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## Vacation Rentals: Commercial Activity Butting Heads with CC&Rs

Rachael Ann Neal Harrington

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## VACATION RENTALS: COMMERCIAL ACTIVITY BUTTING HEADS WITH CC&RS

RACHAEL ANN NEAL HARRINGTON\*

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*“When the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants.”<sup>1</sup>*

## I. INTRODUCTION

Is it time to plan your next vacation? Searching for a hotel that is affordable yet can accommodate your entire family? Vacation rentals<sup>2</sup>

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1. *Edwards v. City of L.A.*, 119 P.2d 370, 370 (Cal. Dist. Ct. App. 1941).

2. For the purposes of this article, the term “vacation rental” will be used. Vacation rental is synonymous with “short-term rental” and is a rental for a period of less than 30 days. The phrase “term rental” will be discussed in further detail in Part II.A, *infra*.

are the new alternative.<sup>3</sup> A vacation rental can fit your entire family with room to spare while providing hotel amenities, including complimentary Wi-Fi, toiletries, bedding, towels, and the added benefits of a “fully equipped kitchen and private dinning space”; sometimes, even free “amenities from portable playpens to cribs with highchairs” and private pools are provided.<sup>4</sup> For one family, a vacation rental “was a wonderful solution for [their] one week stay in the spring!” The owner “greeted [the family] with a cheese board and wine which was perfect after [their] trip down from NY with the kids!” The vacationer raved, “My husband loved the golfing and the kids loved the pool amenities and of course Disney! . . . The house [was] beautifully kept up and the location couldn’t have been better. 5 stars all the way!!!” So, what’s not to love about vacation rentals?

As vacation rentals have become a growing trend throughout the United States and the rest of the world, both local and foreign governments are beginning to tax and regulate the trending activity.<sup>5</sup> The activity itself is not new; however, the recent growth in popularity

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3. See *Discover the Difference*, VRBO, <http://www.vrbo.com/global/advantages.htm> (last visited Mar. 5, 2015); Lori Weisberg, *Airbnb Spawns Vacation Rental Confusion*, UT SAN DIEGO, Mar. 8, 2015, <http://www.utsandiego.com/news/2015/mar/08/airbnb-vacation-rental-growth-causing-confusion/>.

4. *Discover the Difference*, *supra* note 3; Brookford, LLC v. Penraat, No. 159605/14, 2014 WL 7201736, at \*8 (N.Y. Sup. Ct. Dec. 19, 2014); Veronique W., *Perfect Getaway House for the Whole Family*, Comment to Reviews, HOMEAWAY (Nov. 3, 2014), <http://www.homeaway.com/vacation-rental/p3854730#reviews>.

5. See *infra* Part III.A; see also OFFICE OF THE INDEP. BUDGET ANALYST, CITY OF SAN DIEGO, IBA REPORT NO. 15-15, COMPARATIVE INFORMATION ON SHORT-TERM RENTALS (Apr. 22, 2015) [hereinafter IBA REPORT], available at [http://www.sandiego.gov/iba/pdf/reports/2015/15\\_15\\_150417.pdf](http://www.sandiego.gov/iba/pdf/reports/2015/15_15_150417.pdf); Weisberg, *supra* note 3; Lisa Mercer, *Business Licensing Laws for Short-Term Vacation Rentals*, USA TODAY, <http://traveltips.usatoday.com/business-licensing-laws-shortterm-vacation-rentals-101455.html> (last visited Mar. 5, 2015); Rachel Bianco, *Pacific Beach Planning Group Approves New Guidelines for Vacation Rentals*, 10 NEWS (Mar. 3, 2015), <http://www.10news.com/news/pacific-beach-planning-group-approves-new-guidelines-for-vacation-rentals-03032015>; Jason Overdorf, *Germans Worry Berlin is Becoming Too Wealthy for its Own Good*, GLOBAL POST (Dec. 15, 2013), <http://www.globalpost.com/dispatch/news/regions/europe/germany/131213/germany-berlin-tourists-airbnb-economy>; Walter Morris, *Crowds Expected at Council Hearing on Vacation Rental*, Fox5 (Apr. 22, 2015 4:54 PM).

of vacation rentals is palpable.<sup>6</sup> “Vacation rentals have become more popular in recent years in the face of sky-high hotel room rates, and they provide extra amenities like full service kitchens that can come in handy for families or travelers who plan to stay for more than a couple days.”<sup>7</sup> Additionally, companies such as Airbnb and HomeAway, Inc., have supported and instigated the surge in vacation rentals.<sup>8</sup> Both companies are relatively new: HomeAway, Inc., was formed in 2005 and created its first nationwide broadcasting in 2010; and Airbnb formed in 2008.<sup>9</sup> These companies, and others like them, offer online booking services so “travelers can pick the property, enter dates, get quoted a price and then reserve immediately.”<sup>10</sup>

While vacation rentals might be appealing to travelers as an alternative to hotels,<sup>11</sup> the impact they have on communities can be a nuisance.<sup>12</sup> The problem is exacerbated when the activity is operated within the confines of a common interest development subject to

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6. See Carolyn Said, *After Tangle with City, HomeAway CEO Talks Vacation-Rental Growth*, SFGATE, Feb. 20, 2015, <http://www.sfgate.com/business/article/After-tangle-with-city-HomeAway-CEO-talks-6092937.php>; Weisberg, *supra* note 3; Overdorf, *supra* note 5.

7. Matt Johnson, *New Short-term Vacation Rental Regulations Could be Coming*, CBS8 (Apr. 21, 2015, 4:43 PM).

8. See Said, *supra* note 6 (“About 30 percent of travelers now consider staying in a vacation rental. Most are not aware of it as an option. There are 20 million vacation homes in the world; only 10 million are offered as rentals. So there is room for growth.”); Weisberg, *supra* note 3; *Vacation Rentals & Current Travel Trends*, DISCOVER VACATION HOMES, <http://www.discovervacationhomes.com/vacation-rental-trends-data.asp> (last visited Mar. 8, 2015).

9. *Corporate Timeline*, HOMEAWAY, <http://www.homeaway.com/info/media-center/presskit/ha-timeline> (last visited Mar. 7, 2015); *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Mar. 7, 2015).

10. Said, *supra* note 6.

11. See Said, *supra* note 6; *Discover the Difference*, *supra* note 3; *Vacation/Short-Term Rentals*, MIAMI BEACH FLA., <http://web.miamibeachfl.gov/planning/scroll.aspx?id=69472> (last visited Mar. 7, 2015) (“Vacation/short-term rentals . . . have become popular alternatives to traditional hotels.”).

12. See, e.g., *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382, 386 (Ct. App. 1991); Bianco, *supra* note 5.

restrictions regarding the use of property.<sup>13</sup> Accordingly, as communities from large-scale urban cities to small-scale condominium complexes face the growing impact of vacation rentals, the need for regulation is expanding. While cities have already begun the regulation process, homeowners associations are also finding the need to regulate vacation rentals within the association's community.<sup>14</sup>

Homeowners associations govern the operation of common interest developments.<sup>15</sup> The association enforces the governing documents of the development, particularly the Covenants, Conditions, and Restrictions (CC&Rs) and rules and regulations.<sup>16</sup> These documents generally include provisions prohibiting homeowners from operating a business within or conducting other commercial activity out of their homes.<sup>17</sup> Concurrently found in some association governing documents are restrictions limiting rentals, which specifically require rental agreements for terms no less than 30 days.<sup>18</sup> While such rental restrictions may seem to address the very matter of vacation rentals, they do not.<sup>19</sup> Rather, the aforementioned prohibitions on commercial use and business activity more squarely and appropriately dispose of the matter.

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13. See, e.g., *Watts v. Oak Shores Cmty. Ass'n*, 2d Civil No. B240337, 2015 WL 917800 (Cal. Ct. App. Mar. 2, 2015), *vacated*, 2015 WL 1321669 (Cal. Ct. App. Mar. 24, 2015).

14. See, e.g., *id.*

15. "Association" is defined as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." CAL. CIV. CODE § 4080 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.). A "[c]ommon interest development" is defined as "any of the following: (a) A community apartment project. (b) A condominium project. (c) A planned development. (d) A stock cooperative." *Id.* § 4100; see also *id.* § 4105 (defining community apartment project); *id.* § 4125 (defining condominium project); *id.* § 4175 (defining planned development); *id.* § 4190 (defining stock cooperative).

16. *Id.* §§ 4800–4820. "Governing Documents" are defined as "the declaration[, the CC&Rs,] and any other documents, such as bylaws, operating rules, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." *Id.* § 4150.

17. See, e.g., JOHN PAUL HANNA & DAVID VAN ATTA, HANNA AND VAN ATTA ON COMMON INTEREST DEVELOPMENTS §§ 24:2, p. 46, 49 (2014–2015 ed. 2014).

18. See, e.g., *id.* at p. 52.

19. See *infra* Part II.B.

As vacation rentals gain in popularity, an influx of associations seek to enforce the CC&Rs and enjoin homeowners from conducting the activity within common interest developments.<sup>20</sup> This influx will require the courts or the legislature to address the matter of vacation rentals as business activity; the California courts and legislature have yet to address it.

This article will first distinguish between vacation rentals and lease agreements in order to establish the defining distinction rooted in traditional American common law and establish why rental restrictions limiting rentals for less than 30 days are an inappropriate means for addressing this matter. Following this distinction, this article will establish why vacation rentals are, in fact, businesses run out of a homeowner's real property and, therefore, clearly and unambiguously fall within the prohibitions of business activity and commercial use restrictions found in common interest development CC&Rs. The article will then dispose of opponents' counterarguments regarding permissive use of vacation rentals as single-family use of real property, which is permitted by residential zoning ordinances and jurisdictional definitions regarding the same.

