

Leasing Restrictions Via Board Rules May Now Be Invalid

June 30, 2017

By Nicholas Bartzén and Howard Dakoff,
Levenfeld Pearlstein, LLC

Published by CondoLifestyles

On February 3, 2016, the Illinois Appellate Court published its ruling in a case called *Stobe v. 842-848 West Bradley Place Condominium Association* that a condominium board may not adopt a rule or regulation restricting leasing of units that are inconsistent with a declaration that contains language recognizing a unit owner's right to lease. For associations that have leasing restrictions via rules and regulations in such situations, the leasing restrictions are no longer enforceable.

In the Stobe case, the board adopted a rule limiting leasing to 30% of the units. The plaintiff unit owners brought a declaratory lawsuit seeking a court ruling as to whether the board had the authority to restrict leasing to 30% of units when the declaration specifically provides unit owners the right to lease and there is no such restriction.

In both the Stobe trial court and the appellate court, each court held that leasing restrictions inconsistent with the declaration regarding the right to lease must be adopted via a declaration amendment since the declaration allows leasing. Declaration amendments require unit owner approval (and mortgagee approval, if required) rather than a rule or regulation which only requires board approval.

The Stobe decision has thrown into disarray leasing restrictions adopted via rules and regulations of many associations that had previously made the business decision to adopt leasing restrictions via rule rather than through a declaration amendment process. The question now becomes: what is a board to do if it adopted leasing restrictions via rule and the association still wishes to enforce its long standing leasing restrictions?

Leasing Restrictions via Rules

It is a maxim of law that a board of directors has the right pursuant to the Illinois Condominium Property Act and its declaration and by-laws to adopt rules and regulations to govern the matters of an association. As more condominium owners have sought to lease their units, especially with the advent of short-

term rental websites such as [Airbnb.com](https://www.airbnb.com) or [VRBO.com](https://www.vrbo.com), many boards decided, in the interest of controlling leasing, to limit leasing by adopting leasing rules.

Historically, while the preferred practice for leasing restrictions was a declaration amendment, many associations broadly interpreted the holding and dicta (which is language by the Court that is considered authoritative, but non-binding) in *Apple II Condominium Assn. v. Worth Bank & Trust Co.* for the proposition that it could adopt leasing restrictions via rules and regulations. The advantage of adopting leasing restrictions via rule is that such leasing rules could be adopted with a board vote only (i.e. no unit ownership approval required), unlike declaration amendments, by contrast, which require unit owner approval and in many cases, mortgagee approval if the declaration requires mortgagee approval. The disadvantage was such rules ran the risk of said rules being subject to challenge by a unit owner or to judicial review for reasonableness or modified by a future board of directors.

The Stobe court has held that where a declaration provides unit owners the right to lease their units, the board may not adopt leasing restrictions that modify the right to lease in any manner. The court expressly stated: *"Because the declaration has spoken*

on the matter of leasing, any augmentation or diminution of plaintiffs' (i.e., the unit owners) right to lease their unit must be accomplished through an amendment to the declaration, not a rule promulgated by the board."

Accordingly, associations are now on notice that if its board adopted leasing rules that either augmented or diminished a unit owner's right to lease where that right is provided in the declaration, that rule will be held invalid per the Stobe decision.

Leasing Restrictions via Declaration Amendment Remain Valid

Unlike leasing restrictions adopted via rules, leasing restrictions that were adopted by a declaration amendment with the requisite unit owner approval (and mortgagee approval if required) are not be affected by the Stobe decision or are such restrictions subject to judicial review for reasonableness like rules.

While the process of a declaration amendment is much more onerous than that of simply enacting a rule, those associations that undertook the process to amend their declaration find themselves in safe waters when it comes to enforcing leasing restrictions.

What Now?

The Stobe decision left open the possibility of

leasing restrictions via rule if the declaration is either completely silent on the issue of leasing or if the declaration expressly states the board may adopt rules and regulations to effectuate the declaration leasing restrictions. It must be noted, however, that the language by which the Court left open the possibility of leasing restrictions via rule was simply dicta.

Purely administrative rules, such as those requiring unit owners to provide copies of governing documents to lessees, unit owner requirements to provide copies of the lease to the board of directors, and requiring leasing administration fees or move-in/move-out fees, etc. will generally be upheld. However, if an association adopted leasing restrictions via rules where such rules are inconsistent with the declaration leasing provision in any manner, those rules are unenforceable post-Stobe, and to keep such leasing restrictions valid, the association will need to immediately embark on the process to adopt a declaration amendment to add leasing restrictions to the declaration.

If a board chooses to embark on the process of a declaration amendment to validate any now unenforceable leasing rules, the rescission of the unenforceable rules should be accomplished in conjunction with the adoption of a declaration amendment in consultation with the association's legal

counsel.

*Reprinted with permission of MCD MEIDA /
For more information on CondoLifestyles...
Please visit www.condolifestyles.net or
call 630-932-5551.*

Read the article [here](#)