BEWARE-bnb?: ADAPTING THE REGULATORY APPROACH OF COMMUNITY ASSOCIATIONS TO RESIDENTIAL SHARING & ZONING TRENDS

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Author's Synopsis: This Article discusses current trends in the regulation of residential sharing activity by zoning authorities and community associations, and it highlights recent municipal approaches that address short-term rentals. This Article argues that an opportunity exists for community associations to confront residential sharing activity by using current zoning trends as a guide to formulate association-specific regulatory strategies, and it cautions that reliance on existing covenants may not adequately regulate short-term rental activity.

I. INTRODUCTION

The term "sharing economy" is commonly used to label emerging trends in economic activity—such as ride sharing services like Uber and

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Lyft and residential sharing services like Airbnb, Vacation Rentals by Owner, and HomeAway.[1] The sharing economy is rapidly evolving and expanding, but a gap exists in the discussion of "how the sharing economy . . . relate[s] to existing local government regulatory structures."[2] This Article indirectly fills that gap by assessing the parallel regulatory approaches of community associations and municipalities, and discussing how community associations can adapt to residential sharing trends by looking to modern zoning strategies that regulate short-term rentals.

Commentators have analyzed the unique regulatory authority of community associations through a variety of legal frameworks.[3] One approach recognizes that community associations are quasi-governmental in nature, likening their structure, activity, and authority to municipalities.[4] Indeed, community associations often provide traditional governmental services to residents, such as security, repair and maintenance of roads and other common areas, and refuse removal, while also having the authority to levy assessments and fines—a power "loosely equated with the municipal taxing power."[5] Despite these parallels, commentators stress that the "voluntary or private nature of community associations" is in stark contrast to the "involuntary or public nature of municipalities."[6] Recent scholarship has analyzed residential sharing trends in the context of zoning, and this Article incorporates community associations into that discussion.

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[1] *See, e.g.*, Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEGIS. 147, 149–50 (2016).

[2] *Id.* at 149.

[3] *See generally* Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 598–99 (1993) (comparing the activities of community associations through the lenses of corporate law, constitutional law, trust law, and municipal law).

[4] *See id.* at 634–41. Ample similarities exist "to argue that the community association is, at some level, a quasi-government, paralleling the powers, duties and responsibilities of a municipal government." *Id.* at 635 (citing Katherine Rosenberry, *Actions of Community Association Boards: When Are They Valid and When Do They Create Liability?*, 13 REAL EST. L.J. 315, 329–33 (1985)).

[5] *Id.* (citing Boyle v. Lake Forest Prop. Owners Ass'n, 538 F. Supp. 765, 768 (S.D. Ala. 1982); Ralph v. Envoy Point Condo. Ass'n, 455 So. 2d 454, 454–55 (Fla. Dist. Ct. App. 1984)). Further, municipalities and community associations "elect representatives" and maintain control over architectural and construction standards, which "are analogous to the municipal power to issue building permits or grant a zoning variance." *Id.*

[6] *Id.* at 641.

II. BACKGROUND

Airbnb has emerged as a leading competitor of the hotel industry, with guests frequently seeking accommodations through its services instead of hotels.[7] While several large cities have engaged in high profile legal battles over the regulation of Airbnb,[8] its impact is not confined to large cities.[9] Indeed, Airbnb's pervasiveness[10] has prompted local governments across the country to amend zoning ordinances to address short-term rental trends.[11] Meanwhile, some community associations largely rely on their existing covenants to regulate short-term rentals.[12] Although some

[7] *See* Miller, *supra* note 1, at 161 (explaining that a study of Airbnb's impact on the hotel industry in Texas revealed "each 10% increase in Airbnb supply results in a 0.35% decrease in monthly hotel room revenue") (citing Georgios Zervas, David Proserpio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, at 1 (B.U. SCH. MGMT., Research Paper No. 2013-16, 2016)).

[8] *See, e.g.*, Stephen Burns, Chase Edwards & Casey Rockwell, *Legal Ambiguity as a Competitive Advantage: Airbnb's Use of Technological Novelty to Avoid Liability*, 46 REAL EST. L.J. 356, 368–74 (2017); Cory Scanlon, *Re-Zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property*, 70 SMU L. REV. 563, 569–70 (2017).

[9] City-specific data relating to average Airbnb prices, number of listings, number of hosts, occupancy rates, estimated income for hosts, and more can be found through several online tools. *See Get the Data*, INSIDE AIRBNB, http://insideairbnb.com/get-the-data.html (last visited Nov. 5, 2018) (providing Airbnb data for cities like Asheville, North Carolina; Austin, Texas; Denver, Colorado; Nashville, Tennessee; New Orleans, Louisiana; Oakland, California; Portland, Oregon; and Seattle, Washington); *see also MarketMinder*, AIRDNA, https://www.airdna.co/vacation-rental-data (last visited Nov. 5, 2018) (providing data on the number of active Airbnb hosts, "professional hosts" with multiple listings, average daily rates, and occupancy rates for large and small cities across the country).

[10] "Airbnb is the market leader as it relates to the temporary accommodations industry." Jamie Lane & R. Mark Woodworth, *The Sharing Economy Checks In: An Analysis of Airbnb in the United States*, CBRE HOTELS' AMERICAS RESEARCH, at 1 (Jan. 2016), https://pip.cbrehotels.com/docs/default–source/Airbnb/an_analysis_of_airbnb_in_the_united_states.pdf?sfvrsn=2 (stating that Airbnb users spent $2.4 billion in the United States from October 2014 to September 2015).

[11] *See* Neal Early, *Council Legalizes & Regulates Airbnb*, THE SENTINEL (Oct. 14, 2017), http://mont.thesentinel.com/mont/2017/10/14/council-legalizes-and-regulates-airbnb (discussing how Montgomery County Council [Md.] passed a zoning amendment that permits rentals through Airbnb for a maximum of 120 days per year, limits the number of guests to six adults at a time, and limits the number of adults per bedroom); *see also* Brian Crandall, *Cayuga Heights Zoning Revisions Spur Protest*, THE ITHACA VOICE (Oct. 30, 2017), https://ithacavoice.com/2017/10/cayuga-heights-zoning-revisions-spur-protest/ (discussing new local laws that would restrict short-term rentals of less than thirty days to fourteen nights per year).

[12] *See infra* Part III.A.

associations have attempted to impose restrictions on short-term rental activity by amending their governing documents,[13] attempts to do so have achieved varying degrees of success.[14]

There is continuing public debate over the strategies that local governments can or should implement to address residential sharing. At the national level, the hotel industry and Airbnb are actively engaged in conflicting lobbying and funding efforts aimed to influence municipal and state regulation of residential sharing services.[15] At the local level, individuals opposed to Airbnb argue that under-regulated or under-enforced restrictions on short-term rentals negatively impact property values,[16] degrade community character,[17] and cause housing shortages that increase long-term rental costs due to limited inventory.[18]

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[13] *See, e.g.*, Adams v. Kimberley One Townhouse Owner's Ass'n, 352 P.3d 492, 499 (Idaho 2015) (holding in favor of HOA's amendment to prohibit short-term rentals). *But see* Sarah A. McCormack, *What Does Your HOA Think of Airbnb?*, 60 THE ADVOCATE (Idaho State Bar) 20, 22 (Feb. 2017) (explaining that state law has since preempted the holding in Adams). *See generally* IDAHO CODE ANN. § 55-115(3). All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

[14] *Compare, e.g.*, McElveen-Hunter v. Fountain Manor Ass'n, 386 S.E.2d 435, 436 (N.C. Ct. App. 1989) (upholding an amendment restricting the lease of units, but holding that amendment does not bind owners who purchased units prior to that amendment), *with*, *e.g.*, Cape May Harbor Village & Yacht Club Ass'n v. Sbraga, 22 A.3d 158, 169–70 (N.J. Super. Ct. App. Div. 2011) (holding that an amendment prohibiting the rental of homes within the association to third parties was reasonable).

