What’s New on the Home Sharing Horizon?

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I. Rental Restrictions: Any restrictions on renting (usually recorded in CC&Rs, more on that later), can take many forms such as a requirement that the lease be in writing, limitation on number of authorized rentals, or, as here, restrictions on the amount of time a unit can be rented.

II. Short-Term Rentals:

1. Short-Term Rentals = Big Business
   a. Growth of online vacation rental companies such as VRBO, Airbnb
   b. Growing faster than major hotel chains such as Marriott
   c. Depending on location, can be big money for hosts (see, especially, San Francisco, desirable vacation destinations such as Monterey, Carmel, etc.)
   d. Community can benefit from investment in services and infrastructure also

2. Policy Concerns Regarding Short-Term Rentals
   a. Loss of housing stock in areas where housing is scarce (“hotelization”)
   b. Loss of hotel/occupancy/TOT (“Transient Occupancy Tax”) revenue to municipalities
   c. Affordability of housing in expensive markets

III. Prohibitions: Civil Code § 4740 provides that prohibitions on rentals can only apply to new owners that purchase after the prohibition is recorded

1. Minimum lease terms NOT a prohibition
   a. 30 day minimum is reasonable

2. Mandatory waiting periods/owner occupancy requirements. Sometimes referred to as residency requirements but doesn’t really matter if owner actually resides in the unit so long as it isn’t rented.
   a. One to two year waiting period the most common; three years occasionally
   b. Unit bought for parents, children or resided in by immediate family does not violate prohibition so long as no rent or other consideration is paid; make sure governing documents define immediate family
   c. What if unit is bought for college-aged kid that then rents rooms to friends?
   d. FHA recently determined that this form of prohibition is NOT allowable and will reject an application for FHA certification if a community association has a mandatory waiting period
What’s New on the Home Sharing Horizon?

3. Rental caps/ceilings
   a. 25%-30% most common. Can you go lower? What is too high?
   b. FHA has determined that this form of prohibition IS allowable but it still must be reasonable. What is reasonable?
   c. Unpublished case law regarding “reasonableness”

   - Harrison v. Sierra Dawn Estates Homeowners’ Association, Inc. (2010 4th District, Division Two). CC&R amendment that included one year rental waiting period, 20% rental ceiling and one year minimum lease provision and others. [CID was a 55 and over PD for mobile home lots (1,474). Owners filed a lawsuit after the amendments were recorded, alleging they were an unreasonable restraint on alienation and challenging statements made during vote. Court used Nahrstedt to judge CC&R provisions.]


IV. Why Do We Care About Short-Term Rentals?

1. Collective form of ownership with pre-agreed shared risks and rewards
2. Residential character of community
3. Recorded CC&Rs = community expectations
4. Legal/governance relationships

V. Concerns about Short-Term Rentals

1. Protection of Property
   a. Overuse, damage to amenities and rec facilities by short-term renters who are treating community as hotel
   b. Common Area damage (Super Bowl 2 AM pool party)

2. Nuisance Conduct (parties, noise, trash)
3. Security Issues (making public gate codes, security work arounds, entrance locations, etc.)
4. General compliance with rules and community standards
5. Character of community (quiet family neighborhood or party central?)
6. Marketability (desirability, lender guidelines regarding rentals)

VI. Scams and Schemes:

1. Roommate or Renter?
2. Roommates OK, whether paid or not
3. What’s the difference? Does it matter?
4. Subletting Scams
5. Squatters
What’s New on the Home Sharing Horizon?

6. Surprisingly easy to get “tenant” status
7. Shockingly hard to evict squatter “tenants”

VII. Should you try to beat ‘em or join ‘em?

1. Considerations
2. Fears of Associations
3. Nuisance Conduct
4. Security Risks
5. Owner desire to rent

VIII. If you want to fight them:

1. Implementation of Short-Term Rental Restrictions.
   a. Amending the Governing Documents
   b. Clear minimum lease terms
   c. Requirement to rent entire residence
   d. No hotel/transient use
   e. No advertising on short-term rental websites
   f. Increased fines for short-term rentals
   g. Increased fines/fees for lost keys, fobs, etc.
   h. Other violations
   i. Business use
   j. Nuisance

2. Record keeping - may need all of the following:
   a. Who occupies homes -- use Occupancy Report/Form?
   b. Copies of leases, including lease term
   c. Dates of record ownership
   d. List of rental properties
   e. Waiting list
   f. Affidavit re immediate family member

3. More work for manager? YES
   a. Typically not included in management contract
   b. Include in management contract as extra cost
   c. Administrative burden

4. Extra costs to association:
   a. Might be able to recoup administrative fees
   b. May need to update fine policy/schedule of fines to allow board to impose fines for violations of rental restrictions
   c. Reimbursement assessment for legal fees and other costs of enforcement
IX. Enforcement:

1. Short term rentals - what information is needed to enforce? How to gather information for the attorneys.
   a. Complaints from residents in writing and detailed
   b. Printed copy of listing/ad
   c. Photos of cars and occupants
   d. Surveillance camera footage
   e. What not to do - recordings?

