



April 2014

Tips for Monitoring and Enforcing Your HOA's Rental Cap

If your association has a limit on the number of rental units permitted, you need a process for monitoring who's renting, including possibly a waiting list if you're at already at your max. Here we offer tips for tracking rentals easily and fairly, enforcing it, and for communicating your system to homeowners.

Lenders Driving Rental Caps

Rental caps are hotly debated but perhaps less common than the debate level suggests.

"I don't know that we have any clients that have the issue of enforcing a rental cap," says Steven Parker, president of FirstService Residential Nevada in Las Vegas, which manages hundreds of community associations. "We don't have a lot of communities that say there can be only 25 percent renters. They only say you can't have rentals or you can. Where the issue of rental percentages comes into play almost as much is for financing. The cap to qualify for Fannie Mae or Freddie Mac loans is 30 percent maximum rentals."

Beth Grimm, an attorney in Pleasant Hill, Calif., who's practiced HOA law for more than 25 years, representing both associations and homeowners, can't estimate how many California associations have such a cap. "I only talk to those who call me and ask if it's a good idea," she explains. "What I can tell you is that the lending industry has driven associations to implement them because of lending regulations that get more precarious as you get more rentals."

Lenders are also shaping the issue in Florida. "After the foreclosure crisis, a lot of associations here have been trying to cap the number of rentals to meet Fannie Mae restrictions and to get bank loans," says Jed L. Frankel, a partner at Eisinger, Brown, Lewis, Frankel & Chalet PA in Hollywood, Fla., who advises community associations. "Many lenders will lend only if the association has less than a certain percentage of units rented."

Managers Can Help

Many HOA management companies have systems that can help you get a handle on tracking renters. "Our accounting software allows us the ability to give access to tenants of our communities," says Robert White, managing director of KW Property Management & Consulting in Miami, which oversees about 125 associations totaling 30,000—35,000 units. "It also tracks leases signed by renters so if leases expire or there's no lease or rental-approval on record, the tenant won't have access to the building or community. Once the approved lease is uploaded to the system, it's automatic; key fobs or parking passes will automatically deny access upon the lease expiration."

"You have to have some kind of monitoring program in place," says Parker. "There are a number of issues associated with renters, and they don't just involve the rental cap. Renters frequently don't get access to CC&Rs, so they don't know what they can and can't do. Most want to comply, but they don't know how."

"So about four years ago, we put together a program that charged homeowners \$75 a year," says Parker. "For that, we'd track every renter, provide the renter with a copy of the CC&Rs and rules and

regulations, get the renter's phone number, and provide a copy of the lease so the HOA had it. This way, the renter was part of the community. It worked very well, and associations loved it. But a couple of homeowners who didn't like the \$75 fee went to the legislators demanding it be removed. The state legislated that fee out, and when we couldn't charge for it, we couldn't continue the program. We've since rolled it out to several associations that will pay for it. If you have a large rental population, you can do that."

Get Your Rules In Order

But you don't just need software. You need rules to help owners understand who gets to rent and when and to ensure their process is fair.

"Most sets of original governing documents don't limit the amount of units that can be rented," says Frankel. "They either say you can or you can't. If you can, there may be limitations like you can't rent until you've owned the unit for a year, or you can have only one tenant a year. But now you have this challenge of being able to rent only a certain percentage of your units out so potential buyers can qualify for bank loans.

"How do you enforce that?" asks Frankel. "First you need an amendment to the declaration or rules that says only X percent of owners can rent units. Then you have to figure out who those 10 percent are, and you have to do it equitably. Maybe you're lucky enough that the number of units being rented is X percent now. But what about the five other owners who want to rent their units out? Do you tell the X percent they can rent only one year? Or do you let their renters stay as long as they want, and when one leaves, you give that opportunity to someone else? Do you have a waiting list, or do you permit rentals based on a lottery?

"I don't know that a first come, first served system right off the bat is necessarily fair because you want to give everybody the same opportunity," says Frankel. "You could send owners letters saying, 'This is our system. We'll let the people renting now continue, and if we hit that X percent limit, we'll create a list. If you want to rent your unit, we'll put your name on the list and then go down the list. When a tenant moves out, if that unit owner wants to get back in the rental pool, that owner will go the bottom of the list.'"

White says his clients typically follow a similar procedure. "If the documents don't define the process through which owners can rent and comply with the limits, we suggest we create a waiting list," he says. "As a lease expires for an owner who wants to rent, that owner relinquishes his right to rent and moves to the bottom of the waiting list. The next person on the waiting list would then be able to rent their unit out. We recommend this as a fair manner to maintain the limit and give everyone a chance to rent their unit."

In California, Grimm says restrictions typically differ from that model. "They're often written that the rental is permitted until the owner transfers or sells the unit, and then they lose the rental permission; that's so an investor purchaser doesn't get the same benefit," she explains. "Upon the sale, the new property owner goes to the back of the line."

A shoddy system does you no good at all. "Your right to the enforcement of this is really important," says Frankel. "If you have this system and people are doing what they want, you'll be above the cap, and the whole system goes to crap. You can't have that."