After establishing that vacation rentals are clearly businesses and, therefore, that zoning regulations are irrelevant to the enforcement of business restrictions on vacation rentals, this article will address why prohibitions on the activity within common interest developments are reasonable restrictions enforceable both by homeowners associations and the courts. And, finally, this article will conclude by imploring courts to enforce restrictions on business activity as to vacation rentals while also presetting a proposed addition to California Civil Code section 4740, which regulates "rental" restrictions in common interest developments.

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20. See, e.g., *Mission Shores Ass'n v. Pheil*, 83 Cal. Rptr. 3d 108 (Ct. App. 2008); *Watts v. Oak Shores Cmty. Ass'n*, 2d Civil No. B240337, 2015 WL 917800 (Cal. Ct. App. Mar. 2, 2015), *vacated*, 2015 WL 1321669 (Cal. Ct. App. Mar. 24, 2015).

## II. TRADITIONAL PROPERTY LAW OF THE UNITED STATES AND ITS MISAPPLICATION TODAY

### A. *The Rights Associated with a Lease Versus the Rights Associated with a License Finding Vacation Rentals Legally to be License Agreements*

Property law is an intrinsic body of law rooted in the American legal system.<sup>21</sup> Two legal theories of particular prominence and relevance are the laws of real property possession and real property use.<sup>22</sup> More specifically, the law distinguishes between the rights provided under a lease and those provided by a license.<sup>23</sup>

A lease is a “contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration.”<sup>24</sup> A license is “an authority to do a particular act, or series of acts, upon another’s land, without possessing any estate therein.”<sup>25</sup> The primary distinction, therefore, “lies in the character of possession.”<sup>26</sup> A lessee or tenant is given full and “exclusive legal possession of [the] premises and is responsible for [its] care and condition.”<sup>27</sup> By contrast, a licensee or lodger “has only the right to use the premises, subject to the landlord’s retention of control and

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21. See generally *Stowe v. Fritzie Hotels*, 282 P.2d 890 (Cal. 1955); *Millennium Park Joint Venture, LLC v. Houlihan*, 948 N.E.2d 1, 18–19 (Ill. 2010); *White v. Maynard*, 111 Mass. 250, 253–55 (1872); *Shearman v. Iroquois Hotel & Apartment Co.*, 85 N.Y.S. 365, 365 (App. Term 1903); *Offerman v. Starr*, 2 Pa. 394, 396–97 (1845); 49 AM. JUR. 2D *Landlord and Tenant* § 20 (1970); JAMES W. ELY & JOHN W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 11:1 (2009 ed. 2009).

22. See discussion of leases and licenses *infra* notes 21–29 and accompanying text.

23. See, e.g., *Stowe*, 282 P.2d at 892–93; *Millennium Park Joint Venture, LLC*, 948 N.E.2d at 18–19; *Offerman*, 2 Pa. at 396–97; 49 AM. JUR. 2D *Landlord and Tenant* § 20 (1970); ELY & BRUCE, *supra* note 21.

24. BLACK’S LAW DICTIONARY 1024 (10th ed. 2014).

25. *Id.* at 1060 (quoting 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*452–53 (George Comstock ed. 11th ed. 1866) (internal quotation marks omitted)).

26. *Stowe*, 282 P.2d at 893.

27. *Id.*



right of access to them.”<sup>28</sup> Therefore, when the “premises are under the direct control and supervision of the owner and rooms are furnished and attended to by him, he or his servants retaining the keys to them, a person renting such a room is a lodger and not a tenant.”<sup>29</sup> A traditional example of a licensee and licensor relationship is that of a hotel guest and hotel owner;<sup>30</sup> whereas, a traditional example of a lessee and lessor relationship is that of a landlord and tenant.<sup>31</sup>

The distinction, based on the character of possession, is one to which the law must pay close attention, because the traditional terms associated with license or lease are not always synonymous with the same.<sup>32</sup>

An “apartment house” has been referred to as a dwelling house or a tenement house, and sometimes the term is used interchangeably with “flats.” “Duplex houses” may in fact be apartments or flats. A “flat” may be used as a lodging house; if so, it is . . . not distinguishable from a rooming house. Structures . . . frequently called inns or courts, do not lose their identity as hotels, rooming houses or apartments merely by bestowing upon them a different appellation, if in fact they are used to lodge the public. . . . [T]he letting or renting of which to guests, roomers or lodgers is engaged in as a business. . . . The article in the Civil Code relative to innkeepers, notwithstanding that “tenant” is therein sometimes used synonymously with “guest” or “lodger”, indicates a general classification of “hotel-keeper, furnished apartment house keeper, furnished bungalow court keeper, boarding-house or lodging-house keeper”, and keepers of “furnished cottages” as “innkeepers”, and provides therein certain rights, privileges and duties as between the

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28. *Id.*; see also *Short Term Rentals*, CITY OF NEWPORT BEACH, <http://www.newportbeachca.gov/index.aspx?page=371> (last updated Oct. 23, 2014, 8:59:18 AM) [hereinafter NEWPORT BEACH, *Short Term Rentals*] (classifying the permit required to conduct vacation rentals as Short Term Lodging Permit rather than using the term rental).

29. *Stowe*, 282 P.2d at 893.

30. See *Edwards v. City of L.A.*, 119 P.2d 370, 373 (Cal. Dist. Ct. App. 1941); *White v. Maynard*, 111 Mass. 250, 253–55 (1872); *Shearman v. Iroquois Hotel & Apartment Co.*, 85 N.Y.S. 365, 365 (App. Term 1903).

31. *Stowe*, 282 P.2d at 892–93; *Edwards*, 119 P.2d at 370; *White*, 111 Mass. at 253–55; *Shearman*, 85 N.Y.S. at 365.

32. See *Edwards*, 119 P.2d at 372–74.

innkeeper and guests, boarders and lodgers. The character of an inn is not lost because of difference in structure or surrounding buildings or lands.<sup>33</sup>

Therefore, when considering what specific type or form of agreement has been created between property owner and occupant,<sup>34</sup> the substance of the agreement and relationship between the parties thereto must be analyzed rather than the terms used to classify the agreement, property, and people.<sup>35</sup>

Where then, within this web of terms resting upon the distinction between the right to exclusive possession and the mere right to use, do vacation rentals fall? Vacation rentals are generally classified as short-term rentals of real property for terms less than 30 days.<sup>36</sup> The general agreement signed by the occupant provides, “Occupant is renting the Premises as a transient lodger for the number of days specified in paragraph 3 from Owner who retains full legal, possessory and access rights.”<sup>37</sup> Pursuant to this provision, the owner retains legal possession of the property; the occupant merely has the right to use it. This alone, according to American property law, is significant and sufficient to define vacation rentals as licenses, regardless of what terms the occupant or owner may use to define the relation.

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33. *Id.* at 372–74 (citations omitted).

34. To avoid confusion, the term “occupant” will be used throughout this article to refer to guests who stay in vacation rentals. The term “occupant” is used rather than “rental” or “renter” because neither “rental” nor “renter” is associated with lease or license.

35. *See, e.g.,* Logan v. Ranken, No. A133836, 2013 WL 3097667, at \*6 (Cal. Ct. App. June 20, 2013) (“Equally important, Ranken and Chupity never established that their short-term renters were tenants with exclusive possession of the property, as opposed to mere licensees or lodgers with a nonpossessory right to use the property.”).

36. *See* CAL. ASS’N OF REALTORS, VACATION RENTAL AGREEMENT (Jan. 2006), available at [www.car.org/legal/standard-legal-forms/list-of-standard-forms/](http://www.car.org/legal/standard-legal-forms/list-of-standard-forms/) [hereinafter VACATION RENTAL AGREEMENT].

37. *See id.*

Additionally, common law has commented, “[W]hen you rent for less than 30 days, you’re essentially operating a hotel.”<sup>38</sup> To that extent, owners and operators of vacation rentals commonly provide maid service to keep the premises clean and to compete with hotels.<sup>39</sup> Occupants may also find gift baskets, food, or beverages awaiting them for their short stay.<sup>40</sup> These are services distinct from those

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38. *Mission Shores Ass’n v. Pheil*, 83 Cal. Rptr. 3d 108, 112–14 (Ct. App. 2008); see also Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES, Dec. 6, 2014, at B1 (discussing insurance consequences of vacation rentals which for such purposes are “small-scale hotels”).

39. See, e.g., *Brookford, LLC v. Penraat*, No. 159605/14, 2014 WL 7201736, at \*1 (N.Y. Sup. Ct. Dec. 19, 2014); Nightskyview, *Linens Provided or Not?*, COMMUNITY FROM HOMEAWAY (Aug. 9, 2011, 11:37 PM), <https://community.homeaway.com/thread/2353> [hereinafter *Linens Provided or Not?*]; *Selecting the Best Linens for your Vacation Rental*, COMMUNITY FROM HOMEAWAY (Aug. 27, 2009, 12:40 PM), <https://community.homeaway.com/docs/DOC-1546>; *Most Important Vacation Rental Amenities for Travelers in the United States as of March 2015*, STATISTA.COM, <http://www.statista.com/statistics/303340/most-important-vacation-rental-amenities-for-travelers-us/> (last visited Mar. 8, 2015); 2 family renters, *Wish we could have stayed longer!*, HOMEAWAY.COM (July 21, 2008) [www.homeaway.com/vacation-rental/p178343?flspusage=fl#reviews](http://www.homeaway.com/vacation-rental/p178343?flspusage=fl#reviews) (“Very well maintained and clean.”); *Luxurious Home w/ Harbor + City Views From Private Deck; 5 Min to Zoo, Dwnntn, Park*, HOMEAWAY.COM (last viewed Apr. 22, 2015) [www.homeaway.com/vacation-rental/p3649369?flspusage=fl](http://www.homeaway.com/vacation-rental/p3649369?flspusage=fl) (“You will feel rejuvenated after sleeping in one of the 2 spacious bedrooms, generously appointed with high thread count sheets, “Heavenly Bed” mattresses, and modern furnishings.”); cw, *No Words! Amazing Stay*, HOMEAWAY.COM (Feb. 28, 2015) [www.homeaway.com/vacation-rental/p630290vb?flspusage=fl#reviews](http://www.homeaway.com/vacation-rental/p630290vb?flspusage=fl#reviews) (“Everything is top of the line- the bed linens, the abundance of plush towels, the kitchen appliances, the couches, the beds- everything was beautiful, spotlessly clean, perfect. Lisa is awesome, and accommodated us completely.”); *Grand Opening – Walk to Disney – Luxury 5 star Vacation Home- The magic Forest*, HOMEAWAY.COM (last viewed Apr. 22, 2015) [www.homeaway.com/vacation-rental/p475091vb?flspusage=fl](http://www.homeaway.com/vacation-rental/p475091vb?flspusage=fl) (“If you’re looking for a luxurious vacation home that gives you the feeling of a 5 star hotel, you’ve found it.”).

