

# Short-Term (Vacation) Rentals and Community Associations





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# Major Issues

## Community Association Housing Model

The nature of short-term rentals is not intuitively harmonious with the community association housing model. The community association housing model focuses on bringing people together, strengthening neighborhood bonds and promoting a sense of community and belonging. Community association governance is centered around homeowner volunteers who are elected by their neighbors to set policies and oversee the association. Board members and managers are guided by their association's governing documents that are created to maintain community standards, protect property values and encourage a sense of community stewardship.

Association homeowners choose where to live and accept contractual and ethical responsibility to abide by established policies and meet their financial obligations to the association. The community association housing model succeeds when a true sense of community is cultivated, there is active homeowner involvement and a culture of building consensus. Short-term visitors with no ties to the community may not be contractually bound to the association's established policies nor invested in the overall good of the community.

There are many communities, especially in vacation destination areas, where the homeowners in the community are seeking to offer their home as a short-term rental. This becomes a conversation and a choice for community association owners to determine a policy that is appropriate for the entire community.

## Short-Term (Vacation) Rental Platforms & Community Associations

The use of online platforms that facilitate short-term rentals has exploded in popularity. Websites like Airbnb and VRBO connect property owners or "hosts" with guests in order to arrange the listing and booking of accommodations for short-term rentals. The sharing economy for housing is expected to continue to grow. Airbnb, the industry market leader, was founded in 2008 and today is valued at \$24 billion and has nearly 2 million listings across the world. The law has failed to keep up with these new housing platforms and has left the industry largely under-regulated and local jurisdictions scrambling for solutions.

## Common Ground

- Homeowners may want the ability to generate income from their property by using online platforms to list their home.
- Short-term rentals may help the market value of communities, especially considering the geographic location of the community.
  - According to the National Association of Realtors white paper titled *Short-Term Rental Housing Restrictions*, "Short-term rental

restriction can affect property values in different ways. Generally, speaking, all else being equal, if identified negative impacts of short-term rentals in a district or neighborhood are reduced or eliminated by short-term rental housing restrictions, property values may increase....The precise impact that short-term rental restrictions have on property values will depend on various factors, including the general character of the community (e.g., vacation destination verses non-destination community), the precise terms of the ordinance, local and national economic conditions, and local real estate market conditions.”

## Controversy of Short-term Rentals: Protecting Neighbors and the Integrity of the Community Association Housing Model

**Community Association Governing Documents:** Many community associations’ governing documents have leasing restrictions prohibiting rentals for transient purposes. In other words, short-term rentals may be prohibited in community associations.

**Protecting Communities (physical aspects and character):** There is concern that if guests are not homeowners in the community, they are less likely to care for aspects of the community with the diligence that a permanent resident that has a financial stake in the community. Further, visitors may place added burdens on the community. (For example, parking, noise, common amenities etc.)

**Property Value:** Covenants, conditions and restrictions (CC&Rs) are created for a variety of reasons, one being to protect property values. People living in an association governed community contractually agree to adhere to these codes. Further, creation and enforcement of community standards extend some degree of protection against neighborhood degradation and deterioration. Short-term renters do not have a financial stake in communities and are not bound by the communities’ CC&Rs.

**Affordable Homeownership:** When a property owner chooses to rent their home for a short-term basis versus renting on a long-term basis, this leaves units unavailable for long-term renting. There is an argument that this limits long-term rental options thus pushing up the demand and the cost of housing.

**Zoning:** Residentially zoned property is being used for commercial use. According to the Penn State report, “From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb” there are a rising number of hosts that are operating full-time businesses on the housing online platforms. “Nearly 30 percent of Airbnb revenue is derived from...full-time hosts.” Full-time hosts are defined as renting 360 or more days per year.

**Safety:** The safety of residents is a concern, especially in communities with shared common areas.

**Enforcement:** Optics of enforcing rules imposed on short-term rentals in community associations can be tricky. Stephen Marcus, a practicing community association attorney in Massachusetts, quoted in Common Ground Magazine stated, "Catching the culprits is another matter. I think condominium owners are telling their Airbnb guests, 'If anyone asks, you're a friend or a relative'...It creates a problem in terms of enforcement because it may be legitimate and it may not be."

## Short-Term Rentals in Community Associations and Its Impact on Mortgage Finance

**Federal Housing Administration (FHA):** FHA certification may be at risk for condominium associations where short-term rentals are occurring as FHA statutorily prohibits transient housing and does not guarantee loans in condominium associations that permit rentals of less than 30 days. (12 USC 1731(b)).

