

Cape Windsor Community

Meeting to address questions and concerns of:
Notice of Amendment Change to Community's Bylaw
Article IV Right to Enjoyment

*Cape Windsor is not just a location; it's a place where residents come together to create lasting connections.
Keep Cape Windsor a Great Place*

Cape Windsor's By-Laws

Article XVII: Conflicts

Articles vs. By-laws

- In the case of any conflict between the Articles of Incorporation and these By-Laws, **the Articles shall control**

Declarations vs. By-laws

- In the case of any conflict between the Declaration and these By-Laws, **the Declaration (Covenants) shall control**

Why Can't we be like everyone else??

In 2021 the Community's Vote was "NO" to Electronic Meetings

Bylaw Amendment Vote (Fall of 2021, announced in Spring 2022 Newsletter)

The chart below reflects the communities wishes not to implement the Board's proposed changes to Articles that pertain to administrative improvements. To pass, an amendment had to have 127 votes, 51% of homeowners. For those who voted **NO** to every Article, you voted no to a financial control. Article 4 proposed a financial control to limit Board members spending budgeted dollars without Board approval and without consideration of contracts in place for the current years budget. Not passing this change allows spending of dollars already committed.

# Homes Who Voted		134				
Articles		SUMMARY OF VOTES				
		YES	Y %	NO	N %	TOTAL
1	Elections/Electronic	105	0.802	26	0.198	131
2	Compensation/Board Secretary	81	0.643	45	0.357	126
3a	Meetings - Frequency of Board Meetings	92	0.742	32	0.258	124
3c	Meetings - Board can vote via Proxy	99	0.767	30	0.233	129
4	Financial Control - Limit % of Unallocated \$s	95	0.725	36	0.275	131
5	Special Meetings - Members vote electronic	106	0.797	27	0.203	133
6	Notice of Meeting of Members vote electronic	113	0.850	20	0.150	133

Article IV, Section 3

“To Define the term Commercial Activity”

ARTICLE IV

Property Rights: Rights of Enjoyment

Section I. Each member shall be entitled to the use and enjoyment of the common properties and facilities as provided in the declaration. Any member may delegate his rights of enjoyment of the common properties and facilities to the members of the family, his tenants, or contract purchasers, who reside on the property. The member shall notify the secretary in writing of the name of any delegate. The rights and privileges of the delegate are subject to suspension to the same extent as those of the member.

Section 2. Individuals leasing a lot from owners shall have the right in common with the said lot owner to use the facilities of the association. This action does not relieve the lot owner of the payment of all assessments or any other owner responsibility.

Article IV of the By-Laws is amended to add the following:

“Section 3. Leasing is defined as a situation in which the owner of a residential property makes such property available for use by another for consideration, whether in currency or in kind. Leasing for any period less than 120 days (hereinafter referred to as a “short-term” rental) is considered *commercial activity*, and is prohibited by Paragraph 11 of the Restrictive Covenants and Conditions that bind Cape Windsor. As such, all short-term rentals are prohibited, regardless of whether arranged by the property owner, or leased through third party services, such as VRBO, Airbnb, real estate agencies, and the like. All leases of residential property other than short-term rentals, shall be subject to regulations for the leasing of property which shall be established by the Board from time to time.”

Board's Responsibility is to the Community

Manage by the Governing Documents in the best interest of Cape Windsor

Those who want the Board to protect their rights per the Covenants

- Homeowners want the Governing Documents to be managed as designed as a private community
- What about the rights of the homeowners who follow the rules and are impacted by rentals?

Those who believe Short-term rentals are the rights of the property owners

- Because prior boards did not manage this breach of the governing documents, does not make it right.
- The definition of Renter vs. Tenant will be addressed with the new bylaw committee.

Cape Windsor's Demographics

Distribution of Rentals by Frequency

Rental by	Frequency	2022	2023
		T=29	T=30
ONLINE	WKLY	21	22
BY OWNER	YRLY	4	3
BY OWNER	WKLY	4	5

2023 Distribution of use by street

Street	CW DEMOGRAPHICS					Total
	Full-time	Part-time	Rental	Yrly Rental	Lot	
Lincoln	2	1	1		0	4
Taft	7	7	2		1	17
Wilson	15	14	3		2	34
Cleveland	8	30	6		3	47
Tyler	11	33	4	1	1	50
Grant	23	35	6	1	0	65
Roosevelt	7	17	5	1	3	33
Total Properties	73	137	27	3	10	250

The Right Of The Board Without A Community Vote

Article XVI: Amendments, Section 1.

Amendments to these By-Laws may be initiated by a two-thirds majority of the Board of Directors or by one-quarter of the eligible property owners.

