Appeal of Florida, Fourth District

448 So. 2d 1143; 1984 Fla. App. LEXIS 12619

April 11, 1984

SUBSEQUENT HISTORY: [**1] Rehearing Denied May 16, 1984.

PRIOR HISTORY: Appeal from the Circuit Court for Martin County; Rupert J. Smith, Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant condominium challenged the decision of the Circuit Court for Martin County (Florida), which issued a favorable ruling for appellees in their action to invalidate rules that allegedly exceeded the scope of the condominium board's authority.

OVERVIEW: The board of directors (board) of appellant condominium enacted two rules regulating unit rentals and occupancy of units by guests during an owner's absence. Appellees filed a lawsuit on the grounds that such rules exceeded the scope of the board's authority, making them invalid. The trial court agreed, but its decision was reversed and remanded on appeal. As the reasonableness of the rules was not questioned below, the court addressed only the scope of the board's authority. The board was empowered to pass rules and regulations for the governance of the condominium. The disputed rules were legitimate subjects for board rulemaking. Conditions on rental of units and occupancy of units by guests during an owner's absence were required to be included in the condominium declaration. Because the disputed rules did not contravene either an express provision of the declaration or any right reasonably inferable from that right, the board's enactments were valid and within the scope of its authority.

OUTCOME: The court reversed the trial court's opinion granting appellees' request to invalidate rules governing condominium rentals and occupancy during an owner's absence, as addressed by the board of directors of appellant condominium, because it acted within the scope of its authority.

CORE TERMS: condominium, declaration, board of directors, by-laws, rental, guest, condominium units, rulemaking, time to time, invalidated, occupancy, inferable, unit owners, express provision, restricting, contravene, empowered, notice, amend, vis, occupancy rate, per year, calculated

LexisNexis® Headnotes

Governments > Local Governments > Administrative Boards
Real Property Law > Common Interest Communities > Condominiums > Management
Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

HN1 ↓ Condominium rules falling under the generic heading of use restrictions emanate from one of two sources: the declaration of condominium or the board of directors. Those contained in the declaration are clothed with a very strong presumption of validity because the law requires their full disclosure prior to the time of purchase and, thus, the purchaser has adequate notice. Fla. Stat. ch. 718.503(2)(a) (1983). Board rules, on the other hand, are treated differently. When a court is called upon to assess the validity of a rule enacted by a board of directors, it first determines whether the board acted within its scope of authority and, second, whether the rule reflects reasoned or arbitrary and capricious decision making.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations
 Real Property Law > Common Interest Communities > Condominiums > Management
 Real Property Law > Restrictive Covenants > Covenants Running With Land

HN2 ↓ A declaration of condominium is the condominium's "constitution." Often, it contains broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the condominium's operation through the rulemaking process. It would be impossible to list all restrictive uses in a declaration of condominium, such as parking regulations, limitations on the use of the swimming pool, tennis court and card room. The list is endless and subject to constant modification. Therefore, the court has formulated the appropriate test in this fashion: provided that a board-enacted rule does not contravene either an express provision of the declaration or a right reasonably inferable therefrom, it will be found valid, within the scope of the board's authority. This test is fair and functional; it safeguards the rights of unit owners and preserves unfettered the concept of delegated board management.

COUNSEL: James D. McFarland of Anderson, Dungey & McFarland, P.A., Stuart, for Appellant.

Martin D. Kahn of Martin D. Kahn, P.A., North Miami, for Appellees.

JUDGES: Hurley, J. Walden, J., concurs. Glickstein, J., dissents with opinion.

OPINION BY: HURLEY

OPINION

[*1143] At issue is the validity of two rules enacted by a condominium board of directors. The trial court invalidated both rules because it determined that the board exceeded the scope of its authority. We reverse.

The board of directors of the Beachwood Villas Condominium Association enacted rules 31 and 33 to regulate unit rentals and the occupancy of units by guests during the owner's absence. Rule 31, the rental rule, requires that: (1) the minimum rental [*1144] period be not less than one month, (2) the number of rentals not exceed six per year, (3) the occupancy rate not exceed a specified number which is calculated to the size of the unit, (4) tenants not have pets without the approval of the board, and (5) a processing fee of \$25.00 be paid. Rule 33, the guest rule, requires: (1) board approval [**2] for the "transfer" of a unit to guests when the guests are to occupy the unit during the owner's absence, (2) that the number of transfers (either by rental or guest occupancy) not exceed six per year, and (3) that the occupancy rate not exceed a specified number which is calculated to the size of the unit. The trial court found that the board lacked authority to enact either rule. We respectfully disagree.

Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. 4th DCA 1981), suggested that ^{HN1} condominium rules falling under the generic heading of use restrictions emanate from one of two sources: the declaration of condominium or the board of directors. Those contained in the declaration "are clothed with a very strong presumption of validity . . .," *id.* at 639, because the law requires their full disclosure prior to the time of purchase and, thus, the purchaser has adequate notice. See Section 718.503(2)(a), Florida Statutes (1983). Board rules, on the other hand, are treated differently. When a court is called upon to assess the validity of a rule enacted by a board of directors, it first determines whether the board acted within its scope of authority and, ^{**3} second, whether the rule reflects reasoned or arbitrary and capricious decision making. See, e.g., *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975); *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685 (Fla. 4th DCA 1971); see generally Note, *Condominium Rulemaking--Presumptions, Burdens and Abuses: A Call for Substantive Judicial Review in Florida*, 34 U. Fla. L. Rev. 219 (1982); Note, *Judicial Review of Condominium Rulemaking*, 94 Harv. L. Rev. 647 (1981).

The reasonableness of rules 31 and 33 was not questioned below and, therefore, we are concerned only with the scope of the board's authority. Inquiries into this area, as we indicated in *Juno by the Sea North Condominium, Inc. v. Manfredonia*, 397 So.2d 297 (Fla. 4th DCA 1980) (on rehearing), begin with a review of the applicable statutes and the condominium's legal documents, i.e., the declaration and by-laws.

By express terms in the statute and in the declaration the association has been granted broad authority to regulate the use of both the common element and limited common element property.

In general, that power may be exercised as long as the exercise is ^{**4} reasonable, is not violative of any constitutional restrictions, and does not exceed any specific limitations set out in the statutes or condominium documents.

Id. at 302.

Since there has not been any suggestion that either rule violates the Condominium Act, Section 718, Florida Statutes (1983), we begin by viewing the Beachwood Villas declaration of condominium. Article X provides that "the operation of the condominium property shall be governed by the By-Laws of the Association which are . . . made a part hereof." In turn, Article IV of the by-laws states that "all of the powers and duties of the Association shall be exercised by the board of directors . . ." More specific is Article VII, Section 2, which states that "the Board of Directors may, from time to time, adopt or amend previously adopted rules and regulations governing and restricting the use and maintenance of the condominium units . . ."

It is obvious from the foregoing that the board of directors is empowered to pass rules and regulations for the governance of the condominium. The question remains, however, whether the topics encompassed in rules 31 and 33 are legitimate subjects for board rulemaking. ^{**5} Put another way, must regulations governing rental of units and occupancy of units by guests during an owner's absence be included in ^{*1145} the declaration of condominium. At least one court has held that "use restrictions to be valid, must be clearly inferable from the Declaration." *Mavrakis v. Playa Del Sol Association*, No. 77-6049, slip op. at 4 (S.D. Fla. May 11, 1978). This test is rooted in the concept that declarations of condominium are somewhat like covenants running with the land. See *Pepe v. Whispering Sands Condominium Association*, 351 So.2d 755 (Fla. 2d DCA 1977). Even so, we believe that this test is too stringent. ^{HN2} A declaration of condominium is "the condominium's 'constitution'." *Schmidt v. Sherrill*, 442 So.2d 963, 965 (Fla. 4th DCA 1984). Often, it contains broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the condominium's operation through the rulemaking process. It would be impossible to list all restrictive uses in a declaration of condominium. Parking regulations, limitations on the use of the swimming pool, tennis court and card room ^{**6} -- the list is endless and subject to constant modification. Therefore, we have formulated the appropriate test in this fashion: provided that a board-enacted rule does not contravene either an express

provision of the declaration or a right reasonably inferable therefrom, it will be found valid, within the scope of the board's authority. ¹ This test, in our view, is fair and functional; it safeguards the rights of unit owners and preserves unfettered the concept of delegated board management.

