

Deed Restrictions and Airbnb

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The “sharing economy”, led by companies such as Uber and Airbnb, is in full force and continues to gain popularity.

I. INTRODUCTION

Of particular interest in the real estate industry is short-term rental with companies such as Airbnb, Home Away and VBRO. These companies offer an online marketplace for people to lease or rent short-term lodging in houses, apartments, vacation homes and the like. Short-term rentals offer travelers an alternative to traditional sources of lodging, such as hotels. Short-term rentals also offer property owners a way to generate extra income from their residence. The rise in popularity of Airbnb and its competitors has led many neighborhoods to confront the question of what to do about short-term rentals. This article discusses the various ways neighborhoods can address short-term rentals.

II. DEED RESTRICTIONS

Neighborhoods with deed restrictions can address short-term rentals in a number of ways that best suit their distinct neighborhood. For instance, it may be the prerogative of some neighborhoods to encourage short-term rentals. On the other hand, a neighborhood may want to restrict or place regulations on short-term rentals. No matter which direction, deed restricted neighborhoods have an array of options in dealing with short-term rentals.

Deed restrictions are private, contractual covenants, placed on the land by property owners. Such restrictions

are often placed in a deed for a specific property. Alternatively, a developer of a subdivision may place deed restrictions on all the property within the subdivision before the first lot is even sold. With a few exceptions, the contents of deed restrictions can be broad. Neighborhoods, therefore, have latitude to address short-term rentals. A neighborhood seeking to address short-term rentals would likely need to amend their deed restrictions to do so. Amendments to deed restrictions usually require a specified percentage of property owners subject to the restrictions to consent to the amendment.

A. Prohibition of Short-Term Rentals

A simple approach to short-term rentals would be a complete prohibition of short-term rentals. Although this may seem like an overreach on the part of a neighborhood, such prohibition would likely be permissible under Texas law.

With the growing popularity of short-term rentals, some neighborhoods have started to amend their deed restrictions to expressly prohibit short-term rentals. Typically, the prohibition would be placed in the “prohibited use” section of the deed restrictions. An important step to prohibit short-term rentals would be to define “short-term rentals” within the deed restrictions. The most common approach is defining short-term rentals as a rental of less than thirty days or one month. For instance, the following is from a neighborhood in Houston that is in the process of amending their deed restrictions to prohibit short-term rentals: “single family residential use ... prohibits ... renting any part of the Residential Dwelling (including any accessory and outbuildings) on a Lot to others for less than one (1) month.”

A complete prohibition approach may be attractive to neighborhoods that already have deed restrictions in place that limit use to single-family only and otherwise prohibit multi-family use. An express prohibition of short-term rentals is a logical extension for such neighborhoods to maintain a close-knit single-family environment.



B. Short-Term Rentals Permitted

Neighborhoods may also choose to permit short-term rentals. Neighborhoods wanting to allow short-term rentals have two primary avenues for achieving such results. First would be expressly stating that short-term rentals are permitted. Deed restrictions generally have a "permitted use" section, which lists the permitted uses within the neighborhood. This section can be amended to include short-term rentals.

A neighborhood, however, need not necessarily amend their deed restrictions to expressly permit short-term rentals. In many deed restrictions, short-term rentals are likely permitted through silence. Deed restrictions, which neither expressly prohibit nor expressly permit short-term rentals, likely, permit short-term rentals by default. Simply put, courts will not enforce restrictions that do not exist.

It may be prudent, however, for neighborhoods desiring to allow short-term rentals to expressly state as such in their deed restrictions. At least two types of common restrictions may prohibit short-term rentals. Neighborhoods with "single-family use" only or "residential only" restrictions, while not expressly prohibiting or permitting short-term rentals, may in fact prohibit such use. An argument can be made that a restriction to "single-family" use only would prohibit short-term rentals. Single-family use is generally interpreted to mean a "nuclear family" or "extended family." Guests staying at a short-term rental could violate this use because the guests are not part of the owner's nuclear family or extended family. Another type of restriction that may prohibit short-term rentals through deed restriction is limiting the property to "residential" only. Arguably placing a residency on Airbnb could violate a residential only requirement because it may be seen as a commercial endeavor of the property owner.