40. See discussion of license agreements *infra* Part II. See also, e.g., Kate G., *Comfortable, Friendly and Convenient*, Comment to Reviews, VRBO (May 7, 2014), [www.vrbo.com/295294#reviews](http://www.vrbo.com/295294#reviews); SCB, *Vacation Rentals & Current Travel Trends*, HOMEAWAY.COM (Sept. 5, 2015) [www.homeaway.com/vacaton-rental/p958925?flspusage=fl#reviews](http://www.homeaway.com/vacaton-rental/p958925?flspusage=fl#reviews) (“From being welcomed by a box of gourmet cookies to the amazing hilltop view from the patio, to the careful attention to detail in every room and around the property.”); Grace K., *A Home Surely to Please the*

offered in traditional rentals between landlord and tenant.<sup>41</sup> Rather, such rentals are more comparable to a hotel, the traditional and iconic symbol of a license agreement, where maid service and other amenities are provided.<sup>42</sup> The character of the service rendered by the owner to the occupant is, therefore, akin to the character of the service provided by a hotel rather than a landlord.

The proper classification of a vacation rental is, therefore, a license agreement. The occupant is the licensee; the owner is the licensor. The occupant has the right to use the premises for a specified short-term duration while the owner retains exclusive legal possession of the property and provides hotel-like services. The terminologies the parties may apply are immaterial to the legal relation actually created.<sup>43</sup>

*B. The Misapplication of 30-Day Rental Restrictions in CC&Rs and the Davis-Stirling Act*

For homeowners engaging in the operation of vacation rentals within common interest developments, the applicable CC&Rs might include provisions relevant to the activity.<sup>44</sup> For example, CC&Rs might contain provisions limiting rentals to a minimum term of 30

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*Whole Family*, Homeaway.com (Nov. 1, 2014) [www.homeaway.com/vacation-rental/p128088#reviews](http://www.homeaway.com/vacation-rental/p128088#reviews) (“The home was stocked with everything and anything we possibly needed, including a welcome basket and items stocked in the refrigerator.”); Nerd Bon Vivant, *Foodie Cook loved it*, VRBO.COM (May 26 2014) <http://www.vrbo.com/12017#reviews> (“very pleasantly surprised with how well stocked the little kitchen was”).

41. *Brookford*, 2014 WL 7201736, at \*8.

42. Kate G., *supra* note 40; Anonymous, *Perfect Weekend Getaway*, HOMEAWAY.COM (Sept. 5, 2015) [www.homeaway.com/vacaton-rental/p958925?flspusage=fl#reviews](http://www.homeaway.com/vacaton-rental/p958925?flspusage=fl#reviews) (“Everything we needed for our weekend was provided to us, including body wash, shampoo and plenty of K cups! We hired a chef to come in to make dinner for us one night, and he really appreciated that the kitchen was stocked with everything he needed.”); Amazing Prime Location Two Bedroom Designer Ready Suite. Call Now!, HOMEAWAY.COM (last viewed Apr. 22, 2015) [www.homeaway.com/vacation-rental/p3923901?flspusage=fl](http://www.homeaway.com/vacation-rental/p3923901?flspusage=fl) (describing amenities provided).

43. *See, e.g.*, Logan v. Ranken, No. A133836, 2013 WL 3097667, at \*6 (Cal. Ct. App. June 20, 2013).

44. *See, e.g.*, HANNA & VAN ATTA, *supra* note 17.

days.<sup>45</sup> These provisions likely, although not necessarily, specifically refer to lease agreements.<sup>46</sup> The intent, no doubt, is to prevent short-term vacation rentals.<sup>47</sup> In *Mission Shores Association v. Pheil*, the court acknowledged this very concern, citing the Association's "need to restrict rentals to 30 days or more to ensure the property would not become akin to a hotel."<sup>48</sup> The court further held, "[W]e cannot find that the imposition of a 30-day minimum *lease* term is unreasonable."<sup>49</sup> While this article does not argue with the ultimate determination of the court, that restrictions on vacation rentals are reasonable, it does take issue with the application of the term "lease."

The specific CC&R provision at issue in *Mission Shores* provided, "No short-term rentals or leases for less than 30 days are allowed."<sup>50</sup> By focusing on the phrase "lease," the court mischaracterized, as did the association, the nature of vacation rentals. It seems, however, that the association recognized there might just be a difference between vacation rentals and leases, as the CC&R provision included a prohibition of both.<sup>51</sup> This may not always, however, be the case. General form CC&Rs currently only contain the phrase "lease."<sup>52</sup> Thus, where the term "lease" is used in CC&Rs, the enforcement of such provisions against vacation rentals is truly inappropriate as vacation rentals are not leases, they are licenses.<sup>53</sup>

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45. *Mission Shores Ass'n v. Pheil*, 83 Cal. Rptr. 3d 108, 112–14 (Ct. App. 2008); see also HANNA & VAN ATTA, *supra* note 17.

46. *Mission Shores Ass'n*, 83 Cal. Rptr. 3d at 112–14 (discussing a "30-day minimum lease term" restriction); see also HANNA & VAN ATTA, *supra* note 17, at § 24:52 ("[N]o Owner shall lease his Residence for a period of less than thirty (30) days.").

47. *Mission Shores Ass'n*, 83 Cal. Rptr. 3d at 113.

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.* at 793.

51. See *id.*

52. See e.g., HANNA & VAN ATTA, *supra* note 17, at §§ 24:2, 24:52.

53. Courts, of course, should look for guidance in enforcing the CC&Rs based on the intent of the parties to ensure proper application of the governing documents. Enforcing such provisions based on the intent of the parties should, however, be expressly stated in the court's opinion, because enforcement of CC&Rs under the term "lease" will continue to misguide courts, and will only further confuse and muddle the legal complexities of property law.

Similarly, the California Civil Code's Davis-Stirling Common Interest Development Act<sup>54</sup> imposes certain prohibitions on CC&R restrictions on renting or leasing.<sup>55</sup> The code provides:

An owner of a separate interest in a common interest development shall not be subject to a provision in a governing document or an amendment to a governing document that prohibits the rental or leasing of any of the separate interests in that common interest development to a renter, lessee, or tenant unless that governing document, or amendment thereto, was effective prior to the date the owner acquired title to his or her separate interest.<sup>56</sup>

The legislature leaves homeowners and associations alike in a conundrum, having also forgotten the traditional principles of property law. The terminology used is "rental" or "lease" followed later by "renter," "lessee," or "tenant."<sup>57</sup> While the words of the statute are generally the "most reliable indicator of the legislature's intent,"<sup>58</sup> they are, in this instance, ambiguous.<sup>59</sup> The court in *Logan v. Raken* exemplifies this very ambiguity by pointing out the defendants' failure to establish "that their short-term renters were tenants with exclusive possession of the property, as opposed to mere licensees or lodgers

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54. The Davis-Stirling Common Interest Development Act encompasses the Civil Code provisions providing for the regulation of Common Interest Developments.

55. CAL. CIV. CODE § 4740 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

56. *Id.* § 4740(a).

57. *Id.*

58. *Tract 19051 Homeowners Ass'n v. Kemp*, No. S211596, slip op. at 9 (Cal. Mar. 5, 2015).

59. The terms "rental" and "renter" have no traditional association with either license or lease. *See supra* Part II.A. The general agreement used in California for vacation rentals uses the term occupant rather than renter providing additional ambiguity. *VACATION RENTAL AGREEMENT*, *supra* note 36. Furthermore, the term rental is not always used when describing a vacation rental. For example, Newport Beach entitles its permit application for vacation rental, "Short Term Lodging Permit." *NEWPORT BEACH MUN. CODE* ch. 5.95 (Cal. Code Publ'g Co. through Ord. 2015-3, passed Feb. 24, 2015).

with a nonpossessory right to use the property.”<sup>60</sup> In short, the term “rental” has no legal meaning. Thus, it is unclear whether the legislature meant to encompass vacation rentals, as they share the same commonly used term “rental,” or include strictly leases and the traditional notion of the landlord tenant relation. The statute has yet to be addressed by a court, and the legislative history provides no insight as to the interpretation of this provision.<sup>61</sup>

Applying the traditional understanding of property law to the language chosen by the legislature in formulating Civil Code section 4740, the ambiguous terms—“rental” and “renter”—should be likened to the other terms used within this section—“lessee” and “tenant.” “Lessee” and “tenant” have traditional property law meanings associated with a lease agreement.<sup>62</sup> Under this approach, the terms “rental” and “renters” would take on the meaning of lease and lessee. There is no further reference to licenses, licensees, lodgers, or hotel-like operations in section 4740; the statute is completely devoid of any such terms.<sup>63</sup> With all legal terms having sole relevance to lease agreements, the Davis-Stirling Common Interest Development Act provision would, and should as written, only apply to lease agreements and thus be inapplicable to vacation rentals.<sup>64</sup>

Therefore, under the traditional, deep-rooted laws of property, rental restrictions found in CC&Rs and their counterpart Civil Code provisions, although effective at times, are inappropriate means of prohibiting vacation rentals. As discussed *supra*, vacation rentals are and should be properly classified as licenses. The need to have this clarity and understanding in section 4740 is particularly important as

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60. See, e.g., *Logan v. Ranken*, No. A133836, 2013 WL 3097667, at \*6 (Cal. Ct. App. June 20, 2013).