Article VIII: Powers and Duties of the Board of Directors, Section 1.

a. Adopt and publish rules and regulation governing the use of the Common Elements and facilities by, and the personal conduct of the members and their guest therein, and to establish penalties for the infraction thereof.

Article XI: Officers and Their Duties, Section 8 Duties

a. The President shall be the executive officer of the association. It shall be his/her duty to preside at all meetings of the membership and the Board of Directors; to have general and active management of the business of the corporation; to see that all orders and resolutions of the Board are carried out; to execute all contracts and agreements and other obligations in the name of the Association that deal with the administrative and daily operations of the Association

Published Data Regarding Commercial Property

The following pages reflect data
supporting short-term rentals and those
opposing short-term rentals

Delaware TITLE 6

Commerce and Trade

SUBTITLE II

Other Laws Relating to Commerce and Trade

CHAPTER 50C. Safe Destruction of Records Containing Personal Identifying Information

§ 5001C. Definitions.

For purposes of this chapter:

- (1) **“Commercial entity”** means a corporation, business trust, estate, trust, partnership, limited partnership, limited liability partnership, limited liability company, association, organization, joint venture, or other legal entity, whether or not for profit, that transacts business in this State. For the purposes of this paragraph, **“transacts business in this State”** means the course or practice of carrying on any business activity in this State and includes the solicitation of business or orders in this State.
- (2) **“Consumer”** means an individual who enters into a transaction primarily for personal, family, or household purposes except employees.

Therefore Cape Windsor's Covenants supersede the Bylaws

Cape Windsor's Deed Restriction Covenants & Conditions

No:11 That no commercial activity of any type shall be conducted on the residential lots plotted in plot of Cape Windsor.



Authority to Restrict Short-Term Rentals.

[Even if a community has a valid reason to restrict short-term rentals, it still needs legal and/or contractual authority to support the restriction. Typically, the authority comes from an HOA's declaration, from state law, or a combination of the two.](#)

A declaration is a contract among property owners in a community. The owners jointly agree to accept certain obligations and restrictions on how properties in the community can be used. If everyone complies, the community as a whole will benefit—or at least that is the idea.

Throughout the country, courts generally assume HOA restrictions are enforceable as long as a restriction promotes a legitimate purpose and is not forbidden by statute. See, e.g., *Saunders v. Thorn Woode Partnership*, L.P. 265 Ga. 703, 462 S.E.2d 135 (Ga., 1995); *Laguna Royale Owners Assn. v. Darger*, 119 Cal.App.3d 670, 174 Cal. Rptr. 136 (Cal. Ct. App. 1981). Even broad restrictions against all rentals have been upheld in some jurisdictions if the restriction is in the HOA's declaration, and the board can offer a legitimate justification for it. See, *Four Brothers Homes at Heartland Condominium II, et al., v. Gerbino*, 262 A.D.2d 279, 691 N.Y.S.2d 114 (N.Y. App. Div. 1999).

So, the starting point when deciding if an individual HOA has the authority to ban short-term rentals is to look at the community's declaration. If the declaration prohibits rentals (short-term or long), then the HOA can likely enforce the prohibition unless there is some other reason why the restriction is unenforceable. *Armstrong v. Ledges Homeowners' Assoc., Inc.*, 633 S.E.2d 78 (N.C. 2006).

The Grandfather Clause

The most common state-law approach for protecting owners' vested property rights is through "grandfather" laws. A grandfathering provision lets an HOA enforce a newly adopted restriction prospectively but protects owners who previously relied on the restriction's absence.

Grandfathering statutes relating to rental restrictions recognize that a substantial portion of a property's value can consist of the owner's ability to generate revenue by renting it out. As such, owners who previously enjoyed that right should not be deprived of it in the future without their consent. In a nutshell, it is unfair to enforce a rental restriction against an owner who purchased a property when the restriction was not in place.

Under California's HOA law, existing owners are generally protected against later-adopted HOA rental restrictions. However, HOAs can enforce "reasonable" limitations, if not outright prohibitions. *Laguna Royale Owners Assn. v. Darger*, 119 Cal.App.3d 670, 174 Cal. Rptr. 136 (Cal. Ct. App. 1981). What that practically means is that an owner protected against rental restrictions, in general, might nonetheless be prevented from engaging in short-term rentals.

California courts have recognized that short-term rentals can negatively affect a community beyond what results from ordinary, long-term rentals. With that in mind, the courts reasoned that a minimum lease period (or similar rule preventing short-term rentals) does not offend California's grandfathering law because the owner still has the right to rent the property. The right has been limited, but the owner can still rent to a long-term tenant. *Watts v. Oak Shores Community Assn.*, 235 Cal.App.4th 466 (2015), *Mission Shores Assn. v. Pheil*, 166 Cal.App.4th 789, 83 Cal. Rptr. 3d 108 (Cal. Ct. App. 2008)
But that raises a question: what is so different about short-term rentals compared to long-term rentals?

