

**COVER STORY**

# Airbnb's Kryptonite

The term “single-family use” is going to be the most popular condo term in 2017! Well, that is, if you are part of the movement against the use of Airbnb in condominiums



The phenomena and momentum of Airbnb use in condominiums may have finally been obstructed by this simple term which is commonly found in condominium declarations. Previous court cases have successfully levied this term to battle the rise of rooming houses in condominiums and a recent decision has added significant gravitas by extending it to owners who engage in short-term leasing through Airbnb or other social hosting websites.

## The Court: Single-Family Use Does Not Equal Hotel-Type Use

The court in *Ottawa-Carleton Standard Condominium Corporation No. 961 v. Menzies* (2016) was asked to consider whether the corporation's declaration restricting use of the unit for the “purpose of a single family dwelling” was inconsistent with short-term leasing.

In this case, the owners of the unit

entered into a lease agreement with a company whose main purpose was to provide short-term leases to tenants. Guests of the unit were advised to be “discreet about mentioning Airbnb to anyone in the building and under no circumstances should [guests] ever leave the keys with the concierge”. The board of directors determined this use in the building to be similar to the operation of a hotel and decided that it was in the best interest of the corporation to pass a rule restricting the permitted length of tenancies.

Instead of using the procedures found in the Condominium Act, 1998 to oppose the passing of a proposed rule, the owners opted to engage in a vicious and litigious attack on the board, by first obtaining an interim injunction restraining the corporation from enforcing the rule against them or preventing their short-term rental operation. The corporation

was successful in setting aside this decision, defended the owner's application and also brought a counter-claim against the owners.

The corporation's claim was to enforce both the rule and its declaration provision which restricted the use of units to be occupied “only for the purpose of a single family dwelling”.

In addition to finding that the rule was valid, the court also expanded the definition of “single family” a bit further by stating that it “cannot be interpreted to include one's operation of a hotel like business”. The court concluded that short-term leasing was prohibited both by the corporation's rule and the single-family use restriction found in the declaration. Although this is a very strong step forward towards controlling this type of use in condominiums, unfortunately more is needed.

**Municipal Regulation – the final death blow or a delicate balancing act?**

Airbnb is the Uber of condos. Although courts are continually asked to intervene (which has resulted in stretching definitions and fashioning decisions to conform to the social reality of short-term leasing within condos), without clear and specific municipal regulations, condo boards are left with enforcement tools which are ill-suited for the job.

It is also important to note that condos

are not the only ones affected. Airbnb’s net worth of approximately \$20 billion is also making a tangible impact in the hotel market. Hotels are regulated, but Airbnb short-term leasing is not.

The main issue here is that short-term leasing, using Airbnb and other social hosting websites, are not directly referred to within current zoning by-laws. Rooming houses, on the other hand, have received significant attention by the municipality and the discourse surrounding rooming houses has

found City counsellors and stakeholders debating the manifold of issues that arise from their use in a building, including fire safety, tenant protection and affordable housing. As a result of this attention on rooming houses, amended municipal zoning by-laws have been drafted which both defines the term and provides for limitations to its use when permitted.

Akin to the era before rooming houses were municipally regulated, the phenomena of Airbnb has created a blurring of definitions and permitted uses. For example, is a residential unit owner operating a commercial business if they use it for repeated short-term rentals? How often does one need to rent on a short-term basis to be considered a commercial enterprise? Should different insurance policies apply to those owners who engage in such activity within a residential condominium? Or, more importantly, should a residential condominium ever be restricted from providing short-term rentals similar to hotel stays?

Although the City of Toronto is only beginning to look into this issue (with a detailed report expected to be delivered in early 2017), some North American municipalities, such as San Francisco, have taken proactive steps to regulate short-term leasing. San Francisco requires owners who engage in short-term leasing to obtain a \$50.00 license and provide proof of at least \$500,000.00 in liability insurance.

**Concluding Thoughts**

At a deeper level, what is at play here is the balancing of interests between collective ownership and individual property rights. Unfortunately, property definitions in law are both slow to change and do so within a social context. For example, it took decades, if not centuries, for the lords in the Feudal system to permit transfer of property to heirs and blood lines rather than reverting to the monarch. Although only created in 2008, Airbnb, and the other social hosting websites following its model, are forcing the law of property to catch-up. Municipal regulatory intervention is urgently required to clarify and contain this issue; however, in the interim, the courts have weighed in – and, the first court case to tackle this issue directly rendered a significant blow to short-term leasing in condominium using Airbnb and other social hosting websites. **CV**

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