



## **MEMORANDUM**

TO: Lakewood Property Owner's Association

FROM: Amy T. Harriman

DATE: January 10, 2022

RE: Prohibition on Short Term Rentals  
Our File: 27771.87784

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### **SCOPE OF MEMORANDUM**

You had asked me to memorialize our conversation at the meeting of the Board of Directors for the Lakewood Property Owners Association about whether the HOA could, under its current bylaws, ban or restrict homeowners in the Association from offering their property as a short-term rental. Furthermore, the Association would like to know if they can amend the neighborhood's Declaration of Covenants and Restrictions to prohibit or restrict this type of behavior. If the Association can, the Association would like to know how they would go about such a change.

### **BRIEF ANSWER**

The Lakewood Property Owners Association can amend their Declaration of Covenants and Restrictions ("Declaration's") by obtaining approval from 75% of the owners in the Association. Any amendments to the covenants or restrictions must be expressed in clear, unambiguous, and preemptory terms. If the amendments are unclear or ambiguous, Wisconsin courts will resolve disputes in favor of the free use of the property. Therefore, the Lakewood Property Owners Association may amend the Declarations to include restrictions as to the use of the property in the plat, but to be enforceable, they must be clear and unambiguous.

The Lakewood Property Owners Association may amend the Declarations to prohibit short-term rentals. These amendments could include defining permitted and prohibited use, and/or defining and permitting long-term rentals and prohibiting and defining short-term rentals, and providing a penalty clause for violating the Declarations.

### **BACKGROUND & ANALYSIS**

A Lakewood Property Owners Association is a subdivision organization that creates and enforces rules relating to properties within its control. HOAs can be unincorporated, non-profit associations,<sup>1</sup> or incorporated non-profit corporations and therefore subject to incorporation

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<sup>1</sup> See generally, Wis. Stat. § 184.

laws<sup>2</sup>. Generally, the purpose of an HOA is to provide governance over community issues such as architectural design, collecting assessments for communal projects, and enforcing property maintenance standards. HOAs are created by a recorded declaration with the Register of Deeds.

The Lakewood Property Owners Association has a recorded declaration. The original declaration was recorded on May 20, 1982. The declaration has been updated over the years, with the most recent amendment being recorded on February 7, 2014. To amend the Declarations, the Lakewood Property Owners Association must obtain approval from seventy-five percent (75%) of the owners in the Lakewood Property Owners Association. This is generally known as a 1-house, 1-vote policy.

Any interest in real property must be appropriately filed so the public can easily determine from public records how the property may legally be used.<sup>3</sup> In order for a document to be recorded with the Register of Deeds and thereby be appropriately filed, the document must meet specific legal standards.<sup>4</sup> For example, the name of the instrument must be located no less than .5, but no more than 3 inches from the top of the document; the top three inches of the document must be left blank; the ink must be black on standard white paper and several more.<sup>5</sup> The two requirements that are the most relevant from a process perspective is that the document must list the legal description of the property, and original signatures must be notarized or authenticated with a notary ink stamp.

To amend the Lakewood Property Owners Association Declarations, the Association must have seventy-five percent (75%) of the property owners approve of the amendment or restatement. From a best practices standpoint, the Board of Directors of the Lakewood Property Owners Association should mandate the vote be accomplished by written instrument, with an individual checking to confirm the individual claiming to have the power to vote in favor or against. This could be done by reviewing an identification card against the property records. For the most protection, the written voting instrument should be notarized as well. While this may seem like an undertaking, the Association could host a day in the Town Hall or Association common space for people to come and have their signature page notarized. Or in the alternative, the Association could send a copy of all of the updated declarations to residents with specific instructions, including a list of places individuals can get their form notarized, and provide a return address for residents to send the notarized copy to the Association.

The Lakewood Property Owners Association should likely contemplate a renewal/or an update to the Declarations document in the near future, regardless of whether the association includes restrictions on short-term rentals, to reflect any updates in ideals or requirements. For example, the Lakewood Property Owners Association has made amendments to the Declarations about six times, which can make it difficult for property owners to follow along and know what acts are prohibited or permitted. Thus, a general clean-up and update of the Declarations would be appropriate.

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<sup>2</sup> See generally, Wis. Stat. § 181.

<sup>3</sup> Wis. Stat. § 706.001(1); *In re Couillard*, 486 B.R. 466, 472 (Bankr. W.D. Wis.), on reconsideration, 486 B.R. 481 (Bankr. W.D. Wis. 2012) (These recording requirements “shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity”).

<sup>4</sup> Wis. Stat. § 59.43(2m).

<sup>5</sup> *Id.*

### ***Wisconsin's Right to Rent Law:***

The Wisconsin Legislature, in the 2017-2019 State Budget, created a law that prohibits local governments — which include counties, cities, villages, and towns — from banning the rental of a residential dwelling for seven consecutive days or more (the “Right to Rent law”). The law does not prevent local governments from banning nightly rentals or rentals of less than seven consecutive days. The law treats rentals of less than seven consecutive days differently, presumably that lawmakers believe such short-term rentals are more of a commercial use of property, which may be inappropriate in some residential areas. The law does not prohibit local governments from requiring property owners to comply with noise standards, parking requirements, obtaining a local permit, paying penalties for ordinance violations, or complying with other local standards.

The Right to Rent law does not change or restrict a homeowners association's ability to limit or restrict short-term rentals. The law focuses on local units of government and does not prohibit homeowners associations from prohibiting short-term rentals.

