

Analysis of Key West Golf Club Homeowners' Association Governing Documents (i.e. Rules and Regulations)

GOAL OR REASON FOR ANALYSIS: For the purposes of determining the right of the Association to enter onto the private property of homeowners to annually inspect properties.

EXECUTIVE SUMMARY:

The Declaration of Protective Covenants (“Declaration”) of the Key West Golf Club Homeowner’s Association (“Association”) expressly allow three (3) instances whereby the Association can enter onto a homeowner’s property without it being considered trespassing. There are limited to the following:

- 1) To inspect work approved by the Architecture Control Committee (section 8.6.C).
- 2) To secure a Certificate of Occupancy (as required for habitation) on vacant lots (section 8.10).
- 3) To make needed improvements or corrections to a house or lot which will then be assessed to the homeowner (section 9.14).

The governing documents does not expressly allow any other instance when the Association is permitted access onto a homeowner’s property. In addition to the above allowed instances the Declaration provides a clause as part of its “easement for maintenance” which appears to further limit access of the Association, stating: “that all such activity shall be undertaken in a manner so as to minimize interference with any Owner’s use of his property” (section 16.7).

Outside of the inspection of approved work by the Architecture Control Committee as listed above, the only instance where inspection of properties is discussed is as part of the Owners Handbook. Even in this instance, inspection of properties is not linked with access onto a homeowner’s property.

Legal counsel may need to be consulted to clarify legal permissibility of access and trespassing. Such instances include:

What does “to minimize interference” mean and what does it mean in the context of “any Owner’s use of his property”? And is privacy one of the “any” uses that an Owner has of their property?

Since amendments to the Declaration are difficult, may the Owners Handbook allow access (i.e., an easement) onto an owner’s property for inspection purposes if it is not expressly allowed in the Declaration, i.e., can the Owners Handbook supersede the Declaration?

Finally, since 2018, state law requires all changes to HOA governing documents (including previously unrecorded documents) be recorded with the County Clerk. All changes are prohibited from taking effect until after they are recorded with the County Clerk. This includes, but is not limited to, the currently unrecorded Design Guidelines, Owners Handbook, and Resolutions. And, it is unclear if the Owners Handbook provision allowing inspection was updated after the 2018 requirement. Again, if so, this change is not enforceable until after it is recorded with the County Clerk.

ANALYSIS:

Governing Documents and Recording –

The Association has multiple documents that constitute its governing documents (i.e., rules and regulations). Several of these documents are recorded with the County Clerk, these include, but are not limited to, the Declaration of Protective Covenants, Development Agreements, Amendments, and Easements. Other documents that make up the rules and regulations are not recorded with County Clerk, and these include, but are not limited to, the By Laws, Design Guidelines, Owners Handbook, and Resolutions.

Taking effect on 7/01/2018¹, per FL Statute Section 720.306(1)(e), all changes (i.e., amendments and revisions) to all HOA governing documents are only effective when they are recorded with the public records of the county. In fact, the recorded amendments must include underlines and strikethroughs demonstrating the changes as part of the recording. Unless these are recorded with the County Clerk, then these changes are not technically effective. (Note: Since 2018, the Association has made several changes to its governing documents, specifically to its Design Guidelines and Owners Handbook, and through Resolutions. None of these changes have been recorded with the County Clerk, and so, technically these changes have not yet taken effect and are not enforceable.)

Permitted Access, Not Trespassing –

The Declaration identifies only three (3) instances when it is not considered trespassing for the Association to enter onto a lot, i.e., private property. These appear limited to: 1) work approved by the Architecture Control Committee that needs to be inspected upon its completion (section 8.6.C); 2) finishing construction to securing a certificate of occupancy on vacant (or ‘unimproved’) lots (section 8.10); and, 3) to make needed improvements or corrections to a house or lot which will then be assessed to the homeowner (section 9.14). Since the Declaration does not state otherwise, it is likely legally arguable that outside of these three instances would be considered trespassing.

8.6 Inspection of Work. Inspection of work and correction of defects therein shall proceed as follows:

A. Upon the completion of any work for which approved plans are required under this Article 8, the applicant (who may be an Owner or an appropriate association) for such approval (the “Applicant”) shall give written notice of completion to the committee.

