

We Want Our Neighborhood Back: A North Carolina Homeowners Association's Guide to the Use and Enforcement of Rental Restrictions

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Lending you a cup of sugar, offering to watch the kids, or grilling out on a summer afternoon— whatever the activity, our neighbors are a key part of what makes our communities familiar and unique. Neighbors help make a neighborhood into *your* neighborhood. Ideally, the people you share your community with hold similar values and goals for the place you've chosen to call home.

But what happens when transient tenants and their guests begin to overwhelm the neighborhood amenities? Or when the house next to you becomes a revolving door of weekend renters partying the night away? Tenants may not appreciate the character of your neighborhood and may not share the principles that made you choose to live there in the first place. When faced with these concerns, people often turn to their homeowners association to remedy the problem.

This article considers what, if anything, an association can do to regulate tenants and their guests, and in particular, the impact of "rental restrictions," or rules governing an owner's ability to lease the owner's property. Associations often turn to these restrictions as a solution to concerns about tenants, but be warned—there are complex issues involved in this approach, and it is essential to understand how to navigate this difficult area of the law.

Renting: A Right or a Privilege?

Some of the "rights" of being a homeowner are actually privileges. Using the neighborhood tennis courts, parking on the street, or reserving the clubhouse for a child's birthday party are all benefits of living in a community—but they are privileges that can be taken away for violation of the rules or other reasons.

A common misconception is that renting your property is such a privilege. In fact, your ability to use your property as you desire, including the ability to rent it out, is one of our nation's most fundamental rights. More specifically, it is a right that North Carolina's courts have long valued and continue to fiercely protect. Because the right to rent is so fundamental, any party attempting to limit or restrict that right must prove serious and demonstrable reasons for that limitation. If that wasn't challenging enough, property owners get the benefit of any doubt in this area, and courts resolve any ambiguities or enforceability issues in favor of the free and fair use of property, including renting.

What's more, imposing rental restrictions on owners after they have purchased their property comes with its own set of challenges. Courts in North Carolina are reluctant to enforce subsequently adopted restrictions

because those restrictions may conflict with the owners' reasonable expectations about how they could use their property; expectations that may have encouraged them to buy in the first place. The courts in North Carolina generally find these after-the-purchase restrictions unreasonable and will strike them down.

Learning from Past Mistakes

One of the first steps of an effective strategy to manage rentals is identifying past solutions that have been ineffective or have fallen to successful legal challenges. Two main approaches have been proven not to work:

- Rules that absolutely prohibit owners from leasing their property are generally impermissible; and,
- Rules cannot single out tenants and treat them differently from owners.

Associations are responsible for regulating and maintaining common spaces and enforcing governing documents. So rules regarding use of streets, a pool, or green spaces are backed by the strongest authority of the association. But most of that authority ends at an owner's property line. Rules regarding the use of a lot or unit in the community—like rules prohibiting leases—are traditionally subjected to the highest scrutiny by courts. Because of that, direct prohibitions on an owner's right to rent are likely impermissible.

It's also important not to single out tenants from owners. When tenants lease property, they are paying for more than a right to access the physical property. Tenants are paying for many of the rights and privileges that the owners have, including the right to use streets, recreational amenities, and other common areas. So when tenants lease property they must be treated like the owner would be for the duration of the lease. For example, an association cannot draft a rule allowing owners to park on the street but limiting tenants to garage or driveway parking. That type of rule targets tenants for different treatment and is unlikely to survive a legal challenge.

But Something Has to Be Done

Every situation is unique, and each community should consult with an attorney before adopting or attempting to enforce any rental restriction. That said, some general principles can help guide choices between effective solutions and illegal or ineffective regulations.

The first step is to look in the community's Declaration of Covenants ("Declaration") for any existing rental restrictions. These original restrictions are typically created when the community is first created, and are far more likely to be upheld than restrictions which are added after-the-fact because the buyers agreed to these restrictions when they purchased their property. Their agreement prevents them from later arguing that they bought their property with the expectation of renting it out.

Beyond that, communities cannot be accused of targeting specific tenants or owners if the restrictions were in place from the start. But even these original restrictions are subject to limits. Courts will still weigh the restriction against the "right to rent," and even original prohibitions may not survive that test.

If there are no original restrictions, a community may look into amending its Declaration to place some regulations on owners. These amendments are typically subject to legal challenges, both substantively for the ways they limit owners' rights, and procedurally for the way the amendment was presented and passed.

Examples of restrictions that may be proper, enforceable amendments to a Declaration include:

- Requiring minimum lease terms;
- Requiring all owners to use an association approved lease form; and,
- Mandating that all leases require tenants to agree to abide by the same neighborhood rules as owners.

Minimum lease terms may specifically address the hot-button issue of short term rental apps like Airbnb, VRBO, HomeAway, and others.

The most effective means of dealing with a perceived rental problem may simply be the enforcement of existing rules. Associations typically have no direct power over tenants (because the tenant only has a contract with the homeowner and is not bound by the Declaration), but that does not mean the association has to sit idly by as neighborhood rules are violated.

Associations can either adopt an approved lease form that contains terms making tenants directly responsible, or the association can hold the owner responsible for any actions of the tenant. This "indirect" enforcement puts owners on the hook for the actions of their tenants and may make owners less likely to lease their properties in the first place. Associations using this method should be careful to avoid inconsistent enforcement such as only enforcing rules against tenants. Any actions of the community that may be seen to specifically target tenants as a class are susceptible to a successful challenge.

Along that same line of equal treatment, communities are free to pass neighborhood rules that apply to owners and tenants alike. For example a rule prohibiting anyone from parking on the street or assigning lots swimming pool access on staggered days. This may seem like an unfair compromise because the owners are being "punished" by a restriction designed for tenants, but equally applied rules are the most likely to withstand attack. Every association should work with an attorney to tailor new regulations to the unique situation of their community.

Conclusion

A homeowners association seeking to regulate rentals faces a thorny path full of procedural and substantive obstacles. But every case is different, just like your neighborhood's unique charm that made you choose it in the first place. An association working with an attorney should be able to craft a strategy that will help keep or regain that charm and ensure that your neighborhood stays *your* neighborhood.

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