

MERCERTRIGIANI

LEASING RESTRICTIONS

Community association leaders are being called upon to address concerns about the growing number of homes within a community that are rented. The common perceptions are: (1) High owner-occupant ratio has a positive impact on property values; (2) owner occupants take better care of property, both individually-owned and community property; (3) non-owner occupants create a transient atmosphere and are not invested in the community; and (4) secondary mortgage institutions favor loans in communities with high owner-occupancy ratios.

COMMON RESTRICTIONS

Prompted by these concerns, some community associations are considering amendments to governing documents to limit or restrict leasing. Common restrictions on leasing include:

- Limiting the number of properties leased – in relation to the total number of properties in the community – at one time.
- Controlling – if not strictly prohibiting – subletting.
- Imposing a minimum amount of time (6 months, twelve months or more) for which properties may be leased – strictly prohibiting use for “transient or hotel purposes.”

Community associations may also want to ensure that leasing documents:

- Are in writing and signed by all occupants of the property.
- Use of a lease or lease addendum recommended or required by the association.
- Require that tenant and occupant information is provided to the association.
- Are provided to the Board within a specified time frame.
- Incorporate – thus binding the tenant to – the recorded documents and association rules.
- Authorize the association to take action against a tenant as well as the property owner to ensure compliance.

STATUTORY AUTHORITY

Community associations must also ensure compliance with the Virginia Property Owners’ Association Act and the Virginia Condominium Act, which establish limitations and also give authority to address leasing. Section 55.1-1806 of the Property Owners’ Association Act and Section 55.1-1973 of the Condominium Act specifically address – in nearly identical language – association authority regarding rental of properties within a community.

Leasing provisions authorized by both statutes include:

- Charging a rental, application or processing fee of \$50 or less;
- Requiring the owner to provide tenant information – (a) names and contact information of and vehicle information for the tenants and authorized occupants under the lease; (b) name and contact information of any authorized agent of the owner;
- Providing the association with tenant acknowledgement of and consent to association governing documents and rules and regulations.

Governing document provisions that address leasing are drafted in a number of different ways. The approach and amendments should be tailored to community needs and expectations.

SAMPLE LANGUAGE

Introductions

- No Unit shall be used or occupied for (i) transient or hotel purposes or (ii) in any event for a period of less than one year. No portion (e.g., a room) of any Unit (other than the entire Unit) shall be leased or subleased for any period. No Unit Owner shall lease a Unit other than on a written form of lease requiring the tenant to comply with the Declaration, these By-Laws, and the Rules and Regulations. The Board of Directors may recommend a standard form lease for use by Unit Owners of Leased Units. Each Unit Owner shall, promptly after entering into any lease of a Unit, forward a conformed copy of the lease to the Board.
- No Unit Owner shall lease or permit a sublease or assignment. No Unit Owner shall lease a Unit other than on a written form of lease: (i) requiring the tenant to comply with the condominium instruments and rules and regulations; (ii) providing that failure to comply constitutes a default under the lease, and (iii) providing that the Board of Directors has the power to terminate the lease or to bring summary proceedings to evict the tenant in the name of the lessor after forty-five days prior written notice to the Unit Owner, in the event of a default by the tenant in the performance of the lease.
- The Board of Directors may suggest or require a standard form lease for use by Unit Owners. Each Unit Owner shall, promptly after entering into any lease of a condominium Unit, forward a conformed copy of the lease to the Board of Directors. The foregoing provisions of this paragraph, except the restriction against use or occupancy for transient or hotel purposes, shall not apply to the Association, the Declarant, or a Mortgagee in possession of a Unit as a result of foreclosure, judicial sale or a proceeding in lieu of foreclosure.

Sample Restricting by Number of Units

- The number of Owner-occupied Units shall not be less than **[insert number]** Units in the Condominium at any one time. Prior to leasing a Unit, the Unit Owner must make a written request for, and receive from the Association, written verification that the number of Owner-occupied Units will not fall below **[insert number]** Units.

