

**ANALYZING LEASING RULES, REGULATIONS AND  
RESTRICTIONS FOR CONDOMINIUM ASSOCIATIONS**

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## ANALYZING LEASING RULES, REGULATIONS AND RESTRICTIONS FOR CONDOMINIUM ASSOCIATIONS

### I. INTRODUCTION

Historically, courts in Texas generally favor the free and unrestricted use of land.<sup>1</sup> Condominium living, however, has been recognized as a unique form of ownership which may be subject to regulations.<sup>2</sup> “The owners make up a democratic subsociety more restrictive in the use of condominium property than property owners might accept in traditional forms of property ownership.”<sup>3</sup> “Each owner must give up some historic rights of property ownership and the freedom of use of the property and subordinate those traditional ownership rights when electing to own a condominium unit.”<sup>4</sup> The proximity in which condominium owners live impliedly provides the basis for compromising certain rights that are typically present in traditional forms of housing.

### II. RESTRAINT ON ALIENATION

Although condominiums are considered unique forms of ownership allowing for greater latitude in occupancy regulations, restrictions may still be subject to judicial scrutiny if considered unreasonable. With the right to own property comes the right of alienation. Namely, the right to own property includes the right to freely transfer such property at will and without limitations. Could other limitations on the use of property be considered restraints on alienation? Does ownership of property include the right to lease the property? Is a right of first refusal or limitations on leasing, restraints on alienation?

Several cases in Texas discuss limitations on leasing in the context of single-family residential living.<sup>5</sup> Many of these cases revolve around the

potential problems with short-term leasing or leasing for business/commercial use (i.e. investment properties). Even when there are no explicit limitations on leasing, a few of these cases stand for the position that short-term leases (i.e. leases for less than ninety days), may be a violation of the single-family residential limitation. In essence, short term leasing results in absentee owners and/or transient residents. As a result, the residential character of the subdivision may suffer. However, condominiums located in coastal communities or resort areas which were constructed and sold with the knowledge that they would be subject to short-term leases or vacation rentals should have planned for the effects that this type of occupancy would create within their governing documents.

Restrictions and policies encumbering condominiums may be allowed to be slightly more restrictive than ones encumbering single-family residential living. Even if an owner has an absolute right to lease in the restrictions, this right may be subject to limitations.<sup>6</sup> The Gulf Shores Council of Co-Owners, Inc. charged owners a fee for going outside of the rental pool by way of a board enacted policy which then later prohibited owners from using outside leasing agents. The relevant provision in the declaration stated,

[e]ach Apartment [unit] owner shall have an absolute right to lease or rent his apartment upon such terms as he shall approve, subject to all provisions and restrictions applicable to the Project.

An owner filed suit arguing that the provision was arbitrary, discriminatory, and capricious. Reviewing the evidence under a reasonableness standard, the court found that the absolute right to lease was subject to any restrictions as well as the governing documents for the condominium. These gave the board wide latitude to adopt rules and regulations regarding leasing. Therefore, even an absolute right to lease may not be unfettered.

The declaration encumbering the Lakeside Manor Condominium contained a right of first refusal in favor

<sup>1</sup> Cf. Tex. Prop. Code §202.003(a)

<sup>2</sup> *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. Pship.*, 985 S.W.2d 667, 670 (Tex.App.-Corpus Christi 1999, pet. denied).

<sup>3</sup> *Cavazos v. Bd. of Governors of Council of Co-Owners of Summit Condominiums*, No. 13-12-00524-CV, 2013 WL 5305237, at \*3 (Tex. App. Sept. 19, 2013) (quoting *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. Pship.*, 985 S.W.2d 667, 670 (Tex.App.-Corpus Christi 1999, pet. denied).

<sup>4</sup> *Id.* (quoting *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. Pship.*, 985 S.W.2d 667, 670 (Tex.App.-Corpus Christi 1999, pet. denied); see also *Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 780 (Tex.App.-Corpus Christi 1982, writ ref'd n.r.e.).

<sup>5</sup> See *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied); *Bernard v. Humble*, 990 S.W.2d 929 (Tex.App.—Beaumont 1999, pet. denied); *Four Seahorses, Llc v. Spanish Grant Civic Ass'n, Sections 1 & 2, Inc.*, No. 14-04-00638-CV, 2005 WL 2875249, at \*2 (Tex.

