

Rentals In CICs, Part I: Legal Implications

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I. Dealing With Lease Restrictions in Your Governing Documents

A. Lease Restrictions Must be Included Within the CIC Declaration

Minn. Stat. §515B.2-105(a)(11): The declaration shall contain...any material restrictions on use, occupancy, or alienation of the units, or on the sale price of a unit or on the amount that may be received by an owner on sale, condemnation or casualty loss to the unit or to the common interest community, or on termination of the common interest community; provided, that these requirements shall not affect the power of the association to adopt, amend or revoke rules and regulations pursuant to section 515.3-102....

B. Sample Lease Restriction Provisions

1. “All leases shall be in writing and shall provide that they are subordinate and subject to the provisions of this Declaration and the Rules, and that any failure of the tenant to comply with the terms of such documents shall be a default under the lease. A lease of a Residential Unit must have the prior written approval of the Board, and the Board may research and consider the occupancy behavior and criminal record of the applicant and persons living with the applicant, in the same manner as is customary for managers of rental apartment properties. No Residential Unit shall be leased for less than a twelve-month term.... The Association may adopt other reasonable Rules regulating leases and the approval process.”
2. “Leasing of Units shall be allowed, subject to reasonable regulation by the Association, and subject to the following conditions: (i) that no Unit shall be leased for transient or hotel purposes; (ii) that except for a Person acquiring title to a Unit by way of foreclosure or deed in lieu of foreclosure, no Unit may be leased for a term of less than six months unless approved by the Board; (iii) that no Unit may be subleased; (iv) that the Unit shall be leased in its entirety (individual rooms or other portions may not be leased); (v) that leases shall be in writing; and (vi) that leases shall provide that they are subject to the Governing Documents, the Rules and Regulations and the Act, and that any failure of the lessee to comply

with the terms of such documents shall be a default under the lease. The Association shall be entitled to receive a copy of the lease promptly upon request. The Association may also impose such reasonable Rules and Regulations as may be necessary to implement procedures for the leasing of Units.”

3. “Units, or a portion of any Unit, may not be rented or leased by Unit Owners without the written consent of the Board.”

II. Procedures for Amendment of Your Governing Documents

515B.2-118 AMENDMENT OF DECLARATION.

(a) The declaration, including any CIC plat, may be amended only by vote or written agreement of unit owners of units to which at least 67 percent of the votes in the association are allocated, or any greater or other requirement the declaration specifies, subject to the following qualifications:

(1) A declarant may execute supplemental declarations or amendments under section 515B.2-111 or 515B.2-112.

(2) The association and certain unit owners, as applicable, may execute amendments under section 515B.2-107, 515B.2-109, 515B.2-112, 515B.2-113, 515B.2-114, 515B.2-119, 515B.2-122, 515B.2-123, or 515B.2-124.

(3) The unanimous written consent of the unit owners is required for any amendment which (i) creates or increases special declarant rights, (ii) increases the number of units, (iii) changes the boundaries of any unit, (iv) changes the allocated interests of a unit, (v) changes common elements to limited common elements or units, (vi) changes the authorized use of a unit from residential to nonresidential, or conversely, or (vii) changes the characterization of the unit owner's interest in a cooperative from real estate to personal property, or conversely; unless the amendment is expressly permitted or required by other provisions of this chapter. Where the amendment involves the conversion of common elements into a unit or units, the title to the unit or units created shall, upon recording of the amendment, vest in the association free and clear of the interests of the unit owners.

(4) The declaration may specify less than 67 percent for approval of an amendment, but only if all of the units are restricted to nonresidential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than two years after the amendment is recorded.

(c) Every amendment to the declaration shall be recorded in every county in which any portion of the common interest community is located and is effective only when recorded. If an amendment (i) changes the number of units, (ii) changes the boundary of a unit, (iii) changes common elements to limited common elements, or conversely, or (iv) makes any other change

that affects the CIC plat, then an amendment to the CIC plat reflecting the change shall be recorded.

III. Liability of Unit Owners for Actions of Their Tenant(s)

A. Eviction Actions – the Association Lacks the Right to Evict a Unit Owner’s Tenant

Minn. Stat. § 504B.285, Subd. 1: The person entitled to the premises may recover possession by eviction...

Minn. Stat. § 504B.291, Subd. 1(a): A landlord may bring an eviction action for nonpayment of rent....

