

December 2018

The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals and HOAs

Donald J. Kochan

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals and HOAs*, 86 U. Cin. L. Rev. 893 (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss3/1>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

THE SHARING STICK
IN THE PROPERTY RIGHTS BUNDLE:
THE CASE OF SHORT TERM RENTALS & HOAS

*Donald J. Kochan**

Abstract

Property owners are now more than ever exercising the “sharing stick” in their metaphorical bundle of property rights. This Article examines the right to share one’s property with others as a branch, stemming from the inclusion stick, that itself grows out of the exclusion right held by property owners, along with the legal consequences of that characterization.

The right to share, like other rights, can be given up when an owner joins a common interest community (CIC). However, when owners enter CICs and agree to governance by a homeowner association (HOA), they retain whatever residual parts of their ownership bundle they do not give up. Recent CIC and HOA cases examined in this Article illuminate the existence of a “right to share,” where the default rule is that owners of real property have the right to engage in short term rentals unless they have expressly alienated that right through some private agreement. It will only be abrogated upon identifiable language in the initial CIC agreement making such diminishment of the right possible.

The issues in several recent cases discussed here, regarding whether HOAs can create or enforce rules through their covenants, conditions, and

* Parker S. Kennedy Professor in Law and Associate Dean for Research & Faculty Development, Chapman University School of Law. J.D., Cornell Law School, 1998; B.A. Western Michigan University, 1995. This Article evolved from my remarks titled “Traditional Property Principles Confronting a Changing World: Selected Recent Case Developments,” delivered on the “Professors Panel” at the American Bar Association’s Real Property, Trusts, & Estates (RPTE) Law Section Annual Spring Symposium in Denver, Colorado, on April 21, 2017. I thank Wilson Freyermuth for organizing that panel and for the invitation to participate, as well as for offering comments on the Article. I also appreciate the research assistance of Bethany Espinosa and the editorial suggestions of Jennifer Spinella in completing this project.

restrictions (CC&Rs) that prohibit short term rentals, are in essence asking whether the association and community are empowered to limit the sharing stick in the bundle. The primary questions discussed relate to whether, when, and how an association can impose limitations or prohibitions on short term rentals under existing authorities where such express substantive authority is not clearly, expressly given, and when the CIC must instead seek to undertake extraordinary measures like amendment to a CIC's declaration in order to empower an HOA to so limit where it could not before. This Article concludes that the judicial interpretation of scope of CIC and HOA authority in relation to short term rentals demonstrates the strength of the sharing right. However, these cases also reveal that this sharing right may be consensually limited if the initial CIC declaration or valid subsequent amendments grant the proper HOA authority to do so.

I. INTRODUCTION

Short term rentals (STRs) of dwelling units—while not an entirely new phenomena—have “exploded” in popularity with the rise of the “sharing economy,” the emergence of companies facilitating such rentals like Airbnb and HomeAway, and the development of the entire infrastructure and technological assistance that lowers transactions costs associated with such arrangements.¹ Property owners are exercising the “sharing stick” in their property rights bundle now more than ever. Not

1. The *Washington Post* Editorial Board opined on the trend in early 2017:

Home-sharing services such as Airbnb have exploded over the past few years, which is good. Travelers get more options — both in terms of price and location — and property owners can make money on spare rooms or on their apartments while they are away. With some basic regulations, meanwhile, cities can become more attractive to visitors and collect hotel tax revenues. Win-win-win.

See, e.g., Editorial, *The District's Airbnb Bill is Too Restrictive*, WASH. POST, (Feb. 4, 2017) at https://www.washingtonpost.com/opinions/the-districts-airbnb-bill-is-too-restrictive/2017/02/04/556c1d66-e993-11e6-80c2-30e57e57e05d_story.html?utm_term=.96c022aeb3eb;

see also Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 63 (2016) (“a new economic phenomenon is gradually changing the rules of the game. The sharing economy has taken the media, social networks, and public discourse by storm.”); *The Rise of the Sharing Economy: On the Internet, Everything is for Hire*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

surprisingly, the increased adaptation of residential properties into units available for short term stays by strangers, with occupancy that is more dynamic, has generated controversy—including because neighbors are not always happy with what they see as a disruptive transformation of a previously more stable community due to a rise in transient occupancy.²

While debates over how to handle or potentially regulate such disruption are occurring generally within communities of all types, the use of short term rentals inside common interest communities (CICs) with homeowners associations (HOAs) raise particularly interesting legal issues. CICs and HOAs are designed to create governance rules and mechanisms that appeal to some purchasers. Individuals wishing to receive the benefits of these structures can buy into the CIC as offered by developers, accepting restrictions on their autonomy in the process. The combined collective of purchasers with common preferences that buy in can thereby enter into private agreements with enforceable mandates—enforced primarily through “declarations” and associated covenants, conditions, and restrictions (CC&Rs).³

New battles are brewing within CICs where some owners wish to take advantage of their rights to offer their homes for short term rentals while other community members see negative externalities from such rights that they wish to curtail. Among the questions raised in such clashes are three of particular interest for this Article. First, do existing community declarations and rules already prohibit short term rentals under provisions that limit units to “residential” purposes, “single family homes,” non-commercial uses, non-transient uses, or the like? Second, if existing association rules do not yet prohibit short term rentals, may associations or boards amend the rules to prohibit or otherwise limit short term rentals? Finally, if associations or boards do not have wide enough authority to amend ordinary rules to prohibit or otherwise limit short term rentals, may the bylaws or declaration of the CIC be changed, following appropriate procedures set out in the community’s governing documents, to so prohibit or limit such short term rentals? This Article examines recent case developments that provide some answers to, and guidance on, these questions.

As explained in later parts of this Article, the cases have shaken out in a way that supports the existence of a “sharing stick” within the bundle of sticks representing property rights to which property owners are

2. Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 502-03 (2016) (“The sharing economy—the rapidly evolving sector of peer-to-peer transactions epitomized by Airbnb and Uber—is nothing if not controversial.”).

3. ROBERT G. NATELSON, *LAW OF PROPERTY OWNERS ASSOCIATIONS* §2.4 (1989) (explaining the role of general declarations, CC&Rs and bylaws); *see also generally* Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

entitled to lay claim. In other words, the case law supports the existence of a “right to share,” where the default rule is that owners of real property have the right to engage in short term rentals unless they have expressly alienated that right through some private agreement. Such sharing rights, while alienable, are, of course, subject to regulation in the ordinary course of municipal, state, and federal governance—but these topics of public land use controls are beyond the scope of this article.⁴

Part II introduces some basic background on the sharing economy, including homesharing through short term rentals. Part III explains why sharing is a stick in a property owner’s bundle of rights, branching off from the right to include others in the access, use and enjoyment of one’s property. This characterization of sharing as a right is critical to understanding how it can be regulated (by private or public governing structures) and also to how agreements, including declarations in common interest communities, should be interpreted in relation to the retained rights of community owners and the rights subject to community control. Part IV discusses the bargain an owner makes when agreeing to be governed by common interest community rules. In particular, Part IV explains the level of acceptable indeterminacy of rights and assumption of risk when a property owner in a governed community consents to future changes in the CC&Rs. Part V then focuses on recent case developments that provide some insight into when and how common interest communities can prohibit or regulate short term rentals. Part V also examines the different standards applied by courts when reviewing changes in rules where the scope of HOA board authority is more constrained and when reviewing changes effected by amendment through supermajority procedures where approval is more liberally granted in the courts. Part V is focused on examining HOA scope of authority issues, but does not address issues associated with the next step of concern—how the courts might police the exercise of that authority through appropriateness, reasonableness, or business judgment standards. Those issues are left for later work.

This Article concludes that the interpretation of scope of authority and amendment concerns associated with the short term rental controversies in the courts demonstrate the strength of the sharing right, however these cases also reveal that this sharing right may be consensually limited if the initial CIC declaration or valid subsequent amendments grant the HOA proper authority to do so. While the sharing stick is strong, it is alienable. It is, like other rights, capable of

4. See generally, e.g., Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. LEG. 147 (2016) (providing an overview of regulatory models and theories for the sharing economy); Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397 (2016) (building on insights from pluralistic theory to develop a contextual regulatory model for the sharing economy).

becoming subject to voluntarily accepted constraints, when an owner chooses to otherwise take advantage of the perceived benefits of common interest community living by ceding certain rights.⁵

II. THE EVOLVING AND EXPANDING SHARING ECONOMY AND SHORT TERM RENTALS

The concept of sharing—while part of human culture from its origins—has evolved into a sophisticated and coordinated system of market engagement.⁶ Enterprising individuals have identified ways to feed the sharing spirit. They are responding to the demand for alternative means of access to property and goods by capitalizing on new platforms that can facilitate collaborative, access-based consumption.⁷ Miller has explained that, because of these new forces, “[s]haring is no longer an idiosyncratic pursuit; it is now a mainstream manner of consumption.”⁸ Although a relatively new phenomenon, the literature on the sharing economy is already substantial,⁹ where many

5. See, e.g., Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 n.20 (1982) (“decision to join an association is as voluntary as a human decision can be”).