61. See S.B. 150, 2011–2012 Reg. Sess. (Cal. 2011). One commentator on the matter groups vacation rentals under the umbrella of this statute, but arguably gets it wrong. See 9 HARRY D. MILLER & MARVIN B. STARR, MILLER & STARR CALIFORNIA REAL ESTATE § 25B:71 (3d ed. 2000).

62. See *supra* notes 21–27 and accompanying text.

63. See CAL. CIV. CODE § 4740 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

64. Of course, if the legislature is dissatisfied with such findings it can always clarify its intent and modify the civil code.

this section has temporal application:<sup>65</sup> it only applies to homeowners who purchased their property *after* the association imposed new “rental or leasing” restrictions.<sup>66</sup> Finding vacation rentals to be distinct from traditional landlord/tenant, lessee/lessor relations removes this temporal application from restrictions on vacation rentals. This distinction should not only be made clear in the Civil Code but also in CC&Rs, where vacation rentals should properly be listed as a business restriction rather than being paired with a rental restriction on leasing.<sup>67</sup>

### III. STATUTORY LAW AND CASE LAW FINDINGS ON VACATION RENTALS AS BUSINESS ACTIVITY

Vacation rentals are more than mere license agreements. Like hotels, they are businesses conducted with the purpose of making a profit.<sup>68</sup> There is no one source that explicitly confirms that vacation rental operations are business activity. The majority of commentary on the matter, however, informs the public that vacation rentals are, in fact, businesses.<sup>69</sup> Beyond this commentary found in the everyday news,<sup>70</sup> federal and local regulations regarding the matter also hold out the activity as a business.<sup>71</sup> Generally, case law provides a mixed

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65. CAL. CIV. CODE § 4740 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

66. *Id.* Section 4740 of the California Civil Code provides additional ambiguity as to the word “prohibits.” It is unclear whether the statutorily imposed restriction on “rentals and leasing” CC&R provisions applies to any restriction on “rentals and leasing” or strictly to complete ban’s on “rentals and leasing.” HANNA & VAN ATTA, *supra* note 17, at § 22:15. Other than highlighting additional faults in this Civil Code section, this article will not explore this particular ambiguity further as its application to the larger discussion is not necessary.

67. *See infra* Part III (discussing vacation rentals as businesses). For associations that currently have the two restrictions paired together in their CC&Rs, such that the CC&Rs state no short-term rentals or no vacation rentals, courts should make the distinction and enforce the restrictions accordingly.

68. Mercer, *supra* note 5.

69. Weisberg, *supra* note 3; Mercer, *supra* note 5; Bianco, *supra* note 5; Overdorf, *supra* note 5; Said, *supra* note 6.

70. *See supra* notes 3–10, 69.

71. *See infra* Part III.A.



opinion, with California courts not yet having taken a position; however, California courts are moving in the direction of classifying the activity as a business operation.<sup>72</sup> Taken as a whole, and considering the new developments in the growing industry,<sup>73</sup> California courts are heading in the right direction and should continue down this road to find vacation rentals are, in fact, business operations.

### *A. Governmental Regulation of Vacation Rentals Clearly Classify the Activity as a Business Operation*

Both federal and local governments classify vacation rentals as businesses requiring separate and distinct tax filings, with local governments taking matters further by imposing business regulations on the activity. These entities have thus clearly defined the activity as a business operation, and have distinguished between traditional lease agreements and vacation rentals.

#### *1. The Internal Revenue Service Requires “Business Income and Loss” Tax Forms to be Filed Annually for the Operation of Vacation Rentals*

The Internal Revenue Service (I.R.S.) distinguishes traditional rentals between landlord and tenant from vacation rentals between licensor and licensee. All homeowners who engage in rental activity generally are required by the I.R.S. to take specific tax measures with regard to the rental.<sup>74</sup> Form 1040 Schedule E is required for federal tax filing if the owner of real property rents the premises.<sup>75</sup> The form is entitled Supplemental Income and Loss, and tax preparers are

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72. See *infra* Part III.B.

73. See *supra* notes 5–10 and accompanying text.

74. See *Specific Instructions*, IRS, <http://www.irs.gov/instructions/i1040se/ch02.html> (last visited Apr. 3, 2015); *Schedule C (Form 1040)*, IRS, <http://www.irs.gov/pub/irs-pdf/f1040sc.pdf> (last visited Apr. 3, 2015); *Schedule E (Form 1040)*, IRS, <http://www.irs.gov/pub/irs-pdf/f1040se.pdf> (last visited Apr. 3, 2015).

75. *Specific Instructions*, *supra* note 74; see also *Schedule E (Form 1040)*, *supra* note 74.

directed to review the instructions when preparing this form.<sup>76</sup> The form instructions, however, redirect and require those property owners who “provided significant services to the renter such as maid service” to report the rental activity on Schedule C or C-EZ, *not* on Schedule E.<sup>77</sup>

Schedule C is entitled and provides for Profit or Loss from *Business*.<sup>78</sup> As discussed *infra*, this is the appropriate form for property owners operating a vacation rental. The I.R.S. understands and makes the key distinction between the traditional landlord tenant relationship with a lease agreement and vacation rentals. The form advises tax preparers that “[s]ignificant services do not include the furnishing of heat and light, cleaning of public areas, trash collection, or similar services.”<sup>79</sup> These exempted services are either required by law to be provided by a landlord to a tenant or generally provided by a landlord to a tenant.<sup>80</sup>

While the distinction may seem slight, it provides further indication of the inherent differences between traditional landlord-tenant lease agreements and vacation rentals. A traditional landlord only need provide habitable housing.<sup>81</sup> Owners who engage in providing vacation rentals must, and generally do, provide more services to the renter.<sup>82</sup> While maid service is the most common

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76. *Schedule E (Form 1040)*, *supra* note 74.

77. *Specific Instructions*, *supra* note 74.

78. *Schedule C (Form 1040)*, *supra* note 74 (emphasis added).

79. *Specific Instructions*, *supra* note 74.

80. Miller & Starr, 7 CAL. REAL EST. § 19:17 (3d ed. 2014); Michael Paul Thomas et al., CAL. CIV. PRAC.: TORTS § 16:16 (2d ed. 2014) (“A warranty of habitability is implied by law in residential leases. Under the implied warranty of habitability, a residential landlord covenants that premises leased for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect aesthetically pleasing condition, but it does mean that bare living requirements must be maintained.”).

81. Michael Paul Thomas, *supra* note 80, § 16:16.

82. For example, California law requires homeowners who rent their properties furnished with bedding to have the bedding replaced prior to a new guest staying in the home. CAL. CODE REGS. tit. 25, § 40 (Westlaw through 3/20/15 Register 2015, No. 12). Generally, operators of vacation rentals do in fact provide

additional service, many vacation rental operators provide stocked kitchens, gift baskets, pool equipment, and additional accommodations.<sup>83</sup> It is these very services that remove vacation rental income from a mere source of supplemental income to business income.<sup>84</sup>

The distinction between the typical rental—a lease—and what people commonly call a vacation rental—a license—was not lost or forgotten by the I.R.S.; for the purpose of federal taxes, vacation rental income is classified as business income, while typical rental income is merely supplemental income.<sup>85</sup> The I.R.S. is not alone in understanding the inherent differences between a typical rental and vacation rental. Local governments have also retained the knowledge and understanding of the deep-rooted traditional American property law principles and, with such knowledge, treat vacation rentals as businesses.

## 2. *Local Governments Tax and Regulate Vacation Rentals as Businesses*

Local governments have found ways to capitalize on the “business” venture. The similarities of vacation rentals to hotels is such that local governments for tax purposes have defined vacation rentals as hotels and required an additional tax that traditional landlords/lessors are not required to pay.<sup>86</sup>

Many municipalities have tax requirements for hotels.<sup>87</sup> The tax is the Transient Occupancy Tax.<sup>88</sup> The tax is generally a percentage

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bedding and other amenities, above and beyond the bare minimum standards for living. *See supra* notes 39–40, 42.

83. *See supra* notes 39–40, 42.

84. *Specific Instructions*, *supra* note 74.

85. *See Specific Instructions*, *supra* note 74; *Schedule C (Form 1040)*, *supra* note 74; *Schedule E (Form 1040)*, *supra* note 74.

86. *See IBA REPORT*, *supra* note 5; *see also infra* notes 87–92, 102–03 and accompanying text.

87. *E.g.*, S.D. MUN. CODE §§ 35.0101, *et seq.* (Cal. 2015); S.F. BUS. & TAX REG. CODE art. 7, §§ 501, *et seq.* (Cal. 2015); RIVERSIDE MUN. CODE §§ 5.32.010 *et seq.* (Cal. 2015); CLARK CNTY. CODE §§ 6.46.010 *et seq.*; *Hotel Occupancy Tax*, AUSTINTEXAS.GOV, <http://sustintexas.gov/departments/hotel-occupancy-taxes> (last visited Mar. 24, 2015); *Transient Occupancy Tax*, PLACER CNTY., CAL.,

of the “rent<sup>89</sup> charged to the ‘transient’<sup>90</sup> guests.”<sup>91</sup> It is commonly known as a “bed tax.”<sup>92</sup> The distinctive and traditional term “hotel” is generally used and defined so as to address what properties are included within these tax provisions.<sup>93</sup>

Typically, the definition of “hotel” for the purpose of the Transient Occupancy Tax is:

any structure in the unincorporated territory of the county, or any portion of any such structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or

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[www.placer.ca.gov/Department/Admin/Revenue/TransOccTax.aspx](http://www.placer.ca.gov/Department/Admin/Revenue/TransOccTax.aspx) (last viewed Apr. 22, 2015) [hereinafter PLACER CNTY. *Transient Occupancy Tax*; *Tourist and Convention Development Taxes*, MIAMIDADE.GOV, [www.miamidade.gov/taxcollector/tourist-taxes.asp](http://www.miamidade.gov/taxcollector/tourist-taxes.asp) (last visited Apr. 22, 2015).

