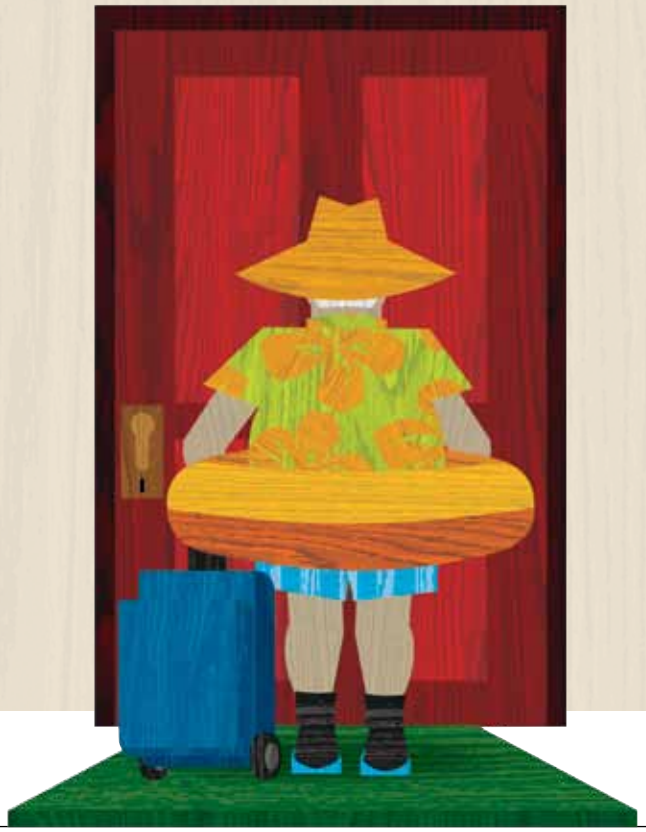
SHORT-TERM RENTALS AND COMMUNITY ASSOCIATIONS

by BARRY A. ROSS

Short-term rentals, also known as vacation rentals, are generally defined as a rental of less than thirty days. During recent years, there has been a tremendous increase in the number of short-term rentals. Property owners have realized that with short-term rentals, they can recover rent much more than rent collected from a more typical one-year rental. Further, companies such as Airbnb and HomeAway, Inc. have facilitated the increase in short-term rentals by providing convenient online booking service for immediate reservations. This dramatic increase in the number of short-term rentals has resulted in a corresponding increase in complaints made by neighbors of short-term rentals, who protest increased noise, debris, and parking problems, and are concerned, generally, about the revolving door of new neighbors.

In response to the increase in short-term rentals, community associations, also known as homeowners associations (or HOAs), have initiated actions to deter and prohibit short-term rentals. While some cities have also initiated actions to deter short-term rentals, these actions have been primarily in the area of licensing and fees, rather than a prohibition of short-term rentals. In such cases, the primary concern is whether the fees are reasonable and non-discriminatory. However, in the case of community associations, the concern is not simply a matter of licensing and fees; rather, community associations are seeking to prohibit short-term rentals completely.



The purpose of this article is to explain the various defenses that may be available to a property owner who wishes to retain the short-term rental, in response to action taken by the community association to prohibit the short-term rental. While not all defenses will work in each case, the following list of defenses should be considered.

Are Short-Term Rentals Prohibited by the CC&Rs or by the Rules?

An important distinction must be drawn between the Conditions, Covenants, and Restrictions, commonly referred to as CC&Rs, and the Rules, sometimes referred to as Guidelines. A change to the CC&Rs requires the affirmative, usually supermajority, vote of the members. In contrast, a change in the Rules requires only a majority vote of the Board of Directors of the community association. There are times when the Board of Directors is unable to obtain a change in the CC&Rs, due to member apathy, a large number of absentee owners, the supermajority vote requirement, or other reasons. In that case, the Board of Directors seeks to change the Rules by a majority vote of the Board to eliminate short-term rentals.

Rules are not entitled to the same "judicial deference" that the CC&Rs are entitled to receive. *Rancho Santa Fe Ass'n v. Dolan-King*, 115 Cal. App. 4th 28, 38 (2004). More importantly, when the CC&Rs contain no restriction on rentals, short-term or long-term, the association may not adopt any Rule imposing restrictions on rentals. In *Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n*, 177 Cal. App. 3d 726, 730, 734 (1986), the court stated that a community association may not adopt a more stringent requirement in the Rules than those that are specified in the recorded CC&Rs. While the Rules may implement the CC&Rs, the Rules may not impose restrictions that are not prohibited by the CC&Rs.

Are the Rules and/or CC&Rs Unreasonable?

A Rule that is unreasonable is unenforceable. Cal. Civ. Code § 4350(e) (West 2012). A CC&R provision that is unreasonable is also unenforceable. Cal. Civ. Code § 5975(a) (West 2012).

While there is some suggestion (dicta) in the court of appeals decision in *Mission Shores Ass'n v. Pheil*, 166 Cal. App. 4th 789, 793, 795, 797 (2008), that an amendment of the CC&Rs to eliminate short-term rentals is considered reasonable in connection with a petition to reduce the supermajority vote requirement in the CC&Rs, this amendment did not concern a Rule change, as it is distinguishable from an amendment to the CC&Rs, which requires the approval of the general membership. As described above, this distinction is important.