[15] *See* Chris Kirkham, *Behind "Grassroots" Campaigns Over Airbnb, Millions of Industry Dollars*, WALL ST. J. (Oct. 1, 2017), https://www.wsj.com/articles/behind-grassroots-campaigns-over-airbnb-millions-of-industry-dollars-1506859202. Airbnb has initiated lawsuits against municipalities to challenge their land use controls. *See* Stephen R. Miller & Jamila Jefferson-Jones, *Airbnb and The Battle Between Internet Exceptionalism and Local Control of Land Use*, 31 PROB. & PROP. 36, 36 (2017). Also, the hotel industry regularly publishes literature critical of residential sharing services, and it especially condemns the prevalence of commercial operators (multi-unit hosts), arguing they supplant much of Airbnb's stated home-sharing model by converting residences into defacto hotels that unlawfully evade hotel regulation. *See, e.g.*, Kirkham, at 1.

[16] *See, e.g.*, Stephen Sheppard & Andrew Udell, *Do Airbnb Properties Affect House Prices?* (Williams Coll. Dep't of Econ., Working Paper No. 2016-03, 2016).

[17] *See, e.g.*, Housefax, Can Your Neighbor's Airbnb Rental Affect Your Home Value?, REALTY TIMES (Feb. 21, 2017), http://realtytimes.com/advicefromtheexpert/item/50758-can-your-neighbor-s-airbnb-rental-affect-your-home-value (asserting that short-term rentals may impact neighboring property values due to a "[p]arty house stigma" and "[r]evolving door of strangers," which could reduce the amount and frequency of offers).

[18] *See* Emily M. Speier, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health & Welfare of the Community*, 44 PEPP.

In the community association context, a variety of legal disputes over the permissibility of short-term rentals arise. Neighbors initiate litigation, often seeking a declaration from the court that an individual's short-term rental violates a restrictive covenant encumbering the property.[19] Likewise, community associations initiate litigation to enforce restrictive covenants in the declaration or master deed.[20] Disputes are not limited to enforcement; some community associations endeavor to amend their governing documents to target short-term rentals,[21] which often prompts owners to initiate litigation challenging the validity of such amendments.[22]

This Article aims to include community associations in the current discussion of short-term rentals and argues that associations should confront residential sharing trends through regulations similar to current zoning trends. Associations that fail to effectively address the inevitable spread of residential sharing should beware of the potential consequences and limitations on their ability to do so in the future.[23] Part III of this Article discusses current trends in the regulation of residential sharing services by community associations and zoning authorities; Part IV identifies regulatory structures that community associations should

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L. REV. 387, 398 (2017) (noting that this problem is of particular concern in "densely populated and high-tourism cities").

[19] *See, e.g.*, Forshee v. Neuschwander, 900 N.W.2d 100, 103 (Wis. Ct. App. 2017), *aff'd*, 914 N.W.2d 643, 644–45 (Wis. 2018) (involving a neighbor who brought action against a neighbor who listed a lakefront home on VRBO, alleging violation of a covenant prohibiting commercial activity on the lot).

[20] *See, e.g.*, 1733 Estates Ass'n v. Randolph, 485 N.W.2d 339, 339 (Neb. Ct. App. 1992) (discussing a homeowners' association that sought to enjoin a homeowner from renting out a basement, alleging violation of a covenant that prohibited subdivision of lots).

[21] *See, e.g.*, Slaby v. Mountain River Estates Residential Ass'n, 100 So. 3d 569, 574–75 (Ala. Civ. App. 2012) (discussing a proposed amendment to "'expressly allow' for short-term rentals," but limit the maximum time to two weeks, which failed to get a majority vote to be adopted); Houston v. Wilson Mesa Ranch Homeowners Ass'n, 360 P.3d 255, 261 (Colo. App. 2015) (holding that an association board's attempt to amend the association's administrative procedures to prohibit short-term rentals and impose fines was unenforceable).

[22] *See, e.g.*, Filmore, LLLP v. Unit Owners Ass'n of Centre Pointe Condo., 333 P.3d 498, 500 (Wash. Ct. App. 2014), *aff'd*, 355 P.3d 1128, 1131 (Wash. 2015) (involving a condominium owner that sued the unit owners' association, challenging an amendment to the condominium's Declaration of Covenants, Conditions, and Restrictions (CCRs) that imposed new restrictions on the owners' ability to lease their units).

[23] For example, associations could eventually be restricted by state laws that curtail amendments restricting short-term rental activity. *See infra* notes 109–13 and accompanying text; *see also, e.g.*, *supra* note 13 and accompanying text.

consider; and Part V concludes by discussing the benefits of prudent, proactive regulation of short-term rentals by community associations.

III. TRENDS IN RESIDENTIAL SHARING REGULATION

A. Community Associations & Short-Term Rentals

Community associations vary in structure depending on state-specific, enabling statutes,[24] but generally take two basic forms—homeowners' associations and condominium associations.[25] While these two forms are similar, the essential difference is that a homeowners' association "is a nonprofit corporation" that may own "the common land, improvements, and facilities," while condominium associations have "the same legal responsibilities [of HOAs]," but the residents of the condominium own "their units and an undivided ownership interest in all the common elements."[26]

Developers establish the legal structure of community associations and can tailor the provisions of the governing documents to fulfill specific association needs and developer preferences.[27] The initial regulatory scheme is created by filing CCRs or recording a master deed.[28] "The declaration describes the property subject to the covenants and the respective rights and obligations of the community association and the

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[24] *Compare, e.g.*, FLA. STAT. ANN. §§ 718.101–.708 (Condominium Act); MD. CODE ANN., REAL PROP. §§ 11-101 to –143 (Maryland Condominium Act); VA. CODE ANN. §§ 55-79.39 to .103 (Condominium Act), *with*, *e.g.*, FLA. STAT. ANN. §§ 720.301–.407 (Homeowners' Association Act); IND. CODE ANN. §§ 32-25.5-1-1 to -5-17 (Homeowners Associations); MD. CODE ANN., REAL PROP. §§ 11B-101–118 (Maryland Homeowners Association Act).

[25] *See* JAMES DOWDEN, CREATING A COMMUNITY ASSOCIATION: THE DEVELOPER'S ROLE IN CONDOMINIUM AND HOMEOWNER ASSOCIATIONS 4 (2d rev. ed. 1986). Note that some states provide other possible community association forms, like horizontal property regimes. *See generally* ALASKA STAT. ANN. §§ 34.07.010–.070; S.C. CODE ANN. §§ 27-31-10 to -.300; VA. CODE ANN. §§ 55-79.1–.38; WASH. REV. CODE ANN. §§ 64.32.010–.920.

[26] DOWDEN, *supra* note 25; *see* Gerald Korngold, *Resolving The Flaws of Residential Servitudes and Owners Associations*, 1990 WIS. L. REV. 513, 514 (1990) (stating that associations may own the common areas that they maintain, and they may also be empowered to "set rules and regulations pursuant to the power granted" in the governing documents).

[27] *See* DOWDEN, *supra* note 25, at 4, 36.

[28] *See* WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.06(e), at 24 (3d ed. 2000) (explaining that "[f]or an HOA, the document is generally referred to as the Declaration of Covenants, Conditions, and Restrictions" while, for condominiums, "the document might be called either the 'Declaration of Condominium' or the 'Master Deed,' depending on state law").

property owners. . . . [and] is prepared on behalf of and recorded by the developer of the community prior to the sale of the first parcel of property."[29] Accordingly, restrictive covenants will vary depending on the specific preferences of developers and the needs of each individual association.[30] Community association covenants generally contain common easements and use restrictions,[31] but the effects of these standard covenants can vary depending on other provisions in the CCRs.[32] Because residential sharing services have made it easier for owners to enter into short-term lease agreements, recent litigation in this area reveals the impact of variations or ambiguities in association covenants.[33]

1. Community Association Use Restrictions

Most association CCRs contain use covenants.[34] Such restrictions are generally "categorized and interpreted by the courts according to certain commonly used terms and phrases," and court interpretation can depend on the precise language of the covenant.[35] One standard CCR provision requires property to be used for residential purposes only,[36] and another

[29] Hyatt & Stubblefield, *supra* note 3, at 598 n.20.

[30] For example, a community association in a college town may elect to include a restrictive covenant barring rentals to students. *See* The SPUR at Williams Brice Owners Ass'n v. Lalla, 781 S.E.2d 115, 119, 122 (S.C. Ct. App. 2015) (enforcing a restrictive covenant in a horizontal property regime, located in a college town, that prohibits the lease of units to college students not related to the unit owner).

[31] *See* DOWDEN, *supra* note 25, at 29–31; *see also* Speier, *supra* note 18, at 398 ("Many homeowners' associations impose covenants requiring property use to be 'single-family' and 'residential,' which apply to the physical structure as well as the activities that occur on the property.").

