EMORY | LAW

Emory Law Journal

Volume 68 | Issue 4

2019

Making a Business of "Residential Use": The Short-Term-Rental Dilemma in Common-Interest Communities

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MAKING A BUSINESS OF "RESIDENTIAL USE": THE SHORT-TERM-RENTAL DILEMMA IN COMMON-INTEREST COMMUNITIES

ABSTRACT

Short-term rentals of fewer than thirty days are being used with remarkable frequency due to the staggering popularity of home-sharing sites such as Airbnb and VRBO. At their best, short-term rentals provide a welcome alternative to the hotel industry with cheaper rates for vacationers and simpler listing processes for homeowners. However, as rental properties become an increasingly attractive investment opportunity, a large number are being operated as de facto hotels that are disrupting communities, eating up affordable housing, driving rent prices skyward, and giving government regulators a headache.

Common-interest communities have been especially burdened by the short-term-rental boom. Because many communities did not address rental activity in their governing documents when they were created, they are usually forced to either amend their governing documents or turn to the courts if they wish to place new restrictions on short-term rentals. The former is effective but difficult to accomplish because adding new use restrictions often requires most or all community members to vote in favor of the changes. As for the latter, a number of common-interest communities have argued that a "residential use" restriction should prohibit some short-term-rental activity, but most courts have been unwilling to entertain that argument.

This Comment proposes a solution for both complications. First, common-interest communities need to be more cognizant of short-term rentals. A newly formed common-interest community should clearly and precisely define what rental activity is and is not allowed to avoid the problems that older communities are currently facing. Existing common-interest communities should try in earnest to amend their governing documents to do the same. This is difficult, but not impossible, and it is preferable to costly and time-consuming litigation. Second, courts should change how they interpret residential use restrictions. Short-term rentals should neither be completely prohibited nor untouched under these restrictions: When a property becomes a short-term-rental business, much like a hotel or bed and breakfast, it is no longer a residential use, but rather a commercial one. This interpretation prevents the most harmful short-term-rental activity from infiltrating common-interest communities while leaving stricter regulation up to community associations or local government. A balance of responsibility between communities and the courts should enable common-

interest communities to fairly and effectively regulate short-term rentals and ease some of the burdens these rentals create.

INTRODUCTION

The Falls at Arcadia was a lovely common-interest community,[1] with rows of idyllic, single-family detached homes fronted by perfectly manicured lawns and pristine sand-colored mailboxes—Desert Sage, to be exact. New residents were impressed with the community's beautiful appearance and friendly neighbors, but they soon became concerned by the extensive rules contained in Arcadia's Declaration of Covenants, Conditions, and Restrictions, or CC&Rs.[2] For example, move-ins had to be completed by 6 p.m. sharp, burnt-out light bulbs had to be replaced immediately, and outdoor basketball hoops were strictly prohibited—as was any exterior implement deemed not to be "aesthetically pleasing."[3] Any exceptions had to be granted by the president of the community association's board of directors, Gene Gogolak.[4] The neighbors were quick to remind newcomers any time a rule was threatened to be broken, and they even took it upon themselves to rectify violations from time to time.[5]

Mr. Gogolak took his job as association president seriously, ensuring that the rules were followed to the letter; though exceptions were allowed, they were never granted.[6] Other association board members had aided Mr. Gogolak in his enforcement of the CC&Rs for years, but they began to wonder if his policies were too harsh—especially when a number of residents began to disappear.[7] Eventually, a pair of federal agents discovered Gogolak's secret: He had recruited a ravenous Tibetan *tulpa* monster to enforce the CC&Rs.[8]

Though no existing common-interest community is actually watched over by a murderous, supernatural being, the *X-Files* episode described above reflects

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[1] The Falls at Arcadia is a fictional common-interest community set in the universe of the *X-Files* television program. It is a useful illustration of the various tropes and attitudes surrounding common-interest communities, but in an interesting and fantastic setting. *See The X-Files: Arcadia* (Fox Network television broadcast Mar. 7, 1999). See Section II.A, *infra*, for a definition of common-interest communities.

[2] *See* Section II.B, *infra*, for a discussion of CC&Rs.

[3] *See The X-Files*, *supra* note 1.

[4] *Id.* See Part II, *infra*, for a discussion of community associations and their organization.

[5] *See The X-Files*, *supra* note 1.

[6] *Id.*

[7] *See id.*

[8] *See id.* This television depiction of common-interest communities is obviously fantastical and sometimes inaccurate. For example, "CC&Rs" does not stand for "contracts, conditions, and restrictions," as the episode represents, but rather "covenants, conditions, and restrictions" (though the average *X-Files* viewer likely would not know the difference). *E.g.*, ELIZABETH A. SMITH-CHAVEZ ET AL., CAL. CIV. PRAC. REAL PROPERTY LITIGATION § 8:16 (2017). However, the community association's unflinching adherence to the CC&Rs reflects the document's status as a community's "constitution," RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 cmt. a (AM. L. INST. 2000), and CC&Rs are indeed binding on future purchasers—they "run with the land," *see* 31 C.J.S. *Estates* § 239 (2018).

a common attitude about life in such communities.[9] The dissemination of homeowners association (HOA) "horror stories" has led many people, whether or not they live in a common-interest community, to think that life in a common-interest community is a terrible and oppressive experience.[10] However, horror stories like that depicted in the *X-Files* episode are misleading in two key respects. First, many Americans find common-interest communities an attractive form of homeownership. Second, although most cautionary tales about common-interest communities involve governing associations abusing their power, one of the largest contemporary threats to happiness in common-interest communities comes from the residents themselves due to the proliferation of short-term rentals.

Though not without their drawbacks, common-interest communities can be an attractive form of homeownership. Due to shared resources and amenities, "owners get more than they usually can by investment of a comparable amount in a neighborhood where the only shared resources are those provided by public government."[11] Indeed, millions of people have chosen this form of ownership: In the United States, as of 2016, there were 342,000 common-interest communities comprising 26.3 million housing units and 69 million residents—meaning more than 1 in 5 Americans were living in a common-interest community.[12] A survey suggests that these residents were largely satisfied with community life: 65% rated their overall experience as positive, and 22% as neutral; 84% said that members of their community's governing board serve the best interests of the community; 66% said that their community's rules "protect and enhance property values," and 22% said the rules have a neutral effect.[13]

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[9] *See, e.g.*, Carol Rossetti, Comment to Kelly G. Richardson, *A Note of Caution About HOAs*, REALTOR MAG (Feb. 12, 2015), http://realtormag.realtor.org/news-and-commentary/commentary/article/2015/02/note-caution-about-hoas [http://archive.is/1bLYE] ("I will never, ever own another property that has an HOA. A tee-pee in the desert would be better!").

[10] *See, e.g.*, Donald Sjoerdsma, *HOA Horror Stories: Homeowners Who Fought and Came Out on Top*, YAHOO! (Sept. 30, 2015), https://www.yahoo.com/news/hoa-horror-stories-homeowners-who-fought-and-came-171316727.html [http://archive.is/lwQs6] (aggregating several stories of homeowners who thought that their community association was treating them unfairly); *What Are Your Home-Owners Association (HOA) Horror Stories?*, REDDIT (Feb. 4, 2013), https://www.reddit.com/r/AskReddit/comments/17v1fx/what_are_your_homeowners_association_hoa_horror/ [http://archive.is/EQFR6] (forum topic with 3,264 comments).

[11] Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 360 (2005). Common shared amenities include "clubhouses, equestrian trails, tennis courts, playgrounds, entry guards, and security patrols." *Id.*

[12] *See* CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2016: COMMUNITY ASSOCIATION DATA 1–3 (2017), https://foundation.caionline.org/wp-content/uploads/2017/07/2016StatsReviewFBWeb.pdf (data includes homeowners associations, condominium communities, and cooperatives). In 1970, there were approximately 10,000 common-interest communities. *Id.* at 1.

[13] *See* CMTY. ASS'NS INST., HOA SWEET HOA: COMMUNITY ASSOCIATIONS REMAIN POPULAR WITH AMERICAN HOMEOWNERS 2 (2016), https://www.caionline.org/PressReleases/Documents/HOAsweetHOA_

The common-interest community model[14] works for a large number of Americans.

However, as Part I of this Comment will show, excessive short-term rentals, usually facilitated by home-sharing websites,[15] are a significant modern threat to happiness in common-interest communities. Although these services allow millions of homeowners to list their properties with ease and many more millions of vacationers to find affordable places to rent,[16] they can also be a significant detriment to communities, or even entire cities.[17] The localized ills of short-term rentals are quite familiar to common-interest communities, especially when they become the site of so-called de facto hotels with a heavy volume of out-of-town guests.

Latter Parts discuss the composition of common-interest communities and their legal relationship with short-term rentals. Part II lays out the pertinent features of common-interest communities, especially how they are structured and governed. Part III explores common-interest community regulation of short-term rentals, in both its straightforward and controversial dimensions. Ultimately, this Comment stresses the need for common-interest communities to draft or amend their governing documents so that they clearly and precisely address what kind and volume of rentals are permitted. This is the only way to ensure that short-term rentals are appropriately managed according to the needs of a particular community. Additionally, this Comment argues that courts should interpret residential use covenants, which have been implemented by many communities, to prohibit extraordinary short-term-rental activity where a property is clearly a business and not a residence. This should be a last resort for communities that cannot resolve their difficulties internally and need relief from the most harmful short-term-rental activity.

Finally, Part IV details how state governments have fallen short in many of their efforts to curb harmful short-term rentals and how common-interest

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2016.pdf.

[14] *See* Section II, *infra*.

[15] *E.g.*, AIRBNB, https://www.airbnb.com (last visited Feb. 20, 2019); COUCHSURFING, https://www.couchsurfing.com (last visited Feb. 20, 2019); HOMEAWAY, https://www.homeaway.com (last visited Feb. 20, 2019) (the "HomeAway family" includes a number of additional services including the popular VRBO). Airbnb is referenced several times in this Comment due to public familiarity, the company's success, and readily available data.

[16] *See, e.g.*, *Fast Facts*, AIRBNB, https://press.airbnb.com/fast-facts (last visited Feb. 20, 2019) (more than 400 million guest arrivals all-time and 5 million listings in 81,000 cities and 191 countries).

[17] *See* Part I, *infra*. *See generally* Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229 (2016) (examining the negative externalities caused by short-term rentals in Los Angeles).

communities are well-suited to fill in the gaps. The common-interest community model facilitates identification and enforcement of short-term-rental regulation violations, meaning these communities are a venue where short-term rentals may be effectively monitored. Because a large proportion of Americans live in a common-interest community, providing an effective framework for regulation would be a significant step toward managing the negative externalities of short-term rentals.

I. THE SHORT-TERM-RENTAL DILEMMA

A "short-term rental" most commonly refers to a rental of fewer than thirty consecutive days.[18] Unlike a lease, which is a sort of "long-term rental," a short-term rental does not involve the grant of an estate in the land being rented.[19] Rather, a short-term rental is a license, which is "an agreement which merely entitles a party to use the land of another for a specific purpose, subject to the management and control retained by the owner . . . ."[20] The frequency of this type of rental has increased dramatically due to websites such as Airbnb, and although this phenomenon has its benefits, many cities and communities have experienced serious negative externalities that can be traced to the short-term-rental boom.[21]

Short-term rental of residential property[22] is not a new practice, but never before has it been such a ubiquitous, worldwide phenomenon. Homeowners have long been able to rent out their properties using a professional renting agent[23] or local real estate agent,[24] for example; and interval ownership or "timesharing" can create a situation resembling a full-time short-term-rental property if split into twelve or more occupancy interests.[25] However, home-sharing sites have made it easy for any owner, anywhere, to list their home for

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[18] The term "vacation rental" or "short-term vacation rental" may also be used. *E.g.*, CARLSBAD, CAL., MUN. CODE ch. 5.60.020 (2017), http://www.qcode.us/codes/carlsbad/; SANTA MONICA, CAL., MUN. CODE ch. 6.20.010(f) (2017), http://www.qcode.us/codes/santamonica/.