B. Within ten (10) days thereafter, the Committee or its duly authorized representative may inspect such Improvement. If the Committee finds that such work was not effected in substantial compliance with the approved plans, it shall notify the Applicant in writing of such noncompliance within such ten (10) days period, specifying the particulars of noncompliance, and shall require the Applicant to remedy the same.

C. If a noncompliance exists, the Applicant shall remedy or remove same within a period of not more than thirty (30) days of such notification. f, [*sic*] upon the expiration of thirty

¹ [Becker - 12/15/2019 News-Press - HOA Rule Amendments Must be Recorded](#)

(30) days from the date of such notification, the Applicant shall have failed to remedy such noncompliance, the Committee shall notify the Board in writing of such failure. The Board, at its option, may either remove the noncomplying Improvement or remedy the noncompliance, and the Applicant shall reimburse the Association, upon demand, for all expenses incurred in connection therewith, plus a 25% administrative charge. If such expenses are not promptly repaid by the Applicant to the Association, the Board shall levy a Special Assessment against such Applicant for reimbursement plus the 25% administrative charge. In the event said Applicant is an association, the aforementioned Special Assessment (but not the 25% administrative charge) shall be levied against all Units in the association in proportion to their respective interests in said association. The entry upon the property by the Association or its agents for the purpose of affecting the terms of this provision is expressly permitted and shall not constitute a trespass.

D. If for any reason the Committee fails to notify the Applicant of any noncompliance within thirty (30) days after receipt of said written notice of completion from the Applicant, the Improvement shall be deemed to have been made in accordance with said approved plans.

8.10 Time Limitation - Commencement and Completion of Construction. The Owner of a Unit or Parcel shall commence construction of the Unit(s) permitted to be constructed thereon not later than the first to occur of (a) six months following the date on which the last of the requisite approvals have been obtained by Declarant for the issuance of building permits with respect to said Unit(s) or Parcel or (b) one year after the date of closing on the transfer of the Unit(s) or Parcel by Declarant to the Owner as evidenced by the date of delivery of the deed to said Unit(s) or Parcel. Said Unit Owner shall complete construction of said Unit(s) (as evidenced by issuance of a certificate of occupancy) within 180 days of commencement. Parcel Owners shall be required to complete construction of all Units in said parcel (evidenced by the issuance of a certificate of occupancy therefor) within two years from the date of closing on the transfer of the Parcel by Declarant to the date of closing on the transfer of the Parcel by Declarant to the Parcel Owner. Once commenced, the Owner shall diligently and continuously proceed with the uninterrupted construction of the improvements thereon. In the event that an Unimproved Unit has been improved but has not had a Certificate of Occupancy issued thereof, the Declarant may, subject to the Right of Repurchase pursuant Article 11 hereof, enter upon the property and complete the improvements required for the issuance of a Certificate of Occupancy therefor and charge to the Owner the costs incurred thereby (including hard and soft costs) as a Special Assessment and thereafter the property shall be assessed as an Improved Unit. The entry upon the property by the Association and its agents for the purpose of affecting the terms of this provision is expressly permitted and shall not constitute a trespass thereon.

9.14 Maintenance of The Golf Club. No weeds, underbrush, or other unsightly growth shall be permitted to grow or remain upon the property within The Golf Club and no refuse or unsightly objects shall be allowed to be placed or suffered to remain upon the property within The Golf Club. All lawns, landscaping and sprinkler systems and any property, structure, improvement and appurtenance shall be kept in good, safe, clean, neat and attractive condition. During the course of construction of any kind within The Golf Club, the owner of the property upon which such construction work is being done shall store all construction materials, including equipment and vehicles, supervise all construction personnel and manage all phases of the construction in a

manner reasonably designed to minimize traffic congestion, dust, noise and other similar distractions, disturbances and inconveniences. Excepted from the foregoing shall by any portion of the property within The Golf Club owned by the Declarant or its nominee through the period of construction of Units or other buildings or structures thereon. Upon the failure to maintain the premises as aforesaid to the satisfaction of Declarant or the Association, and upon the Association's [sic] an association's, or an Owner's, failure to make such correction within thirty (30) days of being given written notice by Declarant or the Association (which written notice does not have to be given by Declarant or Association in the case of emergency, in which event, Declarant or Association may without any prior notice directly remedy the problem), Declarant or the Association may, in furtherance of Declarant's overall plan for the development and uniform appearance of the Golf Club, enter upon such premises and make such improvements or correction as may be necessary, the costs of which shall be paid by the Association, association or Owner, as the case may be, or Declarant or the Association may bring an action at law or in equity. Such entry by Declarant or the Association or their agents shall not be a trespass and, by acceptance of a deed for a Unit, such party has expressly given Declarant and the Association the continuing permission to do so, which permission may not be revoked. If any Owner, the Association or association fails to make payment within fifteen (15) days after request to do so by Declarant or the Association, as appropriate, the payment requested shall be a lien in accordance with the Special Assessment provisions hereof.