- - - - - Footnotes - - - - -

1 In *Tower House Condominium, Inc. v. Millman*, 410 So.2d 926 (Fla. 3d DCA 1981), the court invalidated a condominium bylaw because it was inconsistent with the declaration. Likewise, *Scarfone v. Culverhouse*, 443 So.2d 122 (Fla. 2d DCA 1983), invalidated board action which was unauthorized by and inconsistent with the declaration. In the same vein, a facially neutral rule or board decision may be attacked on the ground that it places an unreasonable or arbitrary limitation on a use permitted by the declaration. See *Lyons v. King*, 397 So.2d 964 (Fla. 4th DCA 1981). As indicated, however, this allegation has not been raised in the case at bar.

- - - - - End Footnotes- - - - -

[**7] Inasmuch as rules 31 and 33 do not contravene either an express provision of the declaration or any right reasonably inferable therefrom, we hold that the board's enactments are valid and plainly within the scope of its authority. Accordingly, we reverse the order on appeal and remand the cause for further proceedings consistent with this opinion.

REVERSED and REMANDED.

WALDEN, J., concurs.

GLICKSTEIN, J., dissents with opinion.

DISSENT BY: GLICKSTEIN

DISSENT

GLICKSTEIN, J., dissenting.

I agree with the trial court and disagree with my colleagues, recognizing that judicial decisions in condominium cases are like congressional legislation in that nobody is happy with the result. The basis of my dissent is in my reading of Article XIII B.9 of the Declaration of Condominium vis a vis Article VII, Section 2 of the By-Laws. The former provides:

9. Regulations

Reasonable regulations concerning *the use of condominium property* and recreational facilities may be made and amended from time to time by the Association in the manner provided by its Articles of Incorporation and By-Laws. Copies of such regulations and amendments shall be furnished by the Association to all [****8**] unit owners and residents of the condominium upon request. [Emphasis added.]

"Condominium property" is described in Section 718.103(11), Florida Statutes (1981), as follows:

"Condominium property" means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

The subject section of the By-Laws says:

Section 2. As to Condominium Units. *The Board of Directors may, from time [****1146**] to time, adopt or amend previously adopted rules and regulations governing and restricting the use and maintenance of the condominium units, provided, however, that copies of such rules and regulations are furnished to each unit owner prior to the time the same become effective.* [Emphasis added.]

If the trial judge's interpretation of the foregoing is reasonable, I doubt that we can substitute our judgment for his. He obviously felt the Association was the proper party to make the regulations as to use of the condominium units because (1) that is what the [**9] Declaration required; and (2) the By-Laws fall if they conflict with the Declaration. It is hard to quarrel with his conclusion.

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APPENDIX 4

DULANEY TOWERS MAINTENANCE CORPORATION et al. v. JAMES M. O'BREY et ux.

No. 1527, September Term, 1979

Court of Special Appeals of Maryland

46 Md. App. 464; 418 A.2d 1233; 1980 Md. App. LEXIS 344

September 5, 1980, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court for Baltimore County; Raine, C. J.

DISPOSITION: *Judgment reversed. Costs to be paid by appellees.*

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff condominium challenged a ruling from the Circuit Court for Baltimore County (Maryland), which entered judgment for defendant unit owners in the condominium's action for injunctive relief to require the unit owners to comply with a rule that the unit owners could not maintain more than one dog in their apartment.

OVERVIEW: The unit owners moved into the condominium with their poodle. Shortly afterward, the condominium's board of directors adopted a rule that restricted each unit owner to one pet. Nearly a year later, the unit owners bought a second poodle, kept both dogs in their unit, and refused to remove one of the dogs. The condominium filed the instant action, and the trial court entered judgment for the unit owners on ground that the rule restricting each unit owner to one pet was not in the condominium's by-laws. The condominium appealed, and the court reversed the judgment. The court held that an amendment to the Horizontal Property Act, Md. Code Ann. of 1957, § 11-104(c), provided that restrictions on the use of condominium units and the common elements were "permissible" as by-laws. Section 11-104(c), prior to the amendment, required that such restrictions be in the by-laws. Therefore, the condominium's council of unit owners could legally delegate its powers of management to the board of directors, which could in turn make reasonable rules concerning conduct that were not inconsistent with the master deed and declaration and bylaws, including the regulation or prohibition of pets.

OUTCOME: The court reversed the trial court's judgment, which had found for the unit owners in the condominium's action for injunctive relief.

CORE TERMS: bylaw, condominium, unit owner, deed, pet, board of directors, common areas, declaration, dog, by-laws, condominium units, occupancy, resident's, occupant, supplied, Maryland Horizontal Property Act, delegate, poodle, House Rules, per unit, enabling statutes, unincorporated, enforceable, communal, parking, binding, reasonable rules, individual units, time to time, restricting

LexisNexis® Headnotes

Real Property Law > Common Interest Communities > Condominiums > Management

HN1 ↓ When a controversy arises as to a resident's right as a unit owner in a condominium,

courts must examine the condominium enabling statutes for relevant provisions, consider the master deed or declaration, study the bylaws, and attempt to reconcile the three. House rules, sometimes called household regulations or rules of conduct, are rules and regulations of a condominium that generally deal with the use and occupancy by owners of units and common areas, patios and other exterior areas, parking, trash disposal, and pets. They frequently prohibit conduct that could constitute a nuisance. If the house rules are reasonable, consistent with the law, and enacted in accordance with the bylaws, then they will be enforced.

Real Property Law > Common Interest Communities > Condominiums > Formation

Real Property Law > Common Interest Communities > Condominiums > Management

HN2 ↓ The Horizontal Property Act, Md. Code Ann. of 1957 § 11-104 provides in part: (a) Bylaws to govern administration--The administration of every condominium shall be governed by bylaws which shall be recorded with the declaration. If the council of unit owners is incorporated, these bylaws shall be the bylaws of that corporation. (b) Required particulars--The bylaws shall express at least the following particulars: (1) The form of administration, indicating whether the council of unit owners shall be incorporated or unincorporated, and whether, and to what extent, the duties of the council of unit owners may be delegated to a board of directors, manager or otherwise, and specify the powers, manner of selection and removal of them; (c) Permissible additional provisions--The bylaws also may contain any other provision regarding the management and operation of the condominium including any restriction on or requirement respecting the use and maintenance of the units and the common elements.

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN3 ↓ The Horizontal Property Act, Md. Code Ann. of 1957 § 11-104(c) provides that restrictions on use of condominium units and the common elements are "permissible" as by-laws.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > Management

HN4 ↓ All rules and regulations properly adopted by a council of condominium unit owners or its designee that apply to an owner's unit are as binding on the residents of a condominium as those that apply to the common areas. A council of unit owners in a condominium may delegate its powers of administration or management to a board of directors which may in turn make reasonable rules and regulations concerning conduct, not inconsistent with the master deed and declaration and bylaws, including the regulation or prohibition of pets.