[19] *See* 49 AM. JUR. 2D LANDLORD & TENANT § 20 (2d ed. 2018); DAVID MCADAM, THE RIGHTS, DUTIES, REMEDIES, AND INCIDENTS BELONGING TO AND GROWING OUT OF THE RELATION OF LANDLORD AND TENANT § 64 (Roy T. Ambert ed., 5th ed. 1934).

[20] 49 AM. JUR. 2D LANDLORD & TENANT § 20; *see also* Rachael Ann Neal Harrington, *Vacation Rentals: Commercial Activity Butting Heads with CC&Rs*, 51 CAL. W.L. REV. 187, 193–97 (2015).

[21] *See infra* notes 33–41 and accompanying text.

[22] The definition of "residential," as will become clear, is uncertain. *See* Part III.B., *infra*.

[23] *See* Munson v. Milton, 948 S.W.2d 813, 815 (Tex. App. 1997).

[24] *See* Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 666 (Idaho 2003).

[25] *See* O'Connor v. Resort Custom Builders, Inc., 591 N.W.2d 216, 217 (Mich. 1999) (where week-long occupancy rights were sold for forty-eight weeks out of the year).

any number of days in exchange for a small fee.[26] Guests also enjoy cheaper rates than hotels in many instances, even if they are renting an entire apartment.[27] As a result, these sites have seen enormous success and have seized a large portion of the short-term rental, and even hotel, market.[28] In Los Angeles, residents listed 11,401 units in 2014 on Airbnb alone, in which 135,000 of the city's 45 million tourists stayed, generating $314 million in economic activity.[29] In New York City, Airbnb accounted for more than 51,000 listings in 2015.[30]

Aside from the advantages for hosts and lodgers, home-sharing activity can have positive impacts on cities. An Airbnb study conducted in Los Angeles in 2014 cited environmental benefits, economic stimulation within neighborhoods due to the spread of lodging, and social and cultural virtues for guests and hosts.[31] Similar effects have been observed in New York City.[32]

Yet there is increasing evidence that the rise in short-term rentals is creating problems. Residents of Silver Lake, a neighborhood in Los Angeles, petitioned their neighborhood council in 2014 to ban all short-term rentals after complaints of traffic, safety issues, and transients.[33] In New Orleans, residents have implored their city to beef up short-term-rental regulation, citing "floors covered with vomit," "short-term strangers squeezing out long-term residents," and

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[26] Airbnb, for example, takes 3% of the amount the host receives from their guest. *What Is the Airbnb Service Fee?*, AIRBNB, https://www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee?topic=250 (last visited Feb. 20, 2019). These sites also typically charge a fee to guests, calculated as a percentage of the host's rental price and fees. *E.g.*, *id.* (0%–20% of the reservation subtotal pre-tax).

[27] *Airbnb vs Hotels: A Price Comparison*, PRICEONOMICS (June 17, 2013), https://priceonomics.com/hotels (comparing median hotel and Airbnb prices in major cities and noting it is 21.2% cheaper to rent an entire apartment on Airbnb and 49.5% cheaper to rent a single room on Airbnb).

[28] For example, since it was founded in 2008, Airbnb has raised more than $3 billion and was recently valued at $30 billion—making it the second most valuable private company in the United States. Katie Benner, *Airbnb Raises $1 Billion More in a Funding Round*, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/technology/airbnb-1-billion-funding.html. The "vacation rental and alternative lodging market" on the whole is at least $100 billion worldwide. *See* Dennis Schaal, *How the Vacation Rental Land Grab Stacks Up: HomeAway vs. Priceline vs. Airbnb*, SKIFT (Apr. 7, 2015, 7:00 AM), https://skift.com/2015/04/07/how-the-vacation-rental-land-grab-stacks-up-homeaway-vs-priceline-vs-airbnb/.

[29] *See* Lee, *supra* note 17, at 233.

[30] Katie Benner, *A Brooklyn Neighborhood Where Airbnb Is Being Put to the Test*, N.Y. TIMES (July 3, 2016), https://www.nytimes.com/2016/07/04/technology/a-brooklyn-neighborhood-where-airbnb-is-being-put-to-the-test.html?_r=0.

[31] David Owen, *Positive Impacts of Home Sharing in Los Angeles*, AIRBNB PUB. POL'Y BLOG (Dec. 4, 2014), http://publicpolicy.airbnb.com/positive-impacts-home-sharing-los-angeles/ [https://perma.cc/B4W3-LCTL].

[32] *See* Benner, *supra* note 30 (detailing some of the positive and negative implications of increased home-sharing activity).

[33] The ban was not instated. *See* Tristan P. Espinosa, Comment, *The Cost of Sharing and the Common Law: How to Address the Negative Externalities of Home-Sharing*, 19 CHAP. L. REV. 597, 601–03 (2016).

concerns about condominium buildings that have become "rogue hotels."[34] A group of New Orleanians has formed a grassroots "Short-Term Rental Committee" to voice their grievances to the city.[35] Similar attitudes toward short-term rentals can be found in communities all over the country.[36]

Short-term rentals can also have crippling effects on a city-wide scale. Increased rents, reduction in the aggregate supply of housing, increased affordable housing shortages, gentrification, and a rise in racial and socioeconomic disparity have all been linked to the increased "hotelization" of housing units in Los Angeles to varying degrees.[37] This "hotelization" does not refer to owners who list their properties part-time when they are out of town but otherwise live there—a large number of Los Angeles Airbnb properties "operate year-round essentially as independent, unlicensed hotel rooms."[38] Moreover, a growing number of listings are maintained by hosts who operate two or more listings (and as many as seventy-eight).[39] These city-wide effects are not isolated to one particular location or region: A study of rentals in New York City found substantially similar results,[40] and the Budget and Legislative Analyst's Office

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[34] *See* Rob Walker, *Airbnb Pits Neighbor Against Neighbor in Tourist-Friendly New Orleans*, N.Y. TIMES (Mar. 5, 2016), https://www.nytimes.com/2016/03/06/business/airbnb-pits-neighbor-against-neighbor-in-tourist-friendly-new-orleans.html?_r=0.

[35] *See id.* A rival group that supports short-term rentals in New Orleans is named "Alliance for Neighborhood Prosperity." *Id.*

[36] *See, e.g.*, Policy Analysis Report from Fred Brousseau, Budget and Legislative Analyst's Office, to Supervisor Campos, City and County of S.F. Bd. of Supervisors, on Analysis of the Impact of Short-Term Rentals on Housing 11 (May 13, 2015) [hereinafter Policy Analysis Report from Fred Brousseau] ("The Planning Department has received noise complaints, concerns about parking, and other quality of life complaints from residents due to units suspected to be short-term rentals. These impacts seem plausible, but the extent and magnitude of these impacts have not been measured.").

[37] Lee, *supra* note 17, at 229–44. In the Venice neighborhood, 12.5% of *all* apartments are listed on Airbnb. *Id.* at 237.

[38] *Id.* at 234. (citing ROY SAMAAN, LAANE, AIRBNB, RISING RENT, AND THE HOUSING CRISIS IN LOS ANGELES (2015), http://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf); *see also* AM. HOTEL & LODGING ASS'N, FROM AIR MATTRESSES TO UNREGULATED BUSINESSES: AN ANALYSIS OF THE OTHER SIDE OF AIRBNB (2016), https://www.ahla.com/sites/default/files/Airbnb_Analysis_September_2016_0.pdf (in Los Angeles area, 4.36% of Airbnb operators list full-time (360 days or more), accounting for 30% of total Airbnb revenue).

[39] *See* AM. HOTEL & LODGING ASS'N, *supra* note 38 (10%–30% of hosts in fourteen major U.S. cities are multi-unit hosts); Adrian Glick Kudler, *Meet LA's Most Prolific Airbnb Host, with 78 Units for Rent*, CURBED LA (Mar. 12, 2015, 3:59 PM), http://la.curbed.com/archives/2015/03/airbnb_los_angeles_most_prolific_host_ghc.php [http://perma.cc/4WMD-7MXH] (host with seventy-eight listings was a "full service vacation rental management company" named Global Homes and Condos); *see also* SAMAAN, *supra* note 38, at 10.

[40] *See* BJH ADVISORS LLC, SHORT CHANGING NEW YORK CITY: THE IMPACT OF AIRBNB ON NEW YORK CITY'S HOUSING MARKET (June 2016), http://www.hcc-nyc.org/documents/ShortchangingNYC2016FINAL protected_000.pdf (using "conservative" classification methods; finding high concentrations of Airbnb listings in certain neighborhoods, decreased vacancy rates leading to higher rents, and significant activity by "commercial hosts" that control as many as 272 listings).

in San Francisco found that "[s]hort-term rentals may exacerbate the housing shortage in San Francisco," among other negative impacts.[41]

II. COMMON-INTEREST COMMUNITIES

Common-interest communities acutely bear the burden of short-term rentals. Before Part III explores the specific problems that common-interest communities face when regulating short-term rentals, this Part provides the basic foundation for understanding how a common-interest community works. These communities are quasi-governmental in their function and the services they provide, but instead of a constitution, statutes, and a legislative body, they are usually governed by a collection of private-law analogues: a declaration, rules and bylaws, and a community association.

A. The Common-Interest Community

A "common-interest" community is one where its residents are obligated to pay dues to fund common services or facilities that benefit all residents.[42] A more complete definition may be found in the *Restatement of Property*:

> A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal
>
> > (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
> > (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.[43]

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41 *See* Policy Analysis Report from Fred Brousseau, *supra* note 36, at 10–11.

42 *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (AM. LAW INST. 2000).

43 *Id.* A substantially similar definition appears in the Uniform Common Interest Ownership Act (UCIOA). *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(9) (UNIF. LAW COMM'N 2014). The principles of the *Restatement* and the UCIOA have been codified by several states, with some modifications. *See* COMMERCIAL REAL ESTATE TRANSACTIONS HANDBOOK 17-4 & n.4 (Mark A. Senn ed., 4th ed. 2018) ("[S]tatutes grounded in UCIOA or the other uniform acts on which it is based are the law in 23 states."); WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 1.01 (3d ed. 2000) ("We do not have a 'national law' of community associations, although the widespread acceptance of the Uniform Laws approach and of the new Restatement of Servitudes has somewhat changed that situation."). They are sufficiently representative of the law of common-interest communities for the purposes of this Comment, but there may be significant variety among jurisdictions in other areas.