2. Complaint driven enforcement is norm for short-term rentals; usually arise because of other issues (parties, noise, nuisance, trash, parking, access, amenities, etc.); no way for board to know otherwise.

3. Is there an affirmative duty on the part of manager or board to enforce rental restrictions?
   a. Complaints
   b. Off-site addresses
   c. Searching listings
   d. Time of year

4. There’s an app for that!

X. If you want to join ‘em: Permitting Short-Term Rentals

1. Why?
   a. Give the people what they want!
   b. Avenue to defray cost of additional security, repairs, and other expenses

2. When?
   a. Special Events/Seasons Only
      i. Indian Wells - BNP Paribas Open
      ii. Coachella/Stagecoach/Desert Trip
      iii. Month of February for Super Bowl
   b. Anytime

3. How?
   a. Amend the CC&Rs, including authority to adopt supplemental rules
   b. Adopt Rules and Regulations
   c. Create explicit owner requirements
   d. Build in specific disciplinary action
   e. Fees
      i. Civil Code § 5600 - fee must have relationship to cost
   f. Exact correlation of fee to expense not necessary
   g. Good faith estimate is sufficient
XI. Responses of Cities to Short Term Rentals:

1. Recent Action Taken by Cities to Ban Short-Term Rentals:
   a. Tiberon - August, 2015: Amended its zoning ordinance to ban rentals fewer than 31 days.
   b. City of Laguna Beach - August, 2015: Extended its moratorium on all short-term rentals in the city until October 1, 2016 to allow the city time to study potential revisions to its municipal code regarding short-term leasing. [Staff will work on an ordinance to ban all short-term lodging in residential zones, which make up a majority of the city. City increased its budget to enforce illegally-run short-term rentals and officials said they will develop a plan to aggressively pursue illegally run homes now being offered as short stays on vacation sites.]
   c. Manhattan Beach - June, 2015: Enacted a ban on short-term rentals of 29 days or less in residential areas.
   d. Indian Wells - June, 2015: After having a moratorium on short-term rentals less than seven days since June, 2014, the city amended its ordinance governing short-term rentals. The city currently allows short-term rentals of at least seven days but on July 4, 2018, the seven-day minimum expires and vacation rentals under 29 days will no longer be allowed in Indian Wells, except, again, during the BNP Paribas Open.
   e. Santa Monica - May, 2015: Enacted a ban on the rental of an entire unit for less than 30 days and requires those who take part in allowable home-sharing to obtain a business license from the city and pay a 14% hotel tax.

2. Action Taken by Cities against Rental Websites (e.g., San Francisco):
   a. San Francisco - February 1, 2015: City’s legislation revised zoning laws to allow for short-term rental in residentially zoned districts. Previously, and as these short-term rentals constituted commercial use, homeowners and tenants were in violation of the city’s zoning laws.
   b. Airbnb has agreed to collect taxes (e.g., transfer occupancy tax) and other fees from hosts and remit them to cities and other governmental entities.


4. Other State Agency Response to Short-Term Rentals Issue: California Coastal Commission.
What’s New on the Home Sharing Horizon?

5. Coastal Act and opinion of the Commission: Any prohibition of an entire class of accommodation that provides widespread lodging opportunities that are varied in cost, is problematic and inconsistent with the Coastal Act.
   a. An association ban on short-term rentals constitutes “Development” (Section 30106) as it “would change access to the coast by diminishing the pool of visitor-serving accommodations”, and therefore, require a coastal commission permit.
   b. Since no permits were obtained, the ban on short-term rentals violates the Coastal Act.
   c. Without a coastal development permit, the association could face fines of not to exceed $30,000 and shall not be less than $500 per violation.
   d. If association intentionally and knowingly acts in violation, fines no less than $1,000 and no more than $15,000 per day for each day in which the violation persists.
   e. Coastal Commission can also seek a cease and desist order.

6. Current Status

XII. Airbnb “Friendly Buildings” Program:
   1. Pilot program for associations and building owners.
   2. Includes profit sharing and insurance.
   3. For more information, email buildings@airbnb.com or check out buildingowners.withairbnb.com.
What’s New on the Home Sharing Horizon?

Rental Checklist

- Is there a minimum rental term in the CC&Rs? If so, what is it?
- Do you have an enforcement policy?
- Does your enforcement policy have escalating fines for short-term rental violations?
  - Are the escalating fines proportionate to the rental rates?
  - What other disciplinary action can the association take (turn off transponders, turn off cable TV, etc.)
- Do you have supplemental rules to address advertising on VRBO, Airbnb, etc.?
- Are you addressing “related” violations in the same violation notices (e.g., noise, parking, etc.)
- What evidence are you gathering for the hearing?
  - Are you taking photos?
  - Are you checking for a city vacation rental permit?
  - Are you soliciting neighbor complaints?
  - Are you keeping logs of the different vehicles?
  - Are you printing out VRBO and Airbnb listings, comments, etc.?
- Have you checked to see if the rentals violate city municipal ordinances?
  - Can you enlist the help of the city to take enforcement action?