



Common Restrictions or Rules: Do They Help? Are They Needed?



It is not uncommon when drafting an amendment to a declaration or to rules and regulations to have a member of the board of directors or management say to us “we must include this restriction.” When we hear the restriction that must be included, we often think “not really” or “yes, but then you also need...” The following is a list of those “must haves” that often stop short of solving a problem.

Rules Related to Noise Restrictions:

Most declarations include a provision that prevents owners from acting in a noxious or offensive manner or in a manner that gives rise to a nuisance. Yet, that language may be too broad to cover the sound of stomping feet over my head; the dog next door who barks every time someone walks past the unit door, or the neighbor below me that decides to install new shelves at 10:00 p.m. Therefore, we are often asked to draft rules that prevent unreasonable noises during certain hours of the day or rules that simply prevent neighbors from creating an unreasonable disturbance.

These are certainly important rules to have, but the rules need to include more than just the basic language. That is, the rules should include a process to be followed when one chronically complains about the same neighbor. Language should be included that addresses a specific process to be followed when the subject of the complaint is for a noise disturbance. For the first complaint submitted, the owner should be required to submit a written complaint that includes the who, what, where and when. The process should state that for the second or subsequent complaint for a noise disturbance against the **same** alleged violator, the complaining witness must submit a written complaint stating the who, what, where and when, but also must submit a recording of the noise disturbance. Other alternative language to include is that the subsequent complaint must be signed and notarized or identify a second witness- someone other than the initial complaining witness. Both witnesses must agree to meet with the board if

necessary. In addition, the complaining witnesses must agree to provide access to their unit to allow the board or its agent to hear the noise. The process should make it clear that if the strict process is not followed, the board of directors may not investigate the complaint. Lastly, the rules should also allow the board to require certain modifications be made to reduce the noise, i.e., require the violating owner to place down more rugs.

These additional requirements will help the board of directors in determining the seriousness of the complaint being submitted. They also will likely alleviate those complaints that are only being made to aggravate a neighbor. The above process will also give the board of directors the tools really needed address the violation.

Restrictions Requiring an Owner to be Current with the Amounts Due and Owing to the Association Before being Allowed to Vote on Any Membership Matters

Some community associations believe that unit owners should have to be current on the amounts owed to the association before being allowed to vote on an association member matter. To be enforceable, such a restriction must be within the association's declaration. This restriction is a "free" way to encourage owners not to default on their payments to the association. Yet, it can create more problems for the association, specifically the current board of directors, if the restriction does not define what it means for an owner to be current on his payments to the association.

For this provision to be effective and not problematic, the declaration or the association's rules and regulations should include a provision on what "current" means for an owner to be current. It should state that for purposes of determining if an owner is current and eligible to vote on a membership matter, the owner must not owe any outstanding **assessments**—regular or special assessments. The definition of "current" for this relevant provision should not include fines. After all, it can be too easy (and tempting!) for a current board to assess a fine against an owner just to prevent him from being able to vote. The definition should also state what is considered to be a delinquent time period, i.e., assessments not paid within sixty (60) days. The time frame should be reasonable.

And so voting members do not feel blindsided, the notice for the membership vote should remind owners they must be current to be eligible to vote and it should remind owners how to make a payment.

Rules Limiting the Weight of Dogs

It is not uncommon for a community association to allow dogs, but only dogs below a certain weight, i.e., less than twenty-five (25) pounds. There are many different reasons for associations to include these rules. Some include it because it is believed smaller dogs are easier to control and will cause less of a disturbance to others. Some include it because it is believed condominiums are a place only for smaller dogs. Others include it because less people are afraid of smaller dogs than they are of big dogs.

Regardless of the reason for including this restriction, the restriction will achieve its purpose, if the rules and regulations for the association require proof of the weight of the dog to be given on a regular basis. After all, the Board does not want to be weighing dogs in the building! The association's rules and regulations should require dog owners to submit verification of the

weight of the dog, by a veterinarian, at least once a year or as requested by the association.