6. See, e.g., John J. Horton & Richard J. Zeckhauser, *Owning, Using and Renting: Some Simple Economics of the “Sharing Economy,”* Harv. Kennedy Sch. Faculty Research Working Paper No. RWP 16-007, Feb. 10, 2016, available at <https://research.hks.harvard.edu/publications/getFile.aspx?id=1307>, at 1 (“In recent years, technology startup firms have created a new kind of rental market, in which owners sometimes use their assets for personal consumption and sometimes rent them out. Such markets are referred to as peer-to-peer or ‘sharing economy’ markets.”).

7. See, e.g., Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 40 TUL. L. REV. 241, 243 (2015) (explaining “collaborative consumption” and “peer-to-peer” as alternative labels to describe “the sharing economy”); Shu-Yi Oei & Diane M. Ring, *Can Sharing be Taxed?*, 93 WASH. U. L. REV. 989, 991 (2016) (“Also known as ‘collaborative consumption,’ the ‘peer-to-peer economy’ or ‘peer-to-peer consumption,’ a broad range of commentators suggest that the sharing economy is transforming the way people consume and supply goods and services, such as transportation, accommodations, and task help.”); Juho Hamari, Mimmi Sjöklint, & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, J. ASS’N. INFO. SCI. & TECH., July 2015, at 2049, available at https://www.researchgate.net/publication/255698095_The_Sharing_Economy_Why_People_Participate_in_Collaborative_Consumption (“We define the term CC broadly as the peer-to-peer-based activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services.”); Miller, *supra* note 4, at 150 (describing alternative names including “collaborative consumption” and “access-based consumption”).

8. Miller, *supra* note 4, at 201.

9. See, e.g., RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* (2010); Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215 (2016); John Infranca, *Intermediary Institutions and the Sharing Economy*, 90 TUL. L. REV. ONLINE 29, 31 (2016); Miller, *supra* note 4; Zale, *supra* note 2, at 502-03 (“The sharing economy—the rapidly evolving sector of peer-to-peer transactions epitomized by Airbnb and Uber—is nothing if not controversial.”); Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69, 70 (2015); Dyal-Chand, *Regulating Sharing*, *supra* note 7; Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The*

articles have provided comprehensive summaries and analyses generally of various and diverse sharing markets. As such, this Article will only briefly sketch the homesharing and short term rental market to provide context for our later discussion on the existence of a sharing stick in the bundle of property rights and our analysis of homeowner association reactions to homesharing.¹⁰

“Sharing” as used in the “sharing economy” generally means that assets or services—like one’s home in the homesharing and short term rentals markets—are allowed to be accessed, possessed, used or consumed by someone other than the property owner (or, in other contexts, the provider of the services).¹¹ The rationale underlying the efficiencies of sharing for property owners, consumers, and the overall market rests on the idea of tapping underutilized resources and making them accessible to be used. Koopman et al., posit, “It is helpful to think of the sharing economy as any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets.”¹² Sharers are owners with assets that have become capable of economically being monetized with the aid of technology¹³ and sharees have found new products being marketed to them that were unavailable before or, if available, at higher prices and with less choice.¹⁴

Case for Policy Change, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 530-31 (2015); Kreiczer-Levy, *supra* note 1; Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647 (2013); Aloni, *supra* note 4.

10. For a good primer on homesharing, see Georgios Zervas, David Proserpio, & John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, B.U. Sch. Mgmt. Research Paper No. 2013-16, last revised Nov. 18, 2016, at 2 available at <http://ssrn.com/abstract=2366898> (for example, reporting Airbnb as having an estimated valuation at over \$30 billion).

11. As I have summarized elsewhere:

[P]roperty that is shared in this sector is used or accessed rather than owned[;] the transfer of possession to facilitate such use or access is temporary rather than permanent and involves something less than granting an ownership share[;] . . . the sharer retains ownership the entire time and has an enforceable expectation for a return of any property and the cessation of use at a pre-determined future point in time.

Donald J. Kochan, *I Share, Therefore It’s Mine*, 51 U. RICH. L. REV. 909, 931 (2017); see also Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shareddefinition> (describing the sharing economy as an “economic model based on sharing underutilized assets . . . for monetary or non-monetary benefits.”).

12. Koopman et al., *supra* note 9, at 531.

13. Kreiczer-Levy, *Consumption Property*, *supra* note 1, at 76 (“From the owner’s perspective, there are certain types of goods that have excess capacity when they are privately owned and consumed. Because the excess capacity is not used, certain types of goods are systematically underexploited.” (emphasis added)).

14. Dyal-Chand, *Regulating Sharing*, *supra* note 7, at 253-54 (“In the areas of home and car sharing . . . individuals also share the excess capacity of assets that they do not fully use or need for themselves with strangers—for a price.”).

“Property sharing,” according to Professor Zale, includes homesharing and occurs “when property owned or possessed by Party A is temporarily used or accessed by Party B (either exclusively or simultaneously with A), with ownership or possession returning to Party A after an agreed-upon period of time.”¹⁵ Property sharing is only one category of sharing evolving in the present marketplace and thereby “makes up only part of the overall sharing economy.”¹⁶ In previous work, I have proposed the following definition for “sharing” in the sharing economy, which is particularly sensitive to the ideas that (1) property owners are sharing things they own, (2) are doing so precisely because they have the power to do so as owners, because (3) they own a sharing stick in their bundle of property rights:

Sharing of a good or real property exists when Owner (O) exercises her right to include by authorizing a Stranger to the property (S) the temporary right to use or access O’s property in some limited and defined manner—converting what would have been a trespassory act by S into a legal, non-trespassory act—where such authorization is revocable by O in property law but where liability may exist in contract for any such revocation or interference by O in the rights or authority granted by O to S.¹⁷

Because one owns what they share, sharing and non-sharing are available choices. When an owner chooses to share with another—i.e., exercises their right to include another in the access and benefits of her property—she may also then set the terms of the inclusion and charge for the benefits, as property owners do when they engage in short term rentals for homesharing.

The reason we have seen the rise of Airbnb, HomeAway, VRBO, and other homesharing platforms—not to mention the platforms for sharing other types of property, goods, and services—is not just demand, it is also the advent of technological capacity that has only recently materialized to create the necessary market infrastructure, complete with reliability and security measures, necessary to make such sharing efficient.¹⁸ As lower-cost, higher reliability mechanisms for making sharing more accessible and more profitable improve, expansion of

15. Zale, *supra* note 2, at 511-12.

16. *Id.* at 512.

17. Kochan, *supra* note 11, at 947.

18. Barry & Caron, *supra* note 9, at 70-71 (2015); see also Kreiczer-Levy, *Consumption Property*, *supra* note 1, at 77 (discussing how “new technologies and online markets have significantly lowered transaction costs for short term use of personal assets”); *The Rise of the Sharing Economy*, *supra* note 1 (“technology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale”).

sharing activity follows. Professor Lee explains that new “[t]echnology has enabled innovative forms of exchange to emerge, spanning an ever-broader range of products and services.”¹⁹ Making connections between suppliers of shared products and consumers is cheaper and easier because of information technology.²⁰ Internet-based social networking capabilities and popularity also take some of the risk out of contracting with strangers. Trust- and reputation-networks that create monitoring, verification, and quality-control mechanisms are key management tools that make using sharing platforms attractive and less dangerous.²¹ Reliable monitoring and rating systems simply could not exist at the scale now available without the development of the information technology and internet networking capabilities brought to us by technological innovation. These systems generate confidence for consumers and for suppliers, each made more comfortable entering these sharing arrangements because they know accountability and reputational rating systems are available to assist their decisionmaking and deter bad behavior.²² A story in *The Economist* articulated it as a system where “the availability of more data about people and things . . . allows physical assets to be disaggregated and consumed as services.”²³ This technological infrastructure supports the sharing economy because it provides “the market-thickening coordination mechanisms . . . such as coordinating on time and geography” previously present only in physical markets rather than online.²⁴

Homesharing—along with other types—has become a major market force. Airbnb,²⁵ for example, which was founded only in 2008, already has reportedly “raised more than \$3 billion and secured a \$1 billion line of credit.”²⁶ Upon statements by Airbnb’s chief executive that it could be ready to go public in 2018, “[i]nvestors have pegged Airbnb’s value at around \$30 billion.”²⁷ That company boasts that it alone has

19. Julia Y. Lee, *Trust and Social Commerce*, 77 U. PITT. L. REV. 137, 141 (2015).

20. Hamari et al, *supra* note 7, at 2048 (crediting technological advances as simplifying “sharing of both physical and nonphysical goods and services”); Oei & Ring, *supra* note 7, at 991 (“The technological platforms employed by these startups enable individual producers and consumers to transact with each other with unprecedented ease.”).

21. Horton & Zeckhauser, *supra* note 6, at 2, 8 (explaining that the sharing economy businesses have proliferated in part because of technological advances but also emerging “recommender systems and reputation systems . . . are central to the function of P2P rental markets.”).