[32] *See* Mark S. Dennison, Annotation, *Construction and Application of "Residential Purposes Only" or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional or Other Purposes*, 1 A.L.R. 6th 135, 151–52 (2005) (stating that court interpretations of covenants "may be affected by whether . . . restrictions are accompanied by another covenant that specifically prohibits" other designated activities). "The manner in which the courts interpret[ ] . . . similar terms may have a significant bearing on a court's determination of whether the incidental business or professional use of a dwelling is in violation of a particular residential restrictive covenant." *Id.*

[33] *See infra* Part III.A.1.

[34] *See supra* note 31 and accompanying text.

[35] Dennison, *supra* note 32, at 151; *see, e.g.*, Lowden v. Bosley, 909 A.2d 261, 263 (Md. 2006) (discussing an owner who argued that a neighbor's short-term rental was prohibited by the "single family residential purpose" covenant).

[36] *See* Dennison, *supra* note 32, at 151 ("As a general rule, the question whether the incidental use of a dwelling for business, professional, or other purposes constitutes a

common covenant prohibits commercial or business use on encumbered property.[37] Many jurisdictions have found short-term rentals to be compatible with these use covenants, especially when there is no express prohibition on short-term rentals in the CCRs.[38]

It is not uncommon for an association's CCRs to expressly prohibit short-term leases or otherwise specifically address an owner's ability to rent out her property.[39] However, absent an explicit prohibition or reference to short-term leases in the CCRs, attempts to enjoin owners from engaging in short-term rental transactions through enforcement of standard use restrictions are generally unsuccessful.[40] But, in a recent unpublished opinion, the Kentucky Court of Appeals indicated that the definition of business or commercial use could be ascertained through the actions of homeowners, thus intimating that short-term rental of property could be defined as business or commercial use in certain circumstances,[41] even if the CCRs are silent as to leases or rentals.

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violation of a covenant restricting its use to residential purposes depends on the wording of the particular covenant and the nature and extent of the incidental [use].").

[37] *See* Russell v. Donaldson, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012) (interpreting whether a covenant "prohibiting business and commercial uses of the property" barred short-term rentals).

[38] *See, e.g.*, Slaby v. Mountain River Estates Residential Ass'n, 100 So. 3d 569, 580 (Ala. Civ. App. 2012) (finding that a "single family residential purposes only" covenant did not make an owner's rental of mountain cabins to groups of unrelated persons unlawful, nor did leasing for a short period of time violate the "residential purposes" language of the covenant, which contained no mention of prohibiting leases).

[39] *See, e.g.*, Seagate Condo. Ass'n v. Duffy, 330 So. 2d 484, 485 (Fla. Dist. Ct. App. 1976) ("[T]he leasing of units to others as a regular practice for business, speculative, investment or other similar purposes is not permitted.").

[40] *See, e.g.*, Santa Monica Beach Prop. Owners Ass'n v. Acord, 219 So. 3d 111, 116 (Fla. Dist. Ct. App. 2017) ("[E]ven if the restrictive covenants were susceptible to an interpretation that would preclude short-term vacation rentals, the omission of an explicit prohibition on that use in the covenants is fatal to the position advocated by the Association[.]"); Scott v. Walker, 645 S.E.2d 278, 280, 283 (Va. 2007) (holding that "in the absence of language expressly or by necessary implication prohibiting" rentals, a short-term rental does not violate restrictive covenants that only require "[n]o lot shall be used except for residential purposes").

[41] *See* Vonderhaar v. Lakeside Place Homeowners Ass'n, No. 2012-CA-002193-MR, 2014 WL 3887913, at *1, *4 (Ky. Ct. App. 2014) (holding that homeowner violated restrictive covenant providing that "[e]ach lot . . . shall be used and occupied for single family residential purposes only," by advertising house online for short-term rent, listing the property as a "motel" on tax returns, "hav[ing] a rental agreement along with check-in and check-out times," and "defin[ing] their rental enterprise as a business").

Additionally, while most jurisdictions will construe ambiguous covenants in favor of the free and unrestricted use of land,[42] recent cases have indicated a shift in analysis that suggests certain short-term rental arrangements could violate covenants that require land be used for residential purposes only. These cases should inform the decisions of associations that plan to address short-term rental activity through existing covenants, proposed amendments, or new rules and regulations.

For example, in *Wilkinson v. Chiwawa Communities Association*,[43] the Supreme Court of Washington explained that the length of a vacation renter's stay does not convert a home's use from residential to commercial as long as the home is used "for the purposes of eating, sleeping, and other residential purposes."[44] The court stated that a homeowner's "receipt of rental income . . . in no way detracts or changes [ ] residential characteristics," and that paying business, occupancy, or lodging taxes does not convert a short-term rental into commercial use.[45] The court distinguished its previous holdings[46] and stated that in cases where covenant violations were found, the violations involved "some form of on-site service."[47] Here, the court found no services were provided to renters

[42] *See, e.g.*, Jacklin Land Co. v. Blue Dog RV, Inc., 254 P.3d 1238, 1242 (Idaho 2011) (alteration in original) (reiterating that "[a]ll doubts and ambiguities are to be resolved in favor of the free use of land") (quoting Brown v. Perkins, 923 P.2d 434, 437 (Idaho 1996)); Yogman v. Parrott, 937 P.2d 1019, 1020 (Or. 1997) (finding covenant that required property to be "used exclusively for residential purposes and [prohibited] commercial enterprise" was ambiguous and found owners' short-term rental was permissible under the ambiguous restrictions); Hardy v. Aiken, 631 S.E.2d 539, 542 (S.C. 2006) (stating that when ambiguity exists, any doubt as to the terms of a covenant shall be "resolved in favor of free use of the property"); Scott v. Walker, 645 S.E.2d 278, 279 (Va. 2007) (construing an ambiguous "residential use" covenant in favor of free use of property thus allowing short-term rentals); Forshee v. Neuschwander, 900 N.W.2d 100, 106–07 (Wis. Ct. App. 2017), *aff'd*, 914 N.W.2d 643, 649 (Wis. 2018) (finding restrictive covenant prohibiting "commercial activity" was ambiguous and thus did not preclude owner from renting home through residential sharing services).

[43] 327 P.3d 614 (Wash. 2014) (en banc).

[44] *Id.* at 620 (citing Ross v. Bennett, 203 P.3d 383, 388 (Wash. Ct. App. 2009)).

[45] *Id.*

[46] *See id.* at 620–21 (citing Metzner v. Wojdyla, 886 P.2d 154, 157–58 (Wash. 1994) (finding that services provided at a children's day care facility violated a residential purpose covenant); Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1073 (Wash. 1993) (finding that services provided to residents of an "adult family home" violated a single-family purpose covenant)).

[47] *Id.* at 620.

that amounted to a violation of the CCRs,[48] but did not elucidate the types of services that could amount to a violation.

Likewise, in *Santa Monica Beach Property Owners Association, Inc. v. Acord,*[49] a Florida court determined that a short-term vacation rental did not violate a subdivision's restrictive covenant which provided that "land shall be used only for residential purposes . . . nor shall any building on said land be used . . . for business . . . purposes."[50] The court distinguished its previous holdings[51] and suggested that the degree of control and services provided to guests by a short-term rental host could convert the rental from residential use to commercial use.[52] Like the court in *Wilkinson*, however, the court here did not provide any further guidance on the type of host activity that could convert a valid short-term rental arrangement into commercial use.

Community Services Associates, Inc. v. Wall[53] further illustrates current trends in the judicial treatment of use covenants in CCRs. Here, the South Carolina Court of Appeals dissected the language of an association's covenants to determine whether the short-term rental of a home through Airbnb was permitted under the CCRs.[54] In this case, the Walls rented out the entire first floor of their home on Hilton Head Island through Airbnb.[55] When the house was rented, the Walls would live in the second floor guest quarters, which was only accessible by an exterior staircase.[56] The association argued that the Walls' rental arrangement violated the covenants because the upstairs guest suite had a kitchen, and that, by renting the first floor without simultaneously renting out the guest

[48] *See id.*

[49] 219 So. 3d 111 (Fla. Dist. Ct. App. 2017).

[50] *Id.* at 113.