HEADNOTES

Real Property -- Maryland Horizontal Property Act -- Section 11-104 -- Condominiums -- House Rules Restricting Number Of Pets Per Unit -- Courts Must Look To Enabling Statutes, Master Deed Or Declaration And Bylaws Where Controversy Arises As To Resident's Right As Unit Owner -- Where House Rules, Which Effect Regulations Dealing With Use And Occupancy By Owners Of Units, Are Reasonable, Consistent With Law And Enacted In Accordance With Bylaws They Are Enforceable -- Held That Under Maryland Horizontal

Property Act A Council Of Unit Owners In Condominium May Delegate Its Powers Of Administration Or Management To Board Of Directors Who May Make Reasonable Rules And Regulations Concerning Conduct, Not Inconsistent With Master Deed, Declaration And Bylaws, Including Regulation Or Prohibition Of Pets -- Rule Regulating Each Unit Owner To One Pet Held Reasonable And Adopted Properly.

SYLLABUS

Suit filed by Dulaney Towers Maintenance Corporation and Dulaney Towers Townhouse Condominium No. 2 against James M. O'Brey and his wife seeking injunctive relief. [***2] From a decree in favor of respondents, complainants appeal.

COUNSEL: *Philip O. Foard*, with whom were *Robert J. Aumiller* and *White, Mindel, Clarke & Hill* on the brief, for appellants.

No brief or appearance by appellees.

JUDGES: Liss and MacDaniel, JJ., and Miller Bowen, Associate Judge of the District Court of Maryland for District 12, specially assigned. Bowen, J., delivered the opinion of the Court.

OPINION BY: BOWEN

OPINION

[*465] [**1234] The circumstances giving rise to this appeal are quite simple. The appellees purchased a unit in a condominium regime known as the Dulaney Towers Townhouse Condominium No. 2 (hereinafter called Dulaney) [**1235] on or about May 10, 1976. When they moved in, they kept and maintained a poodle in their unit. On October 1, 1976, the board of directors of Dulaney adopted numerous rules and regulations, among them being Para. E-2 as follows:

One dog or one cat may be kept by the unit owner or occupant, but shall not be kept, bred, or used therein for any commercial purpose. The present pet population is exempt from this rule.

Proper notice of the adoption of the rules and regulations was given to the unit owners.

In August, [***3] 1977, the appellees purchased a second poodle and maintained both poodles in their unit. The appellants requested that one of the dogs be removed. The appellees refused and the appellants filed this suit in the Circuit Court for Baltimore County, requesting that the appellees be permanently enjoined from maintaining more than one dog in their unit. The Chancellor granted the appellees' Motion for Summary Judgment on November 9, 1979. The appellant filed this timely appeal raising the following issue:

Was the lower court correct in its determination that Sections 11-104 and 11-109 of the Real Property Article do not permit the council of unit owners of a condominium regime to delegate all of its regulatory authority to a board of directors, including the authority to promulgate and enforce rules and regulations restricting the use of common areas and individual units within that regime?

HNI When a controversy arises as to a resident's right as a unit owner in a condominium, the courts must examine the condominium enabling statutes for relevant provisions, consider [*466] the master deed or declaration, study the bylaws, and attempt to reconcile the three. See *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 1971.)

House rules, (sometimes called household regulations or rules of conduct), are rules and regulations of a condominium that generally deal with the use and occupancy by owners of units and common areas, patios

and other exterior areas, parking, trash disposal, pets, etc. They frequently prohibit conduct that could constitute a nuisance. It has been said many times by many courts that if the house rules are reasonable, consistent with the law, and enacted in accordance with the bylaws, then they will be enforced. Hickok, *Promulgation and Enforcement of House Rules*, 48 St. Johns L. Rev. 1132, 1135 (1974). The one rule of Dulaney under attack in these proceedings is that set forth above, relating to the limitation of one pet per unit.

Perhaps, because owners of dogs cannot understand why others do not love their dogs as they do, the house rules of cooperative housing communities dealing with the regulation of pets have been the subject of many cases. Invariably, the courts have adopted a hard-line approach and have upheld condominium board of directors' regulations as to dogs, even to the exclusion of dogs, [***5] as being reasonable and enforceable. The courts stress that communal living requires that fair consideration must be given to the rights and privileges of all owners and occupants of the condominium so as to provide a harmonious residential atmosphere. The rationale for allowing the placing of restrictions in, or the barring of pets by way of, house rules is based on potentially offensive odors, noise, possible health hazards, clean-up and maintenance problems, and the fact that pets can and do defile hallways, elevators and other common areas. See *Justice Court Mut. Housing Co-op v. Sandow*, 270 N.Y.S. 2d 829, 832 (Sup. Ct. Queens County 1966); *Kings View Homes, Inc. v. Jarvis*, 369 N.Y.S. 2d 201 (1975); *Riverbay Corporation v. Klinghoffer*, 309 N.Y.S. 2d 472 (1970); Cf. *Valentine Gardens Cooperative, Inc. v. Oberman*, 237 N.Y.S. 2d 535 (1963). We [*467] join the other states in this view and hold that the specific house rule in question is reasonable.

[**1236] The law controlling the controversy here is contained in ^{HN2} Title 11 of the Real Property Article, commonly referred to as the "Horizontal Property Act." Section 11-104 provides in part:

(a) *Bylaws* [***6] to govern administration -- The administration of every condominium shall be governed by bylaws which shall be recorded with the declaration. If the council of unit owners is incorporated, these bylaws shall be the bylaws of that corporation.

(b) *Required particulars* -- The bylaws shall express at least the following particulars

(1) The form of administration, indicating whether the council of unit owners shall be incorporated or unincorporated, and whether, and to what extent, the duties of the council of unit owners may be delegated to a board of directors, manager or otherwise, and specify the powers, manner of selection and removal of them: . . .

(c) *Permissible additional provisions* -- The bylaws also may contain any other provision regarding the management and operation of the condominium including any restriction on or requirement respecting the use and maintenance of the units and the common elements.

In his memorandum opinion, the Chancellor stated:

There is no Maryland case dealing with this Statute. There is a very similar case in Massachusetts, *Johnson v. Keith*, 331 N.E.2d 879, that states: 'Where a person's right to use his or her own property [***7] is involved, any ambiguity in an asserted restriction of this type should be construed in favor of the freedom of the property from that restriction.' The *Johnson* case is not binding, but its reasoning is persuasive and its conclusion sound. A distinction [*468] may be drawn between Rules relating to the maintenance and control of the common elements, as opposed to Rules relating to conduct within an owner's unit. If it was desired to place legal restrictions on the use of their property by unit owners, it could have been and should have been set forth in the bylaws. This Court construes the Statute as not only permitting, but requiring that any restrictions on the use of condominium units must be set forth in the By-Laws.

We think the Chancellor was in error in drawing a distinction between "Rules relating to the maintenance and control of the common elements, as opposed to Rules relating to conduct within an owner's unit," and in "requiring that any restrictions on the use of condominium units must be set forth in the bylaws."

In *Johnson v. Keith, supra*, the Massachusetts court was interpreting its own State's condominium statute concerning the right to restrict [***8] pets. The court summarized pertinent portions of that law at page 881 as follows:

If the condominium is to be managed by an unincorporated association, as here, the master deed must set forth the names of the managing board. *Ibid.* The by-laws of the organization of unit owners in turn must contain certain provisions. Sec. 11. They must provide '(t)he method of adopting and amending administrative rules and regulations governing the details of the *operation and use of the common areas and facilities*' (emphasis supplied). Sec. 11 (d). In addition, the by-laws must contain any 'restrictions on and requirements respecting *the use and maintenance of the units* and the use of the common areas and facilities, not set forth in the master deed, as are designed to prevent unreasonable interference with the use of . . . the owners' respective units and of the common areas and facilities by the several unit owners' (emphasis supplied). Sec. 11 (e).

[*469] Since the challenged rule "(n)o animal or reptiles of any kind shall be raised, bred, or kept in any unit or in the Common Area and Facilities" sought to regulate the maintenance of animals "in any unit," the court [***9] [**1237] concluded that the challenged regulation, in order to be effective, must have been enacted and recorded as a bylaw.