88. See, e.g., PLACER CNTY. *Transient Occupancy Tax*, *supra* note 87.

89. Rent is generally defined as “the consideration charged, whether or not received, for the occupancy of space in a hotel, valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash credits and property and services of any kind or nature, without any deduction therefrom whatsoever.” L.A. CNTY. CODE tit. IV, § 4.72.020(H) (Cal. 2012); S.D. MUN. CODE § 35.0102 (Cal. 2015); S.F. CAL., BUS. & TAX REG. CODE art. 7, § 501(f) (Cal. 2015); RIVERSIDE MUN. CODE § 5.32.010 (Cal. 2015).

90. Transient is generally defined as:

[A]ny person who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days. Any such person so occupying space in a hotel shall be deemed to be a transient until the period of 30 days has expired unless there is an agreement in writing entered into within the first 30 days of the stay between the operator and the occupant providing for a longer period of occupancy. In determining whether a person is a transient, uninterrupted periods of time extending both prior and subsequent to the effective date of the ordinance codified in this chapter may be considered.

L.A. CNTY. CODE tit. IV, § 4.72.020(L) (Cal. 2012); S.D. MUN. CODE § 35.0102; (Cal. 2015) RIVERSIDE MUN. CODE § 5.32.010 (Cal. 2015); *Territory of Hawaii v. Thom Co.*, 39 Haw. 418, 420 (1952) (“A ‘transient’ is one who stays for a short time, not regular or permanent.”).

91. *Transient Occupancy Tax (TOT) FAQs*, L.A. COUNTY TREASURER & TAX COLLECTOR, [https://ttc.lacounty.gov/Proptax/TOT\\_FAQs.htm](https://ttc.lacounty.gov/Proptax/TOT_FAQs.htm) (last visited Mar. 7, 2015).

92. *Id.*

93. See *infra* note 94 and accompanying text.

sleeping purposes, and includes any hotel, inn, tourist home or house, motel, studio hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, mobile home or house trailer at a fixed location, or other similar structure or portion thereof.<sup>94</sup>

This definition is broad and does not discriminate against the form or substance of the property or structure.<sup>95</sup> Thus, the traditional notion of “hotel” is manipulated to include any and all property used in a hotel-like manner; that is, where a license to use the property is being provided to individuals. The provisions provide further clarity when defining a transient, who is generally “any person who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement for a period of 30 consecutive calendar days or less.”<sup>96</sup> It can be presumed the term “license” is used to provide assurance that the relation of the parties and use of property is not confused with a lease.

Vacation rentals and their occupants fall precisely into these definitions.<sup>97</sup> The occupant, in exchange for a fee, is given permission to use the property for a short duration.<sup>98</sup> It is irrelevant whether the property is a large hotel or a three-bedroom two-bath house.<sup>99</sup> If the occupant pays money in exchange for the ability to stay and sleep for

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94. L.A. CNTY. CODE. tit. IV, § 4.72.020(D) (Cal. 2012); S.D. MUN. CODE § 35.0102 (Cal. 2015); RIVERSIDE MUN. CODE § 5.32.010 (Cal. 2015); *Thom*, 39 Haw. at 419 (“The term ‘hotel’ means an establishment operating under a hotel business license issued pursuant to the provisions of Chapter 133, Revised Laws of Hawaii 1945, as amended, and used predominantly for transient occupancy, that is, for living quarters for nonresidents upon a short-term basis.”).

95. *See* L.A. CNTY. CODE. tit. IV, § 4.72.020(D) (Cal. 2012).

96. *Id.* § 4.72.020(L); S.D. MUN. CODE § 35.0102 (Cal. 2015); RIVERSIDE MUN. CODE § 5.32.010 (Cal. 2015); *Thom*, 39 Haw. at 420 (finding that, had the property been used for nonresident transient guests, the property would have constituted a hotel business).

97. *See* VACATION RENTAL AGREEMENT, *supra* note 36; *Edwards v. City of L.A.*, 119 P.2d 370, 370 (Cal. Dist. Ct. App. 1941).

98. *See* VACATION RENTAL AGREEMENT, *supra* note 36

99. *See supra* notes 94–95 and accompanying text.

a short duration of time, the occupant is a “transient” and the property is a “hotel.”<sup>100</sup>

Under the Transient Occupancy Tax provisions, “hotel” operations are generally classified as a business.<sup>101</sup> It can be presumed the primary reasoning for this classification is the nature of the transactions and relations of the owner and occupant. Thus, where property is used in a hotel-like manner, such that individuals for consideration stay for short periods of time, both federal and local government entities have classified the use as a business.

Local governments, however, have taken additional measures in regulating and classifying vacation rentals as businesses. It is now common to see cities and counties requiring business licenses for vacation rentals and implementing business regulations.<sup>102</sup> While the permission to use the property as a vacation rental may be an issue regarding zoning, the regulation of the activity itself can be found in municipal codes regulating businesses.<sup>103</sup>

Therefore, not only are owners taxed for operating a business by the federal government and are subject to the hotel Transient Occupancy Tax, they are also required to have business licenses to operate and manage the business activity. Thus, from the

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100. See *supra* notes 93–96 and accompanying text.

101. L.A. CNTY. CODE tit. IV, §§ 4.72.100, 4.72.140, 4.72.220 (Cal. 2012); S.D. MUN. CODE §§ 35.0101, *et seq.* (Cal. 2015) (regulating the Transient Occupancy Tax under Business Regulations, Business Taxes, Permits and Licenses); RIVERSIDE MUN. CODE § 5.32.050 (Cal. 2015).

102. See *Short-Term Rental Program*, ANAHEIM, <http://www.anaheim.net/articlenew2222.asp?id=5284> (last visited Mar. 7, 2015); *Short-Term Rental Program - FAQ*, ANAHEIM, <http://www.anaheim.net/articlenew2222.asp?id=5287> (last visited Mar. 7, 2015); ANAHEIM, CAL. MUNICIPAL CODE ch. 4.05.010 *et seq.*; NEWPORT BEACH, *Short Term Rentals*, *supra* note 28; *Business License Tax Application*, CITY OF NEWPORT BEACH, <http://www.newportbeachca.gov/Modules/ShowDocument.aspx?documentid=2830> (last revised July 2014); *Vacation Rental Licensing*, AUSTINTEXAS.GOV, <http://www.austintexas.gov/str> (last visited Mar. 7, 2015); DENVER REV MUN. CODE §§ 33-16 *et seq.* (Colo. 2015); SALT LAKE CITY MUN. CODE §§ 5.14.010, *et seq.* (Utah 2015); CLARK CNTY. CODE § 6.46.010 *et seq.* (Nev. 2015); REV. ORDINANCES OF HAWAII §§ 19.65.010, *et seq.*; Bianco, *supra* note 5.

103. See, e.g., ANAHEIM MUN. CODE ch. 4.05 (Cal. 2014) (Am. Legal Publ’g Corp. through Ord. 6317, passed 3-2-15).

government's perspective, the inherent nature of vacation rentals is that of a business.

*B. Case Law is Stale and Lost in Time as Case Precedents from Years Past are Outdated by the Evolution and Growth of Vacation Rentals*

Case law provides mixed opinion as to the classification of vacation rentals as business activity. Although courts have opined on this issue, they have done so during times when vacation rentals lacked the popularity and force they have today. More forward-looking and modern case law provides a fresher perspective addressing the characteristics of modern vacation rentals.

*1. State Courts Outside of California Provide Mixed Opinions Based on Archaic and Basic Understandings of Vacation rentals, Which are Now Developing and Complex Operations*

At the heart of this discussion is the issue of whether or not the operation of vacation rentals is a business. Within that discussion, however, there is the additional complexity of the CC&Rs for homeowners living in common interest developments. Not all CC&Rs are made equally or drafted the same way, and the form in which the business restrictions are drafted may impact the ultimate interpretation of what is a business for purposes of a common interest development run by an association.<sup>104</sup> With that complexity in mind, the discussion here will address certain peculiarities that, while not generally applicable, have impacted the courts' decisions.

Prior to the outburst of companies such as Airbnb and HomeAway, Inc., which influenced the growth of vacation rentals, Oregon and Washington addressed the matter of whether vacation rentals are businesses.<sup>105</sup> The Washington court of appeal did not feel "compelled" to classify vacation rentals as businesses.<sup>106</sup> Rather, believing there was no difference in the purpose of short-term or long-

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104. See, e.g., *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997) (*en banc*).

105. See *id.*; *Ross v. Bennett*, 203 P.3d 383 (Wash. Ct. App. 2008).

106. *Ross*, 203 P.3d at 388.

term rentals,<sup>107</sup> the court found, “The owner’s receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant.”<sup>108</sup> This conclusion was based on case law cited by plaintiffs,<sup>109</sup> which included cases regarding adult and foster care homes.<sup>110</sup> The court was, unfortunately, ill-informed by the plaintiffs, who failed both to provide better authority on the matter and to properly educate the judge as to basic property law principles. Furthermore, had proper research been undertaken, the plaintiffs would have learned that, as of 1996, San Juan Island, Washington—the location of the property in dispute—had classified transient lodging as a commercial activity.<sup>111</sup>

The courts’ discussion, however, did not end with this under-informed analysis. The court went on to address the plaintiffs’ argument that the state excise tax made the operation a business under the CC&Rs.<sup>112</sup> The court rejected the argument, briefly stating that there was no evidence that such taxes were considered when the developer drafted the operative CC&Rs, and swiftly bolstered its conclusion by finding the nature of the rentals to be residential.<sup>113</sup> The court refused to find a distinction between long-term and short-term rentals;<sup>114</sup> a truly frightening and baffling result, as the distinctions are significant.<sup>115</sup> The timing was not right, however. This court was dealing with the issue at a time when vacation rentals

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107. *Id.*

108. *Id.* But see *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382 (Cal. Ct. App. 1991).