[51] *See id.* at 115-16 (citing Bennett v. Walton Cty., 174 So. 3d 386, 390 (Fla. Dist. Ct. App. 2015) (finding that rental of property for events violated a county code prohibition on non-residential uses); Robins v. Walter, 670 So. 2d 971, 974–75 (Fla. Dist. Ct. App. 1995) (finding that a bed and breakfast operation violated a restrictive covenant because of the "control" over guests and other indicia of business activity)).

[52] *See id.*

[53] 808 S.E.2d 831 (S.C. Ct. App. 2017).

[54] One covenant mandated that all lots be "used for residential purposes exclusively" and provided a detailed explanation of permitted structures. *Id.* at 833. A second covenant permitted a "guest suite or like facility" to be attached to the main dwelling as long it did not have a kitchen, but also directed that "such suite may not be rented or leased except as part of the entire premises." *Id.*

[55] *See id.* at 833–34.

[56] *See id.* at 833.

suite, the Walls violated the covenants.[57] However, the court held that the "dormitory-style"[58] kitchen—which included a hot plate, toaster oven, and mini-fridge—did not amount to a kitchen that violated the CCRs.[59] Further, the court specifically analyzed the language of the covenants at issue and stated that the covenants only require that a "residence with a guest suite to be rented in its entirety *when the guest suite is rented out*."[60] The court held that, because the covenants did not, by "plain and *unmistakable* implication," require a residence with a guest suite to be rented out in its entirety "in every circumstance," the court would not construe the covenants to require as such.[61] This case illustrates another jurisdiction's departure from construing ambiguous use covenants in favor of the free and unrestricted use of land,[62] and instead examining the terms of the CCRs before the court refused to imply a more restrictive interpretation.

While some jurisdictions may be moving towards more specific findings as to the types of activity that may convert a short-term rental to a commercial use, these cases do not clarify the extent of control or types of services provided that could convert the use from residential to commercial. This lack of explanation creates uncertainty for those who host through Airbnb.[63] As a host, would providing "maid service or meals" to a vacation renter amount to a commercial use?[64] What about offering "'concierge' services such as giving tourist advice[,] making restaurant reservations[,]"[65] calling a cab to the airport, accommodating an early check-in time, or providing extra linens? Any combination of these and other types of services are common for Airbnb listings, and many hosts

[57] *See id.* at 834–35.

[58] *Id.* at 835.

[59] *See id.*

[60] *Id.* at 835–36.

[61] *Id.* at 836.

[62] *See supra* note 42 and accompanying text.

[63] *See* Alexander W. Cloonan, *The New American Home: A Look at the Legal Issues Surrounding Airbnb and Short-Term Rentals*, 42 U. DAYTON L. REV. 27, 29 (2017).

[64] Tony Rafel, *"Getting away" in an HOA: What Can Associations Do About Vacation Rentals?*, CMTY. ASS'NS INST., Wash. State Chapter (Jan. 20, 2016), https://wscai.org/getting-away-in-an-hoa-what-can-associations-do-about-vacation-rentals.

[65] *Id.* Indeed, these types of services "resemble [those] provided by hotels." *Id.*

offer such amenities to distinguish their listing in the hopes of attracting more guests.[66]

Although lacking fact-specific guidance from courts, the types of services generally provided by Airbnb hosts reveal an area of regulation that community associations should seek to define for themselves in their governing documents.[67] Unless the CCRs expressly prohibit, limit, or define short-term rentals as a non-conforming use, uncertainty exists as to whether owners can lawfully host on Airbnb and whether community associations can successfully enforce standard use covenants to prohibit that activity.[68] Even if an association's CCRs have more detailed requirements for permitting short-term rental arrangements, it is paramount that the covenants be carefully drafted so as to not be interpreted as less restrictive than desired.[69]

B. Zoning & Short-Term Rentals

Because of the rise in popularity of services like Airbnb, many local governments are proposing and implementing new zoning ordinances and enforcement efforts specifically aimed to address residential sharing trends.[70] Zoning is basically the "legislative division" of a municipality

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[66] *See* Carla Chicharro, *24 Must-Have Amenities for Every Vacation Rental Home*, LODGIFY: PROP. MGMT. (Jan. 20, 2017), https://www.lodgify.com/blog/vacation-rental-amenities (listing recommendations designed to increase a short-term rental's attractiveness to potential visitors like Wi-Fi, guidebooks and recommendations, chauffer services, breakfast, extra linens, and toiletries).

[67] *See infra* note 98 and accompanying text.

[68] *See* Cloonan, *supra* note 63; *see also* Marianne M. Jennings, *From the Courts*, 47 REAL EST. L.J. 71, 74 (2018) ("The critical lesson from [Community Services Associates, Inc. v. Wall, 808 S.E.2d 831 (S.C. Ct. App. 2017)] is that covenants must be drafted specifically to address the issues of short-term rentals.").

[69] *See, e.g.*, Fein v. Payandeh, 734 S.E.2d 655, 659 (Va. 2012) (rejecting a developer's argument that a restrictive covenant, which expressly required lots be subject to a county subdivision ordinance as in effect when the CCRs were executed, encompassed other relevant zoning ordinances in effect but not specified in the CCRs). This case also illustrates the necessity for specificity in restrictive covenants and the principle that covenants "are to be construed most strictly against the grantor," usually the developer in the community association context. *Id.*

[70] *See, e.g.*, CITY OF SAINT PAUL, MINN., CODE OF ORDINANCES §§ 379.01–.08 (requiring hosts to obtain a license from city; maintain liability insurance; and remit all applicable local, state, and federal taxes). Short Term Rental Zoning & Licensing, SAINT PAUL, MINN., (Oct. 25, 2017), https://www.stpaul.gov/departments/planning-economic-development/planning/current-activities/short-term-rental-zoning-and (explaining public hearings, history, City Council votes, and specifics of recently adopted zoning and licensing amendments for short-term rentals).

and, "in practice," zoning is "used as a permitting system to prevent new development from harming existing residents or businesses."[71] The difficult task for local governments, though, is to find "a balance between over-burdensome regulation and no regulation at all."[72]

Recent action by municipalities to revise zoning ordinances in this area acknowledges the necessity of specific regulation of short-term rentals. Indeed, without ordinances that directly define and regulate short-term rentals, attempts to restrict such activity would fall under the enforcement of outdated ordinances "that originally dealt with 'roomers and boarders.'"[73] Notably, community associations face a similar challenge—either attempt to regulate short-term rentals by enforcing the existing (and often outdated) restrictions in CCRs or revise the association's governing documents to define and regulate short-term rentals based on the needs and goals of the association.

1. Zoning Use Restrictions

In response to residential sharing trends, some cities and counties have prohibited homeowners from renting their homes on a short-term basis,[74] while others have set durational limits, occupancy requirements, or structures for registration, fees, and fines.[75] Absent "clear and

[71] Cloonan, *supra* note 63, at 36 (quoting COMM. ON REDUCING DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT'L RESEARCH COUNCIL, URBAN STORMWATER MGMT. IN THE U.S. 73 (2008)).

[72] *Id.* at 47 (noting that over-burdensome regulations lead to non-compliance, but "little or no regulations may lead to mayhem and raging neighbors").

[73] Sara C. Bronin & Dwight H. Merriam, *Boarders, roomers, and short-term rentals*, *in* 2 RATHKOPF'S THE LAW OF ZONING & PLANNING § 33:15 (4th ed. 2018)

[74] *See* TOWN OF SULLIVAN'S ISLAND, S.C., ZONING ORDINANCES § 21-117 ("Vacation rentals are prohibited uses on Sullivan's Island. Nothing in this Ordinance shall be construed to permit any Principal Building or other structure to be used as a Vacation Rental."); § 21-203 (defining "Vacation Rental" as "commercial use of a Principal Building(s) that is: (1) rented, leased, assigned for tenancies; or (2) made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration"); *accord* PROVO CITY, UTAH, ORDINANCE § 6.26.020(2) (prohibiting short-term rentals in agricultural and residential zones, and stating that any dwelling rented "more than one (1) time in any thirty (30) day period shall be prima facie evidence that the use of the building is a short-term rental dwelling").