As pointed out by the appellee, this statute, regarding use restrictions and management, is virtually identical to Md. Sec. 11-111 (f) that was repealed when Maryland's Horizontal Property Act was revised on July 1, 1974. ¹ Section 11-104 was enacted in place of former section 11-111 (f) and was the law on October 1, 1976, the date of the enactment of Dulaney's house rules. Unlike Sec. 11-111 (f) that made it "mandatory" that restrictions on use of the units and use of the common elements be contained in the bylaws, ^{HN3} Section 11-104 (c) now provides that restrictions on use of the units and the common elements are "permissible" as bylaws. The new section cannot be discounted as meaningless. It clearly intends to eliminate the mandatory effect that was explicitly provided for in Sec. 11-111 (f). The new language, "also may contain," drastically changed the import of the bylaws and their content. There is nothing now that, in any way, *requires* that a restriction affecting the use of an individual unit be enacted as a bylaw.

- - - - - Footnotes - - - - -

1 Laws 1974, Ch. 641, was made to apply to "existing condominiums." See *also* Real Property Article § 11-128 (a).

- - - - - End Footnotes - - - - -

[***10] As a matter of fact, it is the exception rather than the rule that bylaws contain specific restrictions respecting use of units and common areas. Common statutory schemes provide that bylaws entrust the responsibility for administration of a condominium to a board of directors. 15A Am. Jur. 2d, *Condominiums and Cooperative Apartments*, § 16, states this accepted practice of putting restrictions on the use of such condominium units as follows:

Occasionally the bylaws also contain regulations concerning the use of the condominium by its owners, but usually such regulations are contained [*470] in a separate instrument listing a number of rules designed to promote the communal comfort of those living in the condominium, such as restrictions on the parking of automobiles, against the keeping of pets, etc.

The Massachusetts statute, with respect to form of administration or management, is also quite similar to former section 11-111 (a) which provided that the "bylaws must necessarily provide for at least" a "form of administration, indicating whether this shall be in charge of a manager, or a board of directors, or otherwise and specify the powers," etc. Compare current [***11] sections 11-109 (a) & (b) which provide that "the affairs of the condominium shall be governed by a council of unit owners" and that "the bylaws may authorize or provide for the delegation of any power of the council of unit owners to a board of directors, . . ."

This clear and unmistakable language represents a significant change in the law that existed prior to July 1, 1974. Under the revised act, within the authority contained in sections 11-104 and 11-109, house rules containing restrictions as to use may be enacted through rules and regulations adopted by a board of directors, so long as the enactment is within the scope of the powers delegated to the board, as set forth in the Master Deed and Declaration and the bylaws.

An examination of the Master Deed and Declaration reveals that Section XI provides:

All present and future owners, tenants and occupants of Units shall be subject to, and shall comply with, the provisions of this Master Deed and Declaration, the By-Laws and the Rules and Regulations, as they may be amended from time to time. The acceptance of a deed or conveyance or the entering into of a lease or the entering into occupancy of any Unit shall constitute [***12] an agreement that the provisions of this Master Deed and Declaration, The By-Laws and the Rules and [471] [1238] Regulations as they may be amended from time to time, are accepted and ratified by such owner, . . . and shall bind any person having at any time any interest or estate in such Unit, as though such provisions were recited and stipulated at length in each and every deed or conveyance or lease thereof . . ." (emphasis supplied).

We note that the rule in question was enacted in accordance with the bylaws of Dulaney, filed with the Master Deed on January 22, 1974, that provides as follows:

ARTICLE V. OBLIGATION OF OWNERS

Section 7: Rules of Conduct

(e) The Board of Directors may make such other reasonable rules as they may deem appropriate.

The Chancellor below drew a distinction between the rules relating to the maintenance and control of the common elements, and the rules relating to conduct within an owner's unit. *Johnson v. Keith, supra*, was cited as authority. As stated previously, the statute analyzed in *Johnson* is not the same as the statute in effect in Maryland on October 1, 1976. We find nothing in the current Maryland [***13] law (Sec. 11-104) that creates such a distinction. ^{HN4} All rules and regulations properly adopted by a council of unit owners or its designee that apply to an owner's unit are as binding on the residents of a condominium as those that apply to the common areas.

The sum and substance of what we have stated is that under the current Maryland Horizontal Property Act, a council of unit owners in a condominium may delegate its powers of administration or management to a board of [472] directors which may in turn make *reasonable* rules and regulations concerning conduct, not inconsistent with the Master Deed and Declaration and bylaws, including the regulation or prohibition of pets. The rule in question is reasonable and was adopted properly.

Judgment reversed.

Costs to be paid by appellees.

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APPENDIX 5

BRIAN S. NOBLE & others, trustees,¹ v. JOHN MURPHY, individually & as executor²

¹ The plaintiffs are trustees of the Weymouthport Condominium -- Phase I Trust.

² Of the estate of Margaret Wilson. Margaret Wilson died while this appeal was pending. The executor of her estate has been substituted as a party pursuant to Mass.R.A.P. 30(a), 365 Mass. 878 (1974).

No. 90-P-1021

Appeals Court of Massachusetts, Norfolk

34 Mass. App. Ct. 452; 612 N.E.2d 266; 1993 Mass. App. LEXIS 472

January 10, 1992

May 6, 1993

PRIOR HISTORY: [***1] CIVIL ACTION commenced in the Superior Court Department on December 28, 1988.

The case was heard by *Roger J. Donahue, J.*, on motions for summary judgment, and a motion for assessment of attorney's fees and agreement to stay was also heard by him.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant condominium owners challenged the summary judgment of the Superior Court Department (Massachusetts), granted in favor of plaintiff condominium managers in an action in which managers sought to enforce a by-law provision banning all pets from the housing unit and imposing a \$ 5/day violation of penalty fee. The condominium was established under Mass. Gen. Laws ch. 183A.

OVERVIEW: The court affirmed the judgment of the lower court because it determined that the pet restriction was a valid use restriction. The court also found that owners had ample notice and opportunity to comply with the by-law provision and the court found that the record did not reveal any genuine issue of discriminatory enforcement. The court found that the fines were within the by-laws, properly assessed by managers, and included in the judgment.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: condominium, pet, unit owners, by-law, dog, animal, ownership, common area, condominium unit, unreasonable interference, originating, fine, deed, attorney's fees, designed to prevent, reasonableness, acquisition, permission, household, tenant, summary judgment, standard of review, peace of mind, regulatory scheme, public policy, unenforceable, amortization, incidentally, eliminating, restrictive

LexisNexis® Headnotes

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations
Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN1 Ownership of a condominium unit is a hybrid form of interest in real estate, entitling the owner to both exclusive ownership and possession of his unit, Mass. Gen. Laws. ch. 183A, § 4, and an undivided interest as tenant in common together with all the other unit owners in the common areas. It affords an opportunity to combine the legal benefits of fee simple ownership with the economic advantages of joint acquisition and operation of various amenities including recreational facilities, contracted caretaking, and security safeguards. Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN2 Mass. Gen. Laws ch. 183A, § 11(e), permits restrictions on the use of residential units which are "designed to prevent" unreasonable interference by individual unit owners with the other owners' use of their respective units and the common areas and facilities. There is no prohibition against restrictions that, although patently designed to prevent such interference, also incidentally preclude generically similar uses that may not be as likely to encroach on the other owners' use of their units and the common areas and facilities. Close judicial scrutiny and possible invalidation or limitation of fundamentally proper but broadly drawn use restrictions, not expressly prohibited by the enabling statute, would deny to developers and unit owners the "planning flexibility" inherent in Mass. Gen. Laws ch. 183A.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations
Real Property Law > Common Interest Communities > Condominiums > Management

HN3 The most common standard of review of condominium use restrictions is equitable reasonableness. The test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. This approach recognizes the discretion of the majority of unit owners while at the same time limiting their rule-making authority to those matters that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. A somewhat different standard of review may be implicated where, a restriction is promulgated after the owner who is in violation of the rule acquires his unit.