C. Regulating Short-Term Rentals

Neighborhoods can take a third approach and allow short-term rentals subject to various restrictions. This approach would provide neighborhoods the opportunity to allow short-term rentals but subject to specific restrictions that best suit that particular neighborhood's needs.

There are numerous ways a neighborhood could regulate short-term rentals. As a starting point, neighborhoods may apply different rules to owner-occupied short-term rentals (i.e., owner lives in the residence but leases a bedroom or outbuilding on the property on a short-term basis) and non-owner-occupied short-term rentals (i.e., an entire residency is rented on a short-term basis).

One common restriction is occupancy limits. The maximum number of allowable guests is usually tied to the square footage or number of bedrooms of the residency. Another common restriction is use restrictions. For instance, a neighborhood may prohibit certain types of assemblies (e.g., bachelor or bachelorette parties, weddings, family reunions, or the like) allowed to take place in the rental. A neighborhood may also place time restrictions on certain types of uses. For instance, the neighborhood may permit weddings at a residency, but only within a certain time window. Neighborhoods may also restrict where in the neighborhood short-term rentals are permitted. A neighborhood, for example, may permit short-term rentals only on streets that abut commercial areas or larger roads while prohibiting short-term rentals in the more interior parts of the neighborhood.

III. OTHER CONSIDERATIONS

While neighborhoods are free to address short-term rental in a number of ways, there are other considerations that may affect the ability to have short-term rentals in a particular neighborhood.

A. Zoning Ordinances

Short-term rentals are not addressed or regulated in many, if not most, zoning ordinances in Texas. If a zoning ordinance is silent on short-term rentals then, absent any other restriction, a property owner is free to lease their property on a short-term basis.

Several Texas cities, however, have amended their zoning ordinances to regulate short-term rentals. The City of Austin has the most expansive short-term rental regulations in Texas. Such ordinances generally impose various licenses and regulatory requirements, such as occupancy limits, general limitations on uses and

prohibited activities. Some ordinances provide that a conditional use permit must be obtained before short-term rentals are permitted. Other regulations include parking requirements, hotel occupancy tax registration, and annual fire safety inspection, among other requirements.

B. Texas Legislation

This past legislative session, the Texas legislature attempted to preempt city zoning ordinances that regulate short-term rentals. Senate Bill 451, by Senator Kelly Hancock of North Richland Hills, would have prevented Texas cities from banning or regulating short-term rentals. The language was broad and limited the ability of cities to regulate only in limited situations (such as building codes or housing of sex offenders). The bill, however, expressly permitted neighborhoods to govern short-term rentals through their deed restrictions. The bill passed in the Senate but failed to make it out of the House. It is likely that more cities will continue to amend their zoning ordinances, which may prompt the legislature to revisit the bill in the next legislative session.

C. Lease Agreements

Even if a neighborhood allows short-term rentals, renters face an additional hurdle when placing their residence on Airbnb that homeowners do not face. Unless the lease agreement provides otherwise, a tenant may not assign or sublet without the consent of the landlord. A tenant renting out their apartment on Airbnb would most likely constitute a sublease, thus requiring landlord consent. So even if a neighborhood permits short-term rentals, a tenant may need to seek the additional consent of the landlord.

CONCLUSION

As short-term rentals continue to grow in popularity, neighborhoods with deed restrictions have the ability to govern to what extent short-term rentals are permissible. Neighborhoods that are successful in rallying the required property owner approval to amend their deed restrictions will have a number of creative ways to regulate short-term rentals which best suits that neighborhood's distinct characteristics. ■