[75] *See generally* Cloonan, *supra* note 63, at 49, 51 (citing SAN LUIS OBISPO COUNTY, CAL., ORDINANCE No. 23.08.165 (requiring registration of vacation rentals for tax purposes, limiting vacation rentals from within "200 linear feet" of other vacation rentals in certain areas, and limiting rentals to no more than "four individual tenancies per calendar month"); *City of Savannah Short-Term Vacation Rentals (STVRs)*, CITY OF SAVANNAH,

unambiguous" ordinances prohibiting rentals, short-term rental arrangements are generally deemed permitted uses in single-family residential zoning districts.[76] However, most courts recognize the validity of short-term rental prohibitions in single-family zoning districts.[77] Commercial use restrictions and residential purpose requirements are also common in zoning ordinances.[78] However, much like restrictive covenants in community association CCRs, courts generally hold that zoning ordinances must be construed in favor of the "free use of property"—thus permitting short-term rentals—unless relevant ordinances unambiguously deny a land owner that right.[79]

For example, in *Siwinski v. Town of Ogden Dunes*,[80] the Supreme Court of Indiana held that an owner's short-term rental on VRBO violated the town's residential district ordinance that banned uses not specifically listed in the ordinance.[81] The court explained that the homeowner's short-

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GA., https://www.savannahga.gov/DocumentCenter/View/4697 (explaining the requirements to register a short-term vacation rental and to comply with city ordinances, including an "initial fee [of] $300 for the first year," an annual renewal fee of $150 per year, and several forms that require information like proof of insurance and a twenty-four hour contact for the property)).

[76] *See* Bronin & Merriam, *supra* note 73; *see also* Fruchter v. Zoning Bd. of Appeals of Town of Hurley, 133 A.D.3d 1174, 1176 (N.Y. App. Div. 2015) (permitting short-term rental of a single-family residence because it did not qualify as a bed and breakfast under the town zoning code, and was thus not expressly prohibited); Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals, 861 N.W.2d 797, 802 (Wis. Ct. App. 2015) (permitting short-term rental absent clear prohibition in ordinance).

[77] *See* Bronin & Merriam, *supra* note 73; *see also infra* notes 80–82 and accompanying text.

[78] *See* Cloonan, *supra* note 63, at 38–42.

[79] *Compare* Heef Realty, 861 N.W.2d at 799–800 (finding an ordinance that merely listed "single-family dwellings" as a permitted use, without more, did not prohibit short-term rentals), *with* Vilas Cty. v. Accola, No. 2014AP2688, 2015 WL 2193002, at *4, *6 (Wis. Ct. App. May 12, 2015) (finding county ordinances, which listed "single-family dwellings" as permitted use but also contained another ordinance specifying restrictions on "the rental of single-family detached dwelling units," prohibited short-term rentals). *Cf.* Jackson & Co. v. Town of Avon, 166 P.3d 297, 298, 300 (Colo. App. 2007) (finding that short-term rentals in a six-unit duplex were impermissible because the subdivision plat marked the structure as a "duplex dwelling," but the owner's building modifications and short-term rentals converted the unit from a "dwelling" to a "lodge" as defined by ordinance).

[80] 949 N.E.2d 825 (Ind. 2011).

[81] *See id.* at 828 (quoting TOWN OF OGDEN DUNES, IND., ORDINANCES § 152.032(B) (stating "no building or premises shall be used . . . for other than one or more of the following specified uses: (1) single-family dwellings; (2) accessory buildings or uses;

term rentals fell within the unambiguous definitions of single-family dwelling and commercial activity as defined by the town ordinances.[82] Similarly, in *Bostick v. Desoto County*,[83] the Mississippi Court of Appeals considered an action by the county to enjoin an owner from renting a home on a short-term basis.[84] The county argued that short-term rentals violated applicable zoning ordinances.[85] The ordinances defined single-family dwellings and hotels separately, and they specifically included "transient guests" in the hotel definition.[86] The court held that short-term rentals were not permitted because a house is not a "single-family dwelling" when it is "continually rented to a succession of transient guests on a short-term basis."[87] The court stated that the county's interpretation of the dwelling definition was not unreasonable, and it equated the short-term rental of a home through online residential sharing services to "property being used as a hotel," making the rental a non-conforming use under the definition of dwelling that excluded hotels.[88]

These cases confirm the parallels between community association covenants and municipal zoning ordinances that address short-term rentals, and reiterate the necessity of careful drafting. Like ordinances,[89]

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(3) public utility buildings; (4) semi-public uses; (5) essential services; (6) special exception uses permitted by this Zoning Code")).

[82] *See id.* at 828, 830 (quoting TOWN OF OGDEN DUNES, IND., ORDINANCES § 152.002 (defining single-family dwelling as "[a] separate detached building designed for and occupied exclusively as a residence by one family" and defining commercial activity as "[a]ny activity conducted for profit or gain")).

[83] 225 So. 3d 20 (Miss. Ct. App. 2017).

[84] *See id.* at 21.

[85] *See id.*

[86] *Id.* at 23–24 (quoting DESOTO COUNTY, MISS., ORDINANCE § 2.24 (defining "dwelling" as a "building or portion thereof designed or used as the residence of one (1) or more persons, but not including a tent, cabin, travel trailer, or a room in a hotel, motel or boarding house"); § 2.47 (defining "hotel" as a "building in which overnight lodging is provided and offered to the public for compensation, and which is open to transient guests")).

[87] *Id.* at 23.

[88] *Id.* at 23–25 (quoting DESOTO COUNTY, MISS., ORDINANCE § 2.24 (excluding from the definition of "dwelling" any "tent, cabin, travel trailer, or a room in a hotel, motel or boarding house")). *But see* Marchenko v. Zoning Hearing Bd. of Pocono Twp., 147 A.3d 947, 951 (Pa. Commw. Ct. 2016) (rejecting a zoning board's characterization of an owner's short-term rental as constituting an improper use of a single-family dwelling as a "lodge" because the owner lived there most of the time, which was inconsistent with the town's definition of lodge).

[89] *See supra* note 88 and accompanying text.

courts will generally require unambiguous terms and clear intent before enforcing a restriction on an individual's ability to lease or rent out their property within a community association. Regardless of the structure of their regulations, municipalities have started to tailor their approach to regulating short-term rentals based on the needs and desires of their city; this tailoring permits individual community associations to use zoning trends as a guide to fit their specific needs.

IV. EMBRACING ZONING TRENDS: CONSIDERATIONS FOR COMMUNITY ASSOCIATION REGULATION OF RESIDENTIAL SHARING

Many zoning authorities have proposed[90] or implemented[91] various strategies aimed to address short-term rentals. No two cities are alike, and no two zoning codes are alike.[92] Community associations should tailor their strategies to address short-term rentals in a similar fashion.[93] The implementation of new strategies may be determined by the existing structure of each association and the provisions of the governing documents, but every zoning strategy that has been implemented to address short-term rentals will likely not fit every community association's needs. For example, some municipalities completely prohibit

[90] For example, Charleston, South Carolina recently lifted a ban on short-term rentals in parts of the city, but passed new ordinances that require hosts to be on the premises at all times, obtain a license from the city, host no more than four adults at a time, and more. *See* Abigail Darlington, *Charleston Finally Lifts Ban on Short-Term Rentals, But The New Rules Are Strict*, POST & COURIER (April 10, 2018), https://www.postandcourier.com/news/charleston-finally-lifts-ban-on-short-term-rentals-but-the/article_51d57ee2-3d00-11e8-aa86-23d8751580dc.html; *see also* CHARLESTON, S.C., ORDINANCE § 54-120 (defining short-term rentals); § 54-208(c) (requiring hosts to obtain various permits and remit taxes); § 54-208(a)(5) (requiring at least one "off street, maneuverable parking space" for each rental unit); § 54-208(a)(3) (banning whole-home rentals by requiring property owners be present when hosting short-term renters).

[91] For example, Holland, Michigan recently amended its ordinances to permit non-owner occupied short-term rentals in commercially zoned districts. *See* Sydney Smith, *Non-owner Occupied Airbnbs Now Allowed in Commercial Zones in Holland*, HOLLAND SENTINEL (Oct. 18, 2017), http://www.hollandsentinel.com/news/20171018/non-owner-occupied-airbnbs-now-allowed-in-commercial-zones-in-holland; *see also supra* note 11 and accompanying text.

[92] *See generally* Grant Wills, Note, *To Be or Not to Airbnb: Regulation of Short-Term Rentals in South Carolina*, 68 S.C. L. REV. 821, 824 (2017) (comparing the regulation of short-term rentals in the South Carolina cities of Columbia and Charleston, and attributing differences to "markedly different policy interests and tourism industries").