Maintenance Easements –

In addition to the above Declaration sections which clarify the three instances by which entry onto lots is not considered trespassing, Declaration section 16.7 reiterates that the allowed access as previously stated in the Declaration shall be an "Easement for Maintenance", and further includes allowed access by an adjacent homeowner, due to specific infrastructural limitations. Despite the allowed access by adjacent homeowners, the allowed maintenance easement for the Association includes a clause which reads: "*provided, however, that all such activity shall be undertaken in a manner so as to minimize interference with any Owner's use of his property.*"

This clause appears to limit access by the Association. The Association is allowed access onto properties (again when permitted by the Declaration, i.e., when it is expressly stated these instances are not considered trespassing), but even in these instances must "minimize interference with any Owner's use of his property."

Questions for legal counsel might include, what does "to minimize interference" mean and what does it mean in the context of "any Owner's use of his property"? And is privacy one of the "any" uses that an Owner has of their property?

16.7 Easements for Maintenance. Easements are hereby reserved in favor of the Association under, upon, across, through and over all portions of The Golf Club for the purposes, as deemed necessary by the Association for preserving and maintaining the Land, the Townhome Units and carrying out its responsibilities under this Declaration; provided, however, that all such activity shall be undertaken in a manner so as to minimize interference with any Owner's use of his property. Where any Land, including any Improvement thereon, ("the Servient Estate") shall abut an adjacent lot line ("the Dominant Estate"), then the Owner of the Dominant Estate shall have an easement over the Servient Estate, which easement shall only be to the extent necessary

and in any event not to exceed four (4) feet wide contiguous to the interior property line running from the front to the rear property line of the Servient Estate for the following purposes:

A. For painting (where permitted), repairing and otherwise maintaining each wall of the Townhome Unit in such Dominant Estate abutting the aforesaid property line.

B. For support in and to all structural members, footings and foundations of any Improvements on the Dominant Estate; provided, however, that nothing herein shall be construed as requiring the Owner of the Servient Estate to erect (or permit erection of) columns, load bearing walls or other structures on the Servient Estate for support of the Improvements on the Dominant Estate.

C. For entry upon and ingress and egress through the Servient Estate with persons, materials and equipment to the extent reasonably necessary in the performance of maintenance, repair, replacement of any of the Improvements on the Dominant Estate.

D. For overhanging troughs, gutters and downspouts and the discharge therefrom of rainwater and subsequent flow thereof over the easement area.

Inspection of Properties –

There is only one (1) instance in the Declaration that allows inspection of properties is as part of the inspection of work approved by the Architecture Control Committee, per section 8.6. Other than this, the Declaration does not allow access onto properties to inspect homes or lots. Again, this does not preclude the Association from access in order to do maintenance on homes or lots, per section 9.14.

The only other discussion about inspection of properties is in the unrecorded Owners Handbook. And it is unclear if this section was revised after the 2018 recording requirement. Again, if revised after 7/01/2018, then any changes that allow inspection would not be effective, until recorded with the County Clerk. Despite when it was revised, the Owners Handbook does not explicitly state that the Association will enter an owner's property to perform these inspections. An additional question for legal counsel might include, can the Owners Handbook allow an easement onto an owner's property to inspect a property if it is not expressly allowed in the Declaration? In other words, can the Owners Handbook supersede what is allowed in the Declaration?

Exterior Appearance

We take great pride in the appearance of our homes. Ensure that the exterior of your property is well maintained and uncluttered.

- All homes must meet specific maintenance requirements. A copy of these requirements is available at the Management/Association Office or online at www.kwgchoa.com, Documents > Design Guidelines, section III.

- Homes will be inspected to make sure they are properly maintained. Violation notices will be sent if homes are not properly maintained.