A condominium associations in violation of FHA prohibition on transient leasing are offered two compliance options: (1) The association may amend governing documents to remove bank owned property exemptions from transient leasing prohibitions, or (2) The association board may provide a dated and signed statement on association letterhead affirming that no units within the condominium project are leased for a term of less than 30 days and tenants are not provided services commonly associated with a hotel.

**Freddie Mac:** Freddie Mac does not accept "Condominium Hotel" projects. According to Freddie Mac's sellers guide, "A Condominium Hotel is a project that is operated and managed as a hotel, or similar type of transient property, even though the units are individually owned (5701.3 (b))." Further, "...The Seller must have policies and procedures in place and must take appropriate steps to ensure that a project is not a Condominium Hotel. To ensure that the project is not a Condominium Hotel, the Seller can rely on sources of information such as the resources listed below as part of its due diligence to determine whether a Mortgage is eligible for sale to Freddie Mac:

- All Project Documents including but not limited to the by-laws, project budgets and financial statements
- Any offering statements (or their equivalent) and marketing materials
- Internet web sites, especially web sites for the project itself, the project developer, the entity marketing the project if other than the project developer, and press releases about the project
- Contract for sale
- Appraisal report (5701.10(a))."

Characteristics used to determine if a project is a Condominium Hotel include, "Mandatory or voluntary rental-pooling arrangements (or unit leasing programs) and revenue-sharing agreements are generally between the individual unit owners, and/or the HOA, the developer, successor to the developer or a third party. These agreements may provide restrictions on the unit owner's use such as blackout dates and occupancy limits, thereby providing a ready supply of units for rent and a revenue share to the unit owners from the rental of the units (see section 5701.3(b)). If the underwriting of the project indicates that the project is operated and managed as a hotel or similar type of transient property, the project is a Condominium Hotel and any Mortgage secured by a unit in such project is not eligible for sale to Freddie Mac (5701.10(b))."

**Fannie Mae:** Similar to Freddie Mac, Fannie Mae does not purchase projects or secure mortgages on projects that operate as a hotel or motel. Characteristics that Fannie Mae examines to determine if a project operates as a hotel include, but are not limited to: registration services, offering of rental units on a daily basis, projects that restrict the owner's ability to occupy the unit, advertising rental rates, location of the project in a resort area and if the project has may have few owner occupants. (Selling Guide B4-2.1-02)

## Property Rights

The ability to rent and receive income from one's property is a fundamental real property ownership right. However, this right is not absolute. Local government has the authority to regulate private land use through their police powers—that is the power of the government to enact measures that protect the safety, health and welfare of society. Further, local governments have the authority to regulate private land use through zoning enabling statutes. Rental regulations must not conflict with general or preemptive state law and must be within Constitutional bounds.

## Constitutionally Protected Property Rights

**Due Process:** Land use regulations must conform to the Fifth Amendment of the Constitution which states that, "No person shall be...deprived of life, liberty or property without due process of law..." A land use regulation will be found invalid if it does not further a legitimate public purpose. A regulation furthers a legitimate public purpose if it advances public safety, health, or welfare. Further, the government must demonstrate a rational relationship between the regulation and legitimate public purpose.

**Takings Clause:** This clause provides that property shall not be taken by the government for public use without just compensation. In addition to a physical invasion of property, courts have held that if a regulation goes too far it will constitute a regulatory taking. Courts use a balancing test set forth in Penn Central Transportation Co. v. City of New York to determine whether a regulatory taking has occurred. The

court aims to balance the public and private interests by looking at several factors such as the economic impact on the property owner, character of the regulation and the property owner's "distinct investment-backed expectations."

**Equal Protection Clause:** No state shall "deny to any person within its jurisdiction the equal protection of the law." If a law is challenged based on equal protection, the issue is whether the government can identify a sufficiently important objective for its disparate treatment. What constitutes a sufficient justification depends entirely on the type of discrimination. If a law does not involve a suspect class or fundamental right, the law is analyzed using the rational basis test. The law will be upheld if it is rationally related to a legitimate government purpose. The test is extremely deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review.

## Other Limits on Property Rights

**Fair Housing Laws:** It is unlawful to refuse to sell or rent, or otherwise make unavailable, a dwelling to any person because of their race, color, religion, sex, familial status, disability or national origin (42 U.S.C. § 3604). Short-term rental platforms have drawn scrutiny for discriminating against minority hosts and guests. The shared housing economy has blurred the lines between personal real estate transactions that may be exempt from the law and commercial transactions. This poses a problem on enforcing the statute and holding guests and hosts accountable.