22. *Id.* at 7 (“key challenge in all markets is facilitating trust among strangers”).

23. *The Rise of the Sharing Economy*, *supra* note 1.

24. Horton & Zeckhauser, *supra* note 6, at 7.

25. AIRBNB, www.airbnb.com (last visited November 25, 2018).

26. Katie Benner, *Inside the Hotel Industry’s Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), at <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html>.

27. *Id.*

facilitated about 150 million people staying in the shared homes of others in more than 191 countries.²⁸ Moreover, Airbnb is just one company – others such as HomeAway,²⁹ VRBO,³⁰ HomeExchange,³¹ Love Home Swap,³² and even more local exchange networks like ParisBestLodge³³ offer similar platforms to facilitate homesharing transactions for short term rentals. While not everyone who uses homesharing ends up staying at properties within common interest communities, many have been so located and many more community property owners and homesharing consumers will want to engage in short term rentals in HOA-governed properties in the days ahead. Undoubtedly, some neighbors in those CICs will object. Thus, it is critical to evaluate why property owners generally have a right to share (discussed next in Part III) and how those rights are affected when a property owner purchases within a common interest community and is thereby subject to its governance rules and amendment structures (discussed in Parts IV-V).

III. THE RIGHT TO INCLUDE AND THE “SHARING STICK” IN THE PROPERTY RIGHTS BUNDLE

As I have explained in more detail elsewhere, “the *sharing* right [is] an outgrowth of the *inclusion* right, which itself grows out of the *exclusion* right held by property owners.”³⁴ Penner has posited, “The ability to share one’s things, or let others use them, is fundamental in the idea of property.”³⁵ If one owns property, then they control access to it.

A common metaphor for describing the rights associated with property ownership is as a “bundle of sticks,” with each “stick” in “the bundle” representing some specific attribute of such ownership. Guzman provides an excellent description of what it means to have a stick in the bundle of property rights:

Legal theory divorces the term “property” from the item itself to instead describe relative rights vis-a-vis that item. “Property” thus means things one can do *with* Blackacre (entitlements) including

28. *Id.*

29. HOMEAWAY, www.homeaway.com (last visited November 25, 2018).

30. VRBO, www.vrbo.com (last visited November 25, 2018).

31. HOMEEXCHANGE, www.homeexchange.com (last visited November 25, 2018).

32. LOVE HOME SWAP, www.lovehomeswap.com (last visited November 25, 2018).

33. PARIS BEST LODGE, www.parisbestlodge.com (last visited November 25, 2018).

34. Kochan, *supra* note 11, at 933.

35. James E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 745 (1996).

its use, possession and consumption, as well as enjoying its fruits, the ability to exclude others from its use, and the ability to transfer it. Although ownership suggests the assemblage of all such rights in one person who then totes the full “bundle of sticks,” one may properly speak of “owning” a lone entitlement or stick . . . Legally, the *right itself* is the property.³⁶

Similarly, according to the U.S. Supreme Court, “A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”³⁷

The logical existence of the “sharing stick” in the bundle of property rights emerges once one examines—as this Part will—the right to exclude and the corollary right to include (and its component sharing branch).³⁸ Inclusion is one of the rights associated with property ownership, i.e., one of the sticks in the ownership bundle.³⁹ This Part explains why the right to include is an essential stick in the property rights bundle, which includes its own “branch” which I will call the “sharing stick in the bundle” that represents an equally important, independent and enforceable property right.

The Supreme Court has regularly given the “right to exclude” recognition as fundamental to property.⁴⁰ Property owners have a

36. Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 614-15 (2000).

37. *United States v. Craft*, 535 U.S. 274 (2002) (citing BENJAMIN CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000) and *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984)); see also generally Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57 (2013) (making the case for the utility of the bundle of sticks metaphor for understanding many of the issues related to property in property law).

38. DUKEMINIER ET AL., PROPERTY 104 (8th ed. 2014) (discussing exclusion and inclusion as the “necessary and sufficient conditions of transferability”).

39. Grey’s formulation of the things/bundles debate is illuminative:

Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*. To own property is to have exclusive control over something – to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership. By contrast, the theory of property rights held by the modern specialist . . . fragments the robust unitary conception of ownership into a more shadowy “bundle of rights.”

Thomas C. Grey, *The Disintegration of Property*, NOMOS XXII 69, 69 (1980), reprinted in LIBERTY, PROPERTY, AND THE LAW: MODERN UNDERSTANDINGS OF LIBERTY AND PROPERTY 291 (Richard A. Epstein, ed., 2000); see also Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1061 (1989) (“[t]he bundle metaphor...expresses a special sense of the separability of the various sorts of legally recognized interests”).

40. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others”); see also *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) (“Property depends upon exclusion

level of dominion and control that allows them to manage property rights, including the power to exercise the right to include which is an extension of the choice to not assert the right to exclude. Kelly conducted exhaustive research and analysis on the ubiquity of the right to include within property law, and he concluded, “the ability of owners to ‘include’ others in their property is a central attribute of ownership and fundamental to any system of private property.”⁴¹

Further, this ability to include makes possible mutually beneficial exchanges—owners are willing to respond to demand from friends and strangers alike who are willing to offer something of value as consideration in exchange for being allowed to access the owner’s property. In other words, sharing is made possible. Dukeminier et al. describe this combination as “a relationship among people that entitles so-called owners to *include* (that is, permit) or *exclude* (that is, deny) use or possession of the owned property by other people.”⁴² Sharing through short term rentals involves an owner permitting another—who might often be a stranger—to share with the owner the benefits that the property has to offer. The owner converts the stranger’s status from what would be a trespasser into someone with legal rights to temporary possession and use.

The sharer retains ownership but allows the sharee a privileged use of the property. Sharing—including through homesharing contracts—becomes an extension of the primary rights associated with one’s ability to use and control the property one owns, including to grant access and usage rights.⁴³ That is why Dukeminier et al. conclude that “[t]he two rights [to exclude and to include] are the necessary and sufficient conditions of transferability.”⁴⁴ The inclusion stick and the sharing stick (that offshoots as a branch stemming from it) empower owners to permit non-owners to access and use their property, including through mechanisms like short term rentals.⁴⁵

by law from interference”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it.”).

41. Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 859 (2014); see also Donald Kochan, *Property as a Vehicle of Inclusion to Promote Human Sociability*, JOTWELL (January 22, 2016) (reviewing Kelly, *supra*), <http://property.jotwell.com/property-as-a-vehicle-of-inclusion-to-promote-human-sociability/>.

42. DUKEMINIER ET AL., PROPERTY 104 (8th ed. 2014).

43. Hamari et al., *supra* note 7, at 2049 (citing Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39(4) J. CONSUMER RES. 882–83 (2012)) (“[a]ccess over ownership means that users may offer and share their goods and services to other users for a limited time through peer-to-peer sharing activities, such as renting and lending.”).

44. DUKEMINIER ET AL., PROPERTY 104 (8th ed. 2014).

45. Kelly, *supra* note 41, at 871-72.

Although homeowners give up certain rights and agree to allow their ownership to be controlled in some ways when entering a common interest community with governance rules, they retain whatever residual parts of their ownership bundle they do not give up.⁴⁶ Thus, it is critical to have a sound understanding of what is included in the pre-agreement bundle of rights that would otherwise be available before subjecting property to a common interest community declaration. That understanding will facilitate the calculation of what was subtracted and what remains.

As will be discussed in more detail in Part V, the litigation over whether homeowners associations may impose limitations on short term rentals is validation for the position that inclusion and sharing constitute default sticks in one's property ownership bundle. The issues in such cases, regarding whether homeowners associations can create or enforce rules through their CC&R's that prohibit short term rentals, are in essence asking whether the association and community are empowered to limit the sharing stick in the bundle.⁴⁷

Living in a common interest community is all about giving up certain rights of ownership (i.e. giving up certain sticks, if you will) in order to gain the benefits of community living.⁴⁸ Included in those benefits is the comfort, confidence and security that, while you give up a certain right to do X, you know that your neighbor has reciprocally given up the right to do X as well, and furthermore has given you the means to enforce the obligation as much as the neighbor can do the same. Presumably, you value more living in a neighborhood where your neighbor cannot do X than you value your own ability to do X. It is a matter of valuing reciprocal obligation.

In order to determine what rights an owner gave up and what she didn't give up, we need to know the starting package—what was the full complement of ownership rights before agreeing to live under the common interest community covenants, conditions, and restrictions. We look at what the owner has *ex ante* (or would have if she purchased a similar lot outside community rule), what autonomy she agreed to

46. *See, e.g.*, *Grave de Peralta v. Blackberry Mountain Ass'n, Inc.*, 726 S.E.2d 789, 792 (Ga. Ct. App. 2012) (citing and quoting *England v. Atkinson*, 196 Ga. 181, 184(1), 26 S.E.2d 431 (1943) (“When it is sought to restrict one in the use of his own private property for any lawful purpose, the ground for such interference must be clear and indubitable. The word indubitable in its literal sense means without doubt.”)).