Though some states have enacted separate statutes for different forms of common-interest communities—usually the trio of planned communities, cooperatives, and condominiums, with a separate condominium statute being the most common—this Comment uses the unified approach of the *Restatement of Property* and the Uniform Common Interest Ownership Act (UCIOA) for simplicity's sake.[44] This inclusive definition requires only a single servitude that encumbers all property within the community requiring owners to pay for common property, facilities, or services that are enjoyed by every owner.[45] Of course, common-interest communities may, and almost always do, include other servitudes that place various restrictions on owners.[46]

A servitude is "a legal device that creates a right or an obligation that runs with land or an interest in land."[47] In every case, a servitude will burden one property and benefit another property.[48] In particular, the servitudes in a common-interest community usually involve reciprocal burdens and benefits: Owners pay assessments and sacrifice some freedoms in exchange for amenities shared by every community member.[49] Additionally, a servitude will "run with land"—meaning that it will automatically pass to successors in interest regardless of notice or consent until the servitude is terminated.[50] Servitudes are presumed valid unless they violate state or federal law, the state constitution,[51] or the state's public policy (which usually allows for broad restrictions on land use and enjoyment).[52] Examples of servitudes that may violate public policy are

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[44] *See* 1994 PREFATORY NOTE, UNIF. COMMON INTEREST OWNERSHIP ACT (UNIF. LAW COMM'N 2014) ("[S]ome differences in result [among the separate uniform acts for each common-interest ownership type] were of form rather than legitimate substance."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 cmt. c (condominium developments and cooperatives are common-interest communities under the *Restatement*).

[45] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8.

[46] *See id.* ("other servitudes burdening the property in the development or neighborhood"); French, *supra* note 11, at 364 (community associations "typically restrict land use and regulate behavior within the community").

[47] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1. This encompasses easements, profits, and covenants (with a handful of exceptions) and thus includes equitable servitudes, negative easements, and irrevocable licenses. *See id.* § 1.1 cmt. d.

[48] *See id.* § 1.1 cmt. c.

[49] *See* French, *supra* note 11, at 359–61.

[50] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 cmt. a; *see also* 31 C.J.S. *Estates* § 239 (2018).

[51] Common-interest communities rarely interact with the U.S. Constitution because they rarely involve a "state actor," but they are frequently subject to state constitutions. *See* WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 4.02(a)–(b) (3d ed. 2000).

[52] *See* Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981) ("[R]estrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions . . . will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1; *id.* at § 3.1 cmt. a ("This section applies the modern principle of freedom of contract

those that are "arbitrary, spiteful, or capricious"; that "unreasonably burden[] a fundamental constitutional right"; that indirectly or directly impose an "unreasonable restraint on alienation"; that "impose[] an unreasonable restraint on trade or competition"; or that are unconscionable.[53]

B. The Declaration of Covenants, Conditions, and Restrictions

Servitudes that govern common-interest communities are contained in a document called the "declaration,"[54] which is usually recorded before any lot or unit is sold, and which is often required by statute for creating a common-interest community.[55] "When the first lot or unit is sold subject to those servitudes, they become effective as to all the property described in the declaration."[56] In addition to servitudes, the declaration may also be required to contain other provisions, depending on the jurisdiction.[57] Often the declaration will contain "the plan of development and the essentials of ownership, the method of operation, and the rights and responsibilities of the association and the owners within the association."[58]

Because the declaration is a key foundational document for a common-interest community, it has been characterized as the community's "constitution."[59] Covenants set forth in the declaration are generally afforded

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to creation of servitudes."); French, *supra* note 11, at 364 (compared to cities and private corporations, community associations have more power to enact invasive restrictions, rules, and regulations that affect the quality of residents' lives).

[53] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1; *see id.* §§ 3.4–3.7 (addressing direct restraints on alienation, indirect restraints on alienation, restraints on trade or competition, and unconscionable servitudes); *see also* UNIF. COMMON INTEREST OWNERSHIP ACT § 2-103 cmt. 5 (UNIF. LAW COMM'N 2014).

[54] This document may also be called the "declaration of covenants, conditions, and restrictions," *e.g.*, Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 738 (N.M. Ct. App. 2013), "declaration of restrictions," *e.g.*, La Cebadilla Estates Corp. v. Sisneros, No. 2 CA-CV 2007-0087, 2007 WL 5615085, at *1 (Ariz. Ct. App. Dec. 18, 2007), "declaration of covenants, deeds, and plats," *e.g.*, Armstrong v. Ledges Homeowners Ass'n, 633 S.E.2d 78, 88 (N.C. 2006), or something else, *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. e.

[55] *See, e.g.*, CAL. CIV. CODE § 4250(a) (West 2014) ("The declaration shall . . . set forth . . . the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes."); UNIF. COMMON INTEREST OWNERSHIP ACT § 2-101(a) ("A common interest community may be created pursuant to this [act] only by recording a declaration . . . ."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. e; HYATT, *supra* note 51, §§ 1.06(e), 2.02.

[56] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. e.

[57] *See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 2-105.

[58] HYATT, *supra* note 51, § 1.06(e).

[59] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 cmt. a; HYATT, *supra* note 51, § 2.02; *cf.* UNIF. COMMON INTEREST OWNERSHIP ACT § 2-117 cmt. 1 (declaration is "the perpetual governing instrument for the common interest community").

judicial deference and a strong presumption of validity.[60] Judicial interpretation of covenants contained in a declaration proceeds using principles of contract and constitutional interpretation, and courts will look to the intent of the parties, the language of the instrument, and various rules comparable to constitutional canons of construction to discern their meaning.[61]

Similar to a government's constitution, the declaration is usually difficult to amend. Statutes will often specify a default rule for amendment procedures, such as a majority or two-thirds of owners with voting power, which may be varied by the declaration in some circumstances.[62] For amendments that enact more fundamental changes, statutes may require a higher proportion of owner approval; in such situations, decreasing the proportion required for amendment may be prohibited.[63] This staggered approach to declaration amendment reflects

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[60] *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1284 (Cal. 1994) (quoting Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981) ("[G]iving deference to use restrictions contained in a condominium project's originating documents protects the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.'")); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981) ("[R]estrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions . . . will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."); *see also* 31 C.J.S. *Estates* § 239 (2018). This conforms with the *Restatement*'s treatment of servitudes in general. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1.

[61] Though courts generally agree that they should give effect to the intent of the parties to a restrictive covenant, some jurisdictions have abandoned the traditional rule that ambiguous covenants should be construed to favor the free and clear use of property, finding it too restrictive. *Compare* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (interpreting servitudes to effect intent of the parties according to language and surrounding circumstances; preferring interpretations that do not violate public policy), *and* Powell v. Washburn, 125 P.3d 373, 376–77 (Ariz. 2006) (adopting the *Restatement* approach), *with* Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 667 (Idaho 2003) (generally applying rules of contract construction and stating "all doubts are to be resolved in favor of the free use of land"), *and* Munson v. Milton, 948 S.W.2d 813, 816 (Tex. App. 1997) (noting that the "primary task is to determine the intent of the framers of the restrictive covenant"; liberally construing language; finding that the covenant is strictly enforced against party seeking to enforce; favoring "free and unrestricted use of the premises").

[62] *See, e.g.*, CAL. CIV. CODE § 4270(b) (West 2017) ("If the declaration does not specify the percentage of members who must approve an amendment of the declaration, an amendment may be approved by a majority of all members . . . ."); UNIF. COMMON INTEREST OWNERSHIP ACT § 2-117 (amendments may be made by at least 67% of votes, with exceptions; the declaration may vary the proportion for certain types of amendments); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 (majority of voting members may make certain amendments; two-thirds of members may make other amendments with exceptions; these proportions may be changed by the declaration). Before 2008, the UCIOA did not permit communities to decrease the proportion of votes required for any amendment below 67%. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 2-117 cmt. 1.

[63] *See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 2-117(f) (at least 80% of votes required to "prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units"; this proportion may only be increased); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10(3) (absent express provision in the declaration, unanimous approval required to "prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units" or "change the

a desire to allow the community to adapt and change over time while protecting individual owners against unfair changes.[64] In addition to protecting individual members against abuse by the majority via voting requirements, the *Restatement* recognizes "an implied power to amend the declaration to impose restrictions on individually owned lots or units to prevent harm to and unreasonable interference with the reasonable use of both common property and individually owned property in the community."[65] Declaration amendments are usually effective as to owners who purchase both before and after amendment,[66] but this is not true in every jurisdiction.[67]

C. The Community Association

In many instances, a common-interest community's declaration will also provide for the creation of a community association, although a formal association is not required for every community in every circumstance.[68] A community association may generally be organized in any form, whether incorporated or unincorporated.[69] However, the association will almost always be managed by a governing board,[70] and common-interest community governance is based on the corporate model.[71] Every property owner within the community will automatically be a member of the community association, and

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basis for allocating voting rights or assessments").

[64] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 cmt. a. Additionally, the *Restatement* allows a court to "excuse compliance" with certain provisions or amendment procedures, such as those requiring a certain proportion of voters to approve an amendment. *Id.* § 6.12.

[65] *Id.* § 6.10 cmt. d. Of course, these amendments must follow the prescribed procedures. *See id.* § 6.10.

[66] *See, e.g.*, Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 461 (Fla. 2002) ("[R]espondents were on notice that the unique form of ownership they acquired when they purchased their units in the Woodside Village Condominium was subject to change through the amendment process, and that they would be bound by property adopted amendments."); McElveen-Hunter v. Fountain Manor Ass'n, 386 S.E.2d 435, 436 (N.C. Ct. App. 1989); Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1279 (Ohio Ct. App. 1989).

[67] *See* Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734–35 (N.D. 1981) (North Dakota condominium statute requires restrictions to be recorded in the declaration prior to conveyance; owner knowledge of declaration provisions for amendment did not change their right to notice prior to purchase); *see also* 31 C.J.S. *Estates* § 241 (2018) ("[A]n amendment cannot be applied retroactively to owners or to individuals who purchased a unit prior to the amendment's promulgation.").

[68] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.1 cmt. a; *id.* § 6.16 cmt. a. Some common-interest community statutes do require that an association be created in all communities or in those of a certain size. *See, e.g.*, CAL. CIV. CODE § 4800 (West 2014); UNIF. COMMON INTEREST OWNERSHIP ACT § 3-101; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 cmt. a. If the declaration does not establish an association, the *Restatement* provides for other avenues to create one. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.3. In the absence of an association, the members may exercise community powers by acting collectively. *See id.* § 6.4.

[69] *See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 3-101.

[70] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16.

[71] French, *supra* note 11, at 363; *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.14 cmt. a.

the distribution of voting power among members should be set forth in the declaration, or else it will be equal by default.[72] The association, usually operating through its governing board, is tasked with managing common property, enforcing servitudes, collecting fees and assessments, promulgating bylaws and rules, and performing other functions set forth in the declaration.[73] The association also has standing to sue on the behalf of itself or community members.[74] While carrying out their governing functions, the association and the board owe fiduciary-like duties of care and good faith to community members.[75]

D. Bylaws and Rules

A community association has the power to promulgate bylaws and rules. In keeping with the comparison of common-interest communities to private governments, these additional governing documents are akin to the community's statutory scheme.[76] Hence, because the declaration is the community's "constitution," the declaration reigns supreme.[77] Community association bylaws, similar to those of a corporation, most often govern the internal operations of the association and board, but they may also contain the same material as rules.[78] In general, bylaws are drafted at the creation of a common-interest community and may be amended by the community association via some vote greater than majority, but they may not be amended by a governing board.[79] In some jurisdictions, bylaws may contain the use restrictions that are usually reserved for the declaration.[80]

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[72] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.3(1), 6.17; French, *supra* note 11, at 363.

[73] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.4; *see also* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102(a); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.5–6.11. Some community powers, especially amending the declaration, require community approval and cannot be performed by the board alone. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-103(b); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 cmt. b. Bylaws and rules may also be recorded before any lot or unit is sold (and thus before any association is created). *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. e ("Sometimes the bylaws or rules and regulations of a common-interest-community association are recorded before lots or units are sold.").

[74] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.11.

[75] *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-103(a); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.13(1)(a), 6.14.