**Private Nuisance:** Nuisance is an interference with a property owner's use and enjoyment of their property. An individual may not use their property in a way that is injurious to other property owners. When presented with a nuisance claim the courts aim to balance the interests of the plaintiff and defendant and will examine factors to determine the land uses reasonableness. Examples of factors from the Restatement of Torts include suitability of the activity on the property, character of the property and hardship on the defendant if injunction or damages are awarded.

**American with Disabilities Act (ADA):** It is unclear whether a short-term rental qualifies as a public housing offering which could expose homeowners and community associations to liability related to compliance with the ADA. The Chicago Ordinance handles this question appropriately by requiring disclosure related to compliance with ADA. According to the Chicago Ordinance, if a homeowner in a condominium rents out their unit and discloses that, for example, the condominium's pool is not ADA compliant, the condominium association is not responsible for accommodating.



## Partnership Programs for Associations and Vacation Rental Companies

There are programs being offered to community associations whereby the vacation rental company (web-based) will help an association amend their CC&Rs to allow home sharing, and in exchange, receive a percentage of the revenue from hosting properties within the association. The community association also gains access to general information about the hosting activity taking place in its community and is promised greater control over the home sharing process.

Community association boards of directors must explore the legal implications of entering into this type of partnership. For example, what are the legal implications of an association accepting commercial revenue? Is there exposure to compliance with the American with Disabilities Act and possibility of greater compliance requirements under the Fair Housing Act? What are the implications when a board decides to participate in the program, when the declaration or master deed contains a restriction against short-term leases? Is an association that participates in this program converted to a place of public accommodation? Principles of law previously applied to long-term rentals, do not adequately address the abundance of issues that the sharing economy presents.

Boards of directors should have a full understanding of the associations legal obligations before entering into these types of partnerships.

## Legislative Trends

**Federal:** There are currently no federal legislative or regulatory proposals.

**State:** Legislation on the state level has focused primarily on preventing local governments from banning short-term rentals and instituting mechanisms for states to impose and collect sales and use taxes from hosting platforms. States that saw legislative proposals regulating short-term rentals in 2016 include: Arizona, Florida, Hawaii, Idaho, Illinois, Maryland, Missouri, New York, Rhode Island, Utah, Virginia and Wisconsin.

**Local:** Most regulation of the industry thus far has been at the local level, in cities' zoning or administrative codes. Types of regulations include:

**Licensing/Registration Requirements:** Those who offer their property for short-term use may be required to register and obtain a license from their local government. (Examples of local municipalities requiring registration include, [Austin](#), [Chicago](#) and [San Francisco](#))

**Insurance Requirement:** Requires host to obtain a certain level of liability insurance for short-term rentals.

**Taxation:** Local governments have taxed revenue on short-term rentals.

**Occupancy Requirements:** Regulations requiring the host to live in the unit for a certain number of days out of the year.

**Prohibition:** Regulations that ban short-term rentals. (Examples of local municipalities that prohibit short-term rentals include [Anaheim](#), [New York City](#), [Santa Monica](#) and others).

**Quantitative Limits:** A regulation that places a cap on the number of short-term rentals allowed.

## Areas of Concern for Community Associations

Legislation that limits community association's ability to decide whether short-term rentals are appropriate for their particular community.

Example: Idaho House Bill No. 511 (3) No homeowner's association may add, amend or enforce any covenant, condition or restriction in such a way that limits or prohibits the rental, for any amount of time, of any property, land or structure thereon within the jurisdiction of the homeowner's association, unless expressly agreed to in writing at the time of such addition or amendment by the owner of the affected property.

## Court Cases

**Wilkinson v. Chiwawa Communities Association:** The Washington Supreme Court held that a simple majority of homeowners cannot amend the community's restrictive covenants where the general plan of development has no relation to the existing covenants. The Court stated, "As the text of the Chiwawa covenants demonstrates, the drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit rentals of a particular duration, they would have done so."

**Houston v. Wilson Mesa Ranch Homeowners Association:** Colorado Court of Appeals held that an association could not rely on its covenants that prohibited homeowners from occupying or using homes in the association for business purposes or administrative procedures to prohibit vacation rentals.

**Fillmore LLLP v. Ventre Pointe Condo:** The Washington Supreme Court held an association can amend its CC&Rs to prohibit short-term vacation rentals, but given that leasing is a "use" under the Association's Declaration, a 90 percent supermajority was required to agree on any Declaration amendment that restricted leasing under the Revised Code of Washington and the Declaration.