Contracts Law > Types of Contracts > Covenants

Real Property Law > Common Interest Communities > Condominiums > General Overview
Real Property Law > Restrictive Covenants > Covenants Running With Land

HN4 There is sound basis for treating restrictions in the originating documents as being clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. Indeed, a use restriction in the originating documents may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.

HEADNOTES

Condominiums, By-laws, Management, Animals. Real Property, Condominium, Restrictions. Practice, Civil, Attorney's fees. Animal. Dog.

SYLLABUS

A by-law of a condominium trust banning all pets from any housing unit or common area of the condominium, the substance of which was part of the originating documents of the condominium, was a valid restriction under G. L. c. 183A absent any showing that the restriction was wholly arbitrary in its application, in violation of public policy, or that it abrogated some fundamental constitutional right. [455-460]

The record of a proceeding by managers of a condominium established under G. L. c. 183A, seeking the removal of two pet dogs from a condominium unit, did not reveal a genuine issue of waiver of violation or of arbitrary, capricious, or discriminatory enforcement of a condominium by-law banning all pets from any housing unit or common area of the condominium. [460]

Defendants who had not raised the issue at trial or objected to the award of attorney's fees in connection with a proceeding by managers of a condominium established under G. L. c. 183A, seeking the removal of two pet dogs from the defendants' condominium unit, were not entitled to a review of their liability for attorney's fees in connection with a condominium by-law provision entitling the plaintiffs to recoup the "cost and expense" of eliminating by-law violations by an offending unit owner. [460-461]

COUNSEL: *Harry D. Quick, III*, for the defendant.

Seth Emmer (Constance M. Hilton with him) for the plaintiffs.

JUDGES: Fine, Jacobs, & Porada, JJ.

OPINION BY: JACOBS

OPINION

[*453] [*267] The plaintiffs, as managers of a condominium established under G. L. c. 183A, sought the removal of two pet dogs from a condominium unit owned by John Murphy and Margaret Wilson.³ They based their action upon a condominium by-law banning all pets from any housing unit or common area of the condominium. They also sought to enforce by-laws providing for the [*268] assessment of a \$ 5 per day per violation penalty and payment by the defendants of the "costs and expense of eliminating" violations. The defendants, by answer and counterclaim, questioned the validity of the pet restriction and the enforceability of any fines and assessments [***2] based upon it. A judge of the Superior Court allowed the plaintiffs' motion for summary judgment and denied that of the defendants. Murphy and Wilson appealed from a judgment which thereafter was entered ordering them permanently to remove their dogs and to pay to the plaintiffs assessments for penalties, costs, and attorney's fees totalling \$ 15,244.75. We affirm.

- - - - - Footnotes - - - - -

3 During the pendency of this appeal, the parties informed the court that the defendants no longer hold any interest in the unit in question as a result of a mortgage foreclosure sale. We were also informed during argument that the dogs which were the

subject of the action were killed in the same accident which fatally injured Margaret Wilson. These events obviously rendered moot the issue of future compliance. The question of the validity of the pet restriction remains before us, however, because of its relationship to the issues of penalty and expense assessments discussed *infra*.

- - - - - End Footnotes- - - - -

The pertinent facts are as follows: Established in 1973, "Weymouthport [***3] Condominium -- Phase I" is a 271-unit complex managed by a trust of which the plaintiffs are trustees. The trust was formed pursuant to G. L. c. 183A, § 8(j), to govern the management of the condominium and contained by-laws that incorporated rules and regulations which [*454] included a restriction against raising, breeding, or keeping any "animals or reptiles of any kind . . . in any Unit or in the Common Elements . . .," together with a provision, sometimes referred to as an amortization or no replacement rule, that protected the harboring of pets owned at the time of purchase of a unit. In 1979, the original trust by-laws were amended to provide that "[n]o animals, reptiles or pets of any kind shall be raised, bred, kept or permitted in any Unit or in the Common Elements" The significant difference was that the pet restriction had ascended from rules and regulations to the by-laws. The amendment was enacted in response to the trustees' concern with pet problems and their understanding that *Johnson v. Keith*, 368 Mass. 316 (1975), had rendered unenforceable the pet restriction contained in the regulations.⁴ The amendment also contained an amortization [***4] provision allowing unit owners and tenants "in occupancy prior to the recording of [the] amendment" to continue to keep in their unit any household pet owned by them at the time they purchased or rented their units. Also, the amendment made allowance for unit owners to have one household pet upon receipt of written permission of the trustees.

- - - - - Footnotes - - - - -

4 A similarly absolute pet restriction was before the Supreme Judicial Court in *Johnson v. Keith, supra*, but the issue of its validity was expressly left unanswered. *Id.* at 321. The court held that rules and regulations governing use of a condominium unit were unenforceable notwithstanding that they were incorporated by reference into the by-laws of the organization of unit owners of the condominium. It noted that the rules and regulations were not recorded with the by-laws and that they could be amended by other than a two-thirds vote of the unit owners, as required for a by-law amendment. The court, in effect, decided that restrictions relating to the *use of a condominium unit* as distinguished from those relating to *use of the common areas and facilities* must be contained in either the by-laws or master deed to be enforceable under G. L. c. 183A. The court noted that "this technicality may be corrected by appropriate action of the unit owners." *Johnson v. Keith, supra* at 320-321.

- - - - - End Footnotes- - - - -

[***5] In September of 1983, Murphy and Wilson were notified by the manager of the condominium that a dog which they had acquired since purchasing their unit earlier that year was being kept by them in violation of the pet restriction [*455] amendment. After removing the dog, Murphy and Wilson, in November of 1983, and again in January of 1984, unsuccessfully sought permission to return it to the unit, the latter request being based upon Wilson's claimed permanent and total disability. In April, 1985, Murphy and Wilson moved out. After a period of renting out their unit, they reoccupied it in November, 1987. Upon being notified in May, 1988, that they were again in violation of the pet restriction, Murphy and Wilson requested and received permission to house their dogs (they had by then acquired a second dog) temporarily in their unit during weekends until October 1, 1988. When the dogs were not removed after that date, the plaintiffs imposed a fine of \$ 5 a day and ultimately brought this action.

1. *Validity of the pet restriction.* The defendants claim the applicable standard for determining the validity of the pet restriction is that of "unreasonable interference" under G. L. c. 183A, [***6] § 11(e), as inserted by St. 1963, c. 493, § 1, which requires [**269] the by-laws of the organization of unit owners to "at least" contain such use restrictions "not set forth in the master deed, as are designed to prevent unreasonable interference with the use of [the owners'] respective units and of the common areas and facilities by the several unit owners." They argue that the question whether the presence of animals constitutes an unreasonable interference under the circumstances is one of material fact and therefore not suitable for resolution by summary judgment. They rely in large part on an affidavit of an expert in animal

behavior who opines that "prohibition of all animals from the condominium units is more restrictive and burdensome than required to meet the statutory standard of preventing unreasonable interference with use of other units or the common areas." The affidavit points to animals such as goldfish and parakeets which "present[] no risk of interference of any kind to use of neighboring units or common areas." The argument misperceives both the thrust of the statute and the basic nature of condominium ownership.

HN1 Ownership of a condominium unit is a hybrid form of interest [***7] in real estate, entitling the owner to both "exclusive [*456] ownership and possession of his unit, G. L. c. 183A, § 4, and . . . an undivided interest [as tenant in common together with all the other unit owners] in the common areas" *Kaplan v. Boudreaux*, 410 Mass. 435, 438 (1991). It affords an opportunity to combine the legal benefits of fee simple ownership ⁵ with the economic advantages of joint acquisition and operation of various amenities including recreational facilities, contracted caretaking, and security safeguards. Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, "must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property." *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975). See *Franklin v. Spadafora*, 388 Mass. 764, 769 (1983).