[93] *See* DOWDEN, *supra* note 25, at 4, 36 and accompanying text.

short-term rentals[94] by defining certain rental arrangements[95] as a non-conforming use within certain residential or commercial zones in the city;[96] however, a broad definition is not universally desirable for community associations, some of which may choose to control or limit, but not bar, rental activity—such as associations located in vacation destinations.

Community associations can prohibit, restrict, or regulate short-term rentals in the initial declaration, or possibly through amendments, with comparable definitions. For instance, associations that seek to define short-term rental arrangements may find the definitions in the Revised Uniform Residential Landlord Tenant Act (RURLTA), which defines "[o]ccupancy as a vacation rental" and "transient occupancy," to be useful.[97] While the RURLTA defines these terms in order to exempt them from the Act, the definitions are inclusive of many different short-term rental arrangements that associations may wish to define and individually address. The RURLTA definitions even provide an example of how associations could define the types of services offered to guests,[98] as discussed *supra*.

However, attempts by associations to amend existing covenants to prohibit, restrict, or regulate short-term rentals can raise procedural and enforcement challenges. Indeed, definitions and restrictions contained in recorded CCRs may be afforded greater deference as to their

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[94] *See supra* note 74.

[95] *See* Cloonan, *supra* note 63, at 33 ("While the exact number of days can vary[,] . . . a [short-term rental] can be generally defined as any 'residential property that is rented to a visitor for less than 30 days.'") (quoting *The Basics: Best Practices in Short-term Rental Regulation*, SHORT TERM RENTAL ADVOCACY CTR. (Nov. 27, 2012), http://www.slideshare.net/STRadvocacy/best-practices-16470368).

[96] *See id.*

[97] REVISED UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 103(a)-(b), 7B U.L.A. 702 (Supp. 2017).

[98] *See id.* (defining "[o]ccupancy as a vacation rental" as occupancy that has the following characteristics: "(A) the tenant rents the dwelling unit for vacation purposes only and has a principal residence other than the unit; (B) the unit is furnished . . . to make [it] ready for immediate occupancy . . .; (C) the occupancy does not exceed [30] consecutive days"); *see also id*. (defining "[t]ransient occupancy" as "occupancy in a room or suite of rooms" with the following characteristics: "(A) the cost of occupancy is charged on a daily basis; (B) the operator of the room . . . provides housekeeping and linen service as part of the regularly charged cost of occupancy; and (C) the occupancy does not exceed [30] consecutive days").

enforceability.[99] On the other hand, such deference may not be afforded to unrecorded rules and regulations promulgated by an association's board of directors, which may be subject only to a determination of reasonableness under applicable state law.[100] Community associations must measure the extent of their desired regulation of short-term rentals against the backdrop of the board's authority to promulgate rules, and whether the rules will be enforceable if challenged on reasonableness or scope of authority grounds.

If a community association's existing governing documents grant the board sufficient rulemaking authority that encompasses the regulation of short-term rentals, the association should first attempt to address short-term rentals through enacting new rules. However, if the rulemaking authority granted in the governing documents does not permit the board to enact rules related to short-term rentals, or if an association desires to prohibit rental activity through new definitions or use restrictions, an amendment to the CCRs would be required.

A. Considerations if Amendment is Required

When a developer establishes a community association by filing a declaration or a master deed,[101] the document will typically include a "plan of development and ownership, the proposed method of operation, and the rights and responsibilities of owners within the association."[102] Importantly, the developer may "empower the community's governing board to modify, change, or adopt new [CCRs]" by providing amendment

[99] *See* Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275, 1283 (Cal. 1994) (quoting Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981) (stating that recorded restrictions are "clothed with a very strong presumption of validity" and should not be evaluated under the reasonableness standard applicable to unrecorded rules and regulations)).

[100] *See infra* notes 134–35 and accompanying text; *see also*, *e.g.*, N.J. STAT. ANN. § 46:8B-13(d) ("The bylaws may also provide a method for the adoption, amendment and enforcement of reasonable administrative rules and regulations . . . relating to the operation, use, [and] maintenance . . . of the units. . . .").

[101] *See supra* Part III.A.

[102] Terrell R. Lee, *In Search of The Middle-Ground: Protecting The Existing Rights of Prior Purchasers in Common Interest Communities*, 111 PENN ST. L. REV. 759, 761 (2007) (citing Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 672 (2000) (quoting WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.05(b)(3) (2d ed. 1988))).

procedures in the original CCRs,[103] or empower the board to enact rules for the benefit of the community. Developers also frequently include a provision that permits the developer to unilaterally amend the CCRs for a certain period of time.[104]

Prior to undertaking a desired amendment, community associations must first "ascertain the extent of authority to amend" as stated in the governing documents, and must always consider the "procedural and substantive challenges" they may encounter.[105] Procedurally, the governing documents may require, for example, a two-thirds vote—which may then raise the question: "two-thirds of what?"[106] Substantively, the "subject matter of the amendment" may require a more significant vote or greater percentage.[107]

Additionally, community associations must comply with relevant state law to successfully amend CCRs to prohibit short-term rentals or enact rules restricting the use of property, the validity of which is based on a standard of reasonableness as determined by state law.[108] Some states also place limitations on the ability of associations to amend CCRs to prohibit leasing activity. For example, Idaho prohibits homeowners' associations from amending a covenant that "limits or prohibits the rental, for any amount of time" unless the owner of the affected property expressly agrees at the time of the amendment.[109] Similarly, California law protects homeowners from retroactive application of amendments restricting the

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[103] *Id.* (noting that "[i]n this way, an HOA board acts as a mini-government, serving the individual property owners within the community").

[104] *See* HYATT, *supra* note 28, § 9.04, at 172.

[105] *Id.* at § 9.02, at 170.

[106] *Id.* ("Two-thirds of [lot] owners? . . . Lots that are in good standing because all assessments are paid?"). *Id.* Many issues can arise related to who may vote, how the vote is conducted, notification procedures, and quorum, which can lead to "significant procedural challenges in any amendment process." *Id.* This Article, however, focuses on the substantive considerations regarding the prohibition of short-term rentals.

[107] *Id.* at 171. Restraints on ownership, including restrictions on leasing, or "[a]n amendment that changes a right appurtenant to the fee interest requires careful scrutiny." *Id.*

[108] *See* Lee, *supra* note 102, at 764–65 (stating that this determination varies from state to state); *see also*, *e.g.*, CAL. CIV. CODE § 5975(a) ("The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable[.]").

[109] IDAHO CODE ANN. § 55-115(3). Thus, Idaho law prohibits an association from retroactively prohibiting or limiting an owner's right to lease property but does not appear to limit the prospective enforcement of a rental restriction on future homeowners subject to an amended covenant at the time they purchase the property. *See* McCormack, *supra* note 13, at 20–21.

ability to lease or rent property, unless owners expressly consent.[110] Notably, an owner not subject to an amendment restricting rental activity under California law must still provide the association with notice "[p]rior to renting or leasing" property in the association.[111] Consequently, an association that seeks to amend the governing documents to eradicate or restrict short-term rental activity within an association may be unsuccessful against current owners if state law prohibits retroactive application absent the owner's consent.

To be enforceable, an amendment must clear procedural hurdles and fulfill the passage requirements as outlined in the governing documents,[112] including, in most instances, increased voting requirements.[113] But even if the procedures are followed, the validity of an amendment or rule restricting the use of property can still be challenged. Because courts treat amendments that restrict rental ability of owners differently than other restrictions, and such amendments may raise "difficult questions and harsh results"[114] (especially when enforced against prior purchasers),[115] it would be prudent for associations to only apply amendments restricting rentals or leases prospectively.

Even absent state law prohibiting retroactive enforcement,[116] there are strategic benefits to prospective enforcement: (1) it helps to get an amendment to pass the heightened vote threshold because, "after all, existing owners are exempted from the amendment"; and (2) it "makes

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[110] *See* MILLER & STARR, 8 CAL. REAL EST. § 28:72 (Tara C. Narayanan & Ella K. Gower 4th ed. 2017) (citing CAL. CIV. CODE § 4740(a)-(b)).

[111] CAL. CIV. CODE § 4740(d).