**Watts v. Oak Shores:** The California Court of Appeals, Second Appellate District, held that associations have the right to restrict short-term rentals and that the Board can charge a fee to off-set the costs associated with renters. The court noted, "That short-term renters cost the Association more than long-term renters or permanent residents is not only supported by the evidence but experience and common sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse."

## Model Language: Excerpts from Municipal Code of Chicago

The Chicago City Council passed a vacation rental ordinance on June 22 that will further regulate the house-sharing industry and provide protections to consumers like those living in the city's community associations. Mayor Emanuel's ordinance amends Chapter 3-24 of the Municipal Code of Chicago and becomes effective January 1, 2017.

Here are specific changes that impact and/or protect condominiums, housing cooperatives, and townhomes (community associations) in the city:

1. Explicitly defines single-family homes, condominiums, housing cooperatives, and townhomes as establishments impacted by the ordinance.
2. Recognizes homeowner's association, condominium association and housing cooperative boards may prohibit short-term rental activity through written bylaw and/or covenant restriction.
3. Requires an owner interested in listing their home/unit as a vacation rental or short-term rental to register with the City of Chicago and become a licensee.
4. Requires an owner to disclose whether the home/unit/building is compliant with the American with Disabilities Act (ADA). Note: The ordinance does not require ADA compliance. The ordinance requires disclosure only.
5. Prevents an owner from listing their home/unit as a vacation rental or short-term rental if their community association governing documents prohibit short-term rentals.
6. Allows entire buildings to opt out of short-term rentals. The ordinance provides for creation of a list of ineligible units that will not be allowed to operate and a list of prohibited buildings.
7. Provides clear limits on the number of allowable rental units within buildings. In single-family homes, only primary residences can be rented; in homes with two to four units, only primary residences can be rented and only one unit per building can be rented; Buildings with more than 5 units will be limited to the lesser of one quarter of the total number of dwelling units or six rental units.
8. Requires on-line platform companies (Airbnb, Home Away, VRBO, etc.) to take responsibility for compliance of the regulation. In other words, if there is a unit

owner posting their unit in a building that has opted-out, the on-line platform companies have responsibility for compliance.

9. Creates a one-strike-and-you're-out rule for certain egregious conditions and a three-strikes-and-you're-out rule for units that cause a disturbance. To ensure compliance, the ordinance establishes a clear penalty structure, as violators may be fined \$1,500 to \$3,000 per offense, with each day that a violation exists treated as a separate and distinct offense. Egregious conditions, criminal activity or public nuisance will be subject to a heightened \$2,500 to \$5,000 per offense penalty.

[Click here to view the full language of the new ordinance.](#)

#### MODEL LANGUAGE FROM THE CHICAGO ORDINANCE

Section 6. 4-6-300 (a) *"Homeowners association"* means the association of all the unit owners, acting pursuant to bylaws through its duly elected board of managers. For purposes of this definition, "unit owner" means the person or persons whose estate or interest in the unit, individually or collectively, is an aggregate fee simple absolute ownership of the unit, or in the case of a leasehold condominium, the lessee or lessees of a unit whose leasehold of the unit expires simultaneously with the lease.

4-6-300 (b) *Application – Additional information required.* In addition to the requirements set forth in Section 4-4-050, an application for, and, if requested, a renewal of, a regulated business license authorizing the owner of a dwelling unit to rent or lease such dwelling unit as a vacation rental shall be accompanied by the following information:

- (6) if the dwelling unit is subject to restrictions imposed by a homeowners association or board of directors, an attestation that the homeowners association or board of directors has not adopted bylaws prohibiting the use of the dwelling unit identified in the license application as a vacation rental or shared housing unit, in any combination

4-6-300(g)(8) *Listing and rental of single family homes that are not the licensee's primary residence – Prohibited.* Such licensee shall not list on any platform or rent any vacation rental that is a single family home, unless such single family home is: (i) the licensee's primary residence; and (ii) the licensee will not be absent from that residence for more than 120 days within any calendar year; and (iii) the licensee will be physically present and available throughout the duration of the rental. Provided, however, that if the licensee is on active military duty, such licensee shall not be in violation of this subsection (h)(8) if such licensee has appointed a designated agent or employee to manage, control and reside in the single family home during such host's absence while on military duty. Provided further, that this prohibition shall not apply if a commissioner's adjustment permitting otherwise has been obtained

(9) *Listing and rental in buildings with up to four dwelling units – Restricted.* Such licensee shall not list on any platform or rent any vacation rental that is located in a building containing two to four dwelling units, inclusive, unless such dwelling unit: (i) is the licensee’s primary residence; and (ii) is the only dwelling unit in the building that is or will be used as a vacation rental or shared housing unit, in any combination. Provided, however, that this prohibition shall not apply if a commissioner’s adjustment permitting otherwise has been obtained;

