

# NCBA Expert Series CLE

## Regulating Airbnb and Related Short-Term Rentals in Community and Condominium Associations

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I. INTRODUCTION. Airbnb has exploded in popularity all over the United States. By using Airbnb, VRBO, Homeaway, and other similar app-based platforms, it is now easier than ever for users to both find rental properties, as well as to offer their own property for rent. Concurrent with this rise in popularity, Airbnb has likewise presented some community associations throughout North Carolina with unique issues regarding enforcement of covenants and regulation of this new form of emerging short-term rental.

II. DEFINING THE ISSUE.

A. What is Airbnb? Simply put, Airbnb is a platform that allows users the ability to contract for purposes of conveying land, boarding, property, lodging, etc., for a specified period of time in exchange for payment. As such, it is tempting to label Airbnb as a lease; however, the elements that distinguish Airbnb from traditional leases are the same factors that have led to its widespread acceptance.

- i. App-Based Platform. Airbnb is accessible in an instant on your mobile device. In a world where people increasingly look to their phones to book flights, hire a cab, and find the best restaurant, it is only natural that people also book their travel and lodging accommodations on the same platform. Younger generations (read: millennials) have embraced this technology and advanced its growth. Just as the platform “Google” is now both a noun and a verb and the term itself has become firmly cemented in the English canon, Airbnb has developed its own evolving and unique identity.
- ii. DIY Aspect. Airbnb eliminates the need to use a leasing agent or rental property manager and sign lengthy paper rental agreements. Whether booking or hosting, Airbnb puts the control ultimately in the individual’s hands. Airbnb is simply a platform, or facilitator of the services hosts and guests contract for.
- iii. Short-Term Duration. Airbnb is predominately short-term in nature. While hosts have the ability of offering minimum and maximum durations, it seems that most stays are for periods less than one week.<sup>1</sup>
- iv. “Homesharing.” One of the most unique aspects of Airbnb is its ability to allow hosts to generate income for renting spare rooms, guest houses, or any other extra space a guest is willing to stay in, while the host is still on the premises. Some hosts will offer tree houses for rent or even

<sup>1</sup> According to an economic impact study conducted by Airbnb in 2012, the average Airbnb visitor stayed for 5.5 days in San Francisco, and 6.4 nights in New York City. *Airbnb Economic Impact*, <https://blog.atairbnb.com/economic-impact-airbnb/> (last visited June 25, 2019).

inoperable RVs onsite. The ability to “share” one’s own property and charge renters for the same, while not having to leave during the rental period, has opened up a new market for those with desirable extra space.

- v. Price. In some cases, Airbnb listings are simply less expensive than booking at a hotel.
- vi. License. Most notably, by Airbnb’s own terms and conditions, hosts agree to grant guests a limited license to use the property.<sup>2</sup> A license essentially grants the holder the privilege to enter the land of another. As distinguished from a lease, a license is not an interest in land; rather, it is merely a privilege, revocable at the will of the licensor. This characterization is an interesting one, because on the surface, a typical Airbnb functions exactly the same as a traditional lease.

### III. RELEVANT LAW.

A. NORTH CAROLINA CASES. While North Carolina does not have any direct case law on point (yet) regarding an association’s ability or authority to regulate Airbnb specifically, certain North Carolina precedent is illustrative.

- i. *McElveen-Hunter v. Fountain Manor Ass’n, Inc.*, 96 N.C. App. 627 (1989).
  - a. Trial Holding: Amendment to condominium declaration which would prohibit leases under one year valid, but not as applied to owner who purchased prior to adoption of the amendment.
  - b. Court of Appeals Holding: Reversed. Amendment valid as to all owners, because all owners purchase with notice that declaration was changeable, and amendment was reasonably related to common good of all owners.
  - c. Note – there is enough specific language about the unique characteristics of condominiums that a court could interpret the rental portions of *McElveen* to only apply to condominiums.
- ii. *Armstrong v. Ledges Homeowners Ass’n, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006).
  - a. Holding: Any amendment to a homeowners association’s covenants are now subject to a “reasonableness” standard of review.
- iii. *Russell v. Donaldson*, 731 S.E.2d 535 (N.C. App. 2012).
  - a. Holding: In community with covenants prohibiting use of lots for business or commercial purposes, the act of leasing, in and of itself, was not a “business use,” at least in the context of short-term rentals.