B. Recommended Means of Ensuring Tenants’ Compliance with Association Governing Documents

1. Community education program is preferred as a means of dealing with tenants. Such education can be provided through the community newsletter, if one exists, or perhaps a “new resident orientation” conducted by association management.
2. The association should require that the landlord include an obligation on the tenant to obey the rules and regulations of the association.
3. Owners should be required to identify their renters to the association’s board of directors and the management by submitting a copy of the rental agreement.
4. Enact a fine schedule for violations of the Rules and Regulations of the Association. Tenants’ actions can render Unit Owners liable for fines; fines, if not paid, can be foreclosed in the same manner as assessments.
5. Assignment of the Unit Owner’s eviction rights (see Section IV infra)

IV. Rights of the Association When the Tenant Defaults on the Lease

A. Eviction Actions – the Association Lacks the Right to Evict a Unit Owner’s Tenant

Minn. Stat. § 504B.285, Subd. 1: The person entitled to the premises may recover possession by eviction...

Minn. Stat. § 504B.291, Subd. 1(a): A landlord may bring an eviction action for nonpayment of rent....

But...the Unit Owner/Landlord and Tenant can grant the Association the power to terminate the lease for failure to comply with the governing documents of the Association:

Compliance with Declaration. The parties hereby acknowledge and agree that the Premises comprises a portion of a common interest community known as ***, which common interest community is subject to a recorded Declaration dated *** and recorded *** as *** County Recorder Document No. *** (the “Declaration”). The parties further agree and acknowledge that, in accordance with Section ** of the Declaration, in the event that Tenant is in violation of any of the terms of the Governing Documents (as that term is defined within the Declaration) and such violation shall continue after thirty (30) days’ written notice to the Landlord, the Board of Directors of the Association (as that term is defined within the Declaration) shall have the right to terminate the Lease and to bring an eviction action to remove the Tenant from the Premises.

B. Result of Nonpayment of Rent on Unit Owner’s Ability to Pay Association Dues.

If the Unit Owner is leasing out the unit, chances are he/she is counting upon the rental income to cover the Unit Owner’s Association dues. If the tenant fails to pay the Unit Owner, and the Unit Owner subsequently falls behind in his/her Association dues, the Association can choose to foreclose upon the unit in order to collect the unpaid dues.

V. Turnaround Issues

A common problem with CICs dominated by rental units is a lack of participation by tenants and owners in Association matters. This stems from the fact that (i) owners are not present at the development and lack the interest in getting involved with the Association so long as their pocketbook remains unaffected; and (ii) tenants who do not own the units in which they live lack the “pride in ownership” necessary to take an active role in the Association or, alternatively, may lack the authority to be involved.

This problem is particularly evident when a CIC reaches the turnover threshold (i.e. the earlier of 75% of the units sold or three (3) years). There have been instances when a developer schedules a turnover meeting and lacks a quorum at the meeting. This may call for the “nuclear option”: if all else fails to effect the turnover, the developer should send a letter to all homeowners indicating that he is in possession of the homeowners’ association documents, bank account, etc., but that he is no longer in a position to exercise control over the association, and informing the homeowners of the necessary action (meeting, election, etc.) and where they can pick up the association documentation. This letter should make it clear that the developer is no longer entitled to act on behalf of the association, and, therefore, will no longer be providing for maintenance (including lawn mowing, snow removal, etc.), assessments, payment of bills relating to the common areas, or any other association item.

ABOUT THE AUTHOR:

Jeffrey C. O'Brien is a senior associate with Mansfield Tanick & Cohen, P.A. Mr. O'Brien practices in the areas of business and corporate law (including choice of entity considerations and entity formations, mergers and acquisitions and preparation of various types of business agreements), real estate law (including commercial and residential purchase transactions, preparation of condominium and homeowners association governing documents, representation of individual owners regarding association disputes, resolution of title defects and commercial lease negotiation and preparation) and estate and business succession planning.

Mr. O'Brien attended the University of St. Thomas in St. Paul, Minnesota, and graduated with honors in 1997 with a Bachelor of Science. He received his J.D. with honors from William Mitchell College of Law in St. Paul, Minnesota and is admitted to practice in the States of Minnesota and Wisconsin and in the United States District Court for the District of Minnesota. He frequently lectures on a variety of topics including real estate lending and loan documentation, asset protection planning and partnerships, choice of entity, commercial leasing, residential landlord-tenant law and general real estate topics. He is a member of the Minnesota Multi Housing Association (MHA) and CIC Midwest.