[76] Carl B. Kress, Comment, *Beyond* Nahrstedt*: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 841 (1995) (citing HYATT, *supra* note 51, § 7.02).

[77] *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 2-103(c) ("If a conflict exists between the declaration and the bylaws, the declaration prevails . . . ."); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. e ("[G]reater weight is often given the terms of the declaration than the terms of other governing documents that are not recorded.").

[78] *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-106; HYATT, *supra* note 51, § 1.06(e).

[79] *See, e.g.*, WIS. STAT. ANN. § 703.10(5) (West 2018).

[80] *See, e.g.*, *id.* § 703.10(3) ("The bylaws also may contain any other provision regarding the management

Rules, on the other hand, are similar to the rules and regulations of a government administrative agency. They are most often promulgated by the community association's governing board to implement provisions of the community's declaration.[81] They may not conflict with the declaration, bylaws, or articles of incorporation or association of the community association, if applicable.[82] Rules often contain substantive regulations. Under the *Restatement*, rules may address uses of and affecting common property, "nuisance-like activities," leasing (to meet underwriting requirements of institutional lenders), and use or behavior restrictions that are expressly authorized by statute or the declaration.[83] Similarly, the UCIOA permits an association to adopt rules affecting use or behavior of individual owners to "implement a provision of the declaration," "regulate any behavior in or occupancy of a unit which violates the declaration or adversely affects the use and enjoyment of other units or the common elements by other unit owners," or restrict leasing "to meet underwriting requirements of institutional lenders."[84] Rules are further limited by a reasonableness requirement in many jurisdictions.[85] However, community associations have at times been granted broad rulemaking power that allows them to enact use restrictions not found in the declaration without resident approval.[86]

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and operation of the condominium, including any restriction on or requirement respecting the use and maintenance of the units and the common elements.").

[81] *See, e.g.*, CAL. CIV. CODE § 4340–70 (West 2014).

[82] *See, e.g.*, *id.* § 4350(c).

[83] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 & cmt. b (AM. LAW INST. 2000). "[A]n association's power to make rules restricting use of individually owned property is based in the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with the neighbors' use and enjoyment of their property." *Id.* § 6.7 cmt. b; *see also* Meadow Bridge Condo. Ass'n v. Bosca, 466 N.W.2d 303, 305 (Mich. Ct. App. 1990) ("[A] rule or regulation is a tool to implement or manage existing structural law, while an amendment presumptively changes existing structural law." (quoting BLACK'S LAW DICTIONARY (5th ed. 1979))).

[84] *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-120(f) (UNIF. LAW COMM'N 2014).

[85] *See id.* § 3-120(h); *see also* Watts v. Oak Shores Cmty. Ass'n, 235 Cal. App. 4th 466, 468 (Cal. Ct. App.), *cert. denied*, No. S226288, 2015 Cal. LEXIS 5134 (July 22, 2015) ("[H]omeowners associations may adopt reasonable rules . . . ."); Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989) ("[T]he validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances."). On the other hand, New York applies the "business judgment rule" to evaluate community association decisions. *See* Kress, *supra* note 76, at 863–69. In California, at least one court has upheld broad rulemaking authority on grounds similar to the business judgment rule, though applying the reasonableness standard. *See Watts*, 235 Cal. App. 4th at 473 (noting broad rulemaking authority and no express prohibition on rules governing short-term rentals).

[86] *See generally Judicial Review of Condominium Rulemaking*, *supra* note 60, at 667 (arguing for increased judicial review of condominium association rulemaking power). This may be the case in *Watts*. 235 Cal. App. 4th at 473–74 (applying judicial deference to all reasoned decision-making of community association board, given broad grant of power and lack of specific limits).

III. COMMON-INTEREST COMMUNITY REGULATION OF SHORT-TERM RENTALS: MEANS AND IMPEDIMENTS

The common-interest community framework described in Part II gives communities tools with which to regulate short-term rentals. A new community that is designed from its creation to limit short-term rentals, or eliminate them entirely, should have little problem doing so. The main concern will be to draft a clear and comprehensive policy and include it in the declaration. Problems arise for existing common-interest communities that did not address short-term-rental possibilities in their declaration. Considering the amount of recent litigation on this issue, it is clear that a large number of communities did not—but they can hardly be blamed for failing to predict the influence that platforms such as Airbnb and VRBO have had on short-term rentals.

Recourse for common-interest communities in this situation is limited: The declaration amendment process is difficult, and regulation on property use is not the province of bylaws or rules.[87] An alternative that many communities have pursued is the residential use covenant that exists in some form in a great many common-interest communities. This tack has been largely unsuccessful because of the difficulty of defining the parameters of "residential use" and what activity falls within these parameters.

Courts should hold that short-term rentals can create an unambiguous commercial use that violates a residential use covenant. Some rental properties are businesses, not residences, according to the common definitions of those words. A logical definition of "residential use" will not permit the de facto hotels that are being created using short-term rentals.[88] However, this is not a foregone conclusion, and many state courts have disagreed. A much better option, therefore, is to introduce a clear restriction into the governing documents than rely on a residential use covenant, if feasible.

A. Regulation of Short-Term Rentals: Best Practices

The best method to control short-term rentals is to include a clearly written servitude in the community's declaration. The declaration is the appropriate location for restrictions on use and occupancy, and a covenant located in the declaration will be found valid in most circumstances.[89] Specifically, a servitude restricting or prohibiting the rental of property entirely has been held not to be

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87 *See* Part II, *supra*.

88 *See* Part I, *supra*.

89 *See* Section II.B, *supra*.

an unreasonable restraint on alienation—or perhaps not even a restraint on alienation at all, but rather a use restriction.[90] It is also appropriate to amend the declaration to enact retroactive limitations or prohibitions on short-term rentals.[91] In many jurisdictions, these amendments will be applicable to both prior and subsequent purchasers.[92] Generally, bylaws and rules are not the appropriate places to enact new restrictions on property use, but this is not true in all jurisdictions.[93]

An effective servitude limiting short-term rentals should precisely define "short-term rental" and specify exactly how many days a property may be rented out. Or, the servitude could restrict short-term rentals to a specific number of times per year or month, or to a certain number of units within a community at a time. A common-interest community has substantial freedom in the use restrictions that may be imposed,[94] as illustrated by the following particularly strict covenant: "No residential unit owner shall rent, lease or otherwise so demise any residential unit or any part therein. Owners shall not permit the use of said unit by any party other than owner or owner's immediate family member."[95] Although designed to prohibit all rental, lease, or similar activity, a subsequent clause in the same declaration is clearer, referring to "a rental agreement, lease, or other instrument granting occupancy."[96] This pair of covenants helps to illustrate two points. First, the lack of consistency creates a concern that the lease and rental restriction will be interpreted to refer to different activity than the grandfather clause. Second, the subtle differences in each phrase calls attention to the need for precision when drafting CC&Rs. The latter is especially important in the context of short-term rentals because of all the variables involved, including the distinction between a lease and a short-term

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[90] *See* Breezy Point Holiday Harbor Lodge—Beachside Apt. Owners' Ass'n v. B.P. P'ship, 531 N.W.2d 917, 919 (Minn. Ct. App. 1995) (citing Holiday Out in Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63, 64–65 (Fla. Dist. Ct. App. 1973)) (holding that a rental limitation is not a restraint on alienation at all, and even if it were, it would not be unreasonable); Apple Valley Gardens Ass'n, Inc. v. MacHutta, 763 N.W.2d 126, 133 (Wis. 2009) (holding that a rental restriction did not render title to condominium unmarketable because it did not affect owner's ability to convey); Le Febvre v. Osterndorf, 275 N.W.2d 154, 158 (Wis. Ct. App. 1979); *see also* 15B AM. JUR. 2D CONDOMINIUMS AND COOPERATIVE APARTMENTS § 39 (West 2018).

[91] *See* HYATT, *supra* note 51, § 9.06.

[92] *See supra* notes 66–67 and accompanying text.

[93] *See* Sections II.C.–D., *supra*.

[94] *See* Sections II.A.–B., *supra*.

[95] *Apple Valley Gardens*, 763 N.W.2d at 128–29 (quoting a common-interest community declaration amendment).

[96] *Id.* at 129.

rental.[97] Thus, for example, a covenant restricting "leases" should not apply to short-term rentals.[98]

B. Residential Use Covenants

In many cases, the declaration does not explicitly address short-term rentals and any attempts to amend the declaration fail; in this circumstance, communities are left to use other means to attempt to corral owners whom they believe are breaking the rules and being disruptive. One servitude that has been litigated extensively is a "residential use" covenant, a common clause that many community associations and residents have claimed prohibits at least some kinds of short-term-rental activity.[99]

Some courts have held that mandating residential use is less restrictive than prohibiting business or commercial use, while many others have held that "residential use" precludes "business" or "commercial" use by definition.[100] At least one court has suggested that a prohibition on "commercial or industrial ventures or business of any type" for "residential lots" is not synonymous with requiring residential use—although the court did not elaborate on the distinction.[101] This Comment assumes that residential use implicitly forbids commercial or business use, which conforms to the analysis of many courts and does not require the confusing task of distinguishing between "residential use," "residential, noncommercial use," "no commercial use," and any number of other combinations.

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[97] *See supra* notes 19–20 and accompanying text.

[98] *See id.*

[99] *See, e.g.*, Santa Monica Beach Prop. Owners Ass'n v. Acord, 219 So. 3d 111, 114 (Fla. Dist. Ct. App. 2017) (citing a number of jurisdictions that have considered and rejected this contention); Hyatt v. Court, No. 2008-CA-001474-MR, 2009 WL 2633659, at *4 (Ky. Ct. App. Aug. 28, 2009) (holding that a frequently rented vacation property was a non-residential, business use); O'Connor v. Resort Custom Builders, Inc., 591 N.W.2d 216, 221 (Mich. 1999) (holding that interval ownership split up into forty-eight weeks "did not constitute a residential purpose"); Munson v. Milton, 948 S.W.2d 813, 816–17 (Tex. App. 1997) (granting a temporary injunction on short-term rentals based on a residential use restriction). A clause limiting property to "residential use" or "residential purposes" is sometimes replaced with or complemented by a prohibition on "business use" or "commercial use." *See, e.g.*, *Munson*, 948 S.W.2d at 815 ("All tracts . . . shall be used solely for residential, camping or picnicking purposes and shall never be used for business purposes.").

[100] *Compare O'Connor*, 591 N.W.2d at 218 (citing Beverly Island Ass'n v. Zinger, 317 N.W.2d 611, 613 (Mich. Ct. App. 1982)) ("A restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business use."), *with* Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 741 (N.M. Ct. App. 2013) ("Courts . . . read into ['residential use' or 'residential purposes' language] a prohibition on activities associated with a commercial or business purpose, regardless of whether the covenants at issue include such an express prohibition.").

[101] *See* Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 668 (Idaho 2003).

Regardless, a residential use covenant is a poor method by which to target any specific activity that a common-interest community desires to limit because it is inherently imprecise. Some activities may be consistent with both commercial and residential use, making it difficult to identify violations.[102] Additionally, "residential use" itself is subject to at least two reasonable interpretations: "a 'residence' can refer simply to a building used as a dwelling place, or it can refer to a place where one intends to live for a long time."[103] Consequently, state courts have interpreted "residential use" in significantly different ways, and many of them have been reluctant to find an implicit restriction on short-term rentals. And even if a court agrees that some short-term-rental activity is incompatible with residential use, there is no guarantee that their interpretation will satisfy the common-interest community. For instance, it appears that no court has concluded that a residential use covenant precludes all short-term-rental activity. The only way to ensure that the common-interest community's particular needs are met is to address short-term rentals in the governing documents.

