

Association of Condominium,
Townhouse, and
Homeowners Associations



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**USE AND OCCUPANCY RESTRICTIONS:
HOW FAR CAN BOARDS GO?**

By Joseph W. Scharnak, Arnstein & Lehr LLP

Illinois condominium associations may restrict unit owners' rights to use and occupy their units either by amending the association's declaration or by adopting a rule. While amending an association's declaration is a time-tested method of ensuring that a restriction will be upheld, the process of amending a declaration is much more burdensome than adopting a rule. Whereas a board can adopt a rule by a majority vote of the board (after providing unit owners with a copy of the full text of the proposed rule and an opportunity to discuss the proposed rule at a meeting of the owners) an amendment to an association's declaration requires the affirmative approval of a supermajority of the owners and often requires notice to (and sometimes approval of) holders of any lien or mortgage against any unit in the association. The difficulty associated with amending a declaration has led some associations to try imposing use and occupancy restrictions through board-made rules thereby avoiding the need for an owner vote altogether. However, use and occupancy restrictions passed in this manner are subject to a different level of scrutiny and may not survive a unit owner's challenge. Thus, boards often struggle with determining just how far board-made rules can go in restricting certain unit uses such as rentals, pets, smoking and business use without the need for obtaining approval.

In February of 2016, the Illinois Appellate Court invalidated a board-made rule restricting unit leasing in *Stobe vs. 842-848 West Bradley Place Condominium Assoc.*, and that decision represents the latest development in the evolution of Illinois law on a condominium board's power to impose restrictions on unit use and occupancy. To properly understand the *Stobe* decision, a quick review of two earlier court decisions is needed.



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QUESTION OF THE MONTH

Kristofer D. Kasten of Michael C. Kim & Associates

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Q. *How does an association enforce the rules and regulations with a bank-owned rental unit? If the violation is frequently repeated, what recourse does the association have? If the renter wants to renew the lease, are the former issues cause not to lease to them legal?*

A. The association would enforce its rules and regulations against a bank that owns a unit in the same manner as it would against any unit owner; that is, it should follow the enforcement policies and procedures set forth in its declaration, bylaws, and rules and regulations, as well as any applicable statute. There may be several options available to the association to remedy such a violation, including, without limitation, levying a fine against the owner (after notice and opportunity for hearing) or evicting the tenant. The most appropriate remedy for any given situation depends upon the actual facts of that situation (such as, the nature and frequency of the violation).

For example, Section 18(n) of the Illinois Condominium Property Act provides that provisions of a condo association's declaration, bylaws, and rules and regulations relating to the use of units or common elements are applicable to any person leasing a unit. That Section also provides that the condo association may pursue an eviction action directly against a tenant for any breach by that tenant of applicable provisions of the declaration, bylaws, or rules and regulations. Accordingly, the condo association would be able to file a lawsuit to evict a tenant who has continually violated the condo association's rules and regulations. The condo association should also include the owner as a defendant in such a lawsuit to recover attorneys' fees and costs against that owner.

Also, the association may, at any time, reach out to an owner to discuss a problematic tenant situation in an attempt to find a mutually agreeable resolution. Perhaps the owner will take appropriate action to stop the problematic conduct or even evict the tenant, without the association's further involvement. The association can inform the owner that it could take action against the owner and the tenant if the problematic situation is not corrected.

Note that the association does not have the authority to renew or not renew a lease to which it is not a party. Also, the association does not have the authority to tell an owner whether he or she can renew or not renew a lease with his or her tenant. Generally, a landlord may choose not to renew a lease for any reason upon the expiration of the term of that lease.

Additionally, the association may need to consider various factors in determining the appropriate course of action to take when a tenant/occupant resides in a bank-owned unit. For example, who placed the tenant in the unit? Was it the former unit owner who was foreclosed, the association via a collection action against the former unit owner, a receiver appointed to handle the unit during the foreclosure proceeding, or the bank after the foreclosure completed? Can the bank owner be held liable for any particular violation if the bank does not have a lease with the occupant? Is the bank owner in the process of evicting the occupant? What is the nature of the violation? Understanding the answers to questions such as these will be essential to a successful enforcement action.

In summary, there is no difference between enforcement of rules and regulations against a bank that owns a unit and any other unit owner. However, since the circumstances under which a person may come to occupy a unit owned by a bank will vary, there is no "one-size-fits-all" answer as to the best course of action. Therefore, it is important that the association consult with its attorney to understand the available options and to formulate a strategy for any necessary enforcement action.