### ***Enforceability of Covenants and Restrictions:***

The State of Wisconsin, from a public policy perspective, favors the free and unrestricted use of property.<sup>6</sup> Therefore, in order for a covenant or restriction to be enforceable, the restriction must be expressed in clear, unambiguous, and peremptory terms.<sup>7</sup> In resolving disputes about the meaning of a restrictive covenant, the court does not look at the general intent but rather determines the meaning of the restriction by the words actually used.<sup>8</sup> If the meaning of the restrictive covenant clearly can be ascertained by the words in the covenant itself, then the restriction will be enforced.<sup>9</sup> If the words employed in the restrictive covenant are ambiguous, such that the language is susceptible to more than one meaning, then the court resolves disputes about the meaning of the restriction in favor of the free use of the property.<sup>10</sup>

For example, in *Forshee v. Neuschwander*, the neighborhood HOA argued that, by renting their property to others on a short-term basis, the Neuschwanders violated a restrictive covenant prohibiting “commercial activity” on the Neuschwanders' lot.<sup>11</sup> The court concluded the restrictive covenant was ambiguous because reasonable minds could differ as to whether short-term rentals such as the Neuschwanders' property met the standard for commercial use. The court reasoned that, on the one hand, the Neuschwanders' made a profit by renting their property to others. Moreover, by selling the use of their property, they were engaging in commerce. However, on the other hand, the actual use of the property was residential in nature as the guests were bringing groceries, living, and sleeping on the property. Thus, the short-term tenants used the property as a residential dwelling. Therefore, the court held the restrictive covenant prohibiting commercial activity was ambiguous.

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<sup>6</sup> *Forshee v. Neuschwander*, 2018 WI 62, ¶ 1, 381 Wis. 2d 757, 914 N.W.2d 643.

<sup>7</sup> *Id.*; See generally, *Dodge v. Carauna*, 127 Wis. 2d 62, 66, 377 N.W.2d 208, 211 (Ct. App. 1985) (At a bare minimum, the standard of validity for deed restriction is reasonableness).

<sup>8</sup> *Forshee v. Neuschwander*, 2018 WI 62, ¶ 17, 381 Wis. 2d 757, 914 N.W.2d 643.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> This is primarily because the phrase “Commercial Activity” was not defined in the Restrictive Covenant, which meant homeowners had differing opinions as to the definition.

In the case of the Lakewood Property Owners Association, the Declarations stated that the property in the HOA shall be single-family dwellings that may only be used for residential purposes.<sup>12</sup> Based on case law, as provided above, the provision does not unambiguously prohibit short-term rentals, and therefore, reasonable minds could differ. Therefore, this provision does not expressly prohibit short-term rentals.

Any amendment the Lakewood Property Owners Association contemplates as a method of prohibiting short-term rentals must be clear and unambiguous so that only one meaning can be read from the language of the restriction. This can likely be achieved by drafting thoughtful language prohibiting short-term rentals, including defining terms and providing a purpose statement for the regulation.

### ***Ways to Prohibit Short-Term Rentals:***

There are several ways the Declarations could be updated to prohibit short term rentals, some of which are: (1) define single-family residential purposes; (2) introduce, define, and prohibit commercial activity; (3) introduce language that authorizes long term rental language but prohibits short term; and (4) provide penalty language for violating the Declarations.

By defining several key terms that are not currently included in the Lakewood Property Owners Association, a court would likely enforce the prohibition language. Merely defining single-family residential on its own will probably not be enough to provide a clear and unambiguous prohibition against short-term rentals. However, by introducing permitted and prohibited use language, taken in conjunction with additional updates, it is likely the ambiguity would be eliminated.

Depending on the level of prohibition the Association is seeking, there are several ways to draft declaration language. For example, if the Association would like to allow long-term rentals and prohibit all short-term rentals, language could be drafted as such. This would allow homeowners to rent their homes for not less than 12 months. Provisions such as this are quite common in condominium association covenants and bylaws and are viewed by the courts as a reasonable restraint of property ownership.

A prohibition against short-term rentals is most protective when there is an enforcement mechanism. This would likely include a fine, which the association could assess on property owners in violation of the Declarations.

### ***Enforcement:***

Whether the Lakewood Property Owners Association includes short-term rental prohibition language in the amended Declarations or not, is it essential to keep an eye towards enforcement. There are two main enforcement methods of administering current or future declarations, (1) assessment penalties for violations (if applicable in the Declaration); and (2) a court-ordered injunction to bar current and future acts.<sup>13</sup> It is possible disgruntled homeowners will disregard the Declarations, and the Association will need to take action to stop these violations.

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<sup>12</sup> See Section 3.1 of the Declarations.

<sup>13</sup> *Le Febvre v. Osterndorf*, 87 Wis.2d 525, 275 N.W.2d 154, 159 (1979) (“An injunction will not be granted unless the court is satisfied that the result would be fair, just, reasonable, and founded on adequate consideration. More specifically, a restriction on the use of real estate must be reasonable under all of the facts and circumstances.”)

## **CONCLUSION**

The Lakewood Property Owners Association may amend their Declarations by obtaining approval from seventy-five percent (75%) of the property owners. Amendments to the covenants or restrictions must be expressed in clear, unambiguous, and peremptory terms for a court to enforce them. If the amendments are unclear or ambiguous, Wisconsin courts will resolve disputes in favor of the free use of the property. Therefore, the Lakewood Property Owners Association may amend the Declarations to include restrictions on the use of the property in the development, including a prohibition against short-term rentals. But, to be enforceable, they must be clear and unambiguous.

There are several amendments that can be made to the Lakewood Property Owners Association Declarations to prohibit short-term rentals. These amendments include defining permitted and prohibited use, defining and permitting long-term rentals and prohibiting and defining short-term rentals, and providing a penalty clause for violating the Declarations.