[112] *See, e.g.*, Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 745 (N.M. Ct. App. 2013) (finding that an HOA's purported amendment to prohibit short-term rentals was invalid because the CCRs required unanimous consent of the HOA members to amend the CCRs within the first twenty-five years from the date the declaration was recorded).

[113] An affirmative, supermajority vote may be required by association governing documents to amend the CCRs. *See* Barry A. Ross, *Short Term Rentals and Community Associations*, 58 ORANGE COUNTY LAW. 42, 43 (Jan. 2016). A supermajority may also be required by state law. *See, e.g.*, WASH. REV. CODE ANN. § 64.34.264(4) (requiring "at least ninety percent of the votes in the [condominium] association," unless a larger percentage is required by the declaration, to restrict the use of any unit).

[114] Lee, *supra* note 102, at 771; *see also id.* at 770–74 (comparing markedly different case outcomes related to retroactive enforcement on prior purchasers from several jurisdictions).

[115] *See, e.g.*, McElveen-Hunter v. Fountain Manor Ass'n, 386 S.E.2d 435, 435–36 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112, 112 (N.C. 1991).

[116] *See supra* notes 109–10 and accompanying text.

reasonable a regulation that may otherwise be unreasonable because the rights of existing owners are not interfered with and prospective owners have notice of the requirements."[117] Whether an association desires to fully prohibit short-term rental activity through an amendment, redefine acceptable uses, or regulate the use of property related to short-term rentals, prospective enforcement may be a prudent strategy to protect a board's decision or association's amendment against a reasonableness inquiry.[118]

Implementing full prohibitions of, or severe restrictions on, short-term rental activity might seem like an attractive strategy for some associations. Justifications for doing so are often based on perceptions about un-affordable housing,[119] the devaluation of property,[120] and the degradation of community character.[121] However, these fears may be misplaced[122] and possibly counter-productive from an economic standpoint.[123] That is not

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[117] HYATT, *supra* note 28, § 9.06, at 174.

[118] *See supra* notes 99–101 and accompanying text.

[119] *See generally* Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendation*s, 10 HARV. L. & POL'Y REV. 229, 243 (2016) (arguing that Airbnb reduces the supply of affordable housing and distorts the housing market due to the amount of commercial operators, which increases rents and contributes to gentrification).

[120] *See* Housefax, *supra* note 17 and accompanying text.

[121] *See* Sheppard & Udell, *supra* note 16, at 2. "If short-term rentals provided via Airbnb create a concentration of . . . effectively unsafe hotels, upsetting . . . neighborhoods with more traffic and persons who don't care about the neighborhood, they may generate a local concentration of externalities that might be expected to depress property values." But, "if these externality effects are modest relative to the impacts of space diverted from providing housing for residents to providing short-term accommodation for visitors, their local concentration of Airbnb properties may increase house prices." *Id.*

[122] *See* Kenneth Rosen, *Short-Term Rentals and the Housing Market*, URB. LAND INST. (Nov. 22, 2013), https://urbanland.uli.org/news/short-term-rentals-and-the-housing-market ("Rents are rising, but short-term rentals are not the culprit."). *See generally* Sheppard & Udell, *supra* note 16, at 39 (analyzing the impact of Airbnb on residential property values in New York City, concluding that, "based on average property values [and] average Airbnb rentals," property values increased 17.7% in New York City when "subject to the Airbnb treatment"). This study only analyzes New York City, but it reveals some peripheral community benefits of increased home values—like "improved police protection" and better "local schools"—and demonstrates that Airbnb does not necessarily diminish community well-being. *Id.*

[123] *See* Jamila Jefferson-Jones, *Can Short-Term Rental Arrangements Increase Home Values? A Case for AirBNB and Other Home Sharing Arrangements*, 13 CORNELL REAL EST. REV. 12, 19 (2015) (arguing that short-term rentals allow owners to "shift and share the burden of homeownership," which "can help to defray mortgage, homeowners

to dismiss legitimate complaints about commercial operators who do not conform with Airbnb's stated home-sharing model.[124] Nonetheless, community associations are uniquely equipped and better positioned than zoning authorities to identify and eliminate commercial operators.[125]

Because the likelihood of success that full prohibitions or use restrictions might have depends on a multitude of factors—including authority to amend or promulgate rules; voting requirements; reasonableness of the amendment or rule; retroactive or prospective enforcement; and state law requirements—community associations should consider alternative, less restrictive strategies to regulate short-term rentals if the CCRs permit the board to do so.

B. Considerations if Amendment is Not Required

To proactively address residential sharing trends, community associations should focus on possible strategies that can be implemented in less time and without the (usually difficult) organization of members required to vote on an amendment to the CCRs.[126] Associations may rely on the decisions of the board of directors to implement rules aimed to control short-term rental activity within the association if the governing documents or state law grant the board authority to do so—often by permitting the regulation of "use" of property.[127] If not, use restrictions limiting short-term rentals may "require approval of the owners"[128] and amendment of the CCRs.[129]

Community associations typically have other governing documents in addition to CCRs—such as bylaws, which "set forth procedures for the

association, and real estate tax costs"). Notably, sharing the "benefits of homeownership—use and enjoyment in particular—can help to avoid or at least mitigate instances of blight due to disrepair, distressed sales at below-market-rate sales prices, and even foreclosures." *Id.* (concluding that home-sharing can help protect community character and value by "helping to insulate individual owners from . . . negative housing market downturns").

[124] *See supra* note 15 and accompanying text.

[125] Community associations have more flexibility than municipalities to police commercial operators because of the inherently personal nature of community associations. Moreover, the zoning strategies identified *infra* regarding registration, fines, and quantitative restrictions could be useful to an association in preventing commercial operating behavior. *See infra* Part IV.B.1.

[126] *See* HYATT, *supra* note 28, § 9.07 at 174 ("Often achieving a quorum, much less a super-majority, is difficult at a meeting.").

[127] *See, e.g.*, *infra* note 139 and accompanying text; *see also supra* note 100.

[128] *Id.*; *see also supra* Part IV.A.

[129] *See supra* Part IV.A.

internal government and operation of the association."[130] Usually, the governing documents and state law will "grant rule-making authority" to a community association's board.[131] Insofar as the documents provide, the board can create, change, or eliminate rules "without approval" of the owners.[132] Also, governing documents "frequently confer broad rule-making powers."[133] While rules are "not entitled to the same 'judicial deference'" as CCRs,[134] courts generally enforce a rule adopted by the board if the rule is reasonable and within the scope of the board's authority.[135]

For example, in *Beachwood Villas Condominium v. Poor*,[136] the court held that the association's board of directors did not exceed the scope of its authority by enacting rules that regulated the rental of units within the association.[137] The CCRs stated that association operations would be "governed by the By-Laws," and expressly incorporated the by-laws into the CCRs; and the by-laws granted the board authority to "adopt or amend previously adopted rules and regulations governing and restricting the *use* and maintenance" of the units.[138] The court reasoned that the new rules—which included provisions that capped the number of permitted rentals, required a "processing fee" and board approval for each rental, and required rental arrangements be for at least one month each—were within the scope of the board's authority because the declaration expressly permitted the board to adopt rules "restricting the *use*" of units.[139]

While the governing documents in *Beachwood Villas* included the use of units as a permitted area of board intervention through rules, such explicit authority may not exist in other associations' documents. Usually, when rules or use restrictions "regulate the homeowner's unit," then new

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[130] HYATT, *supra* note 28, § 1.06(e), at 25.

[131] *Id.* § 3.04, at 49.

[132] *Id.* Rules are more easily changed than CCRs because they are also not recorded. *See id.* at 50.

[133] *Id.* at 50.

[134] Ross, *supra* note 113, at 43.

[135] *See* HYATT, *supra* note 28, § 3.04, at 50–51 (citing Hidden Harbour Estates v. Basso, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981) (enforcing an association rule prohibiting the use and possession of alcohol at the community's pool)).

[136] 448 So. 2d 1143 (Fla. Dist. Ct. App. 1984).

[137] *See id.* at 1144–45.

[138] *Id.* at. 1144 (emphasis added).

[139] *Id.* (emphasis added).

rules or restrictions will "typically require approval of the owners"[140] to be enforceable. However, *Beachwood Villas* is an example of governing documents that clearly delineated the board's authority to regulate short-term rentals. But any ambiguity in the express language of an association's governing documents may not encompass short-term rental regulation.[141] If that is the case, association boards may attempt to regulate short-term rentals through rules not related to the use of units, but that instead provide mechanisms for registration and fees.