Continued from page 1

The 1995 *Apple II* case involved unit owners who purchased their unit solely for investment purposes and therefore relied upon the use and occupancy restrictions that were in place as of the date of their purchase. Thereafter, the unit owners voted to amend the association's declaration to prohibit leasing and the court was asked to decide whether an association may amend its declaration in this manner. The court upheld the validity of the declaration amendment, holding that a declaration amendment imposing use and occupancy restrictions is valid unless the restrictions are arbitrary, against public policy or violate owners' constitutional rights. Although the case did not involve a rule that restricted rentals, the *Apple II* decision suggested that use and occupancy restrictions imposed by a board-made rule would also be valid if the restriction was "reasonable" in its purpose and application.

Two years later, the *Hinojosa* case involved unit owners who asserted that the board lacked the authority to impose a no-pet rule because the rule conflicted with the association's declaration. While the declaration established the board's right to adopt reasonable rules, the document was silent on the issue of pets. After determining that the board had the power to adopt a "reasonable" pet rule, since the declaration was silent on that issue, the court looked at the board's reasons for adopting the rule, considered the board's prior failed attempts to impose less restrictive measures and took notice of the rules uniform application before upholding the rule

as "reasonable" in both its purpose and application.

In the 2016 *Stobe* case, owners brought suit against their association asserting that a leasing rule adopted by the board impermissibly conflicted with the declaration. The rule was adopted in reliance on the



comments made in the *Apple II* decision to the effect that a rule imposing use and occupancy restriction would be lawful as long as the restriction is "reasonable". However, the *Stobe* court disagreed, and invalidated the rule because the condominium declaration in *Stobe* specifically authorized unit leasing. Therefore, even though the rule may have been reasonable, a rule that conflicts with the association's declaration cannot be valid.

Unlike the use and occupancy restriction in *Apple II*, the *Stobe* restriction was imposed solely by the Board and was not made part of the association's governing documents with unit owner approval. Whereas the declaration in the *Hinojosa* case was silent as to the property right at issue, the declaration in the *Stobe* case expressly referenced the rights of unit owners to lease their units and the board's rule attempted to limit those rights. Thus, the *Stobe* decision takes the principles of the prior cases a step further and establishes that when an association's declaration expressly reference a specific

ownership right, any augmentation or diminution of that right may only be accomplished through an amendment to the declaration approved by the unit owners; not a rule promulgated by the Board.

Following the additional guidance provided by the February 2016 *Stobe* decision; the following guidelines may be used to assist in determining how far boards can go when imposing use and occupancy restrictions:

- Use and occupancy restrictions established by an amendment to the association's declaration or bylaws will be presumed valid and will not be disturbed by a court unless shown to be arbitrary, against public policy or in violation of a constitutional right. As before, an amendment to declaration remains the preferred method of implementing restrictions on unit use and occupancy.
- A restriction on unit use and occupancy that is imposed by a board-made rule will be invalidated if it conflicts with provisions in the condominium declaration. Contrary to comments in the *Apple II* decision, if a declaration contemplates unit leasing, a board-made rule restricting unit leasing will not survive a legal challenge. The same principle would apply to rules restricting pets or other unit uses.
- A restriction on unit use and occupancy that is imposed by a board-made rule that does not conflict with provisions in the association's declaration or bylaws will survive judicial scrutiny

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if the rule is reasonable in its application and purpose. Courts will examine such rules on a case-by-case basis, considering the board's reasons for adopting the rule, attempts to impose less intrusive restrictions, and whether the rule applies to all owners.

Finally, the *Stobe* decision leaves the door tantalizingly open for boards to adopt rules restricting uses that are not specifically addressed in the associa-

tion's governing declaration and bylaws, such as smoking in units. It is always best to enact significant restrictions on unit use by way of an amendment to declaration; however, since condominium declarations do not typically address smoking in units, a board-made rule prohibiting smoking in units may be valid if the rule is reasonable in its application and purpose.

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www.actha.org or WWW.CONDOEDUCATION.COM

BEGIN THE DAY

8—9:30 a.m.

GENERAL SESSION: Legal Forum/Ask an Attorney

This session will begin with an update on the various changes affecting community associations and what you need to know so your association can stay on the right path. The Ask an Attorney session will follow. Preference will be given to questions submitted in advance. Panelists: Stuart Fullett of Fullett Rosenlund Anderson, David Hartwell of Penland and Hartwell and State Senator Heather Steans

Your choice! Pick one program from each of the time slots offered!

11:30 a.m.— 12:30 p.m.

Leadership - Role of President & Function of the Board:

This session will cover qualities of successful leaders, how to set a vision for association board and how to recruit and develop good board members. The President should set the standard and build a knowledgeable and committed team. Presenters: Tanya Briggs of LaGrange Tower Condo Assn., Marcia Caruso of Caruso Management Group, Maureen Gold of Harborside III Condo Assn.