C. Differing Interpretations of Residential Use Among State Courts

Courts in a large number of jurisdictions that have had occasion to address the issue have held that residential use covenants do not restrict any short-term rentals.[104] Under this view, homeowners are free to engage in short-term rentals notwithstanding a requirement of residential use. Some of these jurisdictions recognize the traditional rule that ambiguous restrictive covenants are strictly interpreted to favor the free and unrestricted use of property.[105] Another presumption that often accompanies the foregoing is that "[r]estrictive covenants are construed strictly against those claiming the right to enforce them."[106] Thus, if a court finds that a residential use covenant is subject to more than one

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[102] HYATT, *supra* note 51, § 3.04 ("Business use is a difficult topic because so many different activities can violate the restriction yet be consistent with a residential use as well.").

[103] Yogman v. Parrott, 937 P.2d 1019, 1021 (Or. 1997).

[104] *See, e.g.*, *Santa Monica Beach*, 219 So. 3d at 114 (citing a number of jurisdictions that have so held); *cf.* UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103 cmt. 22 (UNIF. LAW COMM'N 2014) ("[O]wners of residential units . . . may hold those units for investment purposes, or . . . individual owners may occasionally or regularly rent their units on an individual or rental pool basis.").

[105] *See Santa Monica Beach*, 219 So. 3d at 116 (quoting Leamer v. White, 156 So. 3d 567, 572 (Fla. Dist. Ct. App. 2015)); *see also, e.g.*, *Pinehaven Planning Bd.*, 70 P.3d at 668; *O'Connor*, 591 N.W.2d at 219; *Estates at Desert Ridge Trails*, 300 P.3d at 743 (quoting Cain v. Powers, 668 P.2d 300, 302 (N.M. 1983)); Munson v. Milton, 948 S.W.2d 813, 816 (Tex. App. 1997); 1 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 61.04(b)(1)(i) (David A. Thomas ed., 2d ed. 2018). *But see, e.g.*, Hyatt v. Court, No. 2008-CA-001474-MR, 2009 WL 2633659, at *2 (Ky. Ct. App. Aug. 28, 2009) (noting that Kentucky has abolished the old rule of strict construction).

[106] *O'Connor*, 591 N.W.2d at 218; *see also, e.g.*, *Munson*, 948 S.W.2d at 816.

reasonable interpretation, it will be held not to interfere with short-term rentals.[107]

Other courts have found that residential use covenants *unambiguously* do not prohibit short-term rentals, a conclusion which often involves a broad interpretation of "residential."[108] The recurring logic in these opinions states that as long as the renter—the person occupying the property—uses the property for residential purposes, there can be no violation.[109] As the Florida appellate court recently held, "the critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental."[110] "[E]ven if the properties are rented to different persons every night," according to this reasoning, short-term rentals can never be a commercial use.[111] Similarly, according to the Washington appellate court, a short-term renter's use of a rented property is "identical to [the homeowner's] own use of the property, as a residence, or the use made by a long-term tenant."[112] In other words, if the person occupying a living space uses it as though it were their residence, then the use is always residential.[113]

Nevertheless, a few courts *have* found short-term rentals or similar activity to violate residential use covenants.[114] Some of these courts have defined

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[107] *See, e.g.*, *Pinehaven Planning Bd.*, 70 P.3d at 668 ("Even if this Court determined the Covenants at issue were ambiguous, because they are subject to more than one reasonable interpretation, they would still be construed in favor of the free use of land, as a matter of law.").

[108] Their definition resembles the first option presented in *Yogman*: "a building used as a dwelling place." 937 P.2d at 1021.

[109] *See Santa Monica Beach*, 219 So. 3d at 115–16; *Pinehaven Planning Bd.*, 70 P.3d at 668 ("[R]enting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood."); Gadd v. Hensley, Nos. 2015-CA-001948-MR, 2016-CA-000164-MR, 2017 WL 1102982, at *6 (Ky. Ct. App. Apr. 7, 2017) ("The rental of one's home does not transform it from a single-family residence since a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes."); Wilkinson v. Chiwawa Cmtys. Ass'n, 327 P.3d 614, 620 (Wash. 2014) ("If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial, no matter how short the rental duration.").

[110] *Santa Monica Beach*, 219 So. 3d at 114.

[111] *Id.* at 115–16.

[112] Ross v. Bennett, 203 P.3d 383, 388 (Wash. Ct. App. 2008) (holding that short-term rentals did not violate a residential purposes covenant).

[113] *Cf. Santa Monica Beach*, 219 So. 3d at 114–16.

[114] *See, e.g.*, La Cebadilla Estates Corp. v. Sisneros, No. 2 CA-CV 2007-0087, 2007 WL 5615085, at *4 (Ariz. Ct. App. Dec. 18, 2007); Hyatt v. Court, No. 2008-CA-001474-MR, 2009 WL 2633659 (Ky. Ct. App. Aug. 28, 2009), *modified*, *Gadd*, 2017 WL 1102982 (*Gadd*, an unpublished opinion, declined to extend *Hyatt* because it was unpublished as well); O'Connor v. Resort Custom Builders, Inc., 591 N.W.2d 216, 220–21 (Mich. 1999) (timesharing interval ownership); Tarr v. Timberwood Park Owners Ass'n, 510 S.W.3d 725, 729–31 (Tex. App. 2016); Munson v. Milton, 948 S.W.2d 813, 817 (Tex. App. 1997); *see also* Robins v. Walter, 670 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 1995) (bed and breakfast with separate entrance and business-like characteristics was commercial use; but the court found that this was not a "rental" as excepted in subdivision

"residential use" or "residence" narrowly as referring to, for example, "both physical presence and an intention to remain."[115] These opinions do not hold that short-term rentals per se violate the covenant, but instead find that certain features of the particular use indicate that it is not residential, but rather a commercial venture—for example, the frequency of the activity, indicia of business, and government business tax or license requirements.[116] Some property owners who rent their home out frequently, as one court opined, "have gone to a great deal of trouble to treat their . . . property as a business,"[117] and the enterprise resembles traditional lodging establishments such as bed and breakfasts, hotels, and motels. In addition to the tax and licensing requirements that many states require,[118] these properties may be advertised online and provide the same services, commodities, and amenities that would be found in a hotel.[119] When a rental property is owned by a business entity, at least one court has held that a business can never "reside" therein but can only conduct business.[120] The unifying proposition in these opinions is that whenever a property is not being used as a permanent or long-term *residence*, but rather to conduct a short-term-rental *business*, it is not consistent with a residential use covenant.

D. A Narrow Definition of Residential Use Is Preferable

Neither interpretation of "residential use" is inherently unreasonable because the term is ambiguous.[121] However, the broad definition accepted by a plurality of courts[122] is inappropriate in the context of a residential common-interest community comprising individual homes—be they condominiums, townhomes, or single-family detached homes. The narrow definition that contemplates living in a place for a long period also more accurately reflects common usage of the term.

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covenant); *Pinehaven Planning Bd.*, 70 P.3d at 669 (Schroeder, J., dissenting).

115 *Tarr*, 510 S.W.3d at 730 (quoting *Munson*, 948 S.W.2d at 816).

116 *See, e.g.*, *Tarr*, 510 S.W.3d at 730–31.

117 *Hyatt*, 2009 WL 2633659, at *4.

118 *See infra* notes 145–48 and accompanying text.

119 *See, e.g.*, *La Cebadilla Estates*, 2007 WL 5615085, at *2 ("[A]dvertisements stated all linens, toiletries, towels, and household items were provided, '[j]ust like a hotel would offer,' and offered daily maid service, a cook, and a chauffeur as amenities of the property."); *Hyatt*, 2009 WL 2633659, at *1 (website, security deposit, cleaning fee, pet fee, linens, toiletries, etc.); *Tarr*, 510 S.W.3d at 730–31 (owner set up an LLC, provided a leasing agreement with check-in and check-out times and a cancellation policy).

120 *La Cebadilla Estates*, 2007 WL 5615085, at *4 ("Because [the owner] is a business, not an individual, it is incapable of residing at the property; it can only conduct business there.").

121 *See supra* notes 102–03 and accompanying text.

122 *See supra* notes 108–13 and accompanying text.

In common parlance and according to some legal definitions, a person's "residence" refers to the location where a person actually lives for an extended period.[123] A short-term rental, by contrast, is transient: It gives a paying occupant a temporary place to stay.[124] Thus a person staying in a hotel or an Airbnb rental for a week, or even a month, could not reasonably declare that they were "residing" therein.[125] A broad definition of "residential" focusing on using a space for "living purposes"[126] would encompass hotels and other transient lodging establishments, and indeed this was the position taken by the Uniform Building Code.[127] Yet it would be inapposite to allow a hotel or bed and breakfast into a residential community,[128] and the same goes for a de facto hotel being operated via short-term rentals. However, the precise point at which short-term-rental activity ceases to be residential is difficult to determine.

In addition to "residential," the term "use" is a component of a residential use covenant, and thus it is important to understand what that refers to. Several courts have said that the proper analysis is to look to the behavior of short-term lodgers to determine whether a property is being used for residential purposes.[129] Yet these opinions do not offer a compelling reason why the activity of a mere licensee[130] should determine the overall use of a property. Instead, it is more

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[123] The dictionary definition of "residence" may refer to "the act or fact of dwelling in a place *for some time*" or "*living* or *regularly staying* at or in some place"; it may similarly refer to "the place *where one actually lives* as distinguished from one's domicile or a place of temporary sojourn." *Residence*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/residence (last visited Feb. 20, 2019) (emphasis added); *see also* Munson v. Milton, 948 S.W.2d 813, 816–17 (Tex. App. 1997) ("If a person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence."). For a legal description of "residence," see, for example, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES § 201(2) (AM. LAW INST. 2017) ("A natural person is resident in the State in which he or she is habitually found or maintains significant professional or personal connections."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (AM. LAW INST. 1971) ("[An individual] is more likely to have [residence in] a state where he has a fixed dwelling place than in one where he lives only in hotels or boarding houses.").

[124] *Cf.* Robins v. Walter, 670 So. 2d 971, 975 (Fla. Dist. Ct. App. 1995) (holding that a bed and breakfast business violated a residential use covenant that defined "renting" as not commercial).

[125] *Cf. Residence*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/residence (last visited Feb. 20, 2019). These are "temporary places of sojourn." *Cf. id.*

[126] *See* Santa Monica Beach Prop. Owners Ass'n, Inc., 219 So. 3d 111, 114–16 (Fla. Dist. Ct. App. 2017).

[127] *See* Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 668 (Idaho 2003) (citing UNIFORM BUILDING CODE 1-26 (INT'L CONF. BLDG. OFFICIALS 1997)) (Uniform Building Code expressly referenced by common-interest community governing documents). The Uniform Building Code, promulgated by an organization based in California, was one of the three major model building codes in the United States. *See* Jim Rossberg & Roberto T. Leon, *Evolution of Codes in the USA*, NEHRP 4–5 (2013), https://www.nehrp.gov/pdf/UJNR_2013_Rossberg_Manuscript.pdf. They were replaced by the International Building Code in 2000, and it quickly became the national standard. *See id.* at 4–8.

[128] *See Robins*, 670 So. 2d at 975.

[129] *See supra* notes 108–13 and accompanying text.