In addition to requiring verification, the association must have a process in place to **collect** this information, i.e., collect it at the beginning of the year with census information. If an owner is alleged to have violated a weight restriction rule, to overcome the violation, the owner must be required to provide proof from a veterinarian as to the weight of the dog. Remember, the association must collect the information related to the weight of each dog for this rule to be effective!

Even then, please note that this rule may create enforcement quandaries. An owner may adopt a specific breed of dog with the reasonable belief that the dog will remain under the weight restriction. However, just like humans, it is a possibility that the dog may put on “winter weight”. Will the Board strictly enforce the pet weight restriction against a dog, which is just a little bit more fluffy than usual? This is a situation which Boards need to contemplate when creating a pet weight restriction.

Rules Against Certain Breeds of Dogs

Similar to the weight limit on dogs, it is not uncommon for a community association to restrict certain breeds of dogs within the association. Some people believe certain breeds pose certain threats to people, which may endanger those within the community. We often hear that associations want to ban Pit Bulls, Rottweilers, Dobermann Pinschers or German Shepherds. Undoubtedly, data will show that certain breeds are more aggressive than others.

Yet, data will also show that some dogs, even of a breed that is not aggressive and in fact known to be playful, can be aggressive and vicious. Many of you have heard Gabby mention her Pug Monti, who will run after people and nip at their ankles, when they try to walk away from him. Monti is of a breed that is known as being mischievous, but affectionate and good with children, but his conduct of nipping at ankles is one most community associations do not want to allow.

Prohibiting a specific breed will not eliminate the offensive conduct that we do not want to see in community associations. Therefore, rules related to dogs (or pets) that prohibit *specific conduct* are the most effective pet rules. As you often hear in K&M Webinars “focus on the conduct, not the person.” This saying applies to pets as well.

Rules Regarding Emotional Support Animals

It is often believed that if emotional support animals are allowed, the association must have specific rules regarding these animals. Remember, under the law, emotional support animals are not pets. Therefore, pet rules are not applicable. Instead, the emotional support animal is seen as an extension of the person to whom the animal provides emotional support. Therefore, the rules that apply to the person apply to the emotional support animal. It is not necessary to adopt rules specific to emotional support animals.

Instead of adopting rules related to an emotional support animal, the board should consider adopting a policy as to how a request for an accommodation (which includes a request to have an emotional support animal) will be handled by the board of directors. It is best for the board of directors to know how to address the request before it is made. Knowing what to do when

such a request is made helps to prevent mistakes from occurring.

Rules that Require Owners to Provide Certificates of Insurance

Declarations often include language which requires owners to have a minimum amount of insurance. Sometimes we see rules and regulations that require owners to provide, on an annual basis, a copy of their certificate of insurance to the association. Most often, that is where the rules stop and that is where such an important restriction loses its value.

The association's rules should state when the certificate of insurance must be produced to the association, i.e., on an annual basis or as requested. Then the association must adopt a policy to collect these certificates, i.e., once a quarter the information is reviewed. Remember, not everyone's policy will expire at the same time of the year, so ensuring the association's records are complete requires the data to be reviewed a few times a year. This restriction can lose its value very quickly if no one is regularly monitoring that current certificates of insurance on file.

Developing a process to confirm that these important documents are within the association's books and records is likely cheaper than there not being insurance coverage at the time of a loss.

Rules That Prohibit Children From Engaging in Certain Conduct

It is common to see rules that state: "children cannot run in the common areas"; "children cannot play catch in streets or the grassy areas"; or "children's toys cannot be left on the common areas." When we see these rules, we usually say so "adults can run in the common areas"; "adults can play in the streets or grassy areas"; or "adults can leave their toys in the common areas." Of course, we are being facetious! The point is, not only can such rules be seen as discriminatory, but also these rules do nothing to prevent **adult** conduct that is just as offensive -maybe even more offensive!