B. OTHER RELEVANT CASES.

- i. *Forshee v. Neuschwander*, 377 Wis.2d 162 (2017).

<sup>2</sup> *Terms of Service*, Section 8.2 Booking Accommodations, <https://www.airbnb.com/terms> (last visited June 25, 2019). For ease of reference as used herein, Airbnb and related platforms are referred to as short-term rentals.

- a. Holding: Short-term leasing of property did not violate covenant restricting commercial use on the Lots, because “commercial use” left undefined and ambiguous in declaration.
- ii. *Eager v. Peasley*, 322 Mich.App. 174 (2017).
  - a. Holding: Owner’s use of lake-front home for short-term rentals violated restrictive covenants contained within deed because covenants clearly and unambiguously prohibited “commercial use,” and properties were restricted to “private occupancy only.”
- iii. *Schack v. Property Owners Association of Sunset Bay*, 555 S.W.3d 339 (Tex. App. 2018), review denied (Mar. 29, 2019).
  - a. Holding: Owner’s use of property for short-term vacation rentals did not violate covenants restricting property to “one family”, and prohibiting any “commercial enterprise ... situated on any tract”, because the former restriction was intended to be a structural restriction as opposed to a use restriction, and the latter restriction only applied to the actual use of the property which takes place on the land as opposed to what occurs off-site, or online.

IV. REGULATION. The convergence of app-based rental platforms with homeowner associations has created widespread interest in the expanding market for short-term rentals. Airbnb and similar short-term rentals can implicate some of the core functions of a homeowners association; namely, the authority to regulate the common plan and scheme of development and the goal of maintaining property values. Many communities are rightfully concerned with becoming labeled a “rental community.” The concerns noted below often lead homeowners associations to enforce rental restrictions, or if such restrictions are not already provided in the governing documents, to enact rental restrictions. Rules and amendments to declarations that restrict an owner’s ability to rent his/her property can face serious opposition in the form of legal challenge. Carefully crafting the restriction and tailoring the same to the community’s needs is paramount in surviving a potential challenge.

- A. Impacts on Community/Condominium Associations. Common concerns within homeowners associations include:
  - a. Increased traffic flow;
  - b. Shortage in parking;
  - c. Safety;
  - d. Noise/nuisance;
  - e. The “revolving door effect,” i.e. constant rental turnover;
  - f. Nature and character of community changing;
  - g. Percentage of rental properties/FHA insured loan issues;
  - h. Issues with fractional rentals, sharing, or boarding house; and
  - i. Property in poor condition/maintenance concerns.
- B. Define the Actual Problem. It is not always necessary to regulate short-term rentals and Airbnb. Association members and managers often hear claims that

“Airbnb will create an increase in criminal activity,” or that “Airbnb will turn a property into a party house.” With these stories in mind, associations routinely seek an outright ban on short-term rentals to prospectively address issues that do not exist. Additionally, while a short-term rental in a community association may be creating increased parking problems or traffic concerns, a ban on short-term rentals does not address the core issue. In this instance, if allowed in the community’s governing documents, it would be proper to instead adopt parking rules and regulations to more specifically address the problem.

- i. NOTE – The act of offering property for short-term rental use is not considered a “business use” pursuant to *Donaldson*. Therefore, an association cannot regulate a lot used for hosting Airbnb rentals under a business use restriction in the association’s governing documents. Likewise, adopting a business use restriction will not effectively regulate short-term rentals.