[130] *See supra* notes 19–20 and accompanying text.

appropriate to look to the party *in possession* of the property. Unlike an owner in fee or a tenant, a licensee in a short-term-rental transaction does not gain legal possession of the property they are renting.[131] Instead, the property, though being occupied by a short-term renter, is still subject to the management and control of the possessor.[132]

Thus, a short-term renter, unlike a tenant or owner in fee, is not the *user* of the property in any meaningful legal sense because they do not have any appreciable amount of control over the property.[133] They are subject to the license and control of whomever is in possession of the property.[134] Therefore, the analysis of whether a use is residential or commercial should consider the party in possession, which would in most cases be the homeowner or a tenant. A similar tack, though not explicitly discussed in terms of possession, was taken by the Kentucky appellate court in *Hyatt v. Court*.[135]

Generally, when short-term rentals are held to violate a residential use covenant, it is because they are more accurately classified as a business or commercial venture than a residence.[136] Under the definition of residential use endorsed by this Comment, commercial or business use by definition violates a residential use covenant.[137] There must be a point at which use of property ceases to be residential and becomes commercial, and this turns on the distinction between "activity" and "use." The mere presence of commercial *activity* does not necessarily create a commercial *use*.

"Activity" is satisfied by the barest departure from inaction.[138] A "use" suggests something far more permanent: "[A] long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or

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131 *See* 28 AM. JUR. 2D ESTATES § 3 (2d. ed. 2018); 49 AM. JUR. 2D LANDLORD & TENANT § 20 (2d ed. 2018).

132 *See* Stowe v. Fritzie Hotels, 282 P.2d 890, 893 (Cal. 1955); *cf.* 49 AM. JUR. 2D LANDLORD & TENANT § 20.

133 "The chief distinction between a tenant and a lodger lies in the character of possession. A 'tenant' has exclusive legal possession of premises and is responsible for their care and condition. A 'lodger' has only the right to use the premises, subject to the landlord's retention of control and right of access to them. To make one a tenant . . . he must have exclusive possession and control." *Stowe*, 282 P.2d at 893. Of course, as this quote suggests, a lodger does indeed "use" the property in some form, for they occupy the premises and make use of its amenities—but they are not the *user* in the higher level context of *residential use*. *See id.*

134 *See id.*

135 No. 2008-CA-001474-MR, 2009 WL 2633659 (Ky. Ct. App. Aug. 28, 2009).

136 *See supra* note 114.

137 *See supra* notes 100–01 and accompanying text.

138 *See Activity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/activity (last visited Feb. 20, 2019).

occasional . . . ."[139] Conducting commercial activity in the home does not create a non-residential, commercial use of property until that activity becomes the primary purpose of the property.[140] "Commercial activity," in short, is activity "conducted to make a profit."[141] By contrast, "commercial use" refers to "an ongoing profit-making activity,"[142] such as a "business."[143]

For example, if a man turns furniture legs on a lathe in his garage and sells them to his neighbors, he is engaging in commercial activity for profit, but it cannot be said that his home has ceased to be used for residential purposes. If the man increases his production and begins selling hundreds of legs to Ace Hardware, and if a line of large trucks parks outside his home twice a month to collect orders, his home is beginning to look like a business. The neighbors may very well think so. Yet the man continues to use three-quarters of his home as a residence. Now, if the man moves out of his home and converts it into a small furniture factory with three employees and a sign out front, then the home is probably being used for commercial purposes, for its sole occupation is commercial.

A similar analysis was undertaken by the dissenting opinion in the Washington case of *Metzner v. Wojdyla*, which involved a woman who operated a day care facility in a subdivision subject to a "residential purposes only" covenant.[144] Although Justice Guy did not fully explore the distinction between commercial activity and use, his opinion recognized that not all commercial activity violates a residential use covenant: "[T]he majority's interpretation . . . erroneously assumes that business uses are per se incompatible with residential uses."[145] In his estimation, the intent behind a residential use covenant is "a desire to preserve the residential character of the neighborhood and to make the

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139 *Use*, BLACK'S LAW DICTIONARY (10th ed. 2014).

140 *Cf.* Houston v. Wilson Mesa Ranch Homeowners' Ass'n, 360 P.3d 255, 260 (Colo. App. 2015) ("[R]eceipt of income does not transform residential use of property into commercial use."); O'Connor v. Resort Custom Builders, Inc., 591 N.W.2d 216, 218 (Mich. 1999) (quoting Beverly Island Ass'n v. Zinger, 317 N.W.2d 611, 613 (Mich. 1982) ("A business use 'may not violate a residential use covenant so long as the nonresidential use was casual, infrequent or unobtrusive . . . .'")); Jackson v. Williams, 714 P.2d 1017, 1022 (Okla. 1985) ("Although the commercial nature of a group may have some relevance, that characteristic is not determinative in this case. It is the *purpose* and *method of operation* which serves to distinguish the proposed residential use of the home from that normally incident to a purely commercial operation.").

141 *Commercial Activity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

142 *Commercial Use*, BLACK'S LAW DICTIONARY (10th ed. 2014).

143 That is, "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." *Business*, BLACK'S LAW DICTIONARY (10th ed. 2014).

144 886 P.2d 154, 158 (Wash. 1994) (Guy, J., dissenting).

145 *Id.* at 159.

neighborhood more attractive for residential purposes."[146] Violation occurs when business activity is so disruptive as to "alter the character of a neighborhood."[147]

The idea that residential use covenants exist to preserve the character of a residential neighborhood is a reflection of the balance between the private rights of the individual property owner and the collective rights of the community. As Justice Taney wrote in *Charles River Bridge v. Warren Bridge*, "[w]hile the rights of private property are sacredly guarded, we must not forget, that the community also have [sic] rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[148] Although even the earliest forms of common-interest communities had yet to emerge in the United States,[149] Taney's words ring true today and should be a guiding principle behind interpretation of residential use covenants.

An individual short-term-rental transaction is indeed commercial activity for a number of reasons: (i) short-term rentals are a monetary transaction and fit within the definition of commercial activity;[150] (ii) they often require a business permit or license;[151] (iii) governments often classify them as commercial;[152] (iv) they are often subject to the same transient occupancy taxes as hotels;[153] and

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146 *Id.*

147 *Id.*

148 36 U.S. 420, 548 (1837).

149 *See* HYATT, *supra* note 51, § 1.05(a) (tracing the history of common-interest communities in the United States).

150 *See Commercial Activity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

151 *See* Lisa Mercer, *Business Licensing Laws for Short-Term Vacation Rentals*, USA TODAY, https://web.archive.org/web/20160105155100/http://traveltips.usatoday.com/business-licensing-laws-shortterm-vacation-rentals-101455.html (last visited Feb. 20, 2019); *What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, https://www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb (last visited Feb. 20, 2019) ("In many cities, you must register, get a permit, or obtain a license before you list your property or accept guests.").

152 *See, e.g.*, SANTA MONICA, CAL., MUN. CODE ch. 9.51.030 (2017), http://www.qcode.us/codes/santamonica/ ("Vacation Rental" included in "Nonresidential Use Classifications"); *Hotel Occupancy Taxes*, AUSTINTEXAS.GOV, http://austintexas.gov/department/hotel-occupancy-taxes (last visited Feb. 20, 2019) ("[A hotel] includes, without limitation, hotels, motels, tourist homes, vacation rentals by owner, houses or courts, lodging houses, inns, hostels, rooming houses, bed and breakfasts, short-term vacation rentals or other buildings where rooms are furnished for consideration.").

153 *See, e.g.*, Hyatt v. Court, No. 2008-CA-001474-MR, 2009 WL 2633659, at *1 (Ky. Ct. App. Aug. 28, 2009) ("[T]he . . . Marshall County tourist and convention commission monthly transient room tax, and the Kentucky sales use and transient room tax, . . . [are] required of motels, hotels, and persons renting their property."); Tarr v. Timberwood Park Owners Ass'n Inc., 510 S.W.3d 725, 727–28 (Tex. App. 2016) ("[The owner] paid Texas Hotel Tax, which is applicable to all rentals of less than thirty days. [He] also remitted the San Antonio/Bexar County Hotel/Motel Tax, which applies to rentals of less than 30 days."); PLACER CTY., CAL., CODE ch. 4.16.010–030 (2017), http://qcode.us/codes/placercounty/; *Hotel Occupancy Taxes*, *supra* note 152; *see also* Emily Badger, *Airbnb Is About to Start Collecting Hotel Taxes in More Major Cities, Including*

(v) the IRS requires real estate rental income to be separately reported either as "supplemental" or "business income."[154]

Short-term rentals are also more likely to "alter the character of a neighborhood"[155] and burden community associations than long-term rentals or tenancies. As a California appellate court has noted,

> That short-term renters cost [an] Association more than long-term renters or permanent residents is not only supported by the evidence but experience and common sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse.[156]

And, as discussed above, there are many concrete examples of the problems short-term rentals are causing all over the country.[157] Granting unrestricted license to engage in commercial activity that has the potential to be so disruptive, as many courts may have done, allows enterprising owners to undermine the residential character of a neighborhood in a way that elevates the rights of the individual far above those of the community. On the other hand, reading a blanket ban on short-term rentals into the vagaries of residential use covenants would go too far in the other direction. Because residential use covenants are only clear insofar as they prohibit uses that are not residential, including commercial or business uses, courts should only interfere and enjoin activity that clearly crosses the line.

E. When Do Short-Term Rentals Become a Commercial Use?

There are many examples of short-term-rental activity that clearly does not rise to the level of a business. Short-term rentals often allow people to *share* their homes, rather than turn them into businesses, as a source of supplemental income, especially in expensive cities where wages make it difficult to pay rent.[158] Though commercial activity occurs when lodgers pay to stay, it is either

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Washington, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/.

154 The distinction turns on whether amenities such as maid service are provided to the renter. *See 2018 Instructions for Schedule E (Form 1040)*, IRS, https://www.irs.gov/instructions/i1040se (last visited Feb. 20, 2019); *2018 Instructions for Schedule C*, IRS, https://www.irs.gov/instructions/i1040sc (last visited Feb. 20, 2019).

155 Metzner v. Wojdyla, 886 P.2d 154, 159 (Wash. 1994) (Guy, J., dissenting).

156 Watts v. Oak Shores Cmty. Ass'n, 235 Cal. App. 4th 466 (Cal. Ct. App. 2015).

157 *See* Part II, *supra*.

158 *See* James A. Allen, *Disrupting Affordable Housing: Regulating Airbnb and Other Short-Term Rental*

infrequent—for example, while the owner or tenant is on vacation—or incidental to the residential use of the owner or tenant—for example, when a lodger sleeps on the sofa for a night.[159] In both cases, the person in possession of the property is still using the property as their residence, or home, for they are usually physically present and they intend to remain there in the future despite the occasional presence of lodgers.[160]

Yet short-term rentals are not always used as an infrequent source of cash for a homeowner or tenant who lives on their property. An increasing number of rental properties are being operated as commercial ventures, and many of them are owned by business entities rather than individuals.[161] Less than half of Airbnb listings in New York City, Los Angeles, and San Francisco mirror the traditional "home-sharing" model where the host is on-site during the lodger's stay, and only 3%–4% of listings are for "couch sharing."[162] "While it was Airbnb's intention to start as a means of bringing together a community and offering a supplemental income, some units on Airbnb in New York have morphed into full-fledged businesses."[163] For example, the City of New York has filed suit against a short-term-rental syndicate that illegally rented out 130 apartments across Manhattan.[164] The scheme, which produced nearly $21 million in revenue from 2015 to 2018, involved 18 corporations and "more than 100 Airbnb host accounts" opened using various names to disguise the operation.[165]

A study that analyzed Airbnb listings in fourteen U.S. cities found that "[a] growing number of hosts are using the Airbnb platform to operate full-time businesses" and that this group accounts for 26% of the company's revenue.[166] Additionally, a growing number of hosts list their units for more than 180 days.[167] "Multi-unit hosts" with two or more units account for nearly 40% of Airbnb's revenue, and this group often overlaps with full-time hosts.[168] In the

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Hosting in New York City, 26 J. AFFORDABLE HOUSING & CMTY. DEV. L. 151, 174–75 (2017).