App. Nov. 3, 2005) (although dismissing appeal as moot because property was sold, trial court permanently enjoined owners from: (1) renting 12705 Maria Court, Galveston, Texas for non-single family residential purposes, and (2) renting 12705 Maria Court, Galveston, Texas for single-family residential purposes but for less than ninety (90) days)

<sup>6</sup> See *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. Pship.*, 985 S.W.2d 667, 670 (Tex.App.-Corpus Christi 1999, pet. denied)

of the association for the sale, rental, lease or transfer of a unit.<sup>7</sup> The provision stated,

[i]n the event of re-sale, renting, or leasing of said Unit, the Board of Directors of the Association has the option to purchase, rent, or lease the same on the same conditions as offered by the said Unit Owner to any third person. Any attempt to re-sell, rent or lease said Unit without prior offer to the Board of Directors shall be deemed a breach of this Declaration and shall be voidable by the association by legal action commenced by the Board of Directors within six (6) months of the sale or lease. If no such legal action is taken within said six (6) months, then the transaction shall be deemed approved.

When a unit owner leased her second unit without first giving the association the right to exercise its option to lease, the association sought an injunction. The court vacated the trial court's injunction, claiming that a right of first refusal is a restraint on alienation as opposed to a covenant restricting the use of land, which did not require a showing of irreparable injury for an injunction. As required by the declaration, the association should have filed suit to have the lease declared void, not to enjoin the breach. Although the method of challenging the violation was incorrect, it is clear that the court would have found in favor of the association as result of the owner's failure to abide by the restrictions giving the association a right of first refusal. On a side note, the court did not find the provision to be arbitrary or discriminatory because mortgagees and the developer were exempt from its application, as argued by the owner.

In *Seagate Condominium Ass'n. v. Duffy*, 330 So. 2d 484, the leasing provision provided,

[a]s previously stated, it is the intent that the owner of each unit of Seagate Towers Condominium shall occupy and use such unit as a private dwelling for himself and his immediate family, and for no other purpose including business purposes. Therefore, the leasing of units to others as a regular practice for business, speculative, investment or other similar purposes is not permitted. To meet special situations and to avoid undue hardship or practical difficulties, the Board of Directors may grant permission to an owner to lease his unit to a specified lessee for a period of not less than four consecutive months nor more than twelve consecutive months.

The foregoing leasing restriction was amended into the original declaration after the owners inherited a condominium unit from their mother. Based on the reasonableness standard used by Florida courts in reviewing restraints on alienation and use, the court found the restriction to be neither unlimited nor unreasonable. The amendment only prohibited a specific type of alienation (i.e. leasing) and it did so in general situations, allowing for exceptions during hardships. Further, the court found the provision to be reasonable given the unique problems of condominium living. Although limitations on leasing may be considered restraints on alienation, courts seem to allow them if the restriction is reasonable, given the distinct nature of condominium living.

The court in *Holiday Out in America at St. Lucie, Inc v. Bowes*, 285 S.2d 63 found no restraint on alienation because the owners were "free to convey the fee title to the property at any time and to anyone in exactly the same state as they acquired it." The leasing restriction provided,

[n]o restrictions are placed herein, as far as renting or selling any condominium unit, provided, however, that all rentals thereof shall exclusively be undertaken by the developer for and in consideration of a schedule or schedules to be promulgated from time to time by the developer. The developer has undertaken an advertising program to promote the rental of the said unit both from itself, insofar as it relates to those units still owned by the developer, and units sold and in private ownership.

The leasing limitation essentially prohibited owners from leasing their units and solely gave the developer the right to lease the units on behalf of the unit owner, and to collect the commission for such services. The owners in this case become disenchanted with the program and sued, alleging the provision was a restraint on alienation. The trial court declared the provision void, as an illegal restraint on alienation. The appellate court reversed the lower court's ruling, again identifying condominium ownership as unique and therefore subject to greater need for control in the management of the use of the common elements. The court also identified a relevant Florida statute which recognized that a declaration may contain restrictions and limitations relating to use.<sup>8</sup> The court upheld the provision, recognizing further that the provision was not unlimited in time because it could be eliminated by a vote of the owners, pursuant to the amendment mechanism contained in the declaration. Although this

<sup>7</sup> *Lakeside Manor Condo Ass'n v. Forehand*, 513 So.2d 1104

<sup>8</sup> F.S. Section 711.08(2)