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A prohibition of short-term rentals will deprive the property owner of substantial enjoyment, and benefit of the property. The prohibition will interfere with rental contracts the owner has made for future rentals. Further, the owner probably would not have bought the property if the owner knew, or had any reason to know, that the property could not be used for short-term rentals, or if the owner knew that the rights to use the property as willed was further limited. There was no disclosure made to the owner from the association at the time of the purchase of the intended restriction on short-term rentals.

Do the Rules and/or CC&Rs Exceed the Authority of the Association?

An association is not permitted to adopt a Rule that exceeds its authority. California Civil Code Section 4350(b) states that a Rule must be within the authority of the Association. Cal. Civ. Code § 4350(b) (West 2012). An association may not exceed its authority by advising owners that they must not allow clutter to accumulate within their housing units. *Fountain Valley Chateau Blanc Homeowners Ass'n v. Dep't of Veterans Affairs*, 67 Cal. App. 4th 743, 746-47 (1998). Similarly, an association acts outside the scope of its authority when it tells a property owner the shortness of the term for which the owner may rent his or her housing unit, especially when there is no mention of this subject in the CC&Rs.

Do the Rules and/or CC&Rs Violate Civil Code Section 4740?

California Civil Code section 4740 is entitled Rental Restriction. Cal. Civ. Code § 4740 (West 2012). Subparagraph (a) states:

> An owner of a separate interest in a common interest development shall not be subject to a provision in a governing document or an amendment to a governing document that prohibits the rental or leasing of any of the separate interests in that common interest development to a

renter, lessee, or tenant unless that governing document, or amendment thereto, was effective prior to the date the owner acquired title to his or her separate interest.

Cal. Civ. Code § 4740(a) (West 2012). Pursuant to Section 4740(a), the prohibition on short-term rentals should not apply to any current owners. *Id.*

Are the Rules and/or CC&Rs Unconstitutional as a Taking Without Compensation?

A prohibition on short-term rentals may constitute a taking of the property without compensation. U.S. Const. art. V and XIV; Cal. Const. art. 1, § 19. The protection of the Constitution has been extended to owners within a homeowners association. As stated in *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 475 (2000): "A homeowners association board is in effect a quasi-governmental entity paralleling in almost every case the powers, duties and responsibilities of a municipal government." *See also Cabrera v. Alam,* 197 Cal. App. 4th 1077, 1088 (2011), (quoting, with approval, the same sentence from *Damon*, 85 Cal. App. 4th at 475).

IN BRIEF

Some governing documents reference a prohibition on "transient" or "hotel" purposes, without defining these terms.

Does the Watts Case Authorize a Prohibition on Short-Term Rentals?

An association may rely on *Watts v. Oak Shores Community Ass'n*, 235 Cal. App. 4th 466 (2015) (*Watts*) in support of its prohibition of short-term rentals. However, the *Watts* case does not concern a prohibition on all short-term rentals, and so does not provide support. Rather, *Watts* concerns the reasonableness of specified fees imposed upon short-term rentals. *Id.* at 468, 472. Most property owners do not object to reasonable fees that are imposed upon short-term rentals.

Are Short-Term Rentals a Commercial Use?

Short-term rentals are solely a residential use and are not a commercial use. Though there are no California court cases specifically addressing this issue, there are several cases outside California that have specifically addressed this issue and found that short-term rentals are not a commercial use. A recent case is the Colorado case of *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, *petition for cert. pending*, 2015 WL 4760331 (Colo. App. 2015) (No. 14CA1086). The court states in part: "We agree with the cases discussed above and conclude that short-term vacation rentals such as Houston's are not barred by the commercial use prohibition in the covenants." *Id.* at *5. Appellate court decisions in Texas, Oregon, and Washington have reached the same result. *See Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997); *Zgabay v. NBRC Property Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116 (Tex. Ct. App. 2015); *Ross v. Bennett*, 203 P.3d 383 (Wa. 2008).

Are the CC&Rs and/or the Rules Ambiguous?

There are times when the governing documents of the association do not clearly prohibit or define short-term rentals. For example, some governing documents reference a prohibition on "transient" or "hotel" purposes, without defining these terms. The terms may not be vague enough to be understood and applied by persons of common intelligence. *See Britt v. City of Pomona*, 223 Cal. App. 3d 265, 278-80 (1990). As stated in *City of San Bernardino Hotel/Motel Association of City of San Bernardino*, 59 Cal. App. 4th 237, 246 (1997), in which the city's transient occupancy tax was found to be unconstitutionally vague and therefore unenforceable, the court stated: "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* (quoting *People v. Barksdale*, 8 Cal. 3d 320, 327 (1972)). In interpreting the CC&Rs, the courts look to the past practices of the association. *Starlight Ridge South Homeowners Ass'n v. Hunter-Bloor*, 177 Cal. App. 4th 440, 451 (2009). If the association has allowed short-term rentals for many years, this may be considered to be a relevant factor in interpreting the CC&Rs.

Are Attorney's Fees Recoverable by the Prevailing Party?

In an action to enforce the governing documents, the prevailing party is awarded reasonable attorney's fees and costs. Cal. Civ. Code § 5975(c) (West 2012).

A property owner should consider the above referenced defenses in an action by the community association to prohibit short-term rentals. While each defense may not apply in each case, these potential defenses can help property owners maximize their desired use of their homes.

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