47. *See, e.g.*, *Adams v. Kimberley One Townhouse Owner's Association, Inc.*, 352 P.3d 492 (2015) (citing cases from multiple jurisdictions dealing with HOA authority to restrict short-term rentals).

48. Paula Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U.J.L. & POL'Y 663, 671 (2000) (“Restrictions on use are an integral, essential aspect of any common interest community, generally regarded as vital to preserving the stable, planned environment that shared ownership aims to foster.”).

surrender for the benefits of the community, and what residual rights were retained.

Thus, before community living, an owner, for example, might have the right to paint her house whatever color she wishes, might be allowed to have a pet, and might be allowed to display signs in her windows. Yet, she may agree to limits on those rights by joining the community and its governance scheme. She might value not living next to a neighbor with a pit bull more than she values owning a poodle, might value not looking at a “Trump for President” sign more than she values displaying a “Clinton for President” sign, and might value being free from viewing a florescent pink house out her window more than she values painting her own house green so she agrees to a brown color scheme within the community. However, if the community rules say nothing on these rights and do not authorize the HOA to create rules related to them, then she has retained those rights and has not consented to their control by the HOA (other than by generally applicable rules as to the exercise of rights—like nuisance provisions or assessments for damages to community property, for example).

The same alienability questions arise with the sharing right. It is possible for an owner to surrender the sharing stick under a common interest community agreement just like any other right, but the owner starts with it inside her bundle absent the agreement or if she were to buy in a place not requiring submission to association rules. It is an ingredient in her ownership package until it is not. She may consent to part with it, but like other rights inherent in ownership, we must examine the facts to determine whether that sharing stick, which begins inside the bundle, has been voluntarily been made unassertable and unexercisable. Unless the sharing stick has been removed from the owner’s collection of enforceable rights within her ownership bundle (such as by subjecting her control and use decisions to a collective governance body by joining an HOA and committing to certain CC&Rs), such owner has retained the default right to share her property with others, including through short term rentals.⁴⁹

IV. SOME BACKGROUND ON THE ASSUMPTION OF RISK OF RIGHTS’ CURTAILMENT BY OWNERS PURCHASING PROPERTY WITHIN COMMON INTEREST COMMUNITIES

When a common interest community is formed and the initial declaration and bylaws are created, the scope of initial and possible

49. *Grave de Peralta v. Blackberry Mountain Ass’n, Inc.*, 726 S.E.2d 789, 792 (Ga. Ct. App. 2012) (covenants silent on rentals did not authorize limits on STRs, especially because “restrictions upon an owner’s use of land must be clearly established” in covenants if such uses are to be precluded).

future restrictions is identified through sometimes broadly worded covenants, conditions, and restrictions with delegated rulemaking authority to the HOA to implement the declaration's mandate.⁵⁰ If a rule can be adopted within the scope of the delegated authority, the HOA is empowered to create such a rule through what might be called the ordinary course⁵¹—general procedures of HOA board voting, often requiring simple majority of that HOA representative body, as contrasted with extraordinary measures requiring voting by all constituent owners before major changes may be adopted.⁵²

On the latter matters, at the time the common interest community is formed, it also usually sets forth in its bylaws the manner by which the general governance declaration can be amended, including expanding or contracting the scope of HOA authority by altering the substantive breadth of the covenants, conditions, and restrictions.⁵³ These are often subject to requirements for votes by a supermajority of property owners in the community and other procedures that are meant to make such changes difficult, work to keep the rules relatively stable, and are designed to generate consensus for change.⁵⁴ Such amendments change the HOA board's authorization to act as an agent of the community.⁵⁵ Thus, even if an HOA board cannot regulate STRs under the initial authorization—for example, when it cannot twist CC&Rs limiting dwellings to residential purposes far enough to find authority to ban STRs—it might gain that authority after a declaration amendment.⁵⁶

In either of these situations—by ordinary HOA rulemaking or by CIC amendment—matters of consent arise regarding whether and how certain rights will be governed or are governable, both now and in the future. This Part will briefly explore the consequence of purchasing property in a CIC subject to its rule structures, including governance bodies like HOAs.

50. See Franzese, *supra* note 48, at 672 (“Typically, restrictions are imposed in the community’s declaration of covenants, conditions, and restrictions (CC&R) (alternatively called the “Declaration of Condominium”) or by board-passed resolution or decision, usually rendered on a case-by-case basis in response to a given resident’s application to do something not specifically allowed or proscribed by the CC&R.”).

51. NATELSON, *supra* note 3, at §4.1 (discussing association rulemaking powers and their limits)

52. *Id.* §3.3.2.1 (describing typical supermajority vote requirements for extraordinary actions while simple majority rule governs ordinary actions).

53. *Id.* §3.4.2 (describing sources of association powers).

54. *Id.*

55. *Id.* §2.5 (“In a subdivision in which the servitudes have created a Property owners Association, the founders purposes [as identified in the declaration] are central to determining the association’s proper organization, powers, and duties.”).

56. See, e.g., *North Country Properties, LLC v. Lost Acres Homeowners Ass’n of Burnett*, 879 N.W.2d 810, ¶¶ 5, 8 (Ct. App. Wisc. 2016) (unpublished) (upholding restriction on short term rentals after “requisite number of lot owners agreed to and recorded the amendments prohibiting”).

Property owners choose to enter common interest communities and are willing to be “governed” and “limited” in their rights to achieve their preferences to live in a community of ordered rules.⁵⁷ The voluntariness of the exercise is key, for individuals need not subject themselves to such private governance.⁵⁸ However, property owners are willing to give up considerable autonomy by joining common interest communities and subjecting themselves to governance by HOAs in order to get the benefits of living in such a community. As the California Supreme Court explained in *Nahrstedt v. Lakeside Village Condominium Association*, “subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development.”⁵⁹ In *Hidden Harbour Estates, Inc. v. Norman*,⁶⁰ a Florida state court captured well the autonomy/governance tradeoffs involved in common interest communities. In its oft-cited description, the court discussed the voluntary relinquishment by homeowners of freedom of choice when entering into condominium or other common interest communities:

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium

57. See, e.g., Timothy Egan, *The Serene Fortress: Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, Sec. 1, at 1 (“The fastest-growing residential communities in the nation are private and usually gated, governed by a thicket of covenants, codes, and restrictions” where individuals have “chosen to wall themselves off, opting for private government”).

58. Consider the following description of the balance struck when choosing to voluntarily subject one’s self and her property to a private governance system:

[A]greement to submit to the decisionmaking authority of a cooperative board is voluntary in a sense that submission to government authority is not; there is always the freedom not to purchase the apartment. The stability offered by community control, through a board, has its own economic and social benefits, and purchase of a cooperative apartment represents a voluntary choice to cede certain of the privileges of single ownership to a governing body, often made up of fellow tenants who volunteer their time, without compensation. The board, in return, takes on the burden of managing the property for the benefit of the proprietary lessees.

Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 536-37 (N.Y. 1990) (citing *Sterling Vill. Condo., Inc. v. Breitenbach*, 251 So. 2d 685, 688 n. 6 (Fla. Dist. Ct. App. 1971)).

59. 878 P.2d 1275, 1282 (Cal. 1994).

60. 309 So. 2d 180, 181–82 (Fla. Dist. Ct. App. 1975) [hereinafter *Hidden Harbour I*].

property than may be existent outside the condominium organization.⁶¹

As the court in *Nahrstedt* also counseled, there are “limitations on personal autonomy that are inherent in the concept of shared ownership of residential property” of “common interest developments” that are accepted by the homeowners when they choose to purchase property within such communities and agree to be governed by the community’s private governance system.⁶² Owners in common interest communities agree to a diminished level of autonomous control over property uses even beyond what would otherwise be permitted outside the community and under public governance rules; they agree to not always wear a crown claiming to be king of their own castle, understanding that they may be ruled by others.⁶³

Owners agree to tolerate and pre-consent to interference with what would otherwise be their property rights.⁶⁴ The existing restrictions at the point of agreement and entry into the common interest community, along with new restrictions within the association or board’s authority to adopt, are “essentially self-imposed.”⁶⁵ As one New York state court put it, “Because of the manner in which ownership in a condominium is structured, the individual unit owner, in choosing to purchase the unit, must give up certain of the rights and privileges which traditionally attend fee ownership of real property and agree to subordinate them to the group’s interest.”⁶⁶ This consent usually includes an understanding that the governing board of the association will have broad powers and wide latitude to impose restrictions or other rules consistent with its mandate to advance community interests identified in the association’s

61. *Id.*; see also *Noble v. Murphy*, 34 Mass. App. Ct. 452, 455–56 (1993) (citing *Kaplan v. Boudreaux*, 410 Mass. 435, 438 (1991); *Hidden Harbour I*, 309 So.2d at 182 (Fla. Dist. Ct. App. 1975)) (“Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, ‘must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.’”).

62. *Nahrstedt*, *supra* note 59.