Residential vs. Commercial Use

Example of: Upheld HOA Covenants – No business' allowed

Residential use restrictions are one of the most common restrictions included in HOA declarations, and they have been consistently upheld by reviewing courts throughout the country. Essentially, a declaration says that properties in the community are intended to be used as homes, not as businesses or farms. And, by accepting a deed to a property subject to the HOA, owners covenant that they will not use their properties for commercial (i.e., business-related) purposes.

When considering this issue, an appeals court in Michigan held that an HOA that prohibited short-term rentals based on a commercial-use restriction did not exceed its authority. *Eager v. Peasley*, 911 N.W.2d 470, (Mich. Ct. App. 2017). Noting that “provid[ing] temporary housing” to vacationers is a “profit-making enterprise,” the court concluded that **“the act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature.”**

Thus, under the Eager Court’s reasoning, a Michigan HOA with a commercial-use restriction could adopt and enforce a policy against short-term rentals, even if the HOA did not have an express rental restriction in its declaration.

Residential vs. Commercial Use cont'd

Example of: Generalized restrictions – Allow business'

On the other hand, states that afford greater deference to individual homeowners' property rights have come down the other way. In North Carolina, for example, courts typically interpret unclear restrictions in favor of homeowners. Based on that principle, a North Carolina court held that a generalized restriction against non-residential use by itself was insufficient authority for an HOA to prohibit short-term rentals. *Wise v. Harrington Grove Cmty. Ass'n*, 584 S.E.2d 731 (2003).

When considering this issue, an appeals court in Michigan held that an HOA that prohibited short-term rentals based on a commercial-use restriction did not exceed its authority. [Eager v. Peasley](#), 911 N.W.2d 470, (Mich. Ct. App. 2017). Noting that "provid[ing] temporary housing" to vacationers is a "profit-making enterprise," the court concluded that "the act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature."

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Bottom Line

- 1. Courts are split on the wording in Covenants and the definition of Commercial activity.**
- 2. However Courts around the County recognize the growing concerns and problems and the strain on a HOA community.**

Elements of Judicial Consideration in Courts

Was the homeowner provided the Governing Documents?

- Did all residents receive the Convents and By-Laws prior to the purchase of property inside of Cape Windsor Community?
- Are these parties expected to acknowledge the receiving of the By-Laws and Convents of Cape Windsor Community before the purchase of property?
- Are these parties given a copy of all By-Laws and Convents at time of purchase and all information regarding the building inside of Cape Windsor Community and the understanding that Cape Windsor Community is running under a HOA?
- Is the board of the Cape Windsor Community elected and seated by a majority vote of the voting community?

New Amendment Process

- Did the new amendment receive enough votes by the elective board to be adopted and present to the community for review and voting?
- Was the new amendment presented to the community with sufficient amount of time to be reviewed and voted on?
- Did the new amendment receive a majority vote of the entire Cape Windsor Community? This amount needing to be 127 votes.
- Will the ballots results be made accessible to the Community on the designated day assisted by the elected board?
- Will the ballots remain secure and readily available for any and or all court proceeding?

This Delaware beach town is set to regulate short-term rentals. 5 things you should know



Emily Lytle
Delaware News Journal

How does Lewes define a short-term rental?

If someone rents their home or part of their home for 30 consecutive days or fewer, then the residence is considered a short-term rental under the amended code.

A home that someone rents for more than 30 consecutive days – and isn't regulated as a hotel, motel or other facility already identified elsewhere in city code – would then be considered a long-term rental.

Pros of Short-Term Rentals

The pros for short-term rentals through services like VRBO, Airbnb and Privately owned rentals are solely about additional income for the homeowner.

The local area can receive tax benefits and attract more people who are likely to spend money there. Those using short-term rentals also enjoy the convenience of home amenities while they are on vacation or waiting to move into a home they bought.

- Greater income for the homeowner
 - Generation of tax revenue to the local economy
 - Personal income tax advantages / deductions for needed property maintenance / upgrades
 - Supplement to retirement income
 - Some can use the interest tax and a portion of the HOA fee as a tax write off
- ❖ How ever if this is a secondary property and is not used as a rental there are no tax benefits with federal and most state tax laws

Pros of Short-Term Rentals cont'd

Rental Property Tax Deductions

As a rental property owner, you can deduct various expenses related to buying, operating, and maintaining the property. Here's a rundown of the most common deductions; Mortgage Interest Deduction, Rental Property Depreciation, Repairs and Improvements, Property Taxes and Travel Expenses.

