

SHORT-TERM RENTALS – THE HOA PERSPECTIVE
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I. INTRODUCTION

Short-Term Rentals (“STRs”), which can encompass everything from nightly rentals to thirty day rentals to six month rentals, have become a hot button issue in common interest communities since the inception of websites such as airbnb, VRBO and HomeAway. The market for STRs in Colorado increased exponentially with the legalization of recreational marijuana. The dramatic increase in STRs has compelled many common interest communities to consider ways to restrict, or at least regulate, leasing in their communities.

II. LEGAL AUTHORITY

A. Imposing Leasing Restrictions

When a common interest community wants to restrict leasing to eliminate or control STRs, the first question is whether this can be done by the Board through the adoption of a rule or policy, or whether it requires an amendment to the covenants upon approval of the required percentage of the owners. The prevailing view is that leasing restrictions may only be imposed by an amendment to the recorded covenants, and not by the adoption of a rule.

The Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101 *et seq.* (“CCIOA”) contains several provisions regarding the use of property within common interest communities. C.R.S. § 38-33.3-205(1)(l) requires that restrictions on the use, occupancy, and alienation of units be contained in the recorded declaration. C.R.S. § 38-33.3-217(4.5) requires that no amendment may change the uses to which any unit is restricted in the absence of a vote or agreement of at least sixty-seven percent (67%) of owners, or any larger percentage specified in the declaration. Similarly, the Restatement of the Law on

Property/Servitudes provides that, absent specific authorization in the covenants, an HOA does not have the power to adopt rules that restrict the use or occupancy of individually owned units.

In a recent case addressing STRs, the Colorado Court of Appeals specifically stated: “For short-term vacation rentals to be prohibited, the covenants themselves must be amended ... the board’s attempt to accomplish such amendment through its administrative procedures was unenforceable.” *Houston v. Wilson Mesa Ranch Homeowners Association, Inc.*, 360 P.3d 255 (Colo.App.Div.3. 2015).

B. STR is Not a Commercial Use

Most residential common interest communities have a provision in their covenants that prohibits, or at least limits, the use of the property for commercial or business purposes. In *Wilson Mesa*, cited above, the association relied on such a provision when it fined an owner for leasing his property through VRBO. The Court concluded that short-term vacation rentals are not barred by the commercial use prohibition in the covenants.

III. PROS AND CONS

In any given community, there are bound to be owners who purchased their property as an investment property, specifically to be rented out for profit, as well as owners who purchased their property in order to live in it for many years. These two groups of owners will most likely disagree about STRs, because they have different goals for their properties.

A. In Favor of STRs

1. The property was purchased as an investment property. STRs maximize the value of the investment.
2. The property was specifically purchased because the covenants and applicable zoning did not prohibit STRs.
3. STRs increase the value in the community as a whole, particularly if the community is located in an area, such as downtown Denver, where communities allowing STRs are hard to find.
4. Prohibitions on STRs unfairly discriminate against investor-owners.

5. Non-investor owners can also generate occasional income by offering their properties for STR while on vacation or for special events.
6. Leasing restrictions could jeopardize a condominium's eligibility for FHA loans.

B. Opposed to STRs

1. Condominiums become ineligible for FHA mortgage insurance if the owner-occupancy rate is less than 50%, thus reducing the pool of potential buyers.
2. Owner-occupants are subjected to a "revolving door next door."
3. Increased security and safety risks due to the increase of "strangers" in the community.
4. Increased traffic, parking problems and wear and tear on the common areas.
5. Noise, nuisance, odor and other covenant violations by people who do not have pride of ownership or are unfamiliar with or unwilling to follow the rules.
6. Increased workload for property managers and staff who are required to address issues and answer questions for short-term tenants.
7. Difficulty or inability to enforce covenant and rule violations.

IV. AVAILABLE REMEDIES

For communities that have STR prohibitions in their covenants, or have successfully amended their covenants to include such prohibitions, there is still the issue of enforcement.

A. Imposition of Fines

All common interest communities in Colorado are required to adopt policies, procedures and rules regarding enforcement of covenants and rules, including notice and hearing procedures and a schedule of fines. HOAs are prohibited from levying fines for violations unless notice and an opportunity for a hearing is given. As a result, the process can take time, as well as place an administrative burden on management, staff, the hearing committee and Board.

Some owners simply pay fines for STRs as a cost of doing business. The fines do not deter these owners from continuing to violate the STR prohibitions.

Some owners will not pay fines unless required to by court order. If an HOA is required to file a lawsuit to collect delinquent fines, there is additional delay as well as the HOA having to incur legal fees. Luckily for the HOA, most STR violations are easy to prove, since the STR listing or advertisement is persuasive evidence of a violation. Upon establishing that the violation occurred, the HOA should be entitled to an award of attorney's fees and costs.

B. Injunctive Relief

The fining process does not always cause the violations to stop, and certainly does not cause the violations to stop immediately. Unlike a hotel that can immediately evict unruly guests, HOAs do not have the ability to require STR tenants to vacate the premises, absent a court order. The process to obtain a court order is lengthy and can often be complicated or expensive. By the time an order can be obtained, the STR tenants are likely to be long gone. Nonetheless, a court order should help prevent the violating owner from continuing to commit STR violations.

V. CONCLUSION

STRs aren't going away any time soon, so common interest communities should be prepared to address them in ways that work best for the community. First, the Board should take the pulse of the community on the issue and have open discussions about people's concerns and needs. This can be done through meetings, surveys, a task force, or any combination thereof. Next, a decision should be made as to whether it is appropriate to pursue a covenant amendment and, if so, what that will look like. Finally, if the decision is not to amend the covenants, the Board can look into whether there are additional rules or policies that can be adopted to address issues raised by STRs, without imposing any new use restrictions that are not contained in the covenants.