63. See *Sterling Vill. Condo.*, 251 So. 2d at 688 (“Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others.”).

64. *Tropicana Condo. Ass’n, Inc. v. Tropical Condo., LLC*, 208 So. 3d 755, 759 (Fla. Dist. Ct. App. 2016) (“Due to the uniqueness of condominium living, condominium associations have a degree of control over the ownership of units and, concomitantly, individual owners tolerate a degree of intrusion into their property ownership.”).

65. *Franklin v. Spadafora*, 388 Mass. 764, 773 (1983) (“Since the plaintiffs’ decisions to purchase units within the condominium were no doubt voluntary, any restrictions imposed on the plaintiffs’ right to buy or sell property within the condominium are, for this reason, essentially self-imposed.”).

66. *Schoningher v. Yardarm Beach Homeowners Ass’n, Inc.*, 134 A.D.2d 1, 6 (N.Y. App. Div. 1987).

bylaws, declaration, or other governing documents.⁶⁷

Consequently, individual owners are agreeing to a certain amount of indeterminacy of their rights, which may change as the board, or its rules, change in reasonably anticipated ways contemplated by the scope of the initial consent. In fact, “[t]hrough the exercise of this authority, to which would-be apartment owners must generally acquiesce, a governing board may significantly restrict the bundle of rights a property owner normally enjoys.”⁶⁸ Moreover, courts often favor strict enforcement of common interest community governance rules—including the rights in these “private constitutions” to change the rules—precisely because, while one individual owner may object, one owner’s rights are subordinated to the will of the collective precisely because the remaining owners have reliance interests in the enforcement of the community scheme.⁶⁹

There is, in effect, an assumption of risk that the rules could change.⁷⁰ New rules might be adopted under existing board authority and, when necessary, amendments may be made to the community’s governing documents to expand or contract board authority, increasing or decreasing the scope of the board’s rulemaking power.⁷¹ Both expansions and contractions can affect property rights, because some owners may buy into a community relying on the presence and enforceability of existing restrictions, just as much as some might buy in based on the absence of certain restrictions. The California Supreme Court in *Nahrstedt* described this assumption of risk well when it quoted Natelson’s observations that “owners associations ‘can be a powerful force for good or for ill’ in their members’ lives;”⁷² and “anyone who

67. *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 536 (N.Y. 1990) (“owners consent to be governed, in certain respects, by the decisions of a board” and “such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations”).

68. *Levandusky*, 75 N.Y.2d at 536.

69. As one Florida court explained:

[S]trict enforcement of the restrictions of an association’s private constitution, that is, its declaration of condominium, protects the members’ reliance interests in a document which they have knowingly accepted, and accomplishes the desirable goal of “allowing the establishment of, and subsequently protecting the integrity of, diverse types of private residential communities, [thus providing] genuine choice among a range of stable living arrangements.”

Aquarian Found., Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1168 (Fla. Dist. Ct. App. 1984) (quoting Robert Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1527 (1982)).

70. *Villa De Las Palmas Homeowners Assn. v. Terifaj*, 33 Cal. 4th 73, 85 (2004) (“A prospective homeowner who purchases property in a common interest development should be aware that new rules and regulations may be adopted by the homeowners association either through the board’s rulemaking power or through the association’s amendment powers.”).

71. *Id.*

72. *Nahrstedt*, *supra* note 59 (citing Robert G. Natelson, *Consent, Coercion, and*

buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in a way that benefits the commonality but harms the individual.'"⁷³

When an owner purchases units subject to a declaration that can be amended so long as certain procedures are followed, they are on notice of the possible change and face a high hurdle to challenge a change that should have been foreseeable as somehow contrary to their rights.⁷⁴ Property owners are willing to live with the uncertainty of changing rules and the possibility of amendments to declarations or bylaws (i.e. are willing to give up some certainty and predictability in how they can use their property) in order to get the benefits of the community. They accept the risk of change. They know in advance that the rules might change and that they are often subjecting themselves to the will of the majority in an HOA.

The question, though, is determining the breadth of that agreement and the scope of anticipated interference. While property owners agree to allow changes in rules, property owners in HOAs expect the changes to go only *so far*.⁷⁵ The next Part in this Article will show some specific

"Reasonableness" In Private Law: The Special Case of The Property Owners Association, 51 OHIO ST. L.J. 41, 43 (1990)).

73. *Id.* (citing Natelson, *supra* note 72, at 67).

74. *Woodside Vill. Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452, 460-61 (Fla. 2002) ("we find that respondents 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 properly adopted amendments.") The *Woodside* opinion has a useful string of citations in it on this concept:

See Kroop v. Caravelle Condo., Inc., 323 So.2d 307, 309 (Fla. 3d DCA 1975) (upholding restriction limiting leasing to once during ownership where condominium owner acquired unit with knowledge that the declaration might thereafter be lawfully amended); *see also Ritchey v. Villa Nueva Condo. Ass'n*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695, 700 (1978) (noting that declaration provided bylaws could be amended and that purchaser would be subject to any reasonable amendment properly adopted); *McElveen-Hunter v. Fountain Manor Ass'n, Inc.*, 96 N.C.App. 627, 386 S.E.2d 435, 436 (1989), *aff'd*, 328 N.C. 84, 399 S.E.2d 112 (1991) (noting that plaintiff acquired her units subject to the right of other owners to restrict their occupancy through properly enacted amendments to the declaration); *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 57 Ohio App.3d 73, 566 N.E.2d 1275, 1277 (1989) (stating that purchasers of condominium units should realize that the regime in existence at the time of purchase may not continue indefinitely and that changes in the declaration may take the form of restrictions on the unit owners' use of their property); *cf. Burgess v. Pelkey*, 738 A.2d 783, 789 (D.C.1999) (stating unit owner was on notice at time of purchase of the possibility that his rights in the cooperative could be affected by subsequent changes in the cooperative's bylaws and house rules).

Woodside Vill. Condo. Ass'n., 806 So. 2d at 461.

75. NATELSON, *supra* note 3, at § 3.1 (association gets its power from declaration and founding documents and cannot exercised powers not conferred). Courts also examine the exercise of rules by boards and community amendments under a variety of tests, including looking at compliance with

applications of these tests in relation to short term rental rules and amendments. Homeowners must be able to anticipate possible changes in HOA declarations and bylaws before it can be said that they consented to new restrictive authority purportedly created after they joined.⁷⁶ Changes must be consistent with expectations. Owners should be able to predict how the rules might change—to identify a foreseeable bandwidth of available options for altering their usage rights. If a rule or even a declaration or bylaw change goes *too far*, then it is not authorized.

V. THE TREATMENT OF SHORT TERM RENTALS UNDER COMMON INTEREST COMMUNITY AND HOMEOWNER ASSOCIATION GOVERNANCE RULES AND PROCEDURES

While there are many cases addressing whether individual owners subject to certain covenants may engage in short term rental operations dating back decades,⁷⁷ and while “boarding” is an age-old property concept,⁷⁸ the sharing economy boom is bringing heightened attention to permission issues, including how CC&Rs should work in relation to homeowners rights to include. These cases are highly fact-specific and language dependent, often turning on interpretations of the restrictions, of the rights of owners, and of the authorities granted HOAs in governing documents.

Of course, if an owner buys into a common interest community where a prohibition on, or the authority to, regulate short term rentals is already clearly and expressly included in the agreement, then they have consented to that substantive limitation on rights—subject, of course, to

procedures laid out in the governing bylaws, a reasonableness standard upon application of authority, and the business judgment rule for certain decisions. “Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners.” *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (“If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof.”); *see also* *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 537 (N.Y. 1990) (an exemplar for the application of the business judgment rule). A full explication of those standards of review for the exercise of authority—as distinguished from scope of authority—is beyond the scope of this Article.

76. NATELSON, *supra* note 3, at §2.5 (“In construing the effect of a subdivision declaration, it frequently is necessary to determine the scope of the servitudes the declaration contains.”).

77. *See, e.g.*, *Yogman v. Parrott*, 921 P.2d 1352, 1353 (Or. Ct. App. 1996) (STRs were not “nonresidential” nor “commercial” in violation of subdivision covenants); *Miesch v. Ocean Dunes Homeowners Ass’n, Inc.*, 464 S.E.2d 64, 66, 68 (N.C. Ct. App. 1995) (HOA did not have authority to impose maintenance assessment and user fees on short term renters because it violates express rights of unit owners who rent to such short term renters).

78. *See generally, e.g.*, WENDY GAMBER, *THE BOARDINGHOUSE IN NINETEENTH CENTURY AMERICA* (2007); Ruth Graham, *Boardinghouses: Where the City was Born*, *BOSTON GLOBE* (Jan. 13, 2013), <https://www.bostonglobe.com/ideas/2013/01/13/boardinghouses-where-city-was-born/Hpstvjt0kj52ZMpjUOM5RJ/story.html>.

other rules of reasonableness and general limits on governance authorities. In fact, many new neighborhoods are realizing the need to be intentional in drafting to make sure their declaration reflects whether the community supports or shuns homesharing.⁷⁹

This Article focuses only on whether provisions in agreements are interpreted to allow prohibition or limitation of short term rentals at all, aside from how such authority could be exercised if it indeed exists within the scope of possible restrictions.⁸⁰ The latter issues are no doubt important and consider, for example, questions like whether the exercise of authority is reasonable, appropriate, in good faith, or the exercise of sound business judgment.⁸¹ Nonetheless, those standards of review regarding the exercise of proper substantive authority are mostly beyond the scope of this Article.