Other Common Expense:

- Advertising
- Employees and independent contractors
- Home office expenses
- Insurance premiums
- Lawn care
- Losses from casualties (hurricane, earthquake, flood, etc.) or thefts
- Professional services (e.g., accountants, tax preparers, property managers, attorneys)
- Utilities
- The cost of personal property (e.g., appliances and furniture) used in rental activity¹
- The IRS considers HOA fees tax deductible as a rental expense.

Cons of Short-Term Rentals

- However, the number of cons rise considerably beyond the benefits. On top of ***not being committed to the rules of the association***, short-term rentals mean more noise pollution in the form of guest activities and traffic, a larger amount of trash, and **security risks**. There is also greater liability for the association and a higher potential for illegal acts by tenants.
- In many areas, short-term rentals have garnered a bad reputation, especially as places that turn into sites for large parties that lead to property damage at the rental and throughout the community, including the amenities. For that reason, many homeowners do not want short-term rentals in their neighborhoods. As part of an HOA, many homeowners feel that these types of rentals should be banned.
- **No financial benefit to the HOA**
- Safety and security risks
- **Greater maintenance costs for HOA (common and recreational areas)**
- Noise pollution
- Trash overflow / extra collection
- Homeowner exposure to illegal activities
- Homeowner liability
- Impact on property value
- Assessments from HOA to help defray costs of maintenance

Questions Received

GENERAL

- ❑ I mailed back our ballot, but did not put our lot number on it does that disqualify our ballot? **Missing lot number does not disqualify a ballot.**
- ❑ Why can't Cape Windsor live stream/zoom community meetings? All of the clubs that we belong and our HOA in Annapolis have included zoom access to BOD meetings and special meetings like the September 9 meeting...What is preventing Cape Windsor from doing the same? **(see slide #3)**
- ❑ We have no intention of renting our property. But, we don't want to limit our choice to do so in 5 or 10 years in the future. Or limit future owners of the opportunity to earn return on their investment in Cape Windsor real estate. The more restrictive the HOA by-laws are they will decrease the future sales value of our investment in Cape Windsor. Why do you believe further restrictions will improve the value of our investment?
- ❑ We have not experienced any problems with short term renters in our area of Grant Ave. What/where is the short term rental problem that is driving such drastic desire to change the Home Owner Association by-laws?
- ❑ If there are specific properties that are causing trouble, aren't there other ways of dealing with those particular property owners?
- ❑ What is the current opening policy of ballots?
- ❑ Are all the infractions dealt with swiftly with consequences or is the protocol to give warnings?
- ❑ Why have you never provided any complaints to the rental owners?
- ❑ Why did you **promise** to work with us to solve issues and have never once contacted me in over a year?
- ❑ What will be done in regards to the other commercial activity in CW?

Questions Received cont'd

- What about existing long-term leases? Did the board consider allowing long term leases (years not days, weeks or months)?
- Can there be a distinction between an individual renting their owner occupied property in CW vs an individuals or corporations owning properties solely for rental income.

What if the Amendment pass'

- The impact of this amendment passing and residents being allowed to let friends and family stay at their home for free?
- What is the protocol required to pass the amendment? do we need 127 to respond and then need to have 51% of the responses to be in favor ...Or do we need 127 affirmative votes to pass the amendment?

Questions Received cont'd

Enforcement

- Regarding the commercial Activity stance, there are numerous questions around the impact of enforcing this amendment. For example:**
 - Additional questions about other commercial activity such as realtors, LLCs, small businesses that use this address or operate out of their home.
 - Comment about property managers working from their homes here in CW
- How will any of these and other rules be enforced?**
 - Are all the infractions dealt with swiftly with consequences or is the protocol to give warnings?
- Regarding Short term rentals vs long term rentals:**
 - Most believe long term renters are not the problem and shouldn't be impacted
 - Commercial activity and how we can't say its ok for a homeowner to rent for a year vs a week if both are commercial activity

Finances

- Who paid for the lawyer who wrote up this amendment?
- Did you use community funds to pay for legal counsel?
- Did the Board consider a rental fee—like \$1,000 per rental week payable to the association. Or an equivalent deposit amount forfeited for infractions?

Suggestions

What was recommended

- My preference is to have individual water meters
- Charge an impact fee for each weekly renter/rental
- Those with larger homes paying more for their dues because of their impact on the infrastructure such as water usage, pool, parking and so on.
- To charge extra for those with larger than avg homes and/or more than x number of bathrooms as those have a direct impact on the infrastructure.
- Homes that were built with more than two levels and how that is a direct violation of CW rules. **Cape Windsor does not have a limit on levels, there is a height restriction for Sussex County 42'.**
- If this amendment does not pass, restrict renters from homeowner's amenities.
- Were there any other less restrictive options considered, like allowing only 1 rentable week during the season or only 2 leases during the season regardless of the time?
- Did the Board consider a rental fee—like \$1,000 per rental week payable to the association. Or an equivalent deposit amount forfeited for infractions?