

Not All Residential Rentals Are Equal! Short vs. Long Term Rentals

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Strata Regulation 7.1 was amended on July 18, 2018 effective November 30, 2018 to allow for a fine of up to \$1,000.00 per day for an owner or tenant violating a bylaw that prohibits or limits the rental of a residential strata lot for remuneration as vacation, travel or temporary accommodation. A maximum fine of up to \$500.00 every 7 days continues to apply to other rental bylaws.

What is the difference between temporary accommodation and other residential rentals? The differences are substantial including duration of term, taxation, substance, rights, duties, obligations, remedies and governing legislation. RTA Policy Guideline #9, Tenancy Agreements and Licenses to Occupy dated January, 2004 addresses factors that may be relied upon to distinguish between the two types of rentals.

The accommodation rental is a short-term rental for remuneration from an occupant pursuant to a licence arrangement as compared to other rentals to a tenant pursuant to a tenancy agreement governed by the *Residential Tenancy Act* ("RTA") or the *Manufactured Home Park Tenancy Act* ("MHPTA").

The *Strata Property Act* ("Act") defines an "occupant" and a "tenant". An "occupant means a person, other than an owner or tenant, who occupies a strata lot". An example of temporary accommodation by an occupant is AirBnB, vacation rental or bed and breakfast.

Conversely, a "tenant means a person who rents all or part of a strata lot, and includes a subtenant but does not include a leasehold tenant in a leasehold strata plan as defined in section 199 or a tenant for life under a registered life estate". The definition of "tenant" includes both residential and non-residential rentals.

A "residential strata lot means a strata lot designed or intended to be used *primarily* as a residence".

Rental restrictions for tenancy agreements applicable to residential strata lots are governed by section 141 of the *Act* which states:

141 (1) *The strata corporation must not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as provided in subsection (2).*

(2) *The strata corporation may only restrict the rental of a strata lot by a bylaw that*

(a) *prohibits the rental of residential strata lots,*
or

(b) *limits one or more of the following:*

(i) *the number or percentage of residential strata lots that may be rented;*

(ii) *the period of time for which residential strata lots may be rented.*

(3) *A bylaw under subsection (2) (b) (i) must set out the procedure to be followed by the strata corporation in administering the limit.*

Section 141(1) only applies to "tenants". It does not refer to "occupants". Moreover, it refers to "tenancy agreements" which excludes licence or occupancy arrangements. Each type of agreement attracts different tax treatment, rights, duties, obligations and remedies.

A tenancy agreement for rental of a residential strata lot is governed by the RTA and MHPTA. Conversely, temporary accommodation, such as AirBnB, is not governed by this legislation. Although not cast in stone, a short-term rental may be defined as the rental

of a strata lot for 30 days or less. Commercial, retail and hotel rentals are excluded from section 141 since they are not residential rentals.

A residential rental bylaw must strictly comply with section 141 and the enforceability test set out in section 121 of the Act:

- 121** (1) *A bylaw is not enforceable to the extent that it*
- (a) contravenes this Act, the regulations, the Human Rights Code or any other enactment or law,*
 - (b) destroys or modifies an easement created under section 69, or*
 - (c) prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot.*
- (2) *Subsection (1) (c) does not apply to*
- (a) a bylaw under section 141 that prohibits or limits rentals,*
 - (b) a bylaw under section 122 relating to the sale of a strata lot, or*
 - (c) a bylaw restricting the age of persons who may reside in a strata lot.*

Section 121 (1)(a) states that a bylaw must not contravene any other “enactment or law”. This includes zoning bylaws. Residential rentals may be permitted in a residential zone. However, short term accommodation may be prohibited in a residential zone. The zoning should be carefully reviewed to determine the applicable restrictions for your neighborhood.

If zoning prohibits single family dwellings or temporary accommodation, then a bylaw that permits this usage is unenforceable. There is a question regarding whether a Strata Corporation may adopt a bylaw that is more restrictive than the zoning bylaw. Such bylaws are routinely adopted. This arguable issue is beyond the scope of this discussion. A legal opinion should be sought if further input is needed.

What is clear is that a licence (Airbnb) does not create “an interest in the strata lot”. A licence to an occupant is contractual in nature. An owner may enter and

regain possession of a strata lot governed by a licence without first complying with the RTA or the MHPTA. Conversely, a residential tenancy agreement creates an interest in land in favour of the tenant including a right to exclusive possession of the strata lot.

Each type of rental attracts different termination, rental rates, access rights and taxation. A residential tenancy agreement is not subject to tax. However, tax such as GST is payable on a short term accommodation rental.

A tenant is protected by the RTA and MHPTA. Conversely, an occupant governed by a licence has few rights and little protection. An owner could revoke the licence and demand that the occupant leave the strata lot. This makes sense in a hotel or temporary rental context. It does not make sense for long term residential rentals.

On December 8th, 2017, amendments to the RTA and MHPTA removed the fixed term, must vacate provision commonly found in tenancy agreements. Further, the *Residential Tenancy Regulation* was amended to provide only one situation where a must vacate clause is legal. Section 13.1 states, in part, that a fixed term, must vacate tenancy agreement is allowed if: “. . . the landlord is an individual, and that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.”

“Close family member” means parents or children of the landlord or the landlord’s spouse. A fixed term, must vacate clause that is in an existing tenancy agreement for any other reason is void and cannot be enforced even if the tenancy agreement was entered into several months or years ago.

These amendments cast into doubt whether a Strata Corporation can impose restrictions on “the period of time” for the rental of a residential strata lot pursuant to section 141 (1)(b)(ii)? However, this legislation does not apply to occupancy agreements. Therefore, bylaw restrictions on “the period of time” can govern an occupancy arrangement.

The fine for breach of tenancy agreement bylaw (s. 141, Act) is up to \$500.00 for every 7 days that the strata lot

is rented in contravention of the bylaw. Conversely, the maximum fine for breach of a licence bylaw is up to \$1,000.00 per day commencing December 1, 2018. An appropriately worded bylaw is required to take advantage of this fine.

There is a question regarding whether statutory exemptions for rental agreements apply to a licence agreement for temporary accommodation including the one year grace period, family member exemption, developer exemption and hardship exemption (Sections 142, 143(2)-(4) and 144 of the *Act*). These exemptions likely only apply to a tenancy agreement with a tenant. A decision of a Court or Tribunal is required to definitively answer this question.

In conclusion, there are significant differences between the rental of a residential strata lot pursuant to a licence to an occupant and the rental to a tenant pursuant to a tenancy agreement. Given these differences, we recommend that two different bylaws be adopted to address each type of rental. The occupancy bylaw would, for example, prohibit AirBnB, short-term vacation rentals, house swaps, time shares and bed and breakfasts. A rental bylaw would prohibit or limit tenancy agreements subject to the statutory exemptions set out in the *Act*.

These are very complex bylaws. The case law on these issues is evolving. A Strata Corporation should consult with a strata lawyer for assistance in drafting these bylaws to maximize the probability that the bylaws are enforceable.