The primary questions discussed in this Part relate to whether, when, and how an association can impose limitations or prohibitions on short term rentals under existing authorities where such express substantive authority is not clearly, expressly given. These situations involve whether HOAs may adopt rules relating to short term rentals through previously granted authority to promote residential and single family uses or to control against transient or commercial uses, for example; or, alternatively, whether and how a community might vote to amend its declaration to expand HOA authority so that it more clearly reaches authorization to control short term rentals and homesharing activities. As to the former, many courts have found that HOAs cannot fit square pegs into round holes, instead requiring that the hole be altered through properly completed amendment procedures.⁸²

A large number of cases have found that, as traditionally written,

79. See, e.g., Brian Eason, *Homeowners Associations Clamp Down on Rentals*, USA TODAY (Oct. 4, 2012, 9:17 PM), (“Most of the covenants for brand new neighborhoods within the last few years have leasing restrictions”), <https://www.usatoday.com/story/money/business/2012/10/04/homeowners-oppose-rentals/1614229/>.

80. NATELSON, *supra* note 3, at §4.2 ((1) ordinary HOA rules must find the affirmative source of their authority in the founding documents like the declaration; and then (2) the exercise of that authority must also be reasonable; and (3) the means “must not offend any provision in the declaration or other documents of superior force”).

81. Franzese, *supra* note 48, at 666, 676-96 (explaining that the exercise of authority even when within scope of available restrictions must still be tested, for example, under standards of reasonableness, appropriateness, good faith, and business judgment).

82. See, e.g., *Wilkinson v. Chiwawa Cmty’s. Ass’n*, 327 P.3d 614, 616 (Wash. 2014) (en banc) (interpreting covenants as not prohibiting short term rentals and holding that an amendment prohibiting STRs would require unanimous approval because not related to existing covenants); *Houston v. Wilson Mesa Ranch Homeowners Ass’n, Inc.*, 360 P.3d 255 (Colo. Ct. App. 2015) (if association wants to prohibit short term rentals, it needed more than simple procedural amendments); *Estates at Desert Ridge Trails Homeowners Ass’n v. Vazquez*, 300 P.3d 736 (N.M. Ct. App. 2013) (if community wanted to bar short term rentals, because authority did not exist under “residential use” limitation, an amendment to declaration would be necessary).

many CC&Rs do not prohibit short term rentals or should be interpreted as allowing them—because they lack direct language prohibiting short term rentals,⁸³ include language allowing leasing but without time specifications,⁸⁴ have limits on using property only for “residential use,”⁸⁵ limit usage to “single family homes,”⁸⁶ require usage be non-commercial or non-business,⁸⁷ prohibit transient use,⁸⁸ and the like, or at least because they are ambiguous as to whether the CC&Rs limit or

83. *See, e.g.,* Grave de Peralta v. Blackberry Mountain Ass’n, Inc., 726 S.E.2d 789 (Ga. Ct. App. 2012) (where covenants were silent on rentals, STR limits not valid).

84. *See, e.g.,* Dawson v. Holiday Pocono Civic Ass’n, Inc., 36 Pa. D. & C. 5th 449 (Common Pleas Pa. 2014) (residential use is “not restricted owner-occupied residential use” and the express authority to “lease” was not limited in duration, so short term rental allowed); *see also* Friedman v. Rozzlle, No. 13-12-00779-CV, 2013 WL 6175318 (Tex. Ct. App., Nov. 21, 2013) (community homeowners acquiescence in short term rentals in community for 19 years amounted to abandonment of restriction making the prohibition unenforceable).

85. *See, e.g.,* Dunn v. Aamodt, 695 F.3d 797, 800 (8th Cir. 2012) (“residential purpose” phrase in covenants was ambiguous so would not be interpreted to preclude STRs); Applegate v. Colucci, 908 N.E.2d 1214, 1216 (Ind. Ct. App. 2009) (STRs were “residential use”); Lowden v. Bosley, 909 A.2d 261, 262 (Md. 2006) (residential purposes covenant did not preclude short term rental).

86. *See, e.g.,* Houston v. Wilson Mesa Ranch Homeowners Ass’n, Inc., 360 P.3d 255, 256-58 (Colo. Ct. App. 2015) (short term rentals can be considered “residential” under covenants, “commercial use” prohibition in covenants does not preclude short term rentals, and mere procedural amendments invalid to allow imposition of fines for STRs was invalid); Estates at Desert Ridge Trails Homeowners Ass’n v. Vazquez, 300 P.3d 736, 738, 744., 748 (N.M. Ct. App. 2013) (“residential purpose” limitation did not bar short term rentals and general rulemaking authority of association could not extend to restricting rental activity, meaning only unanimous approval for amendment would accomplish same); Mason Family Trust v. Devaney, 207 P.3d 1176, 1179 (N.M. Ct. App. 2009) (“dwelling purposes only” covenant that also prohibited business or commercial purposes did not preclude dwelling-based STRs); *see also* Tarr v. Timberwood Park Owners Ass’n, Inc., 556 S.W.3d 274 (Texas 2018) (neither “single family residence” nor “residential use” limitation in subdivision lot deed precluded short term rentals). For a similar result under that term in zoning, *see* Heef Realty & Investments LLP v. City of Cedarburg Board of Appeals, 861 N.W.2d 797, 798 (Wis. Ct. App. 2015) (“single family residential” zoning permitted short term rental). *But see* In re Miller, 482 A.2d 688, 692 (Pa. Commw. Ct. 1984) (boarding home violated single family residence zoning).

87. *See, e.g.,* Vera Angel Revocable Trust v. O’Bryant, 537 S.W.3d 254 (Ark. 2018) (prohibition on “commercial use” in subdivision restrictive covenant not specific enough to preclude usage for short term rentals.); Slaby v. Mountain River Estates Residential Ass’n, Inc., 100 So. 3d 569, 580, 582 (Ala. Civ. App. 2012) (neither single family residence limit nor prohibition on commercial uses in covenants precluded short term rentals). For a similar result interpreting these terms in zoning, *see* Siwinski v. Town of Ogden Dunes, 922 N.E.2d 751 755 (Ind. Ct. App. 2010) (short term rental was not a “commercial use” in violation of zoning ordinance). *But see* Vonderhaar v. Lakeside Place Homeowners Ass’n, Inc., No. 2012-CA-002193-MR, 2014 WL 3887913, at *10-13 (Ky. Ct. App. Aug. 8, 2014) (STRs, akin to hotels or motels, are a prohibited business use under the covenants, especially where declared as business for tax purposes).

88. *See, e.g.,* Ross v. Bennett, 203 P.3d 383, 384 (Wash. Ct. App. 2008) (short term rentals, less than 30 days, were considered under covenants to be a permitted residential use and not a prohibited business use). *But see* S. Ridge Homeowners’ Ass’n v. Brown, 226 P.3d 758 (Utah Ct. App. 2010) (weekly rentals violated restrictions on “nightly” rentals and “timeshares” in covenants); Monarch Point Homeowners Ass’n v. Ardit, No. G040668, 2009 WL 1838286, at *1-3 (June 26, 2009) (prohibition on “transient or hotel purposes” was properly interpreted in clarifying addendum as including the authority for the HOA to prohibit short term rentals less than 30 days).

prohibit short term rentals.⁸⁹ In each of these situations, the “right to share” through short term rentals has usually been found present as surviving the initial agreement and protected when associations have attempted to claim violations of the governing rules and charge assessments for their alleged violation.

Gadd v. Hensley,⁹⁰ a March 2017 case from the Court of Appeals of Kentucky—is a good example of such a common resolution, interpreting HOA rules to allow short term rentals. In *Gadd*, the court examined deed restrictions in a subdivision and found ambiguities that led it to conclude that short term rentals were not prohibited. The subdivision deeds in question allowed rentals but without specifying any length restriction.⁹¹ The developer nonetheless tried to curtail the rights of Gadd to enter into short term rentals by claiming that the “single family residential use purposes” clause somehow modified the leasing clause to prohibit short term rentals.⁹² The trial court granted summary judgment for the developer.⁹³ The court of appeals, though, reversed the lower court’s grant of summary judgment, holding that the deeds were insufficiently clear to limit the rights of owners to engage in short duration rentals.⁹⁴

The court of appeals concluded that it was clear that the “language of the restrictive deed does not prevent Gadd from renting his property on a short term basis” because “[w]hen language is ambiguous [the court] is not permitted to constrain the free exercise of a property owner’s use of property.”⁹⁵ In particular, the court reasoned, “Clearly, Gadd’s ability to rent his home for any length of time, short or long, supports his, the homeowner’s, unrestricted use of the property. This interpretation protects the property owner.”⁹⁶ *Gadd* represents an informative, straightforward interpretation of the typical covenant language regarding “residential” or “single family” uses or purposes. Those provisions usually do not prohibit short term rentals—due in part to the courts putting a thumb on the scale of homeowners’ rights to exercise their property rights if not clearly abdicated by agreement, including the right

89. See, e.g., *Scott v. Walker*, 645 S.E.2d 278, 279 (Va. 2007) (ambiguous covenants must be interpreted in favor of free use of property and against restrictions so short term rental was allowed). But see *Tarr v. Timberwood Park Owners Association, Inc.*, 510 S.W.3d 725, 731-32 (Tex. Ct. App. 2016) (in a split with other Texas courts, holding restrictive covenant barred short term rentals within CIC).