- - - - - Footnotes - - - - -

5 The Uniform Condominium Act approved by the National Conference of Commissioners on Uniform State Laws in 1977 defines "condominium" as meaning "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." This Act has been adopted in ten states, but Massachusetts is not among them.

- - - - - End Footnotes- - - - -

[***8] **HN2** General Laws c. 183A, § 11(e), permits restrictions on the use of residential units which are "designed to prevent" unreasonable interference by individual unit owners with the other owners' use of their respective units and the common areas and facilities. There is no prohibition against restrictions that, although patently designed to prevent such interference, also incidentally preclude generically similar uses that may not be as likely to encroach on the other owners' use of their units and the common areas and facilities. Close judicial scrutiny and possible invalidation or limitation of fundamentally proper but broadly drawn use restrictions, not expressly prohibited by the enabling statute, would deny to developers and unit owners the "planning flexibility" inherent in c. 183A. See *Barclay v. DeVeau*, 384 Mass. 676, 682 (1981). In *Franklin v. Spadafora*, 388 Mass. at 769, the court upheld a by-law amendment restricting to two the number of condominium units which could be owned by one person or entity and noted that nothing in c. 183A prohibited [*457] the type of general restriction at issue even if the court [***9] assumed that tenants would not be less responsible than owners. *Id.* at 768-769 & n.12. The court stated that, viewed as a compromise between the desires of the majority and the right of an individual owner to use property as he or she desires, "the amendment is a reasonable means of achieving the majority's proper goal." *Id.* at 769-770. See *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. Ct. 530, 534-535 (1989) (a condominium association may prohibit the operation of a family day-care business in a unit notwithstanding that the enterprise's interfering [**270] effect on other unit owners is "minor . . . modest[] . . . [and] benign . . .").

HN3 The most common standard of review [of condominium use restrictions] is equitable reasonableness." Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 Chi.-Kent L. Rev. 653, 655 (1988). *Franklin v. Spadafora*, 388 Mass. at 770-772, can be read to favor such a test. Its formulation is commonly attributed to *Hidden Harbour Estates, Inc. v. Norman*, *supra*, [***10] a Florida decision cited in both *Franklin v. Spadafora*, *supra* at 769, and *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. Ct. at 533, and in which it is stated that: "the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof." *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d at 182. This approach recognizes the discretion of the majority of unit

owners while at the same time limiting their rule-making authority to those matters "that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners." *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 640 (Fla. Dist. Ct. App. 1981). We recognize that a somewhat different standard of review may be implicated where, in contrast to this case, a restriction is promulgated after the owner who is in violation of the rule acquires his unit. See *Franklin v. Spadafora, supra* at 772-774.

[*458] [***11] When enacting the pet restriction in issue, the trustees expressed concern with "pet problems." The record indicates that they had received several complaints involving dogs and one that concerned a boa constrictor. Unit owners are not required to conduct investigations or cite authority in order reasonably to conclude that the presence of pets within the condominium may interfere with their health, happiness, and peace of mind.⁶ It is a subject well within their common knowledge and competence. Also, considerations of efficient and even-handed enforcement support an absolute prohibition of all pets rather than a restriction limited to certain pets. Cf. *Wilshire Condominium Assn., Inc. v. Kohlbrand*, 368 So. 2d 629, 631 (Fla. Dist. Ct. App. 1979) (citing New York cases in which absolute dog prohibitions have been upheld as a matter of law). Any concern with procrustean effect is met by the provision giving the trustees discretion to permit a unit owner to keep a household pet.

- - - - - Footnotes - - - - -

⁶ "Attitudes about pet animals are understandably passionate. One person's companion is another's nuisance. It is not necessary to approve or even sympathize with [the trustees'] position to acknowledge that an owner of . . . property may think it best for the property and for the preponderance of current and future [occupants] that there not be pet animals in the [condominium]." *Clifford V. Miller, Inc. v. Rent Control Bd. of Cambridge*, 31 Mass. App. Ct. 91, 95 (1991).

- - - - - End Footnotes- - - - -

[***12] A condominium use restriction appearing in originating documents which predate the purchase of individual units may be subject to even more liberal review than if promulgated after units have been individually acquired. The substance of the pet restriction in issue was part of the originating documents of the Weymouthport condominium. The master deed expressly made unit ownership subject to attached rules and regulations that contained the restriction. The 1979 incorporation of the restriction into the by-laws was undertaken primarily to better accommodate future enforcement. Constructive knowledge of the regulatory scheme of the condominium was chargeable to Murphy and Wilson as of the time they acquired their unit. See *Tosney v. Chelmsford Village Condominium Assn.*, 397 Mass. 683, 688 (1986).

[*459] ^{HN4} There is sound basis for treating restrictions in the originating documents as being "clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land [***13] and they will not be [**271] invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. . . . Indeed, a use restriction in [the originating documents] may have a certain degree of unreasonableness to it, and yet withstand attack in the courts." *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d at 639-640. See also Natelson, *Law of Property Owners Associations* § 4.4.4, at 34 n.17 (1989 & Supp. 1991) (questioning the appropriateness of reasonableness review when the regulation in question was enacted prior to its opponents' acquiring ownership and was known by them at the time of acquisition). Also, unit owners, upon purchase, may pay a premium to procure what they regard as a beneficial restrictive scheme. Note, *Judicial Review of Condominium Rulemaking*, 94 Harv. L. Rev. 647, 653 (1981). Under this formulation, the value of meeting the reasonable expectations of original unit owners and enforcing their right to freely associate by contract with persons of like expectations outweighs the possibility that some owners [***14] may purchase into a condominium regime without actual notice and full understanding of its restrictions. Our appellate decisions appear to recognize the validity of this approach. See *Tosney v. Chelmsford Village Condominium Assn.*, 397 Mass. at 688; *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. Ct. at 533. (developers may impose

reasonable restrictions on condominiums under c. 183A "and persons who contemplate acquisition of a condominium unit can choose whether to buy into those restrictions"). Compare Note, Condominium Rulemaking -- Presumptions, Burdens and Abuses: A Call for Substantive Judicial Review in Florida, 34 U. Fla. L. Rev. 219, 227 & n.50 (1982) ("Because most buyers ignore or misunderstand disclosure statements, a [*460] presumption of validity based on the unit owners' knowledge of [origination documents] rests on a practical fiction"); Note, Judicial Review of Condominium Rulemaking, 94 Harv. L. Rev. at 650-651. The defendants do not contend that there is any fundamental public policy or constitutional provision guaranteeing the right to [***15] raise, breed, or keep pets in a condominium. By insulating properly-enacted and evenly-enforced use restrictions contained in the master deed or original by-laws of a condominium against attack except on constitutional or public policy grounds, already crowded courts and the majority of unit owners who may be presumed to have chosen not to alter or rescind such restrictions will be spared the burden and expense of highly particularized and lengthy litigation. ⁷

- - - - - Footnotes - - - - -

7 We resist, as unnecessary to our decision, the plaintiffs' suggestion that we adopt the business judgment rule as the measure of the validity of the actions of a unit owners' organization. That rule, when applied, generally is invoked with respect to questions of the propriety of amendments to a preexisting regulatory scheme and essentially imposes fiduciary duties similar to those required of corporate directors. We recognize, however, that several States have adopted this standard and that it receives varying degrees of approval among commentators. See Hyatt, Condominium and Homeowner Association Practice: Community Association Law § 6.02(a)(1), at 212-218 (2d ed. 1988); Goldberg, Community Association Use Restrictions: Applying the Business Judgment Doctrine, 64 Chi.-Kent L. Rev. 653 (1988); Note, Judicial Review of Condominium Rulemaking, 94 Harv. L. Rev. at 664-667.