109. *Ross*, 203 P.3d at 388.

110. *Id.*

111. SAN JUAN CNTY. CODE §§ 1.01.060, 16.55.045 (originally adopted May 7, 1991, current through Ord. 1-2015, passed Jan. 27, 2015), available at <http://www.codepublishing.com/WA/SanJuanCounty/#!/sanjuancounty16/SanJuanCounty1655.html#16.55.045/> (last visited Apr. 29, 2015).

112. *Ross*, 203 P.3d at 388.

113. *Id.*

114. *Id.*

115. See *supra* Part II.



were not trending and access to Internet advertising and booking was absent.<sup>116</sup>

While there is no excuse for deviating from the traditional legal principles that guide our legal system, Washington is not alone in failing to appreciate the inherent differences between long-term and short-term rentals.<sup>117</sup> Oregon has also found vacation rentals not to be businesses.<sup>118</sup> Its determination, however, was more specific to the relevant CC&Rs that governed the development, which elaborated on what constituted a business, covering structural standards and livestock.<sup>119</sup> Common sense dictates that a vacation rental is neither like livestock nor structural standards and building codes. The court, however, also indicated that the term “commercial enterprise,” as used in the CC&Rs, without elaboration, was ambiguous as to vacation rentals. The court noted that vacation rentals were businesses, as they “systematically and purposefully generate revenue from arm’s length transactions,” but also were *not* businesses, as profit is not their “primary aim . . . as would be true . . . of a bed-and-breakfast.”<sup>120</sup> The logic here is disjointed; the court states on the one hand vacation rentals purport to generate revenue but, on the other hand, states revenue is not the venture’s primary aim. The apparent explanation for this result is the comparison of vacation rentals to bed-and-breakfasts.<sup>121</sup>

What makes conducting a bed-and-breakfast so different from operating a vacation rental? A bed-and-breakfast is “an accommodation offered by an inn, hotel, or especially a private home, consisting of a room for the night and breakfast the next morning for

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116. HomeAway.com, Inc., and Airbnb, Inc., either had not yet been formed or had yet to gain nationwide broadcasting, revolutionizing the industry with online booking services. *Compare Corporate Timeline*, HOMEAWAY, <http://www.homeaway.com/info/media-center/presskit/ha-timeline> (last visited Mar. 7, 2015) (HomeAway.com formed in 2005), and *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Mar. 7, 2015) (Airbnb formed in 2008), *with Ross*, 203 P.3d 383 (decided in 2008).

117. *See Yogman v. Parrott*, 325 Or. 358, 362–63 (1997).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

one inclusive price.”<sup>122</sup> By contrast, a vacation rental is “a fully furnished property, such as a condominium, townhome or single-family-style home, often referred to as villa rentals in Europe. The client/traveler arranges to rent the vacation rental property for a designated period of time, many rent on nightly basis similar to hotel rooms.”<sup>123</sup> Essentially, the primary differences are that the occupant of a bed-and-breakfast gets only a room within the house and a meal rather than the whole home and possibly an arrival gift, as is provided with a vacation rental. Both activities, however, are done with the purpose of generating income: income the I.R.S. and local governments view as business income and hotel income.<sup>124</sup>

Additional circumstances that qualify the Oregon court’s holding are the facts that the defendants did not supply maid service, occupants brought their own bedding, no extra accommodations were provided, and defendants were not required to have a business license.<sup>125</sup> Such accommodations would likely be provided at the bed-and-breakfast referred to by the court, which possibly connects the disjointed logic and result in the opinion. In today’s modern market of vacation rentals, however, it would be difficult to find an American vacation rental without such amenities.<sup>126</sup> Accordingly, this rationale no longer has merit.

While it may be true that some vacation rentals lack such basic amenities, the vast majority provide the above-mentioned amenities in addition to many others, with travelers expecting free Wi-Fi, pools,

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122. *Bed-and-Breakfast*, DICTIONARY.COM, <http://dictionary.reference.com/browse/bed-and-breakfast> (last visited Mar. 8, 2015).

123. *Definition of Vacation Rental*, VACATIONRENTALCOMMUNITY.COM, <http://www.vacationrentalscommunity.com/wikis/vacationrentalwikipedia/definition-of-vacation-rentals.aspx> (last visited Mar. 8, 2015). The terminology “vacation rental” is not used in other parts of the world. *Id.* In Italy, the phrase to describe a vacation rental is a “bed-and-breakfast.” *Id.*

124. *Supra* Part III.A.

125. *Yogman v. Parrott*, 325 Or. 358, 361 (1997).

126. *See Discover the Difference*, *supra* note 3; *Linens Provided or Not?*, *supra* note 39; *Selecting the Best Linens for your Vacation Rental*, *supra* note 39; *Most Important Vacation Rental Amenities for United States Travelers as of February 2014*, *supra* note 39.

and laundry facilities.<sup>127</sup> The industry itself has grown in popularity following both the Washington and Oregon decisions, with homeowners making their vacation rentals more comparable to hotels—the primary market competitor—and websites like HomeAway.com and Airbnb.com revolutionizing the industry and market with online reservations and booking.<sup>128</sup>

This developing trend and the vacation rental industry's push to be more comparable to—if not better suited for travelers than—hotels has resulted in a New York court coming to a different conclusion than its outdated Washington and Oregon counterparts. Finding vacation rentals *were* businesses, the New York court made stark analytical distinctions from the Washington court and applied opposing factors to those asserted by the Oregon court.<sup>129</sup>

In addressing the business aspects of the venture, the New York court classified the vacation rental operation as a business on the grounds that the defendant “advertised to tourists and other visitors to book rooms” and “provide[d] all of the items commonly provided by a typical hotel, and other useful amenities to facilitate a visitor or tourist’s stay in New York City; fresh linens and towels, complimentary soap, shampoo, a hair dryer, an iron, a dolly, Wi-Fi, and a map and information on local entertainment venues.”<sup>130</sup> The defendant “charge[d] her Guests either a nightly or weekly rate, and a fee for additional persons staying in a room; maintain[ed] rules for check-in and check-out procedures; require[d] Guests to make a reservation; and provide[d] Guests with a reservation number.”<sup>131</sup> Following the enumeration of all these services rendered, the court observed, “None of these characteristics are attendant of the typical ‘roommate’ living agreement or arrangement.”<sup>132</sup>

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127. See *Discover the Difference*, *supra* note 3; Brookford, LLC v. Penraat, No. 159605/14, 2014 WL 7201736, at \*8 (N.Y. Sup. Ct. Dec. 19, 2014); Veronique W., *Perfect Getaway House for the Whole Family*, Comment to Reviews, HOMEAWAY (Nov. 3, 2014), <http://www.homeaway.com/vacation-rental/p3854730#reviews>.

128. *Vacation Rentals & Current Travel Trends*, *supra* note 8.

129. See Brookford, LLC, 2014 WL 7201736.

130. *Id.* at \*8.

131. *Id.*

132. *Id.*

Furthermore, the court took a stance on the issue of ambiguous restrictions.<sup>133</sup> While the property at issue did not have CC&Rs, it did have City-imposed regulations on use.<sup>134</sup> The court did not limit the scope of the term business or see the need to create parameters.<sup>135</sup> Rather, the court held, “To limit ‘business’ to the sale of retail goods or the manufacture or repair of some product is wholly disingenuous[;]”<sup>136</sup> doing so ignores the very nature of vacation rentals as hotel—like businesses.<sup>137</sup>

The courts in Oregon and Washington addressed this issue in a vacuum and at a time when vacation rentals did not have the same popularity or the same need to compete with hotels as they do today. The more modern New York court holding provides better insight into the result courts should reach when addressing vacation rentals. California is one state that has yet to make the explicit finding to this regard.

## 2. *California Lacks Assertive Authority and Opinion but Has Moved in the Direction of Classifying Vacation Rentals as Hotels and Businesses*

California Courts have yet to address the specific matter of vacation rentals as businesses. There are, however, three cases that revolve around the issue and place California in a position to make findings similar to those of the court in New York.<sup>138</sup>

In *Mission Shores*, a California court of appeal found that homeowners operating vacation rentals are “essentially operating a

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133. *Id.* at \*13.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*; see also *Stewart v. Chalet Vill. Props., Inc.*, No. E2007-01499-COA-R3-CV, 2008 Tenn. App. LEXIS 191, at \*4 (Tenn. Ct. App. Mar. 31, 2008), *rev'd*, 2009 Tenn. LEXIS 702 (Tenn. Nov. 3, 2009) (“As did the Supreme Court in *Crawford*, we find the first criterion applicable in that the rental of vacation houses is a business of a type generally thought suitable for public regulation.”).

138. *Mission Shores Ass’n v. Pheil*, 83 Cal. Rptr. 3d 108 (Ct. App. 2008); *Colony Hill v. Ghamaty*, 50 Cal. Rptr. 3d 247 (Ct. App. 2007); *Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382 (Ct. App. 1991).

hotel.”<sup>139</sup> There, the court was not addressing whether the activity was a business, but rather, whether the restriction on vacation rentals in the CC&Rs was reasonable.<sup>140</sup> Similarly, in *Ewing v. City of Carmel-By-The-Sea*, the court did not address whether vacation rentals were in fact businesses.<sup>141</sup> Rather, the court addressed whether a city’s restriction on vacation rentals was constitutional.<sup>142</sup> In doing so, the *Ewing* court noted the City’s “repeated use of the word [“commercial”] as strong evidence that [the City] intends only to prevent homeowners . . . from operating like a bed and breakfast, hostel, hotel, inn, lodging, motel, resort, or other transient lodging.”<sup>143</sup> Thus, the court found no ambiguity as to the City’s classification of vacation rentals as commercial activity.<sup>144</sup>

The most relevant California case on topic is *Colony Hill v. Ghamaty*, which found the short-term rental of rooms to be business activity under CC&Rs that prohibited property being used for “any commercial purposes whatsoever.”<sup>145</sup> The defendant had been renting out the rooms in his property for varying terms ranging from two to six months.<sup>146</sup> The agreements with the occupants were oral, and occupants were given exclusive use of the rooms.<sup>147</sup> Much of the court’s reasoning related to single-family use regulations within the City.<sup>148</sup> Of specific importance to the *Colony Hill* court’s conclusion, however, was the fact that the operative CC&Rs had both a restriction against commercial use and a restriction against “leas[ing] his [or her] lot for transient or hotel purposes.”<sup>149</sup> The court did not base its conclusion on the incorrectly labeled “leasing” restriction<sup>150</sup> that

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139. *Mission Shores Ass’n*, 83 Cal. Rptr. 3d at 110.