90. Nos. 2015-CA-001948-MR, 2016-CA-000164-MR, 2017 WL 1102982 (Ky. Ct. App. March 24, 2017).

91. *Id.* at *6-7.

92. *Id.* at *7.

93. *Id.* at *3.

94. *Id.* at *14, 16-18.

95. *Id.* at *17.

96. *Id.* at *16.

to include. The court's holding in *Gadd* is consistent with the idea that the right to share exists and the courts will presume that it has not been given over to the association to restrict when express provisions do not encompass such an alienation of control and when homeowners could not anticipate in the agreement that they would be so restricted.

Of course, we know from precedent and experience regarding CICs and HOAs that rules can be changed.⁹⁷ Further, as Part IV explained, owners' rights to object to such changes are somewhat limited because they entered into community association agreements understanding that certain rights could be curtailed in the future. There are generally two categories of options for expanding community governance to preclude or limit short term rentals—changes to rules via ordinary course and changes to declarations or bylaws under prescribed extraordinary (usually super-majority) procedures.⁹⁸ Several recent cases have found that the former category of authority is not sufficiently broad in scope to allow the imposition of new restrictions on short term rentals not readily anticipated by existing declarations. Several recent cases have also found, however, that substantive changes in declarations or bylaws have a much wider berth within which to expand restrictions on owners' bundles of rights precisely because owners pre-committed to accept such changes provided extraordinary procedures precede their adoption and application.

A March 2017 case from New York is illustrative of the point that ordinary association rule changes by the board alone cannot accomplish the imposition of restrictions on short term rentals that would otherwise be authorized under existing rights. In *Matter of Olszewski v. Cannon Point Association, Inc.*,⁹⁹ the New York Supreme Court Appellate Division examined condominium bylaws that granted homeowners the right to convey or lease his or her home "free of any restrictions."¹⁰⁰ The court held that such language defining the homeowners rights would be rendered meaningless when an HOA board of directors adopts rules imposing numerous limitations on homeowners' rental of their property.¹⁰¹ Thus, in the case, the court impliedly equated short term rentals to "leases"¹⁰² and refused enforcement of the restrictions on short

97. NATELSON, *supra* note 3, at §2.4.

98. *Id.* §3.3.2.1.

99. 148 A.D.3d 1306 (N.Y. App. Div. March 9, 2017).

100. *Id.* at 1308.

101. *Id.* at 1310.

102. There is some remaining debate over whether a short term rental as usually transacted in today's sharing economy, such as through Airbnb, constitutes a "lease" in the legal sense that term is usually given in the context of property law, or whether it is a "lease" only in the more colloquial sense. A court concerned with such a distinction would need to evaluate whether the use of that term "lease" in an HOA or CIC document has a particular meaning and whether short term rentals fit into the

term rentals.¹⁰³ However, at the end of its opinion, the court counseled that the association could—through proper procedures—amend the bylaws. As the court in *Olszewski* explained that, because the homeowners “expressly were granted the right to lease their properties free of any restrictions,” then “to the extent that [the community members] wish to impose rules in this area, they may do so—but only if the rules so adopted do not in fact conflict with the rights and privileges conveyed to petitioners (and similarly situated homeowners) pursuant to the relevant provisions of the bylaws.”¹⁰⁴ If the rules adopted conflict with rights granted, as they did under the facts in *Olszewski*, the community members could instead “successfully avail themselves of the procedures set forth in the declarations and bylaws relative to the amendment thereof.”¹⁰⁵ The court further noted that the HOA should “persuade the required percentage of each association’s homeowners/members as to the merit of their position and amend the bylaws accordingly” if indeed the community members believed that the injury from the short term rentals was so substantial as to require a remedy.¹⁰⁶ Nevertheless, the court reiterated that this more difficult avenue of change was required because “[a]bsent appropriate amendment to the relevant governing documents, however, the 2014 rules constitute an impermissible exercise of [the association’s] powers.”¹⁰⁷

What might be called an “anti-shoehorning” rationale in *Olszewski* mirrors the rationale adopted in another very recent case regarding zoning boards and their authority to impose new zoning restrictions on short term rentals. Although public regulatory controls are largely beyond the scope of this Article, a brief aside into that area is useful to flag some of the parallel discussions. In a February 2017 opinion, the Commonwealth Court of Pennsylvania in *Shvekh v. Zoning Hearing Board of Stroud Township*¹⁰⁸ held that even though a zoning board’s interpretation of its own ordinance is entitled to deference, it “cannot advance a new and strained interpretation of its zoning ordinance in order to effect what it would like the ordinance to say without an amendment.”¹⁰⁹ The court explained that the zoning board could not

documents’ definition of “lease” or “sublease.” The court in *Olszewski* did not seem to see a need to draw a distinction. Such matters of interpretation of the term “lease” will undoubtedly become important in these HOA STR cases, but those subjects of inquiry are beyond the scope of this Article.

103. *Olszewski*, 148 A.D.3d at 1311.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 154 A.3d 408 (Pa. Commw. Ct. Feb. 6, 2017).

109. *Id.* at 414.

stretch its ordinance on “tourist homes” to encompass short term rentals of private residences, cautioning that “amendments cannot be effected by shoehorning a use that involves renting an entire single-family home to vacationers into the definition of ‘tourist home.’”¹¹⁰ If the zoning board wanted authority for that interpretation, the court admonished the board to seek an amendment to the ordinance instead.

Despite the owner-protective ruling in *Olszewski*, we must remember that these cases turn on interpretations of words. The cases are fact-specific and often depend on the presence or absence of language in the restrictions and in the language of the governing documents. Consider a different case with different declarations and bylaws leading to a different conclusion. In *Watts v. Oak Shores Community Association*,¹¹¹ the California Court of Appeal in 2015 held that “homeowners associations may adopt reasonable rules and impose fees on members relating to short-term rentals of condominium units.”¹¹² The court interpreted broadly the bylaws granting wide authority to adopt rules, including the power to adopt rules to protect quiet enjoyment—in light of evidence presented that showed that short term renters cause more problems and impose more costs than community owners impose.¹¹³ It explained that the “powers to adopt rules” includes rules for addressing such concerns even when they limit owners’ control over their property.¹¹⁴ Thus, while the court did not reject that there may be a right to share and that right may include the right to create short term rentals, when the owners do not preserve strong protections for their rights and concurrently confer broad authority by agreement to restrict those rights for the greater good of the community, then those owners cannot be said to complain if the broad power is exercised broadly. How the balance is drafted in the governing agreement can make a substantial difference.

Note that in the *Watts* case the court was confronted with a grant of authority, yet made no discussion of the existence of a concomitant broad grant of rights to be free from restrictions like seen in *Olszewski*. The absence of such a countervailing right allowed the court in *Watts* to construe the power to adopt rules more expansively. If the HOA’s authority is written broadly enough and does not constrain the association from imposing short-term rental restrictions through rules, *Watts* illustrates the possibility that courts may uphold such board-initiated actions.

As explained in Part IV, the unique thing about the HOA short term

110. *Id.* at 415.

111. 235 Cal. App.4th 466 (Cal. Ct. App. 2015).

112. *Id.* at 468.

113. *Id.* at 473.

114. *Id.*

rental cases is that an owner's expectations include the possibility of change; rights to do something now do not always last in perpetuity if (1) the HOA substantive rulemaking authority is broad enough to allow changes or new rules through ordinary procedures designed to carry out existing mandates; or (2) the governing declarations or bylaws permit amendments to the HOA's substantive rulemaking authority and mandates. Change can be done with normal rulemaking in that first category, but cases like *Olszewski* illustrate the difficulties in doing so if there is not an express category of HOA authority with a broad enough scope to attack the issue at hand, i.e. if the existing authority is not wide enough that the owners could have anticipated the possibility of a rule against short term rentals as being encompassed within its scope. Allowable residential and single family home purposes are usually interpreted to allow short term rentals, so those types of provisions are insufficient to curtail inclusion rights. There would need to be language that creates a foreseeable expectation of short term rental limitations that would allow an owner ex ante to anticipate the possibility their rights to engage in short term rentals would be precluded. The interpretive rules are designed to allow the owners to make informed choices to enter into the CIC agreement reasonably able to foresee the consequences of ceding certain property rights to the authority of the community's governing entities.