159 *See id.* at 167.

160 *Cf.* Munson v. Milton, 948 S.W.2d 813, 816 (Tex. App. 1997) ("[R]esidence generally requires both physical presence and an intention to remain.").

161 *See, e.g.*, SAMAAN, *supra* note 38, at 10 (Los Angeles).

162 *See id.* at 8.

163 Allen, *supra* note 158, at 166.

164 Luis Ferré-Sadurní, *Inside the Rise and Fall of a Multimillion-Dollar Airbnb Scheme*, N.Y. TIMES (Feb. 23, 2019), https://www.nytimes.com/2019/02/23/nyregion/airbnb-nyc-law.html.

165 *Id.*; Luis Ferré-Sadurní, *New York Empire of Illegal Airbnb Rentals Booked 75,000 Guests, Suit Says*, N.Y. TIMES (Jan. 14, 2019).

166 AM. HOTEL & LODGING ASS'N, *supra* note 38 ("full-time" defined as at least 360 days per year).

167 *Id.*

168 *Id.*

instances where a host does list a single property, they are far more likely to receive no profit from the listing: "38 percent of [Airbnb] hosts with a single listing of *any type* generated no income whatsoever."[169] On the other hand, "commercial entities" own the most heavily used units in cities like Los Angeles, and these units have occupancy rates that are nearly identical to those of traditional hotels.[170] So while Airbnb does, by percentage, primarily remain a platform for hosts to infrequently rent out a single property, a disproportionate share of the money goes to the growing number of multiple-unit and full- or greater than half-time hosts.

In some cases, it is relatively easy to conclude that rental activity is of a great enough frequency and intensity to cross the line between commercial activity and commercial use: For example, a full-time rental property listed 360 or more days out of the year and never occupied by an owner or tenant is being used to make a profit nearly 100% of the time and is being used as a residence none of the time.[171] In other words, the possessor never conducts residential activity on the property, but always commercial activity. The same is true when a business entity, rather than an individual, is in possession of a property, because "a business . . . is incapable of residing at [a] property; it can only conduct business there."[172] There are other factors that are indicia of commercial use, including the observation of the formalities of lodging business,[173] providing amenities common to lodging businesses,[174] the payment of transient occupancy taxes,[175]

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169 SAMAAN, *supra* note 38, at 13.

170 *See id.* at 10 (around 66% occupancy; one listing in Venice Beach had a 93% occupancy rate).

171 *See* Metzner v. Wojdyla, 886 P.2d 154, 159 (Wash. 1994) (Guy, J., dissenting) ("In exceptional circumstances, the main use and purpose of the property is clearly business, *i.e.*, the property is used for business purposes 24 hours a day, 7 days a week."); AM. HOTEL & LODGING ASS'N, *supra* note 38 (data on full-time short-term-rental properties).

172 La Cebadilla Estates Corp. v. Sisneros, No. 2 CA-CV 2007-0087, 2007 WL 5615085, at *4 (Ariz. Ct. App. Dec. 18, 2007). However, a business could lease a property to an individual to reside therein.

173 *See, e.g.*, *id.* ("[T]he trial court could reasonably infer that other business was conducted there as well, such as meeting with guests to obtain identification, have rental agreements signed, or provide keys to the property."); Hyatt v. Court, No. 2008-CA-001474-MR, 2009 WL 2633659, at *1 (Ky. Ct. App. Aug. 28, 2009) (security deposit, cleaning fee, pet fee, sales tax, written rental agreement, check-in and check-out times, damage deposit, and extra persons charge); Tarr v. Timberwood Park Owners Ass'n, 510 S.W.3d 725, 730–31 (Tex. App. 2016) (guest agreement designating check-in and check-out times, cancellation policy, and minimum stay "show[ed] that the home [was] being used for transient purposes").

174 *See, e.g.*, *La Cebadilla Estates*, 2007 WL 5615085, at *7 ("[A]dvertisements stated all linens, toiletries, towels, and household items were provided, '[j]ust like a hotel would offer,' and offered daily maid service, a cook, and a chauffeur as amenities of the property."); *Hyatt*, 2009 WL 2633659, at *1 ("The [owners] provided linens, paper products, and other amenities for which there were other fees.").

175 *See supra* note 153.

running advertisements,[176] ownership or management by a business entity,[177] and ownership of multiple properties.[178] Courts should determine whether, under the totality of the circumstances, the primary purpose of a property is to conduct a short-term-rental *business* rather than be a residence.

F. Appropriate Resolution of Short-Term Rentals and Residential Use Covenants

Interpreting residential use covenants to prohibit only short-term-rental activity that clearly amounts to commercial use would not prevent every negative externality of short-term rentals, but it would stop the most harmful and hotel-like instances from infiltrating common-interest communities. It would be unwise to leave the entire question of short-term-rental regulation in common-interest communities up to the courts because the judiciary is not attuned to the specific needs of each community. Moreover, common-interest community disputes are particularly ill-suited for judicial resolution: "Resorting to the courts to resolve disputes tends to be highly divisive and can create substantial discontent within the community. . . . In addition, many disputes may never be resolved, and, abuses by association boards may go unchecked because of the emotional toll and financial risks involved in bringing a lawsuit."[179] If disagreements cannot be resolved internally with improved communication within the community, it may be preferable to circumvent the judicial branch entirely and implement alternative dispute resolution or state bureaucratic oversight to resolve conflict.[180]

Limited judicial review of the intersection between short-term rentals and residential use would ease the greatest burdens faced by common-interest communities that find it difficult to introduce rental restrictions into their governing documents without giving community associations too much power to blindside residents with unexpected restrictions on use. If, for example, the rulemaking power of community associations were expanded to allow associations to impose retroactive use restrictions, it would subvert the expectations of owners, as a matter of both freedom of contract and free use of

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[176] *See, e.g.*, *Hyatt*, 2009 WL 2633659, at *4 (owners set up a copyrighted website to advertise their property). Use of a home-sharing website would also be advertising.

[177] *See La Cebadilla Estates*, 2007 WL 5615085, at *4 ("Because [the owner] is a business, not an individual, it is incapable of residing at the property; it can only conduct business there."); *Tarr*, 510 S.W.3d at 730 (owner used an LLC to operate rental business).

[178] *See, e.g.*, *La Cebadilla Estates*, 2007 WL 5615085, at *4 (business owned a "portfolio of rental homes").

[179] French, *supra* note 11, at 366.

[180] *See id.* at 365–69.

land. "People purchasing property in a common-interest community, which is usually subject to specific use restrictions set forth in the declaration, are not likely to expect that the association would be able, under a generally worded rulemaking power, to impose additional use restrictions on their property."[181] There is a similar rationale for making declaration amendment difficult.[182] The *Restatement* and UCIOA recognize a power to adopt rules preventing nuisances that unreasonably interfere with the use and enjoyment of property,[183] and although some short-term-rental properties might create a private nuisance,[184] this theory would not affect the more far-reaching harms that short-term rentals have produced.[185]

Some jurisdictions have recognized broader community-association rulemaking authority, including rules affecting short-term rentals,[186] but such standards of review give dubious protections to owners in common-interest communities.[187] Using residential use covenants to regulate short-term rentals rather than expanding rulemaking authority would be more in line with owners' expectations about how new use restrictions are imposed and would require no modification of existing common-interest community statutes. Likewise, reading such covenants to reach only short-term-rental activity that clearly amounts to commercial use ensures that the same expectations are not undermined by the courts.

Lastly, and perhaps most importantly, this limited judicial review would not let community associations off the hook. It is not the province of the courts to draft common-interest community covenants. Instead, it is essential that the governing documents of any common-interest community clearly address rentals of every type, whether the community or its developer wants to allow all

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181 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (AM. LAW INST. 2000).

182 "The declaration for a common-interest community functions like a constitution for the community. Like a constitution, the declaration should not be subject to change upon temporary impulse. . . . The varying approval requirements are designed to address the tension between providing the flexibility required for long-term viability of the community and providing safeguards for the reliance interests of those who find themselves in the minority." *Id.* § 6.10 cmt. a.

183 *See id.* § 6.7; UNIF. COMMON INTEREST OWNERSHIP ACT § 3-120(f)(2) (UNIF. LAW COMM'N 2014).

184 *See, e.g.*, Walker, *supra* note 34; *see also* RESTATEMENT (SECOND) OF TORTS § 821D, Reporter's Note (AM. LAW INST. 1979) (listing examples of successful private nuisance claims).

185 *See* Part I, *supra*.

186 *See, e.g.*, Watts v. Oak Shores Cmty. Ass'n, 235 Cal. App. 4th 466, 472–75 (Cal. Ct. App. 2015) (upholding rules establishing a minimum seven-day rental period and an annual fee for owners who rent their properties). *See generally* Kress, *supra* note 76.

187 *See generally* Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1140–52 (1993) (examining a few theories of deference to condominium association rulemaking).

rentals, prohibit them entirely, or do something in between.[188] The community association is best positioned to address the particular needs of their community; the judicial option is costly, time consuming, and unreliable, even if the common-interest community is sited in a sympathetic jurisdiction; and short-term rentals can be quite disruptive within the community or a larger geographic area. There is no excuse for a newly formed community not to address short-term rentals, for it is exceedingly simple to do so;[189] and although amending the CC&Rs is difficult for existing communities, it should be easier to gain the votes of community members if short-term rentals are truly disruptive.

IV. COMMON-INTEREST COMMUNITIES CAN AND SHOULD REGULATE SHORT-TERM RENTALS

The reform proposed in Part III would be an important step toward reining in short-term rentals to manageable levels and counteracting the negative externalities discussed in Part I. Moreover, common-interest communities are better situated for short-term-rental regulation than cities or municipalities and would be a valuable supplement to government efforts. Although many local governments have made an effort to regulate short-term rentals, they have largely fallen short in effectively enforcing those regulations. The structure and scope of common-interest communities make enforcement of short-term-rental regulations more likely to occur. These communities provide homes for a large proportion of the population and are often located within cities struggling with short-term rentals, meaning regulation in this form would likely have a meaningful impact.[190]

A. Inadequate Governmental Regulation

The negative externalities created by a high volume of short-term rentals persist despite the earnest efforts of local and state governments. Many cities, including those discussed in Part I, regulate short-term rentals, ban them entirely, or are considering extensive regulations of the activity.[191] In theory, these

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188 *See* Section III.A, *supra*.

189 *See id.*

190 *See supra* notes 11–13 and accompanying text.

191 *See generally* Lara Major, Comment, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469 (2016) (survey of modern local, state, and private regulations; case studies of New York, San Francisco, and Portland); Ashley M. Peterson, *Sharing Space*, L.A. LAW., Jan. 2017, at 28 (focusing on California cities' regulation of short-term rentals; briefly discussing New York City regulations). Here are a few examples of existing local regulation of short-term rentals:

(1) New York City, New York, prohibits rental of permanent residential multiple dwellings for fewer

regulation and licensing schemes should curtail short-term rentals to levels acceptable to the needs of a particular city; however, in many cases they have proved inadequate.[192] For example, the San Francisco Planning Department described the task as a "nightmare," partly due to the refusal of Airbnb to release data on hosts.[193] Some commentators have suggested ways by which local governments could improve regulation of short-term rentals.[194] But even if companies such as Airbnb were to disclose the personal details of their host users,[195] or if other suggestions for improving regulations were implemented, government agencies would still be faced with the large task of enforcing their laws. In light of the shortcomings of traditional government regulation of short-term rentals, common-interest communities may be a welcome source of supplemental regulation that can fill in the gaps where governments have failed.