- In the event that **[insert number or more]** of the Units in the Condominium become tenant-occupied, Unit Owners who wish to lease their Units shall be placed on a waiting list maintained by the Association. Once fewer than **[insert number]** Units in the Condominium are tenant-occupied, priority to lease a Unit shall be given to the Unit Owner on the waiting list who has owned the Unit for the longest period of time. The Unit Owner with priority shall have 30 calendar days to confirm with the Board of Directors whether the Unit Owner will be renting the Unit. If the Unit Owner does not provide such confirmation within 30 calendar days, that Unit Owner will no longer have priority and will be dropped from the waiting list. If other Unit Owners remain on the waiting list, the next Unit Owner on the waiting list who has owned the Unit for the longest period of time shall be given priority.

Sample Restricting by Percentage of Units

- The number of Owner-occupied Units shall not be less than **[insert number]** percent of the total number of Units in the Condominium at any one time. Prior to leasing a Unit, the Unit Owner must make a written request for, and receive from the Association, written verification that the percentage of Owner-occupied Units will not fall below **[insert number]** percent.
- In the event that **[insert number]** percent or more of the Units in the Condominium become tenant-occupied, Unit Owners who wish to lease their Units shall be placed on a waiting list maintained by the Association. When fewer than forty-nine percent of the Units in the Condominium are tenant-occupied, Unit Owners on the waiting list will be permitted to lease their Units in the order in which the names appear on the list maintained by the Association, so long as no more than **[insert number]** percent of the Units are tenant-occupied. Unit Owners who lease their Unit will be assessed a move-in fee in an amount established by the Board. Such fee will be due at the beginning of the lease term.

Sample Restricting by Percentage of Units per Mortgage Institutions

- As long as the secondary mortgage institutions (FNMA, FHLMC, FHA and VA) require that a minimum percentage of the Units be occupied by Unit Owners, no Unit Owner may convey his Unit to any person who does not intend to occupy the Unit as a principal residence until such time as at least the required minimum percentage of Units are occupied by Unit Owners. FNMA currently requires a minimum percentage of percent Owner occupancy. If the percentage of Units not occupied by Unit Owners drops below the minimum percentage at any given time, no Unit Owner may convey his Unit to anyone who does not intend to occupy the Unit, and no Unit Owner who occupies his or her Unit may lease it. The minimum percentage of Owner-occupancy required by the secondary mortgage institutions shall be reviewed annually or as needed by the Board of Directors. In the event of undue hardship to the Unit Owner, the Board of Directors may give written consent that a Unit may be leased or conveyed to a person who does not intend to occupy the Unit.
- In order to ensure compliance with the secondary mortgage institutions' requirements, each Unit Owner must apply to and obtain the written approval of the Association to lease his or her Unit. Such approval must be obtained each time the Unit Owner enters into a lease. In

the event of undue hardship to the Unit Owner, the Board of Directors may give written consent that a Unit may be leased or conveyed to a person who does not intend to occupy the Unit. The Board of Directors shall adopt Rules and Regulations to carry out the requirements of this Section.

Sample Conclusions

- Notwithstanding the foregoing, the Board of Directors, on behalf of the Association, may grant a waiver of any or all of the leasing restrictions if the Board of Directors, in its sole discretion, determines that such waiver is necessary due to hardship demonstrated by the Unit Owner. A grant of waiver shall be made by the Board of Directors in its sole discretion on a case-by-case basis.
- Alternative language: Notwithstanding the above, any one or more of the leasing restrictions set forth in the immediately preceding paragraph may be waived by the Unit Owners upon the vote of Unit Owners to which at least fifty percent of the votes in the Association appertain.
- Notwithstanding the restrictions in this subsection, the Board of Directors, on behalf of the Association, may grant a waiver of any or all of these leasing restrictions if the Board of Directors, in its sole discretion, determines that such waiver is necessary due to hardship demonstrated by the Unit Owner. A grant of waiver shall be made by the Board of Directors in its sole discretion on a case-by-case basis. The restrictions contained in this subsection are binding on all Unit Owners upon recordation and, with the exception of the two-year new Owner occupancy requirement, shall apply retroactively to Unit Owners who purchase their Units prior to the date the Amended and Restated Bylaws are recorded.
- To the extent that the restrictions in this paragraph are inconsistent with the affordable housing program leasing standards for Units designated as “affordable Units” as required by the Declaration of Restrictive Covenants for Affordable Dwelling Units recorded in the **[insert name]** County land records on _____, 20__ in Deed Book _____ at Page __ (“ADU Covenants”), such restrictions shall not apply to the affordable Units.