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Counsel's Comments

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PROHIBITION OF LEASES AND OTHER RENTAL RESTRICTIONS FOR CONDOMINIUM UNITS

For decades, there has been an ongoing debate among condominium lawyers and in the courts throughout the nation as to the right of a condominium association to prohibit leases or to restrict the number of rentals within a condominium community. Although we are unaware of any reported New Jersey cases, courts in other jurisdictions have commonly upheld "no-lease" restrictions. See, Flagler Fed. Sav. & Loan Ass'n v. Crestview Towers Condo. Ass'n, Inc., 595 So. 2d 198 (Fla. Dist. Ct. App. 1992); Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976); *and* Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E. 2d 93 and 99 (Ill. App. Ct. 1995). These cases are premised upon various legal theories such as (i) the presumption of validity of the restrictions, (ii) the promotion of the residential character of a community, or (iii) that leasing restrictions do not constitute unreasonable restraints on alienation unless they are arbitrary, against public policy or constitute a violation of a unit owner's constitutional rights.

Recently, however, the collapse of the housing market and the resultant economic consequences have brought the issue of leasing restrictions to the fore in those condominiums where unit vacancies have increased substantially and rental bans exist or are being considered. Moreover, on May 15, 2005, the Indiana Supreme Court in a divided 3 to 2 decision rejected a new line of attack based upon the allegation that "no-lease" restrictions were a vidlation of the federal Fair Housing Act (FHA). See, Villas West II of Willowridge v. McGlothin, 841 N.E. 2d 584, 499 (Ind. Ct. App. 2006). In this case, the majority of Indiana's highest court reversed the finding of the trial court and the Indiana Court of Appeals that the association's "no-lease" covenant resulted in a racially disparate impact, which prevented more blacks than whites from living in the community and, therefore, violated the anti-discrimination provisions of the FHA.

In essence, the Indiana Supreme Court found that even if the association's "no-lease" restriction disproportionately affected African Americans by decreasing available rental housing, it was rebutted by the association's legitimate, non-discriminatory interest for excluding renters from a subdivision because "the exclusion of renters helps maintain property values." As the majority opinion went on to state, "Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling the home." Moreover, the court's majority opined that "it seems obvious that an owner/occupant is both psychologically and financially invested in the property to a greater extent than a renter." In conclusion, it states, "Because plaintiff points to no equally effective less discriminatory alternatives to the Defendant's legitimate non-discriminatory policy, that policy does not support a disparate impact FHA violation, even if it has a disparate impact on a protected class."

Finally, as for the allegations of disparate treatment (rather than impact) under the Fair Housing Act, the Indiana Supreme Court found the trial court's findings to be ambiguous and ordered a remand for reconsideration of the claim of intentional discrimination.

Although the *McGlothin* case and those in other jurisdictions uphold restrictions that completely prohibit the rental of units, there are other issues for condominium associations to consider in evaluating their current lease restrictions or any new ones that are proposed. These include "grandfathering" of pre-restriction purchasers from such restrictions or prohibitions, which appears to be an unnecessary prerequisite to enforcement in most jurisdictions. See, Woodside Village Condominium Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002), which notes that "the majority of courts in other jurisdictions have held that a duly adopted amendment restricting either occupancy or leasing is binding upon unit owners who have purchased their unit before the amendment was effective." See also, Worthington Condominium Unit Owners Ass'n v. Brown, 57 Oh. App. 3d 73 1989.

Similarly, hardship provisions which address circumstances, such as job relocation, extended vacation, disability, or difficulty in buying or selling units should be considered. Moreover, a maximum ceiling for the number of rental units permitted by FNMA and FHLMC underwriting standards combined with a waiting list mechanism are other topics that need to be addressed as well as the impact of the New Jersey tenant protection statutes and regulations. See, N.J.S.A. 2A:18-61.1, et seq. and N.J.A.C. 5:24-1.1 et seq.

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Finally, one should be aware that N.J.S.A. 46:8B-9(m) of the New Jersey Condominium Act authorizes "restrictions or limitations based upon the use, occupancy, transfer, leasing, or other disposition of any unit (providing that any restriction or limitation shall be otherwise permitted by law." Although there are no reported cases addressing the validity of any lease restrictions incorporated into the governing documents for any New Jersey condominium or other common interest community, it is important to understand that in those cases where association approval of proposed tenants is required,

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rejection may not be based on race, religion or other protected status. See, Berner v. Enclave Condo Ass'n, 322 N.J. Super. 229 App. Div., Cert. DN 162 NJ 131 (1999), where a white condominium unit owner had a standing to bring an action under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., because of the board's rejection of his African American tenant on the basis of race.

In conclusion, "no-lease" restrictions are generally enforceable in most jurisdictions, which would seem to provide ample authority for the establishment and enforcement of similar provisions in New Jersey condominiums. Accordingly, association boards and their attorneys should address the relevant issues where there is a concern about the impact of rental units upon the property values of unit owners and the availability of financing for unit resales. In addition, although the subject is beyond the scope of this article, they should remain mindful of the need to incorporate lease rider requirements into the condominium documents to provide inter-alia for self help remedies such as collateral assignments of rent in the event of delinquent common expense payments and eviction rights where a tenant is a chronic violator of the association's restrictions or rules and regulations. ■