

Uptick in Leasing Violations: Does Summer Have You Sizzling Hot?

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As summer commences, is your community beginning to experience an uptick in leasing activity and leasing violations? The combination of summer travel, the recent downturn in the housing market and the rise of investor owned properties seems to have contributed to an increase in illegal leasing throughout many community associations. Owners have gotten very creative in their approach to generating rental income from their properties while attempting to avoid the traditional leasing restrictions contained in most governing documents. What can a community association do to curb this trend?

First, the board of directors needs to know and understand the numerous provisions in the neighborhood's governing documents that can collectively be used to stop leasing violations. Input should be sought from legal counsel on how best to approach these violations. You may be surprised at which provisions in your governing documents help avoid not only traditional leasing, but short-term leasing of properties through Airbnb, VRBO, and other similar services.

Many covenants contain provisions that prohibit transient occupancy of property. Transient occupancy includes not just weekend or weekly rental of the entire property, but also the short-term rental of a single room within a property even while the owner of the property remains living in the property at the same time.

Most use restrictions prohibit owners from conducting business activities in or from their property. These restrictions typically prevent business activity that involves visitation of clients to the property beyond that which would normally be expected for guest visitation to a property without business activity, and they also restrict business activity which would constitute a nuisance or threaten the security or safety of residents of the community. Both these restrictions are often subject to the board's discretion which can prove useful and aid in the effective prevention of leasing violations. Short-term rentals on Airbnb constitute a business activity. This type of rental activity clearly involves guests visiting and staying in a home in a greater volume than would be expected to accompany standard residential use. Short-term overnight visits to a home are more analogous to hotel/motel use which is inconsistent with the residential character of communities. Last, but not least, the steady stream of non-residential guests coming and going from a particular property can threaten the safety and security of neighboring residents in the community.

Recently, a Fulton County Superior Judge agreed that short-term rentals through Airbnb violate the prohibition of transient occupancy of units and the restriction of business activity provisions contained in a condominium declaration. In that case, *City Heights Condominium Association, Inc. v. Nathan Jennings*, Civil Action File No. 2015CV267122, the court interpreted the provisions of a condominium declaration substantially similar to those discussed above and found that an owner's rental of a condominium unit through Airbnb violated the declaration's prohibition against transient tenancy and its prohibition against using a unit for business use.

It is not uncommon to hear the claim that the home is actually being

occupied by an "owner" of the property, and thus a leasing violation has not occurred. Many property owners now hold title via a corporation, limited liability companies, a trust and some other legal entity in an effort to circumvent leasing restrictions. The tenant is often named as an officer in the entity or is given a small ownership interest in the entity in order to support an argument that the occupant is occupying the home as an owner. Owners have gone so far as to name their tenant as a beneficiary of a trust holding title to a home. Such action exposes both the owner and tenant to substantial risk and liability. Transfers of title can constitute a default under the mortgage securing the unit and may not be easy to undo. Ownership can create liability for assessments and other charges stemming from ownership of the home. On the surface, such arrangements can present enforcement challenges for community associations. However, if

an association looks behind the paperwork provided at substantive nature of the relationship between the owner of the home and the tenant/occupant, the true tenancy nature of the relationship can be revealed. A close investigation will often yield advertisements offering the property for lease, the lack of a bona fide pre-existing relationship between the owner of the home and the tenant/occupant, and an occupancy agreement governing the relationship between the owner and the tenant/occupant that is more akin to a lease than a true business arrangement.

Leasing restrictions in today's governing documents must be drafted giving consideration to the reality of our current real estate markets. Gone is the day where a simple provision restricting leasing is sufficient. The definition of leasing should specifically exclude lease purchase agreements and house-sitting arrangements; and make clear that short-term or transient occupancy including occupancy arrangements secured through Airbnb and other similar service providers constitutes leasing. The provisions should also clearly state that leasing includes situations where no rent is paid and where occupancy is arranged

through barter operations. The board of directors should be given authority to revoke any leasing permit issued to an owner if, in a reasonable opinion of the board, the owner is violating the provisions of the declaration including transient occupancy, business activity, or the leasing provisions themselves. As a preventive measure, the board should have the right to terminate leasing privileges when it is discovered that the owner is advertising a property for lease or occupancy in violation of the governing documents. This helps stop the leasing arrangement before it can start. Leasing restrictions should address ownership of a unit by a legal entity or other thing that is not a natural person (an "Entity Owner"). Entity Owners should be prohibited from changing the person designated to occupy a home more frequently than once every twelve months, without the board's express written consent, thereby curbing transient occupancy. Entity Owners should be required to provide documentation to the board that is sufficient to establish that the relationship between the tenant/occupant is substantive and not a guise to avoid leasing restrictions.

At the end of the day, carefully drafted leasing restrictions are the best way to prevent unwanted leasing and to maintain your cool throughout the summer. ■



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