1. Potential Strategies for Regulation

Notwithstanding outright prohibitions on short-term rentals,[142] many zoning authorities have crafted more specifically tailored approaches to regulate residential sharing. Common zoning strategies include: requirements for licensing, registration, and permitting;[143] minimum and maximum quantitative standards for the duration and frequency of short-term rentals,[144] and the number of guests allowed;[145] fees associated with permitting standards and fines associated with non-compliance;[146] and

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[140] HYATT, *supra* note 28, § 3.04, at 49–50.

[141] *See, e.g.*, Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 744 (N.M. Ct. App. 2013) (quoting RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 6.7 cmt. b (AM LAW INST. 2000)) (rejecting an HOA's interpretation that rulemaking power to prevent "'nuisance-like activities'" applied to regulating short-term rentals).

[142] *See supra* note 74.

[143] *See, e.g.*, Kristi King, *Alexandria Proposes Registry for Short-Term Rentals*, WTOP (Oct. 12, 2017), https://wtop.com/alexandria/2017/10/alexandria-proposes-registry-for-short-term-rentals-public-hearing-set.

[144] *See* MIAMI BEACH, FLA., CODE OF ORDINANCES § 142-905(b) (banning rentals and advertising of rentals of less than six months and one day in single family homes); Cloonan, *supra* note 63, at 48 (citing S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A) (limiting short-term rental of properties to a maximum of ninety days per year); *see also* Bianca Kaplanek, *Vacation Rental Rules Move Forward in Del Mar*, THE COAST NEWS GROUP (Nov. 2, 2017), https://www.thecoastnews.com/vacation-rental-rules-move-forward-in-del-mar (discussing an ordinance that would require "seven-day minimum stays for no more than 28 days a year in nearly all residential zones" in Del Mar, California).

[145] Some cities have implemented maximum occupancy requirements, typically related to the number of bedrooms in the rental unit. *See, e.g.*, ISLE OF PALMS, S.C., CODE OF ORDINANCES § 5-4-202(a)-(b); *see supra* note 90 (discussing quantitative restrictions on the number of permitted guests and required parking spaces for short-term rentals in Charleston, South Carolina).

[146] *See* Wills, *supra* note 92, at 828 (citing CHARLESTON, S.C., ZONING ORDINANCES § 54-227) (explaining that "short-term rentals of less than 30 days are illegal and violations carry a hefty fine").

geographic[147] or proximity restrictions.[148] As discussed *supra*, insofar as the governing documents of the community association permit the board of directors to enact rules regulating short-term rentals, these zoning strategies provide boards with several regulatory tools to consider.[149] Unlike rental prohibitions or severe restrictions on use through amendments or rules, some strategies may not be as susceptible to judicial review.[150] It is then up to the board to consider the specific needs and goals of the association before implementing new rules.

As previously discussed, associations that elect to enact rules related to short-term rental activity must be mindful of the reasonableness of any new rule, fee, or regulation. As illustrated in *Watts v. Oak Shores Community Association*,[151] an association may "adopt reasonable rules and impose fees on members relating to short-term rentals[.]"[152] In this case, owners who rented their units to short-term vacation renters challenged the validity of "an annual fee" that was "imposed on owners who rent their homes."[153] The court acknowledged the association's argument that renters cost the association more money than the average owner and their guests,[154] and rejected Watts' argument that the fee was unreasonable

[147] *See id.* at 829 n.58 (explaining short-term rentals are only permitted in specific commercial zone districts as a "conditional use"); *see also* Smith, *supra* note 91 (discussing an amended ordinance that permits short-term rentals in commercially zoned parts of the city).

[148] *See* Speier, *supra* note 18, at 414–15 n.207 (citing SAN LUIS OBISPO COUNTY CAL., CODE § 23.08.165(c) (2012) (prohibiting residential vacation rentals from being established within two hundred feet of an existing residential vacation rental on the same block)).

[149] These strategies can, and should, be considered together to maximize an association's desire and need to regulate short-term rentals. For example, the City of Santa Fe, New Mexico combines registration and quantitative restrictions through a permitting system that includes a cap on the number of permits that may be issued. *See* SANTA FE, N.M., CODE OF ORDINANCES § 14-6.2(A)(5).

[150] *See* HYATT, *supra* note 28, § 5.03(b)(1)-(2), at 88–89, 97–98 (discussing the reasonableness standard and the business judgment rule for reviewing actions of the board of directors).

[151] 185 Cal. Rptr. 3d 376 (Cal. Ct. App. 2015).

[152] *Id.* at 378.

[153] *Id.* at 379.

[154] *See id.* at 382 ("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.").

because it was imposed only on owners engaged in rental activity.[155] The court reasoned that, because the governing documents empowered the board of directors to adopt rules governing short-term rentals, the board reasonably decided "that all owners should not be required to subsidize Watts's vacation rental business."[156]

This case provides an example of how one community association created a fee structure to off–set costs borne by the association from short-term rental activity and illustrates the necessity that boards act within the scope of their authority when implementing rules to address residential sharing activity.

V. CONCLUSION

While common law and state statutes control the formation, structure, and operation of community associations, the increase in short-term rentals facilitated by residential sharing sites requires associations to evaluate their options for adapting to these short-term rental arrangements. When possible, community associations should seek to regulate, not prohibit or overly restrict, short-term rental activity.

Prohibitions or restrictions on use are more difficult to accomplish because of CCR amendment requirements, which implicate organizational considerations, state law issues, and may be more susceptible to judicial review—especially when enforced retroactively. Consequently, tailored regulation that focuses on administrative procedures for registration, rather than prohibiting a use of property, appears to be the trend for many municipal zoning changes.[157] Some community associations may have more flexibility to provide for community needs and desires through regulation and rule promulgation if the governing documents empower the board to do so.

There are potential economic benefits that can be realized by community associations that capitalize on the popularity of residential sharing services by implementing strategies that include registration fees for hosts, or fines for non-compliance with association procedures.[158] In

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[155] *See id.*

[156] *Id.*

[157] *See supra* notes 11, 70, 75, 90–91 and accompanying text.

[158] *See, e.g.*, Jennings, *supra* note 68, at 74–75 (discussing the recent development of Airbnb's "Friendly Buildings Program," where Airbnb has begun to give associations that are friendly to short-term rentals "a portion of Airbnb's commissions on all short-term rentals in the neighborhood. . . . resulting [in] cash for common areas improvements, road refurbishing, and expenses").

addition to providing a potential extra funding stream for the association itself, the value of the property within some associations could benefit from thriving communities that embrace Airbnb travelers.[159] Undisputedly, Airbnb and similar residential sharing services help hosts "make ends meet"[160] by renting out rooms or their entire home to supplement their income, and they provide value to travelers lodging in and visiting less tourist-centric areas. Moreover, neighborhood businesses that operate outside of "hotel districts and tourism zones" can financially benefit from Airbnb guests.[161]

While the law concerning an association's regulation of short-term rentals is relatively unsettled, outcomes are inextricably connected to the existing structure of each community association. Because of the unpredictable future of sharing economy trends, advancements in technology, and possible state law restrictions on the regulation of short-term rentals, community associations should confront residential sharing trends through tailored approaches that aim to address the specific goals and needs of each community.

[159] *See supra* notes 121–23 and accompanying text.

[160] LEIGH GALLAGHER, THE AIRBNB STORY 114–15 (2017).

[161] Belinda Smith, *Short Term Rentals: Homeowners and Businesses Benefit*, SAN DIEGO UNION TRIBUNE (Letter to the Editor) (Feb. 1, 2017), http://www.sandiegouniontribune.com/opinion/commentary/sd-smith-short-term-vacation-rentals-20170201-story.html (stating that Airbnb remitted seven-million dollars in tax revenue from Transient Occupancy Taxes, which helps "pay for our streets, parks and libraries"). *But see* Tom Coat, *Short-term Rentals: Code Enforcement Long Past Due*, SAN DIEGO UNION TRIBUNE (Letter to the Editor) (Feb. 1, 2017), http://www.sandiegouniontribune.com/opinion/commentary/sd-coat-short-term-rentals-20170201-story.html (claiming that 80% of Airbnb's revenue in San Diego is generated by "owner-absent short-term vacation rentals").