A Rude Awakening: Your Board May Not Have the Right to Screen Leases and Sales at All!

October 9, 2017

By: Donna DiMaggio Berger

Even in the frenzy of post-Irma repairs, ordinary life continues and for most volunteer boards and professional managers that means screening applicants who wish to lease or purchase in their communities.

However, purchase and rental screening has become such a part of the fabric of community association life that some boards and managers have forgotten to confirm the source of authority for such activity. Several boards were recently dismayed when I advised them that they do not have authority either to charge a transfer/application fee or to approve leases or sales at all. They learned this information while they were in the midst of screening pending applications.

Their responses to that uncomfortable revelation included:

“Of course we can screen, we always have.”

“Our manager told us we can screen and charge an application fee.”

“We suspected we couldn’t do it but it’s a calculated risk we’re taking.”

The fact that your community may have a practice in place for charging a screening fee, requiring applications, running background checks and conducting personal interviews with potential new purchasers and potential new tenants does not make any of the foregoing legal unless your governing documents (and specific documents in some instances) provide your Board with this authority. In fact, in two of these communities, the Declaration clearly specified that sales and leases were not subject to prior approval by the board only to prior notice. In today’s investor-friendly environment, more and more developers are creating initial documents which allow unfettered leasing and

sales activity. It is neither reasonable nor advisable for a board to assume it has the authority to screen sales and leases because its management company does the screening and collects the associated fees. A responsible manager will urge the board to obtain the necessary legal opinion any time the question of legality arises.

In a Florida condominium, a transfer fee cannot exceed $100 per applicant (with spouses and a parent/dependent child being treated as one applicant) and a transfer fee cannot be charged at all unless the association has the right to approve a lease or sale and the fee is provided for in the Declaration, Articles or Bylaws.

Why is it important to be so cautious?

A cottage industry has naturally cropped up where some lawyers and law firms are initiating individual and class action lawsuits against boards and management companies for charging fees in excess of or in violation of the statutory limits. Granted, there is a reasonable desire on the part of many volunteer boards and a high expectation on the part of many association residents to ensure that new purchasers and tenants are properly screened to avoid any potential threat to the safety, security or financial well-being of the community. However, the framework to conduct such screenings must be authorized by the governing documents. As for taking a calculated risk, given the potential to be ordered by a court to return illegal transfer fees taken over the span of several years, there is little doubt that confirming your authority or properly amending your governing documents to provide such authority is crucial.