Like with the dogs, rules should not be directed towards a specific class of people, but specific conduct. So instead of restricting children from acting in a specific manner, restrict all people from acting in that manner.

Enforcement Process that Allows for an Appeal

Community associations are encouraged to adopt the process to follow when an owner's conduct rises to the level of a violation. A specific process helps the owners understand what will happen if they violate and it helps the members of the board know how to handle a violation. It is not uncommon that the last step of this process includes language as to how an owner can appeal the board of directors' finding. When a mother disciplines her child, she does not impose a punishment and then says, "if you disagree with my punishment you may go to your father and see if you can convince him to be more lenient." Instead, she usually tells the child her punishment and that is the end of it.

This is what a board of directors should do as well when they complete the enforcement process. Most declarations include language that the board of directors' determinations are final and binding. This language is included so that there is no question that the board of directors must make decisions—including those that are hard to make—and everyone is bound

by the decision.

Most associations that include this language within their enforcement process will say it is necessary to ensure that the owner is treated fairly. There is no question that every owner must be treated fairly and in a consistent manner. The way to do that is to ensure that the specific enforcement process is a fair process and that it is followed. That is, from the moment that an owner receives a notice of violation they must be treated fairly. Following a fair process from the beginning to the end will alleviate the need for an appeal. Eliminating the appeal process will also make it clear when a violation matter is closed. Finally, it sends a strong message that the board of directors is enforcing its documents and its determinations are binding.

But we've always done it that way!



Assessments are the lifeline of a community association. Without the prompt payment of assessments, it becomes difficult for a community association to fully meet its contractual obligations under the declaration. That is why it is necessary for a board of directors, from time to time, to turn a delinquent unit owner over to the association's attorney for collection. For many boards this is a distasteful part of the job and it is done on a case-by-case basis versus uniformly based upon objective data, such as the number of months that an owner is delinquent. Why? Because we've always done it this way, plus we want to be sure that we do not send Bob the Board member or Mary the Marvelous Neighbor to the attorney! This method of acting, unfortunately, may get an association in trouble.

Board members have a fiduciary duty to the association. Part of that fiduciary duty is adhering to the terms of the association's governing documents and uniformly enforcing its terms against all owners. What does that mean for purposes of collection? That means that all like owners should be treated alike. If Anita the Annoying Neighbor is referred to collection before she is six months delinquent in assessments, but Bob the Board member, who is *twelve* months delinquent in assessments is not, that is differential treatment. This action is a breach of the board's fiduciary duty, as it is providing Bob the Board member with preferential treatment because he is a board member and treating owners differently. As this sort of situation can bring about liability to the association, it should be avoided.

So, how can boards do this better and avoid this potential liability? In short, boards should take the subjective factors out of collecting assessments and focus only on the objective factors, such as how delinquent is the account. This is most commonly done through the adoption of a collection policy. By and through a collection policy, the board adopts a resolution where it directs the managing agent (or the board treasurer) to take certain collection action, such as issuing demand letters or referring the account to the association's attorney, based upon

objective factors, such as being x number of days delinquent (without an agreed upon payment plan in place). Collection policies further outline whether the board will accept payment plans for delinquent balances and, if so, on what terms. These policies help ensure that the board is taking timely action to collect the association's assessments and doing so on a uniform and consistent basis. Such a collection policy also helps the association combat any claims of differential treatment or discrimination in court. If your association continues to refer collections based upon who the owner is and not just how much they owe, it is time for your association to leave the old way in the past and investigate a collection policy for the protection of your association.

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If you have any questions or require our assistance, please do not hesitate to contact us.
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Chuck Keough (cmk@kmlegal.com), Dawn Moody (dln@kmlegal.com), and Gabby Comstock (grc@kmlegal.com)

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www.kmlegal.com

info@kmlegal.com

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**Keough & Moody, P.C.,
114 East Van Buren, Naperville, IL 60540**

