



ATTORNEYS AT LAW

# GATES WISE SCHLOSSER & GOEBEL

Gordon W. Gates   D. Peter Wise   Frederick J. Schlosser   Todd M. Goebel   Bradley B. Wilson   James R. Enlow

## MEMO

**To:** Trevi Gardens Home Owners Association

**From:** Bradley B. Wilson  
Gates Wise Schlosser & Goebel

**Re:** Amending HOA Covenants to Limit Rental Properties

**Date:** February 2, 2023

---

**Background:** An increasing number of lots within the Trevi Gardens subdivision are being used as rental properties with some being used as out-of-town corporate rentals. The Trevi Gardens Home Owners Association (hereinafter “the HOA”) has advised that many of the rental properties are in need of repair and/or landscape maintenance. The HOA is concerned that the rental properties which have not been maintained will diminish the property values of all the lots within the Trevi Gardens subdivision.

As a result of the above, the HOA is looking at methods of limiting the number of lots within Trevi Gardens subdivision which may be used as rental properties. The HOA has presented several alternatives to achieve this goal and has asked for my opinion on each of them.

**Method 1. Amending the Declaration of Covenants, Conditions, Restrictions and By-Laws for Trevi Gardens Homeowners Association to (hereinafter “the HOA Covenants”) to set a limit on the number of properties within Trevi Gardens which can be rentals.**

**Question 1. Can we amend our Covenants in this way?**

**Response.** The Declaration of Covenants, Conditions, Restrictions and By-Laws for Trevi Gardens Homeowners Association (hereinafter “the HOA Declaration”) has several provisions which create an implied right to lease. *See e.g., Article II, Section 2, Article II, Section 11.* Thus, an amendment to the HOA Declaration would be necessary in order to enact a valid leasing restriction. Article XII, Section 5 of the HOA Declaration states, “The

covenants and restrictions of this Declaration may be amended by an instrument signed by not less than one-half (½) of all votes except as proved herein for unilateral annexation. Any amendment must be properly recorded in the public records for Sangamon County.”

Should the HOA decide to amend the HOA Declaration in order to impose a restriction on leasing, it is recommended that the amendment contain a “grandfather clause” exception such that the restriction would not apply to any lot which is subject to a lease agreement in effect on the date the amendment is recorded with the Sangamon County Recorder’s Office. Additionally, the HOA may want to consider an exception which allows for the leasing of a lot to an Owner’s immediate family member (grandparent, parent, child, grandchild). Finally, the HOA may want to consider a further exception which would allow an Owner to petition the HOA for a waiver of leasing restriction if faced with a short-term financial hardship such as a divorce, illness, job relocation, mortgage foreclosure or similar acute event.

**Question 2. Can we enforce this in the community? Can we prevent property purchases to be used as rentals once they exceed a certain % of total properties?**

**Response:** Yes. The HOA can enforce the restriction. Under Article VIII, Section 2(c) of the HOA Declaration, each Owner is obligated to pay specific assessments against any particular Lot which are established pursuant to the terms of the Declaration, including but not limited to any reasonable fines as may be imposed in accordance with the Declaration.

Under Article VIII, Section 7 of the HOA Declaration, any assessment not paid within ten (10) days is subject to a late charge. The HOA Board must issue a Notice of Delinquency upon the Owner. If the assessment is not paid within thirty (30) days, a lien shall attach to the property. The amount of the lien shall include the amount of the fine, the late charge, interest and costs of collection, including reasonable attorneys fees. If the assessment remains unpaid after sixty (60) days, the HOA may bring suit to collect such amounts or foreclose upon the lien.

It is not recommended that the HOA attempt to “prevent” a sale of a Lot. Rather, enforcement actions should be instituted only after a violation has occurred.

**Question 3. Can we fine someone who attempts to rent a property once they have been told their rental has exceeded our Covenant’s limitation on total rental properties.**

**Response:** This is not recommended due to foreseeable difficulties in the enforcement. Covenants which are not uniformly enforced may be challenged and potentially be deemed unenforceable. It is unknown how the HOA could identify all “attempts” to rent a property.

**Method 2. Amend our Covenants and By-Laws to say properties cannot be rented for a period for a period from the date of purchase (for example, one year)?**

**Question 1: Can we amend our Covenants in this way.**

**Response:** Yes, provided that such an amendment is enacted in accordance with Article XII, Section 5 of the HOA Declaration.

**Question 2. Yes. Such a covenant can be enforced via the manner described above.**

**Method 3. Can we charge higher HOA dues for rental property owners or a certain group of rental property owners (Such as out of town corporate owners)?**

**Question 1. Would we have to amend our Covenants and By-Laws?**

**Response:** Rather than charging higher HOA dues to rental properties, it is suggested that the HOA impose certain fees on rental properties to cover administrative costs which result from the rental of Lots. Such fees could include a security deposit for the use of the common areas or a lease review fee should the HOA required all leases to be presented to the HOA Board for review. It is recommended that the HOA Declaration be amended to grant the HOA Board the right to impose such fees.

**Question 2. Is charging a different level of HOA dues legally enforceable?**

**Response:** Charging reasonable fees to cover administrative costs for rental properties is legally enforceable.

**Method 4. We get calls from title companies when a property is about to be sold or purchased. They wish to know if the property is current on their HOA dues. Can we charge a fee at the time of closing for properties which are being purchased for the purpose of being rented out? In other words, have the title company collect additional fees at closing?**

**Response:** If there is a lien on a property, the title company would likely suggest to the purchaser that the lien should be paid, but the purchaser may purchase the property subject to the lien.

**Method 5. Are there any other possible solutions of which you are aware.**

**Response:** The HOA's concern is that rental properties are not maintained. The HOA could amend its Declaration to address these restrictions. For example, an amendment could provide that grass may not exceed a certain height or that structures must be devoid of peeling paint. However, it would be difficult to address all maintenance issues in such a manner.