The fact that a community's constitution, bylaws, or declarations can be changed, however, is important. Simply by agreeing to enter into a common interest community (including agreeing to give the CIC the power to liberally amend its primary governing documents)—and thereby assuming the risk that such amendments could include substantial limitations on the property owner's rights as a result of (usually) supermajority choice—a homeowner is agreeing forever to a somewhat indeterminate bundle of sticks.¹¹⁵ They are, in effect, agreeing that rights that may exist when they move in (such as to enter into short term rentals) may not last forever and could be curtailed without standing to complain.

A very instructive case on these principles of governance amendments is *Adams v. Kimberley One Townhouse Owner's Association, Inc.*, from the Idaho Supreme Court in June 2015.¹¹⁶ In 2003, Virgil Adams purchased a lot in a subdivision, subject to CC&Rs

115. See, e.g., *Filmor LLLP v. Unit Owners Ass'n of Centre Pointe Condominium*, 333 P.3d 498, 508 (Wash. Ct. App. 2014) (interpreting legislation on condo units to require a 90 percent vote to amend declaration or bylaws to impose leasing restrictions including because that interpretation "protects the reasonable and settled expectations of unit owners who purchased their units under the original declaration and advances the legislature's intent to provide additional consumer protection to condominium purchasers").

116. 352 P.3d 492 (Idaho 2015).

contained in a 1980 declaration which included provisions allowing for subsequent amendments to the declaration by a 2/3 vote of the subdivision lot owners.¹¹⁷ In 2012, Adams began entering into short-term rental agreements for his property.¹¹⁸ In 2013, after numerous complaints about the behavior of various short term renters using Adams's property, the 1980 declaration was amended by requisite supermajority vote to change the permitted use of subdivision lots.¹¹⁹ Among other things, the 2013 amendments required board approval of rental documents and advertisements along with the prohibition of both subleases and rentals for fewer than six months.¹²⁰ After Adams continued to enter into short term rentals in defiance of the 2013 amendments, the board enacted house rules to impose penalties for each day a unit was rented (\$300/day fine) or advertised (\$100/day fine) in violation.¹²¹ Adams then brought a declaratory judgment action seeking to invalidate the 2013 amendments.¹²² The district court granted summary judgment to the Association, upholding the validity of the 2013 amendments.¹²³ The Idaho supreme court affirmed.

The court held that the modifications in the 2013 amendments were not "new" unknown burdens added to the CC&Rs, but instead that they were anticipated within the broad amendment authority granted in the 1980 declaration. It further held that Adams was both subject to such restrictions and should have been aware of the possibility of such restrictions being imposed upon purchase, i.e., no legitimate reliance interests were affected.¹²⁴ After identifying a split of authority among the states as to whether a new restriction on rental activity may be reasonably added under a general amendment provision or whether a new restriction is per se unreasonable, the supreme court found Idaho's approach to CC&R amendments more consistent with the line of cases that adopt a case-by-case approach rather than a per se prohibition.¹²⁵ The court explained that while some amendments may go "too far" in changing the nature of original restrictions, the restrictions in this case did not do so.¹²⁶ In fact, it explained that changes to CC&Rs should be liberally permitted under a general amendment provision and parties to CC&Rs should be bound by even significant future alterations unless an

117. *Id.* at 494 n. 2.

118. *Id.* at 494.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 495-99.

125. *Id.* at 496-98.

126. *Id.* at 497-98.

amendment term produces an unconscionable result.¹²⁷ According to the court in the *Adams* case, the 2013 amendments simply narrowed what may be considered a “single family residential purpose” to reflect the long-term and stable occupancy implied by that condition on lot use “rather than it being used as a hotel as Adams had.”¹²⁸

In March 2017, the California Court of Appeal in *Ocean Windows Owners Association v. Spataro* (a non-citable, “not officially published” opinion),¹²⁹ we see another application of the fact-specific or language-specific approach. In *Ocean Windows*, the HOA had asked the lower court to grant a petition that would allow approval of changes to its CC&R’s by a reduced voting percentage of its members.¹³⁰ The proposed amendments were aimed at preventing short term and weekend rentals that many in the association had come to see as problematic—due to increased costs to the association due to trash pickup, security, project management, damage to common areas and the like.¹³¹ The proposed amendments got only 71%, not the 75% supermajority required to pass under their bylaws.¹³² Thus, the HOA petition to amend by a lower percentage of approving owners upon court approval (available to it by statute) followed. The lower court granted the petition. The property owner aggrieved by the new rule argued that the lower court abused its discretion—not because there were any procedural errors in the vote but based instead on a claim that there was not a sufficient showing that the amendments were “necessary” for the good of the community, something she claimed was a required element to grant these petitions to allow reduced voting percentages by statutory right.¹³³ The Court of Appeal affirmed the lower court, and in so doing rejected the property owner’s definition of the standard, explaining that the proposed amendments need only be “reasonable” to qualify for the granting of a petition.¹³⁴ Moreover, after identifying substantial evidence in the record, the Court of Appeal held that the proposed new restrictions were, indeed, reasonable in light of injury caused the community from short term rentals and the lower court properly

127. *Id.* at 498.

128. *Id.* For a similar recent case where the court has enforced a properly enacted Declaration Amendment with the requisite number of homeowners in a community voting to adopt the change in the restrictions to include prohibitions on short term rentals, see *North Country Properties, LLC v. Lost Acres Homeowners Association of Burnett*, 879 N.W.2d 810 (Wis. Ct. App. March 22, 2016).

129. No. D066852, 2017 WL 1075056 (Cal. Ct. App. March 22, 2017).

130. *Id.* at *3-5.

131. *Id.* at *10, *14.

132. *Id.* at *9-10.

133. *Id.* at *12-13.

134. *Id.* at *2.

exercised its broad discretion when granting the petition.¹³⁵

These lines of cases are consistent with the general rules interpreting the consent to be governed and owners' acceptance of restrictions on property rights in common interest communities. So much depends on the language of the instruments of agreement.¹³⁶ Homeowners joining common interest communities are presumed to come to the agreement table having the right to enter into short term rentals of their property. This sharing right is presumed to survive the agreement to be governed by community rules unless there is some evidence in the agreement to the contrary. Nonetheless, most CICs also allow for relatively liberal amendments to their governing documents. Unless the amendment authority is sufficiently limited in scope, restrictions on short term rentals are very likely to be upheld within the scope of allowable amendments.

If homeowners wish to provide armor against amendments that would curtail such rights, express limits on the substantive scope of amendment authority rather than simply procedural protections of supermajority rules should be included within the language of the bylaws. Conversely, associations that wish to have the authority to impose rules can learn from these cases that the governing documents should be drafted broadly enough in the first instance to confer such power to prohibit or regulate short term rentals. If they are not, then such associations or members in the community wishing to limit short term rentals should seek to amend the declarations or bylaws and declaration to permit such broader authority.

Finally, associations and homeowners should be aware of and, if desired, responsive to, creative rule circumvention techniques. Remember, drafting with precision matters and drafting in anticipation of creative ways to skirt the rules can be equally important. For example, one recent report warned associations that "governing documents [even when they include restrictions on short-term rentals] may not be adequate enough to prevent the savvy owner from taking advantage of potential ambiguities."¹³⁷ This attorney explained that homeowners will get creative when they need to: "For example, if an owner can obtain a one-year lease from a short-term renter that provides for early termination with no penalty, the owner is then able to provide a valid lease agreement to the association, effectively providing a short-

135. *Id.* at *15.

136. Franzese, *supra* note 48, at 672 ("As to the former means of imposing restrictions, the CC&R or 'Declaration of Condominium' is the community's master document").

137. Theresa L. Donovan, *Does your Community Association have sufficient protections in place for Short-Term Vacation Rentals?*, THE CONDO AND HOA LAW BULLETIN (Apr. 17, 2017), <https://thecondoandhoalawbulletin.com/2017/04/17/short-term-rentals/>.

term lease disguised as a long-term lease.”¹³⁸ When language matters, cases can turn on what is stated and, critically sometimes, what is not stated—with the latter having particular importance when interpretive rules tend to favor property rights, erring on the side of protecting homeowner uses not expressly prohibited.

VI. CONCLUSION

The reason for the presumptions seen in the cases evaluated in this Article, and the explanation for why some methods work to curtail short term rental rights while others do not, rest again on the right to include and the subcategory within it that is the right to share. Because it is a stick in the property owner’s bundle of rights, the sharing branch stemming off the inclusion stick will presumptively survive an owner’s agreement to enter into a common interest community. It will only be abrogated upon identifiable language in the initial agreement making such diminishment of the right possible. Such authority in the initial declaration might confer upon the HOA the power to curtail the homesharing right from the outset, or it might only be limited after amendment procedures create such authority to control the sharing right, with such amendments being made pursuant to the homeowner’s consent to such future alterations in the balance between her rights and the association’s authority. In other words, an owner’s rights to engage in short term rentals may become limited if an owner agreed to give up perpetual control of the sharing stick when they entered the common interest community, but not before they have done so.

138. *Id.*