140. *Id.*

141. *Ewing*, 286 Cal. Rptr. at 384.

142. *Id.*

143. *Id.* at 391 (internal quotation marks omitted).

144. *Id.*

145. *Colony Hill v. Ghamaty*, 50 Cal. Rptr. 3d 247, 249 (Ct. App. 2006).

146. *Id.* at 250–51, 253.

147. *Id.*

148. *Id.* at 253–57.

149. *Id.* at 249 (quoting the CC&Rs).

150. See discussion of leases versus licenses and the use of legal terminology *infra* Part II.

intended to prohibit vacation rentals (or, as the rental was classified in this case, “seriatim renting” or “serial renting”).<sup>151</sup> The court based its conclusion on the restriction prohibiting commercial activity; that is, businesses.<sup>152</sup>

Vacation rentals are not so different from seriatim rentals. They, too, are short-term agreements with various individuals and/or families and involve people coming and going on a week-to-week, day-to-day basis.<sup>153</sup> Vacation rentals, however, are more hotel-like than seriatim rentals, as no exclusive possession is given and more hotel-like amenities are provided.<sup>154</sup> The natural progression of case law and precedent would, therefore, dictate that courts in California should find the operation of vacation rentals, like seriatim renting, as being business operations prohibited under CC&R provisions restricting “any commercial [activity] whatsoever.”

#### IV. ZONING REGULATIONS SHED LIGHT ON THE MATTER BUT ARE NOT DISPOSITIVE OF THE ULTIMATE QUESTION: ARE VACATION RENTALS BUSINESSES?

The discussion on vacation rentals has not been limited to the concept of business and commercial activity. Much of the case law, particularly in states other than California, focuses on zoning regulations, or jurisdictional definitions, for residential single-family use of the property by occupants.<sup>155</sup> While this seems to be a logical means for disposing of the issue—as business ventures are generally not single-family use homes—zoning ordinances or jurisdiction-specific definitions of single-family residential use are highly specific

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151. *Colony Hill*, 50 Cal. Rptr. 3d at 252, 255, 257.

152. *Id.* at 257.

153. *See* VACATION RENTAL AGREEMENT, *supra* note 36; *Definition of Vacation Rental*, *supra* note 123.

154. *See supra* Part II.A; *see also supra* notes 26–37, 39–42 and accompanying text.

155. *See* Slaby v. Mountain River Estates Residential Ass’n, Inc. 100 So. 3d 569 (Ala. Civ. App. 2012); Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 (Ind. 2011); Lowden v. Bosley, 909 A.2d 261 (Md. 2006); Estates at Desert Ridge Trails Homeowners’ Ass’n v. Vazquez, 300 P.3d 736 (N.M. Ct. App. 2013); Heef Realty & Investments, LLP v. City of Cedarburg Bd. of Appeals, 2015 WI App 23.

to a city or county.<sup>156</sup> CC&R provisions that prohibit commercial use and or business activity, on the other hand, are distinct from zoning ordinances regulating single-family use.<sup>157</sup> Of course, local zoning provisions and jurisdiction-specific definitions can shed light on how local governments have or may address the matter.<sup>158</sup>

The primary reason such discussions are raised is because CC&Rs generally compel all properties within the development be used for single-family residential purposes only.<sup>159</sup> These provisions, however, are generally separate and distinct from the provisions prohibiting businesses and commercial use.<sup>160</sup> Thus, the issues and questions presented are very different. While the analysis may involve a discussion of vacation rentals as businesses, the primary discussion under these familial restrictions centers on the definition of family and the use of the property by the occupants rather than operation by the owner as addressed in the discussions regarding business use of property.<sup>161</sup> Therefore, discussing vacation rentals under these types of regulations does not address whether vacation rentals truly are businesses. Rather, it is a discussion regarding whether vacation

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156. See, e.g., *Estates at Desert Ridge Trails Homeowners' Ass'n*, 300 P.3d at 747.

157. See *id.* If a zoning ordinance banned vacation rentals from single-family residential use areas, the activity would not be permitted. It would not, however, be a matter addressed pursuant to the CC&Rs. It would purely be a matter relevant to the zoning ordinances. See e.g., SEAL BEACH, MUN. CODE § 11.4.05.135 (Cal. 2015) (prohibiting vacation rentals under city zoning).

158. See, e.g., ANAHEIM MUN. CODE ch. 4.05.040.010 (Cal. 2014). In Anaheim, California, the City permits vacation rentals in residential single-family zones, but requires homeowners in these areas abide by the business regulations for vacation rentals and secure proper permits and business licenses.

159. See, e.g., *Colony Hill*, 50 Cal. Rptr. 3d at 250; *Lowden*, 909 A.2d at 262; *Estates at Desert Ridge Trails Homeowners' Ass'n*, 300 P.3d at 738.

160. See *Slaby v. Mountain River Estate Residential Ass'n*, 100 So. 3d 569 (Ala. Civ. App. 2012); *Colony Hill*, 50 Cal. Rptr. 3d at 249; see also HANNA & VAN ATTA, *supra* note 17.

161. *Estates at Desert Ridge Trails Homeowners' Ass'n*, 200 P.3d at 741–43 (discussing the resolution of vacation rentals under residential restriction rather than business restrictions will inevitably also require a discussion of the operation as a business, but the outcome is with regards to the specific residential use restriction rather than a prohibition on business activity with the court later looking at the definition of family rather than taking a strictly business analysis of the operation).

rentals are consistent or inconsistent with zoning regulations or jurisdiction-specific definitions for familial and residential uses. Such discussion and analysis, however, has also produced mixed results from the courts.<sup>162</sup>

Two cases, *Estates at Desert Ridge Trails Homeowners' Association v. Vazquez* and *Siwinski v. Town of Ogden Dunes*, provide general examples of the positions being deliberated.<sup>163</sup> Both cases address the matter of single-family use regarding the use of the property by the occupant.<sup>164</sup> The New Mexico court in *Vazquez* ultimately found the use of the properties by families, even for a short time, was within its jurisdiction's definition of single-family use, whereas the Indiana court in *Siwinski* held the short-term use of the property was not single-family use of the property and, thus, vacation rentals violated the single-family use regulation.<sup>165</sup>

California courts have also participated in the discussion on vacation rentals or similar type rentals in light of single-family use zoning ordinances.<sup>166</sup> In *Ewing*, a California court of appeal had to address whether regulations on vacation rentals were constitutional after the City of Carmel-by-the-Sea specifically enacted an ordinance regulating vacation rentals.<sup>167</sup> The policy grounds for the ordinance were as follows:

Review and develop measures to restrict commercial short term rental of single family residence in the R-1 district. . . . Preserve existing permanent housing and maintain the vital residential

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162. See *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 830 (Ind. 2011) (finding vacation rentals to be commercial activity that is inconsistent and not permitted in single-family residential areas). But see *Heef Realty & Investments, LLP v. City of Cedarburg Bd. of Appeals*, 2015 WI App 23 (finding single-family zoning ordinance did not prohibit vacation rentals).

163. *Siwinski*, 949 N.E.2d at 830; *Estates at Desert Ridge Trails Homeowners' Ass'n*, 200 P.3d at 741–43.

164. *Siwinski*, 949 N.E.2d at 828–30; *Estates at Desert Ridge Trails Homeowners' Ass'n*, 200 P.3d at 743.

165. *Siwinski*, 949 N.E.2d at 828–30; *Estates at Desert Ridge Trails Homeowners' Ass'n*, 200 P.3d at 743.

166. *Colony Hill v. Ghamaty*, 50 Cal. Rptr. 3d 247 (Ct. App. 2006); *Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382 (Ct. App. 1991).

167. *Ewing*, 285 Cal. Rptr. 387.



character of Carmel-by-the-Sea. Prohibit expansion of visitor oriented commercial use such as transient rentals. . . . Encourage the conversion of commercial transient housing to housing for permanent residents.<sup>168</sup>

The statute and purpose here were clear: the legislature wanted specifically to regulate and prohibit vacation rentals.<sup>169</sup> Thus, the court did not need to involve itself in an in-depth discussion of vacation rentals and single-family use. The ordinance itself prohibited vacation rentals; when a zoning ordinance outright prohibits the use, it removes the need to discuss the issue of this article: whether vacation rentals are business operations with specific regard to CC&Rs.<sup>170</sup> This further highlights the specific effect particular zoning regulations have in the larger analysis of this issue. Zoning ordinances, in and of themselves, do not squarely address whether vacation rental activity is a business operation for the purpose of other restrictions on the property.<sup>171</sup>

The court in *Colony Hill* also had the opportunity to discuss the issue but with a more thorough analysis.<sup>172</sup> The zoning ordinances at issue were those of San Diego, California.<sup>173</sup> For the purposes of the City of San Diego, family was defined as “two or more persons related through blood, marriage or legal adoption . . . or unrelated persons who jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic

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168. *Id.*

169. *Id.*

170. For example, a set of CC&Rs may prohibit business activity. The common interest development to which such CC&Rs apply may be in a city that permits vacation rentals in residential areas. The mere fact that the city permits the use in residential areas does not change the nature of the use or invalidate the CC&R restriction against business activity. *E.g.*, ANAHEIM MUN. CODE chs. 4.05.010, *et seq.*, 18.01.010, *et seq.* (allowing homeowners to engage in vacation rentals in residential areas, but requiring homeowners whose property is located in a common interest development to obtain permission from the association prior to being allowed to engage in it).