- - - - - End Footnotes - - - - -

[***16] 2. *Enforcement.* Murphy and Wilson received ample and repeated notice of violation and reasonable opportunity to comply with the restriction. The record does not reveal a genuine issue of waiver of violation or of arbitrary, capricious, or discriminatory enforcement. That the trustees consistently and reasonably utilized a complaint-driven procedure for enforcement, which incidentally may have focused on pets observed outside the units, rather than on any which might have been kept within, does not give rise to any constitutional issues.

3. *Fines and Fees.* The defendants argue that the by-law provision which entitles the plaintiffs to recoup the "cost and expense" of eliminating by-law violations by an offending [*461] unit owner does not include attorneys' fees. The expense provision is part of a valid contract between the parties. *Barclay v. DeVeau*, 11 Mass. App. Ct. 236, 245 (Greaney, J., dissenting), *S.C.*, 384 Mass. 676 (1981). Attorneys' fees generally constitute the most substantial component of the cost of enforcement and, therefore, would appear to be within the context of the word "expense" and the objective [***17] intent of the bylaws to shift the financial burden of successful enforcement to the offender. We need not rule on the question, however, since there is no indication in the record that the defendants raised the issue below or objected to the award of attorneys' fees. *Edgar v. Edgar*, 406 Mass. 628, 629 (1990). The fines were in accord with the by-laws and were properly assessed by the plaintiffs and included in the judgment.

Judgment affirmed.

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APPENDIX 6

Breezy Point Holiday Harbor Lodge - Beachside Apartment Owners' Association, Respondent, vs. B.P. Partnership, a Minnesota partnership, et al., Appellants.

C5-94-2479

COURT OF APPEALS OF MINNESOTA

531 N.W.2d 917; 1995 Minn. App. LEXIS 709

May 30, 1995, Filed

PRIOR HISTORY: [**1] Appeal from District Court, Crow Wing County; Hon. Robert Kautz, Judge. District Court File No. C5-94-568.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant owners challenged a judgment of the District Court, Crow Wing County (Minnesota), which, on cross motions for summary judgment, ruled in respondent association's favor and granted a permanent injunction restraining the owners from renting their condominium unit for more than 14 days per year in the association's action for such injunction.

OVERVIEW: The association filed an action against the owners seeking a permanent injunction restraining the owners from renting their condominium for more than 14 days per year. The court affirmed the grant of the injunction. The rent restriction was not a restraint on alienation. While the owners were entitled to exclusive possession and fee simple absolute ownership of their unit, those rights were subject to the remaining provisions of the Condominium Act, including any reasonable restrictions on the use of their unit. Even if the rental limitation was a restriction on alienation, the restriction would have been valid under the Condominium Act. The Condominium Act did not expressly prohibit reasonable or limited restrictions on alienation of units. The owners' argument that since no rental restriction existed when they purchased their unit, the association was precluded from enforcing the later enacted restriction against them was not raised before the district court, and the court declined to address it. The court noted that the amendment to the association's declaration complied with the association documents and the Condominium Act.

OUTCOME: The court affirmed the judgment in the association's favor and granting the association an injunction.

CORE TERMS: Condominium Act, uniform act, rental, alienation, declaration, apartment, condominium, bylaws, per year, undisputed, renting, leasing, tenants, summary judgment, injunctive relief, occupy, Uniform Condominium Act, condominium unit, condominium owners', unit owners, time to time, use of property, exclusive ownership, fee simple absolute, legislative intent, general purpose, contemplate, injunction, ownership, unlimited

LexisNexis® Headnotes

Civil Procedure > Summary Judgment > Hearings > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN1 ↓ Minn. Stat. § 515.07 (1994) provides that failure to comply with bylaws and administrative rules is ground for damages or injunctive relief.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2 ↓ Summary judgment is properly granted when no genuine issues as to any material fact exist and one party is entitled to judgment as matter of law. Minn. R. Civ. P. 56.03.

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN3 ↓ The Condominium Act specifically contemplates use restrictions. Under Minn. Stat. § 515.11(7), the declaration may restrict use of unit. Under Minn. Stat. § 515.19, subd. 1(j), the bylaws may contain restrictions and requirements respecting use and maintenance of units, common areas, and facilities. Under Minn. Stat. § 515.12(3), the deed shall contain statement of use for which unit is intended and restrictions on its use.

Real Property Law > Common Interest Communities > Condominiums > Leases

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN4 ↓ The power of alienation is affected only when an owner cannot convey title in absolute fee.

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

HN5 ↓ The rule against restraints on alienation precludes only unlimited or absolute restraints.

Civil Procedure > Appeals > Reviewability > Preservation for Review

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > Leases

HN6 ↓ Only those issues that the record shows were presented and considered by the trial court may be reviewed.

Contracts Law > Types of Contracts > Covenants

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Restrictive Covenants > General Overview

HN7 ↓ Minn. Stat. § 515.07 states that each apartment owner shall comply strictly with the bylaws and with the administrative rules adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration.

SYLLABUS

A restriction limiting rental of condominium units to 14 days per year is valid under the Minnesota Condominium Act, Minn. Stat. §§ 515.01-.29 (1994).

COUNSEL: For Breezy Point Holiday Harbor Lodge - Beachside Apartment Owners' Association, Respondent: Stanley Efron, Cheryl Hood Langel, Henson & Efron, P.A., Minneapolis, MN.

For B.P. Partnership, a Minnesota partnership, et al., Appellants: Timothy Moynihan, Phillip R. Krass, Joel Abrahamson, Krass, Monroe, Moxness & Gibson Chartered, Bloomington, MN.

JUDGES: Considered and decided by Klaphake, Presiding Judge, Randall, Judge, and Mulally, Judge. *

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION BY: Roger M. Klaphake

OPINION

[*918] OPINION

KLAPHAKE, Judge

Respondent Breezy Point Holiday Harbor Lodge - Beachside Apartment Owners' Association (the association) sued appellants B.P. Partnership and Dean Morlock (the owners), to enforce a 14-day rental restriction. On cross motions for summary judgment, the district court ruled in the association's favor and granted a permanent injunction restraining the owners from renting their condominium unit for more than 14 days per year. The owners appeal.

FACTS

Neither party disputes the facts as found by the district court. The association is a 20-unit condominium owners' association which was established in 1965 under the Minnesota Condominium Act, Minn. Stat. §§ 515.01-.29 (1994) (the Condominium Act).¹ The owners purchased their condominium unit in 1978.

- - - - - Footnotes - - - - -

1 The parties assume that this case is governed by the Condominium Act, and not by the later enacted Uniform Condominium Act. See Minn. Stat. § 515A.1-102(b) (1994) (Uniform Act applies to all condominiums created after August 1, 1980). They do not discuss whether the Uniform Act should nevertheless be applied to the rental restriction in this case. See *id.* (provisions of Condominium Act "do not invalidate any amendment to the declaration * * * of any condominium created before August 1, 1986, if the amendment would be permitted by [the Uniform Act]"). The parties do not question the applicability of the Condominium Act, and do not argue that the later enacted Uniform Act should apply.

- - - - - End Footnotes- - - - -

[*3] At the time the owners purchased their unit, there were no restrictions or limitations on rentability of units. Indeed, Article VIII of the association's original declaration contemplated that units might be rented:

Each apartment owner shall occupy and use his apartment as a private dwelling for himself and his family and

social guests and residential tenants and for no other purposes.

(Emphasis added.) On September 29, 1986, Article VIII was amended to read:

Each apartment owner shall occupy and use his apartment as a private dwelling for himself and his family and for no other purpose; social guests and residential tenants shall be allowed to occupy such apartment (absent the owner) only as may be permitted under the regulations prescribed by the Board of Directors of the Apartment Owners' Association from time to time.

(Emphasis added.) On May 26, 1991, the association's Board of Directors passed a resolution stating that "effective with the Annual Meeting date in September, 1992, no units will be allowed to be rented cumulatively for more than fourteen (14) days yearly."