C. Review the Declaration. This may seem simple enough, but many communities request changes to their governing documents to regulate Airbnb and such provisions already exist in the covenants. More often, however, covenants are relatively silent or ineffective for regulation of Airbnb. An example of a standard provision in a declaration follows.

- i. “No lot shall be used except for residential, single family use and all uses incident thereto.”
  - a. The above provision is not effective for regulating short-term rental use. As long as lessees are using the property as residence and not for the purpose of conducting a business or commercial enterprise, this provision has no bearing on an owner’s ability to lease his/her property or host under Airbnb.
- ii. See section D (ii) (c) below for an example of an effective restriction.
- iii. If the Declaration must be changed to provide for effective regulation, check to determine whether the association must adopt a formal amendment (as is often the case), or is allowed to promulgate rules enforceable as to the individual lots.

D. Method of Regulation. If the concern is indeed the short-term rental use of the property itself, and not a peripheral issue, there are two methods of regulation:

- i. *Rental Prohibition.* A comprehensive rental restriction which prohibits all rentals is certainly effective for curtailing short-term rentals; however, it is not advisable. Under the holding in *Armstrong*, amendments to declarations must be reasonable under the circumstances. For instance, a rental prohibition adopted at a community in Topsail Beach would likely not be reasonable given the nature of the area and sheer volume of vacationers and rental activity in that area.
- ii. *Rental Restriction.* Carefully crafting a specific limitation on rentals is generally a better practice. This way, an association can address the core issue.
  - a. If the association’s concern is the frequency and short-term nature of the rental, the rental restriction should address the



duration of rentals. A common limitation is that lots shall not be rented for periods of less than thirty days.

- b. If the association's concern is that homes are being rented to multiple parties at once (i.e. boarding house), the rental restriction should limit rentals to the entire lot or unit.
- c. If the association's concern is safety or that the constant rental turnover creates unfamiliarity within the community, the restriction may provide that leases are subject to Board of Directors' pre-approval. \* Caution; See Section F, below.
- d. A sample rental restriction which addresses the former concern is as follows: "No Lot shall be rented for boarding house, bed and breakfast, hotel, or other transient residential purposes, which, for purposes of this Declaration, shall be defined as a rental for any period less than thirty (30) days."

E. Grandfathering. A common problem occurs when owners who purchased their lot prior to the rental restriction are already hosting with Airbnb or providing short-term rentals. In these cases, while the holding in *McElveen-Hunter* inspires confidence, *Armstrong* still requires a reasonableness standard applied to amendments. Under *Armstrong*, the inevitable question is: is it reasonable to restrict rentals as applied to an owner who was not on notice of such restriction when he/she bought the property? Grandfathering current owners can avoid this question altogether. Although this solution does not completely eliminate short-term rental use, crafting rental restrictions which apply only to owners who purchase their lots after the effective date of the amendment addresses this common problem in the most effective and equitable way. While current owners will be able to continue to offer their property for short-term rentals, over time, such owners are phased out. This method provides a safer alternative in the event a challenge to any proposed amendment is likely.

F. Fair Housing. An association must be careful that by adopting rental restrictions it has not implicated any fair housing concerns. The State Fair Housing Act in N.C.G.S. § 41A-1 et seq., provides that it is unlawful to discriminate against a person involved in a real estate transaction due to race, religion, sex, nationality, or handicap, by, *inter alia*, refusing to engage in a real estate transaction including refusing to rent, and representing that a property is not for rent when it in fact is for rent. These concerns commonly surface in the context of Board of Directors' approval of leases. For this reason, associations must be careful that any rental restrictions are neutral and do not have a practical effect of negatively impacting a protected class.

V. CONCLUSION. The rise in Airbnb and other short-term rentals has changed the way that people across the world seek accommodations when travelling. While benefits for travelers abound, the consequences of increased use have led to myriad concerns and issues related to enforcement in homeowners and condominium associations. By reviewing the governing documents and carefully crafting reasonable rental restrictions in harmony with North Carolina law, associations have options for enforcement against all forms of emerging short-term rental platforms.

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