

CONDO COMMENTARY

When Condo owners are away, can tourists come to stay?

By David Thiel, B.A., LL.B.

A recently reported Manhattan case called attention to condo owners who were occasionally renting their unit to tourists – apparently at a rate of \$250 per night – when the condo owners were themselves out of town.

This sounds like a great deal for the unit owners. Who wouldn't want to have the ability to rent to vacationers or tourists to generate some extra, sometimes substantial, income? In many cases, however, the immediate neighbours and the condominium board representing the other owners may not want this to happen.

Indeed, in the aforementioned New York case, the condominium board filed a lawsuit against the subject owners in an effort to prevent rentals to vacationers, citing violation of its bylaws.

Could such a scenario unfold closer to home? Of course it could, and it has in fact occurred frequently in Ontario. Condominium boards and courts in Ontario have been dealing with short-term rentals and related issues for at least the past two decades.

Validity of rental restrictions

The issue of vacation rentals in residential condominium buildings has been addressed by the Ontario courts dating back to 1994. The vacation rental issue is really a subset of the more general issue of short-term rentals or occupancies of condominium units.

In 2001 and 2002, the Ontario Superior Court decided upon such issues in the related cases of Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp No. 1280 and Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp No. 1385, which are together known as “the Skyline cases.”

Skyline had promoted residential units it owned in downtown Toronto to travel agencies as executive suites, fully furnished, for corporate leisure travel. A related 2001 court decision references the subject owner as advertising its accommodation as a “unique alternative to staying in just an ordinary hotel.”

The primary issue in the Skyline cases was whether or not a condominium corporation rule essentially prohibiting short-term rentals of less than six months (subject to certain exceptions that did not apply to Skyline) was valid and enforceable against Skyline. Among other arguments, Skyline contended that the rule in question was invalid as such a restriction on leasing should have been found in the declaration rather than a rule.

Continued on page 2...



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Continued from page 1

In the Skyline cases, the court ultimately confirmed that the condominium corporation could enact such rules and that such rules were consistent with the condominiums' declarations, which provided that residential units were to be used as private single family residences and for no other purpose. The court noted, in accordance with established case law, that courts should give deference to condominium boards and give effect to the rules boards enact, unless such rules are clearly unreasonable or contrary to the legislative scheme.

In upholding such rules, the court recognized various concerns related to short-term rentals:

- Transient guests don't know the condominium rules and documents and have no vested interest in abiding by the rules as owners do;
- Transient guests have no interest in long-term upkeep, maintenance or repair;
- It's not unreasonable for owners to consider that the use of recreational facilities is less inviting when there is a risk of encountering absolute strangers;
- Transient guests have the potential to compromise the security of the condominium, and comings and goings of transient guests can make owners feel less comfortable.

These and other reasons have made many condominium boards consider enacting rules to prohibit and/or restrict short-term rentals. Condominium boards should also check with a condominium lawyer as to whether such vacation rentals would also violate the restrictions on the use of units as may be found in the condominium's declaration, or whether such a rule would be consistent with the terms of the declaration.

Vacation rentals by individual owners

Since the Skyline cases in 2001 and 2002, there has been a proliferation of website services that facilitate the vacation rental of condominiums. Once primarily the domain of firms such as Skyline and others managing and renting an inventory of these types of units, individual owners of condominium units now have a greater ability and access to tools to market the rental of their personal residential units for vacation purposes.

The principles behind the Skyline cases remain, however, and individual owners renting for vacation purposes would also be subject to any condominium rule prohibiting short-term rentals or occupancies.

Permitted short-term rentals

It should also be noted that some condominiums may have declaration provisions which specifically permit short-term rentals. Such buildings may be marketed to investors/purchasers as allowing vacation or executive rentals on a short-term basis. In some instances, the builder may have also offered or facilitated management services to implement a pool of rental suites.

When a declaration specifically authorizes short-term rentals, any rule to prohibit such short-term rentals would be inconsistent with the declaration and therefore invalid.

Continued on page 3...

Continued from page 2

A declaration could be amended on consent by the condominium corporation upon following the procedures required under the Condominium Act (the Act), which includes, among other requirements, obtaining the written consent of at least 80 per cent of owners. If a condominium board considers such steps to address the short-term rental concern, there could be serious issues raised by those owners who may have depended heavily upon the right to rent to vacationers on a short-term basis. It's conceivable that the oppression remedy under Section 135 of the Act could be raised in response, even if the condominium corporation could obtain the required number of consents from owners.

For the reasons referenced above, permitting vacation or other short-term rentals has the potential to change the nature of a particular building. Whether or not a condominium board may seek to enact restrictions may depend upon the precise wording of the declaration and the reasonable expectations of owners when purchasing their properties.

This article first appeared in the August 2013 edition of CondoBusiness Magazine.