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than thirty days. *See* N.Y. MULT. DWELL. LAW § 4(8)(a) (McKinney 2011) ("'[P]ermanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more . . . ."); Brookford, LLC v. Penraat, 8 N.Y.S.3d 859 (N.Y. Sup. Ct. 2014); N.Y.C. ADMIN. CODE § 27-287.1 (2017) (unlawful to advertise any use that is not permanent residence purposes).

(2) Carlsbad, California, only permits short-term rentals within certain geographic areas and imposes licensing, taxing, and operational requirements on lawful short-term renters. *See* CARLSBAD, CAL., MUN. CODE ch. 5.60 (2017), http://www.qcode.us/codes/carlsbad/.

(3) Santa Monica, California, allows "home-sharing," or rental when the host is living on-site throughout the visitor's stay, but prohibits "vacation rentals," or rentals for exclusive transient use for fewer than thirty days, in permanent residential occupancy zones. *See* SANTA MONICA, CAL., MUN. CODE ch. 6.20 (2017), http://www.qcode.us/codes/santamonica/; *see also* SANTA MONICA, CAL., MUN. CODE § 9.51.030(B)(15)(c) (2017), http://www.qcode.us/codes/santamonica/ (classifying "vacation rentals" as "commercial use").

(4) Portland, Oregon, grants permits only for "accessory short-term rentals," where the primary use of the dwelling is long-term occupancy and only part of the dwelling is used for short-term rental. *What Is an Accessory Short-Term Rental (ASTR)?*, PORTLAND DEV. SERVS., https://www.portlandoregon.gov/bds/article/518658 (last visited Feb. 20, 2019).

192 *See, e.g.*, Katie Benner, *A Brooklyn Neighborhood Where Airbnb Is Being Put to the Test*, N.Y. TIMES (July 3, 2016), https://www.nytimes.com/2016/07/04/technology/a-brooklyn-neighborhood-where-airbnb-is-being-put-to-the-test.html?_r=0. ("[A] report found that 55 percent of the 51,000 or so Airbnb listings in New York City violated a state law that prohibits rental or a residential with three or more units for less than 30 days unless the permanent resident is present."); Jay Barmann, *Airbnb Law Impossible to Enforce, Says Agency Tasked with Enforcement,* SFIST (Mar. 23, 2015, 4:30 PM), http://sfist.com/2015/03/23/airbnb_law_impossible_to_enforce_sa.php [http://perma.cc/H82B-UF8Q] (San Francisco Planning Department faced with "registration nightmare" to enforce ninety-day rental cap; Airbnb would not release data on hosts, making rental activity very difficult to track); Lori Weisberg, *Airbnb Spawns Vacation Rental Confusion*, SAN DIEGO UNION-TRIB. (Mar. 8, 2015, 6:00 PM), http://www.sandiegouniontribune.com/business/tourism/sdut-airbnb-vacation-rental-growth-causing-confusion-2015mar08-story.html (rental companies, homeowners, and local jurisdictions faced with "bewildering array of regulations").

193 Barmann, *supra* note 192.

194 *See, e.g.*, Lee, *supra* note 17; Major, *supra* note 191, at 500–04.

195 *See* Major, *supra* note 191, at 500–01.

B. Common-Interest Communities Are Suited to Regulate Short-Term Rentals

Common-interest community members live under several layers of governance. The state legislature enacts one or several common-interest community statutes; the community's developer creates the community's declaration (and perhaps bylaws and rules); and the community association, managed by its board, promulgates bylaws and rules.[196] These communities also host a struggle between a number of dueling principles.[197] For example, traditional property rules give owners an expectation that they may use their property freely as long as it does not interfere with their neighbors' use and enjoyment, and the common law disfavored servitudes that interfered with free use, especially when successors in interest became involved.[198] Yet an owner who buys into a common-interest community enters into a contractual obligation whereby certain property rights and freedoms are sacrificed to gain benefits enjoyed by all community members.[199] Within this contractual obligation, the law attempts to accommodate the desires of the majority, the rights of the few, the need for the community to adapt, and the judgment of the association and the board.[200] A theme of modern statutory approaches to achieving balance is to grant broad power to regulate communities before any units are sold, but to limit that power to varying degrees once a sale has been made.[201] Of course, whether this works in practice is up for debate.[202]

Given the amalgam of doctrines influencing common-interest community law, this model has been said to "occupy a space that lies somewhere between public governments and private businesses or associations."[203] Common-interest

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196 *See* Part II, *supra*.

197 *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6, Introductory Note (AM. LAW INST. 2000) ("Three strands of law come together in the law governing residential common-interest communities: the law of servitudes; the law governing the forms of ownership used in the community; and the law governing the vehicle used in the community for management of commonly held property or provision of services. Servitudes underlie all common-interest communities, regardless of the ownership and organizational forms used.").

198 *See id.* §§ 4.1, 6.7 cmt. b. The *Restatement* takes the position that common law restrictions on servitudes should be removed: horizontal privity, touch and concern, and similar doctrines should be abolished, and the intent of the parties should always govern interpretation of servitudes rather than a predilection for the free use of land. *See id.* § 4.1 cmt. a.

199 *See* 31 C.J.S. *Estates* § 232 (2018); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6, Introductory Note.

200 *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6, Introductory Note.

201 *See* Part II, *supra*.

202 *See generally Judicial Review of Condominium Rulemaking*, *supra* note 60 (arguing that condominium rulemaking power may be too broad).

203 French, *supra* note 11, at 361; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6, Introductory Note ("Like local governments, community associations have the power to make rules governing some behavior within the community, and the power to enforce the rules with fines and other penalties. They also have the

communities have regulations and provide services that resemble public government, but they are structured around private contracts and corporate models of organization.[204] Yet common-interest communities are not profit-driven, and they are permitted to influence residents' lives in more invasive ways than cities.[205] And most importantly for the subject of this Comment, the intimacy of common-interest communities suggests that enforcement of rules is more likely and may be more effective than city ordinances or state laws.[206] This is partly due to size—these are "communities," after all, not cities, and thus there are usually fewer residents to manage.[207] Communities also have fewer regulations to keep track of because the county or city the community is sited within will handle fire, police, taxes, schools, and other services. Additionally, every property owner, as well as the association, has the power to enforce the CC&Rs, and associations often hire companies to address complaints or conduct inspections.[208] Unlike a government agency, residents of common-interest communities have a personal stake in ensuring that the rules are enforced for the sake of common areas, the use and enjoyment of their own property, and the property values of the community. Whether acting individually or as an association, these residents have many incentives to follow through with enforcement and the power to do so.

There is other evidence that enforcement of short-term-rental restrictions could be more effective if implemented closer to the ground. Many efforts to control rentals have come from residents who are worried about the effects of short-term rentals on their property and neighborhood.[209] And when government

power to enforce the servitudes through judicial action. Like local governments, associations often administer land-use regulations and provide utility services to their members. Unlike local governments, however, association charters are created by private contract and, absent other circumstances, the associations' actions are not state action sufficient to subject them to challenge under the United States Constitution or § 1983 liability.").

[204] *See* French, *supra* note 11, at 361–64.

[205] *See id.* at 364.

[206] *See id.*

[207] For example, the average number of units in a California common-interest community is around 100, and 68% of communities have 50 units or fewer. *California CID Stats and Figures*, VISION 34–35 (2014), https://www.cacm.org/Resources/IndustryData2014.pdf (CACM, the organization that published the statistics, uses the term "common-interest development" (CID)). Thus, 68% of common-interest communities are smaller than the least populated towns in the state (around 200 residents). *California Very Small Towns and Villages (Fewer than 1000 Residents)*, CITY-DATA.COM, http://www.city-data.com/city/California3.html (last visited Feb. 20, 2019). By contrast, Silver Lake, a neighborhood in Los Angeles, has over 30,000 residents. *Silver Lake*, L.A. TIMES, http://maps.latimes.com/neighborhoods/neighborhood/silver-lake/ (last visited Feb. 20, 2019).

[208] French, *supra* note 11, at 364; *see also* Heather Kelly, *Meet the Airbnb Police*, CNN (Oct. 1, 2016, 9:50 AM), http://money.cnn.com/2016/10/01/technology/airbnb-police/index.html (private investigation companies being hired by "[l]andlords, apartment managers, and condo associations" to catch illegal rentals; one company, BNB Shield, uses software to identify potential violations).

[209] *See supra* notes 33–36 and accompanying text.

programs dedicated to the issue are implemented, enforcement may be primarily driven by resident complaints rather than the investigative efforts of the people in charge.[210] Given individual or collective power to shut down short-term rentals, residents would not have to rely on bureaucracy—and the common-interest community model gives residents that ability.[211]

CONCLUSION

Short-term rentals provide substantial benefits to their proprietors and the many lucrative websites that facilitate them. However, they also cause problems for cities and individuals. Unfortunately, local governments that have tried to regulate short-term rentals to varying degrees have found their goals difficult to accomplish due to roadblocks that are not easily cleared. The common-interest community model, on the other hand, could effectively enforce short-term-rental restrictions, but many of these communities feel like they are unable to do so because of a difficult declaration amendment process and an inability to find relief in the courts.

The best solution to this problem is to increase the clarity and precision with which common-interest community governing documents address short-term rentals. A newly formed common-interest community must include a well-drafted rental provision in its declaration, and existing communities should try to resolve the issue internally by amending their declarations to do the same. Additionally, communities that find themselves unable to amend their declaration should be able to exclude some short-term-rental activity via residential use covenants, which many common-interest communities have in their declaration already. Although short-term rentals are not per se incompatible with residential use, many property owners are creating de facto hotels that are unambiguous commercial ventures. With a simple shift in judicial interpretation, which has already occurred in a small number of jurisdictions, common-interest communities would be equipped to eradicate the most harmful instances of short-term-rental activity, and residents would not be unfairly stripped of their right to infrequently rent out their homes. Meanwhile, more nuanced regulation of rentals would still be left up to community associations and local government.

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[210] *See* Policy Analysis Report from Fred Brousseau, *supra* note 36 ("[A]pproximately 92.2 percent of [the Office of Short-Term Rentals'] 322 enforcement cases active since February 2015, . . . were generated by complaints (274) or referrals (23) from other City departments.").

[211] *Cf.* HYATT, *supra* note 51. Of course, it is neither feasible nor desirable for every housing unit in every city to be a part of a common-interest community, and whether grassroots enforcement of short-term-rental bans would be effective in practice is a question outside the scope of this Comment.

Although the proposal of this Comment would certainly not solve the short-term-rental problem, it would be a significant step toward that end.

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* Executive Notes & Comments Editor, *Emory Law Journal*, Volume 68; Emory University School of Law, J.D., 2019; Columbia University, B.A., 2016. Thanks to the incomparable Frank S. Alexander, for his guidance and mentorship; to Fiona O'Carroll and Rebecca Reiman, for their advice on style and substance; to Lindsay McCall, for her keen eye; to Rich Kubiak, for his steadfast leadership; and to Elena Kozlova, Anton Lesaca, Sarah Lipinski, and Lauren Weaver, for their dedication to the minutiae of law journal editing.