It is undisputed that the owners have violated this resolution by renting [**4] their unit more than 14 days per year. It is also undisputed that the owners received all the required notices, yet failed to attend or participate in the association and board meetings at which Article VIII was amended and the resolution was adopted.

ISSUE

Is a 14-day rental restriction valid under the Condominium Act?

ANALYSIS

The district court concluded that the owners' violation of the rental restriction entitled the association to injunctive relief under Minn. Stat. § 515.07 (1994) ^{HN1} (failure to comply with bylaws and administrative rules is ground for damages or injunctive relief). While permanent injunctive relief is generally granted after a full trial on the merits, in this case it was granted after the court determined summary judgment was proper. Cf. *Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383, 389 (Minn. App. 1992) (trial court combined injunction and summary judgment hearings), *pet. for rev. denied* (Minn. Mar. 26, 1992). ^{HN2} Summary judgment is properly granted when no genuine issues as to any material fact exist and one party is entitled [**919] to judgment as matter of law. Minn. R. Civ. P. 56.03; see also *A.J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc.*, [**5] *Inc.*, 260 N.W.2d 579, 582 (Minn. 1977) (district court's application of statutory language to set of undisputed facts is issue of law for this court to review de novo).

The district court concluded that the rental restriction is a reasonable restraint on the use of the units. ² ^{HN3} The Condominium Act specifically contemplates such use restrictions. See Minn. Stat. §§ 515.11(7) (declaration may restrict use of unit); 515.19, subd. 1(j) (bylaws may contain restrictions and requirements respecting use and maintenance of units, common areas, and facilities); 515.12(3) (deed shall contain statement of use for which unit is intended and restrictions on its use).

- - - - - Footnotes - - - - -

2 The owners do not challenge the district court's finding and conclusion that the restriction is reasonable as a means to address problems arising from the owners' rental of their unit. Those problems relate to the lack of control over tenants and the need for additional maintenance caused by those tenants.

- - - - - End Footnotes - - - - -

The owners argue that the rental restriction [**6] is actually a restraint on alienation, not a use restriction. At least one other jurisdiction, however, has upheld a rental restriction as a valid restriction on the use of property and not a restraint on alienation. See *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So. 2d 63, 64-65 (Fla. Dist. Ct. App. 1973) (provision granting condominium developer exclusive right to rent units and prohibiting other owners from such rentals upheld as valid restriction on use of units). ^{HN4} The power of alienation is affected only when an owner cannot convey title in absolute fee. See *id.* at 64 (no

restraint on alienation when owners can freely convey fee title to property); *Le Febvre v. Osterndorf*, 87 Wis. 2d 525, 275 N.W.2d 154, 158 (Wis. Ct. App. 1979) (restriction on leasing of units affects only use of units, not right to alienate units); 15A Am.Jur.2d Condominiums & Co-operative Apartments § 39, at 869 (1976) (restrictions on leasing or renting units frequently contained in condominium documents in accordance with provisions allowing use restrictions).

The owners nevertheless insist that by viewing the rental limitation as a valid use restriction under the Condominium Act, the district [**7] court ignores other sections of the Condominium Act which grant owners exclusive ownership and possession and a fee simple absolute estate. See Minn. Stat. §§ 515.05; 515.02, subd. 3. As the association notes, however, the concept of property interests or ownership is separate and distinct from lawful restrictions on the use of property. While the owners are entitled to exclusive possession and fee simple absolute ownership of their unit, those rights are subject to the remaining provisions of the Condominium Act, including any reasonable restrictions on the use of their unit.

Even if we were to agree that the rental limitation is a restriction on alienation, the restriction would be valid under the Condominium Act. The Condominium Act does not expressly prohibit reasonable or limited³ restrictions on alienation of units.

----- Footnotes -----

³ The owners do not challenge the district court's conclusion that the rental restriction is not an unlimited restraint upon alienation, because it only prohibits the leasing of units for more than 14 days per year, unit owners are free to sell their property at any time, and the restriction can be terminated at any time by a vote of the unit owners pursuant to the association bylaws. See *Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484, 485-86 (Fla. Dist. Ct. App. 1976) ^{HNS} (rule against restraints on alienation precludes only unlimited or absolute restraints).

----- End Footnotes-----

[**8] The owners nevertheless insist that since the Condominium Act does not expressly contemplate or allow restrictions on alienation, then those restrictions are prohibited. As support for this position, the owners compare sections of the Condominium Act with sections of the later enacted Uniform Condominium Act. Minn. Stat. §§ 515A.1-101 to .4-117 (1994) (originally enacted by 1980 Minn. Laws ch. 582, art. 1) (the Uniform Act).

The owners first note that the Uniform Act omits concepts in the Condominium Act, such as fee simple absolute and exclusive ownership and possession. They insist that such omissions evidence a legislative intent to change the law, and infer that the legislature intentionally deleted these concepts or rights [**920] for condominium owners governed by the Uniform Act. The owners next note that the Uniform Act contains other language not found in the Condominium Act, particularly the concept of restrictions on alienation of units. See Minn. Stat. §§ 515A.2-105 (declaration shall contain "any restrictions on use, occupancy, and alienation of the units"); 515A.4-107(a) (before resale of unit, seller must disclose "any right of first refusal or other restraint on the [**9] free alienability of the unit"). The owners insist that the absence of the term "alienation" from the Condominium Act and its addition in several sections of the Uniform Act implies that the earlier Condominium Act does not allow restraints on alienation of units while the Uniform Act allows such restraints.

These comparisons are not instructive, however, because the Minnesota legislature did not draft the Uniform Act. Thus, the legislature's intent in adopting the Uniform Act may not be gleaned by comparing it with the Condominium Act. See Minn. Stat. § 515A.1-110 (Uniform Act "shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of [this Act]"); *id.* § 645.22 ("Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them."); *Layne-Minnesota Co. v. Regents of the Univ. of Minn.*, 266 Minn. 284, 290-91 n.13, 123 N.W.2d 371, 376 n.13 (1963) ("The intent of the drafters of the [uniform] act becomes the legislative intent upon enactment."). In addition, the

Uniform Act acknowledges the existence of [**10] and occasional conflict with the Condominium Act but does not repeal it. See Minn. Stat. § 515A.1-102. The two acts thus need not be harmonized or construed together. Cf. *Hahn v. City of Ortonville*, 238 Minn. 428, 435, 57 N.W.2d 254, 261 (1953) (under doctrine of in pari materia, different legislative acts involving single subject must be construed to avoid irreconcilable differences and conflicts).

Finally, the owners argue that since no rental restriction existed when they purchased their unit in 1978, the association is precluded from enforcing the later enacted restriction against them. Cf. *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730 (N.D. 1981) (restrictions on leasing of condominiums unenforceable against later purchaser because not "of record" as required by North Dakota statute). The owners impermissibly raise this issue for the first time on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ^{HN6} ("only those issues that the record shows were presented and considered by the trial court" may be reviewed). We therefore decline to address this issue, other than to note that it is undisputed that the amendment to Article VIII complied with the requirements [**11] and procedures set out in the association documents and the Condominium Act. See ^{HN7} Minn. Stat. § 515.07 ("each apartment owner shall comply strictly with the bylaws and with the administrative rules adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration"). Moreover, this argument has been considered and rejected by other courts. See, e.g., *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695, 700 (1978) (owner bound by subsequent amendment where declaration provided that bylaws could be amended and enforced against all owners); *Flagler Fed. Sav. & Loan Ass'n v. Crestview Towers Condominium Ass'n*, 595 So. 2d 198, 200 (Fla. Dist. Ct. App. 1992) (owners who purchase units knowing of and accepting provisions for amendment of declaration are bound by subsequent amendments to declaration).

DECISION

The district court did not err in concluding that the rental restriction was valid under the Condominium Act, and in permanently enjoining the owners from renting their unit for more than 14 days per year.

Affirmed.

Roger M. Klaphake

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