171. *See Ewing*, 285 Cal. Rptr. 387.

172. *See Colony Hill*, 50 Cal. Rptr. 3d at 250–51, 253.

173. *Id.* at 250.

unit.”<sup>174</sup> The discussion on single-family use centered on the conduct of the occupants and, specifically, whether they conducted themselves in a manner indicative of an “integrated economic unit.”<sup>175</sup> The occupants rented individual rooms in the defendant’s home for limited and varying durations.<sup>176</sup> However, the defendant could not prove that this form of serial rental and occupation by individuals was done in a manner that was integrated as one economic unit.<sup>177</sup> Regardless of the defendant’s failure to meet the required burden of proof, the court noted that such rentals “could destroy the single-family character of Colony Hill.”<sup>178</sup> While the court here found short-term seriatim renting was *not* single-family use, the ultimate result was based on application of specific local codes and thus has limited precedential effect to this regard.<sup>179</sup>

*Colony Hill* supports California’s position that vacation rentals are not generally supportive of single-family residential use; however, the case also exemplifies how results are highly localized and specific to the local and jurisdictional parameters of single-family use. Therefore, while courts can look to zoning regulations for authority regarding whether vacation rentals are businesses, the ultimate distinction cannot be forgotten. The discussion of single-family use is very different from that of business use, and restrictions in CC&Rs that prohibit business activity are distinct from restrictions limiting use of property to single-family use.

Thus, the enforcement and discussion of prohibitions on businesses in common interest developments need not address the matter of single-family use.<sup>180</sup>

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174. *Id.* (quoting S.D. MUN. CODE § 113.0103 (Cal. 2015)).

175. *Id.* at 255.

176. *Id.* at 250.

177. *Id.* at 255.

178. *Id.*

179. *See id.* at 250.

180. Although from a practical standpoint, associations may want to seek legal action and enforcement of both provisions as individual and distinct actions.

## V. RESTRICTIONS IN CC&RS PREVENTING HOMEOWNERS FROM OPERATING VACATION RENTALS ARE REASONABLE AND ENFORCEABLE

In order for associations to enforce the CC&Rs, the restrictions must be reasonable and non-arbitrary.<sup>181</sup> California courts have already succinctly concluded that restrictions on vacation rentals are reasonable.<sup>182</sup> As vacation rentals grow in popularity as projected,<sup>183</sup> the residential character of communities will be threatened.<sup>184</sup> Vacation rentals have adverse impacts on local communities, “including, but not limited to, increased levels of . . . vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City.”<sup>185</sup> Additionally, “[s]uch commercial use may increase demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs.”<sup>186</sup> Within common interest developments specifically, the occupants “require greater supervision and increased administration expenses.”<sup>187</sup> “[S]hort-term [occupants] cause more problems than owners or their guests. The problems include parking, lack of awareness of the rules, noise and use and abuse of the facilities.”<sup>188</sup>

Citing the San Diego City Council, the court in *Ewing* found:

It stands to reason that the “residential character” of a neighborhood is threatened when a significant number of homes—at least 12% in

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181. CAL. CIV. CODE § 4350 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.); see also *Nahrstedt v. Lakeside Village Condominium Ass’n*, 33 Cal. Rptr. 2d 63 (1994).

182. *Mission Shores Ass’n v. Pheil*, 83 Cal. Rptr. 3d 108, 112 (Ct. App. 2008); *Watts v. Oak Shores Community Ass’n*, 2d Civil No. B240337, 2015 WL 917800, at \*4–6 (Cal. Ct. App. Mar. 2, 2015), *vacated* 2015 WL 1321669 (Cal. Ct. App. Mar. 24, 2015).

183. See Said, *supra* note 6; *Vacation Rentals & Current Travel Trends*, *supra* note 8.

184. See *Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382, 387 (Ct. App. 1991).

185. *Id.*

186. *Id.*

187. *Watts*, 2015 WL 917800, at \*2.

188. *Id.*

this case, according to the record—are occupied not by permanent residents but by a stream of [occupants] staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other “unmitigatable, adverse impacts” cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community.<sup>189</sup>

These occupants, the court reasoned, “do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor.”<sup>190</sup> They fail to “engage[] in the sort of activities that weld and strengthen a community.”<sup>191</sup> Vacation rentals essentially create, and are in fact, a nuisance in communities, particularly in common interest developments.<sup>192</sup>

The Oak Shores Community Association took assertive measures and, rather than prohibiting vacation rentals all together, implemented rules regarding their operation.<sup>193</sup> The rules included “restricting owners from renting out their homes more than once in any seven-day period; an annual fee of \$325 imposed on owners who rent their homes; a rule limiting the number of automobiles, boats and other watercraft that renters are allowed to bring into Oak Shores;” and fees regarding garbage collection, boats and watercrafts, building permits, and property transfers.<sup>194</sup> In *Watts v. Oak Shores Community Association*, plaintiffs brought suit against the association challenging these rules and regulations, arguing on appeal that the association should not have been granted judicial deference by the trial court.<sup>195</sup>

The appellate court affirmed the trial court’s finding that the association acted well within its authority to enact such rules and

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189. *Ewing*, 286 Cal. Rptr. at 388.

190. *Id.*

191. *Id.*

192. *See Monarch Point Homeowners Ass’n v. Arditi*, No. G043700, 2011 WL 2623830 (Cal. Ct. App. 2011).

193. *Watts v. Oak Shores Cmty. Ass’n*, 2d Civil No. B240337, 2015 WL 917800, at \*1 (Cal. Ct. App. Mar. 2, 2015), *vacated* 2015 WL 1321669 (Cal. Ct. App. Mar. 24, 2015).

194. *Id.*

195. *Id.*

regulations and was doing so in good faith and for the best interest of the association as a whole.<sup>196</sup> The court recognized the disparate impact the vacation rentals had on the community:<sup>197</sup> “Short-term renters use the common facilities more intensely; they take more staff time in giving direction and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse.”<sup>198</sup> The regulations on the vacation rentals were reasonable to address these issues. The court specifically noted, “The Board may reasonably decide that all owners should not be required to subsidize Watt’s vacation rental business.”<sup>199</sup> *Watts* provides an example of the measures associations will take to resolve the problems caused by vacation rentals and the support they will find from the courts as problems inflicted by vacationing occupants increase.<sup>200</sup>

California courts, thus, pave the way for empowering associations to take charge, restrict, and regulate vacation rentals to prevent or mitigate the negative impact that can result therefrom. Retaining residential quality, preserving quiet enjoyment of property, and keeping costs down within communities provide a strong basis for enforcement of such regulations and restrictions to be reasonable.<sup>201</sup>

## VI. CONCLUSION

Vacation rentals are grouped by lay people into the category of “rentals,” which includes traditional landlord tenant lease agreements. Vacation rentals, however, are not lease agreements; they are licenses.<sup>202</sup> While the population of the United States has popularized

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196. *Id.* at \*4–5 (relying on *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249 (1999)).

197. *Id.* at 4.

198. *Id.*

199. *Id.*

200. This is also a great example of what associations may do if they do not want to outright ban vacation rentals within their common interest development.

201. *See Mission Shores Ass’n v. Pheil*, 83 Cal. Rptr. 3d 108, 112 (Ct. App. 2008); *see also Ewing v. City of Carmel-By-The-Sea*, 286 Cal. Rptr. 382, 387 (Ct. App. 1991).

202. *Supra* Part II.A.

the term “vacation rental,”<sup>203</sup> it is merely a common usage title that lacks legal meaning. As such, the legal community should not be grouping vacation rentals together with lease agreements.

Having forgotten traditional and operative legal principles, the California legislature has created ambiguity in the California Civil Code’s Davis-Stirling Common Interest Development Act provisions pertaining to “rentals and leasing.”<sup>204</sup> In addressing this matter, courts should not find section 4740 of the California Civil Code applicable to vacation rentals. If the legislature is displeased with such a result, it may address the matter by properly amending the Civil Code to clearly and unambiguously reflect its intent. It should, however, do so in a manner clarifying that Civil Code section 4740 is only applicable to lease agreements, and should explicitly except vacation rentals. In conjunction with amending the language of the section 4740 to remove all “rental” or “renter” terminology—leaving only “lease,” “lessee,” and “tenant”—the Code should additionally be amended to add the following subsection:

(g) This section shall not apply to Vacation Rentals. For the purposes of this Act Vacation Rentals are short-term license agreements whereby a homeowner permits limited use of the unit to occupant(s) for a term less than 30 days.

Concurrently, California courts should find vacation rentals are business operations and are prohibited as such by CC&R restrictions prohibiting businesses and commercial use. The operation of vacation rentals is akin to that of a hotel.<sup>205</sup> The industry has greatly developed and continues to expand, with more local governments seeking to regulate the activity as a business and both local and federal governments taxing them as the same.<sup>206</sup> The California courts should not be deceived by layperson terminology and outdated uninformed

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203. *Definition of Vacation Rental*, *supra* note 123.

204. *Supra* Part II.B.

205. *Mission Shores Ass’n*, 83 Cal. Rptr. 3d at 112.

206. *Supra* Part II.A.

court decisions that fail to consider modern developments in the growing industry.<sup>207</sup>

Vacation rentals are businesses comparable to hotels and should be treated accordingly. In the words of one guest, “[The vacation rental was] an alternative to a week in a conference hotel while traveling . . . . [Owner] and staff were accommodating, friendly and always accessible. They made sure we had everything we needed upon arrival . . . . [Owner] even found a highchair and crib.”<sup>208</sup> There is no mistaking the hotel-like quality and amenities provided, and “[w]hen the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants.”<sup>209</sup>

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207. *Supra* Part II.B.1.

208. Kate G., *supra* note 40.

209. *Edwards v. City of L.A.*, 119 P.2d 370, 370 (Cal. Dist. Ct. App. 1941).