What's the Big Deal About Reserve Studies: If you have one, that's a good start. If you don't, you should begin the process now. But having one is not doing any good if you don't use it to your advantage. Learn how to use it for budgeting, to account for your reserve funds, report expenditures, and other uses of the information in the study. Presenters: Mark Cantey of Cantey Associates and Kimberly May of Advanced Property Specialists

Ponds, Trees & Natural Landscaping - Enhancement or Nuisance: Native vegetation and sustainable landscaping are the practices of enlightened environmentalists. The panelists will share ideas and methods to transition your ponds, trees and landscaping so they will be easier to maintain. Associations can reduce the expense of maintenance when the transition is complete. Presenters: Chris Berg of Independent Association Managers, Tom Tyler of Bartlett Tree Experts, Sarah Zink of Integrated Lakes Management

1:30 p.m.— 2:30 p.m.

Oops! Some Acts Can Cause Big Messes: This session will describe some of the mistakes boards make, such as, approving contracts that are not in compliance with the governing documents, not giving proper notice, making decisions outside of proper meetings and more. Learn from others' mistakes so you can avoid these common pitfalls. Presenters: Marshall Dickler of Dickler Kahn Slowikowski & Zavell, Amanda Paton of Marcum, Janice Subasic of ACM Community Management

Leasing & Crime Free Policies - Enhance Your Community: Many municipalities are assisting their local associations by encouraging adoption of policies to have safer and more neighborly communities. The panelists will give examples of tenant screening and leasing policies that have been proven effective and the methods to put this in practice. Presenters: John Bickley of Kovitz Shifrin Nesbit and William Townsell of the Chicago Police Dept. Community Outreach

Rules - It's a New Set of Problems: How should your association handle the social issues that now crop up and don't have easy solutions? These present day nuisances include smoking and marijuana, noises, odors, pets, service animals, and more. Learn how to develop and revise rules so they will be enforceable. Presenters: Andrea Sorgani of Alma Property Management and Jim Webb of Keay and Costello

END THE DAY: 2:30–3:30 p.m.

Ask a Professional: Steve Silberman of Marcum, Kim May of Advanced Property Specialists, Ron Sirotzki of Hollinger Insurance Services, and Attorney Charles VanderVennet

NOTE: ACTHA's Annual Meeting will take place at 3:45 p.m.

Registration Form

YES!! I want to register for the Conference and Trade Show on Saturday, April 16 at the Drury Lane in Oakbrook Terrace. **Full Conference Access includes:** seminars, continental breakfast, sit-down lunch, Trade Show, parking and all seminar hand-outs.

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_____ Amount Enclosed; Make check payable to "ACTHA" and remit to 11 E. Adams, Ste. 1107, Chicago, IL 60603 or register online at ww.actha.org: *NOTE: No refunds are given after April 1 and there will be an additional charge of \$10 per person for anyone registering after April 14 or at the door. All cancellations are subject to a 25% handling fee.*

QUESTIONS???? Preference will be given to questions submitted in advance for the Ask an Attorney and/or Ask a Professional Panels. What is your question? (PLEASE PRINT and ATTACH)



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As Bob Hope would say.... thanks for the memories!

I have had the distinct pleasure of serving as ACTHA's Executive Director since 1989 but now look forward to a more leisurely life of retirement. I have met so many wonderful people—those living in associations, industry professionals and a wonderful group of individuals who have served on ACTHA's board during my tenure.

I am proud to have worked with the ACTHA board in building a successful organization serving those in community associations—the ONLY organization in Illinois that is devoted exclusively to the interests of those individuals. We have put together a multi-faceted educational offering of conferences, seminars and webinars as well as a certification program designed exclusively for those living in associations. In addition, ACTHA's legislative monitoring and advocacy has been instrumental in strengthening condo and common interest association laws in Illinois, while rebuffing efforts that would have adversely affected community associations. The only disappointment is that more associations do not see the value of ACTHA and join. If you are looking to get me a retirement gift, persuade a friend living in a non-member ACTHA association to join!

My successor is Mark Swets. He comes with impeccable credentials including certification as a Certified Association Executive from the American Society of Association Executives. He has a strong background in non-profit associations including a stint with Smith Bucklin. In addition, Mark lives in a condominium where he served as Board President. Mark is therefore familiar with both sides of the equation—serving on the board and not serving on the board.

Officially I step down on April 15 although I hope to see many of you at ACTHA's Spring Educational Conference and Trade Show on the 16th at Drury Lane. And it will be an opportunity to meet Mark as well.

I know I leave my position with ACTHA in good hands. And I also know that all of you will welcome and support Mark just as you have supported me. Thanks again for your support and good wishes.

Gael Mennecke, Executive Director