# Addressing Short-Term Rentals in Community Associations

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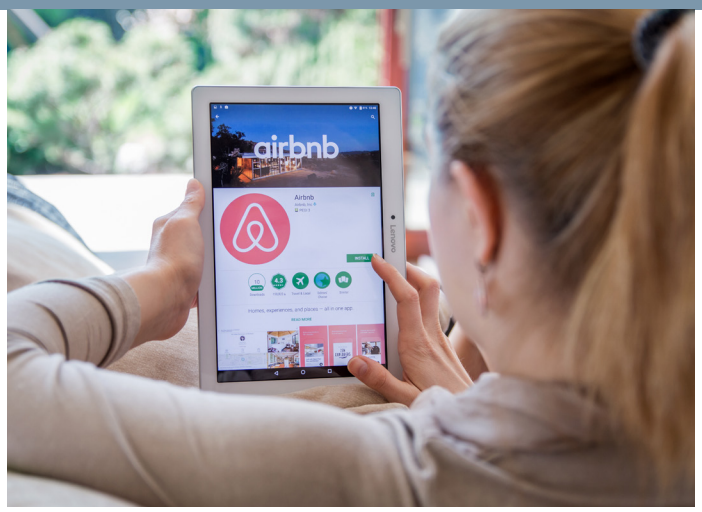


While most news outlets deemed Atlanta's hosting of the Super Bowl a success, it brought an unwelcome surprise for many condominium and homeowners associations: Airbnb and similar short-term tenants. Not unexpectedly, many of those tenants came ready to party, and associations were concerned about the common complaints for most short-term tenants: frequent move-ins and move-outs of unknown occupants, discourteous and obnoxious behavior, and excessive use of the common areas. Compounding this unpleasant surprise, many boards of directors and community managers learned that their association's covenants did not provide the authority to prohibit Airbnb or other short-term rentals.

Because the rise in Airbnb, VRBO and similar short-term leasing websites is a relatively recent phenomenon, most community association governing documents do not specifically address the issue. Even declarations of condominium and covenants drafted only a few years ago which include general leasing restrictions do not include provisions specifically prohibiting short-term leasing. This gap creates a potential problem for many associations who want to control or prohibit Airbnb and other short-term leasing because Georgia law generally favors the rights of owners to do what they want with their property. Under Georgia law, restrictions on an owner's use of land must be clearly established and must be strictly construed. If there is any doubt in meaning of restrictive covenants, courts will construe the restrictive covenant in favor of the owner's freedom to use the property how the owner wishes.

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Many boards of directors assume that provisions in their associations' governing documents that restrict the use of the units or lots to "residential uses" and/or prohibit business and commercial activity in the community can be relied on to prohibit short-term leasing. The appellate courts in Georgia have yet to decide whether such residential use restrictions and bans on commercial or business activity prohibit short-term leasing. However, other states' appellate court decisions on this issue cast doubt on whether Georgia courts would hold that residential use restrictions forbid short-term leasing.

While some states' appellate courts have ruled that a residential use restriction, or prohibition on use of lots for business and/or commercial purposes, does prohibit short-term rentals, the majority of appellate decisions from courts of other states find that such restrictions do not prevent an owner from being able to rent his or her property for short-terms stays of one or two nights or longer. These courts reason that renting property to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of a residential use restriction, and that the transitory or temporary nature of such use by vacation and other short-term renters, or owners' receipt of rental income for this use, does not change the residential status or turn it into a commercial or business use.

Georgia courts are not required to follow the decisions of other states on this issue. However, when this issue does come before a Georgia court, as it inevitably will, we can expect that our courts will look to the decisions of other states. Also, based on current Georgia law, to the extent that a residential use restriction or business/commercial use prohibition in governing documents is ambiguous, Georgia courts will construe the restriction in favor of the owner. For this reason, boards of directors should consult with their association attorney before relying on a residential use restriction or prohibition on business or commercial use as a basis to prohibit short-term rentals.

Even managers and boards of associations whose recorded declaration contains specific restrictions on leasing, including restrictions on duration, should not assume that the restriction prohibits short-term leasing. Some leasing restrictions commonly used in declarations, even those declarations and leasing amendments drafted in the past five years, contain language that can be interpreted to only apply to long-term leases. That means that a court may read leasing restrictions to not apply to Airbnb and other short-term rentals unless short-term rentals are expressly addressed. This may result in an owner being able to rent his or her property for short-term rentals on Airbnb, VRBO and similar sites, even if the owner is prohibited by the association's leasing restrictions from renting the property for a traditional long-term lease.

Restrictions on an owner's use of his or her property, including the owner's right to lease, must be contained in the recorded declaration to be enforceable. Leasing restrictions cannot be imposed by board-adopted rules. Associations without leasing restrictions prohibiting short-term (or other) rentals must add the restrictions by amendment to the recorded declaration, following the declaration's amendment process, which typically requires approval by two-thirds vote of the membership.

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Although the Super Bowl is over, the popularity of short-term rentals in the Atlanta metro area shows no signs of slowing down. And, Atlanta is sure to attract other major events, in addition to our regular flow of visitors. This means the problems caused by short-term tenants, including the frequent move-ins and move-outs of unknown occupants, discourteous and obnoxious behavior, and excessive use of common recreational areas, are also here to stay. If your community association wants to be sure that it has the requisite authority to prohibit short-term rentals, now is the time to check with your attorney to determine your current legal authority to do so, and whether an amendment is needed.