(10) *Listing and rental in buildings with five or more dwelling units – Restricted.* Such licensee shall not list on any platform or rent any vacation rental that is located in a building containing five or more dwelling units, when more than six dwelling units in the building, or one-quarter of the total dwelling units in the building, whichever is less, are or will be used as a vacation rental or shared housing unit, in any combination, if the dwelling unit identified in the license application is licensed as a vacation rental

4-6-300(h)(6) *Violation of condominium or cooperative building restrictions – Prohibited.* Such licensee shall not to list on any platform or rent any vacation rental that is subject to restrictions imposed by a homeowners association or board of directors, unless the homeowners association or board of directors has approved the dwelling unit for use as a vacation rental or shared housing unit;

4-13-220(e) *Compliance with rental, homeowners association and cooperative building agreements – Required.* Each licensee under this Article II shall have the duty not to list, or permit any person to list, any short term residential rental on its platform, unless the licensee advises the short term residential rental provider that the provider must comply with all existing applicable rental agreements, or homeowners association or cooperative building rules or restrictions, regarding the rental for transient occupancy of the short term residential rental

4-14-020 *Shared housing unit registration – Required.* (a) Registration by intermediary required. Except as otherwise provided in subsection (g) of this section, no dwelling unit listed on a short term residential rental intermediary’s platform shall be rented by a shared housing host until such intermediary, acting on behalf of the owner or tenant of the listed dwelling unit, and in accordance with Section 4-13-230, registers such unit with the department, as evidenced by the submission to the department of a registration application meeting the requirements of subsections (b) and (c) of this section.

(b) Registration application – Form and contents. The registration application required under subsection (a) of this section shall be in a form and manner prescribed by the commissioner, and shall be accompanied by the following information:

(1) the shared housing host’s name, which shall be the name of a natural person;

(2) the address of the dwelling unit being registered as a shared housing unit, including, if applicable, the floor of the building on which the dwelling unit is located and the unit number, unit letter or similar unit identification;

(3) the name, address and contact information of a local contact person;

(4) the attestations set forth in subsection (c) of this section;

(5) whether the dwelling unit identified in such application is a: (A) single-family home, and if so, whether the home is the named host's primary residence; or (B) building containing two to four dwelling units, and if so, whether the dwelling unit is the applicant's primary resident, or (C) building containing 5 or more dwelling units; and

(6) any other information that the commissioner may reasonably require in connection with the issuance or renewal of a registration under this chapter.

4-13-410 *Penalty for violation.* In addition to any other penalty provided by law, any person who violates this section or any rule promulgated thereunder shall be subject to a fine of not less than \$1,500.00 nor more than \$3,000.00 for each offense. Each day that a violation continues shall constitute a separate and distinct offense.

4-14-040 *Legal duties* (a) *Descriptive information on listing – Required.* Each shared housing host shall include the following information in every listing of a shared housing unit on a platform:

(2) a statement on: (i) whether the short term residential rental is wheelchair or ADA accessible; (ii) whether the short term residential rental has any parking availability or restrictions; and (iii) the availability of, or restrictions on, the use of any recreational facilities or other amenities applicable to guests

4-14-030 (c) *Duty to remove ineligible listings from platform.* If, following a final determination of ineligibility under Section 4-13-260(a) or Section 4-14-030(a), the shared housing host is notified in writing by the commissioner that a shared housing unit is ineligible to be listed on any short term residential rental intermediary's platform, the shared housing host shall remove the ineligible listing from the platform in accordance with rules prescribed by the commissioner. In addition to any other penalty provided by law, any shared housing host who fails to comply with this subsection shall be fined not less than \$1,500.00 nor more than \$3,000.00 for such failure to comply within 8 to 14 calendar days of the date on which notice under this subsection is sent; and not less than \$2,500.00 nor more than \$5,000.00 for such failure to comply on the 15th calendar day of the date on which such notice is sent or on any calendar day thereafter. Each day that a violation continues after such 15th calendar day shall constitute a separate and distinct offense.

4-14-050 Unlawful acts. (a) *Criminal activity, nuisances, egregious conditions – Prohibited.* It shall be unlawful for any shared housing host to permit any criminal activity, or public nuisance within the meaning of Section 4-13-260(a)(1), or egregious condition, to take place within the shared housing unit. In addition to any other penalty provided by law, any person who violates this subsection shall be subject to a fine of not less than \$2,500.00 nor more than \$5,000.00 for each offense. Each day that a violation continues shall constitute a separate and distinct offense.