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COMBATTING THE HOUSING CRISIS THROUGH HOA RENTAL RULES

THE IMPACT OF AB 3182 ON HOA RENTAL RESTRICTIONS EFFECTIVE JANUARY 1, 2021

INTRODUCTION

On September 28, 2020, Governor Newsom signed AB 3182 (Ting), a new bill which seeks to address California's housing crisis by further restricting the ability community associations (HOAs) have to impose rental prohibitions and restrictions. "We must marshal all available resources to address the housing and homelessness crisis. There are millions of homes across the state that have the potential to be rented to Californians in need of housing but are prohibited from being leased under outdated HOA rules. AB 3182 prohibits rental bans in HOAs to allow homeowners who want to rent out their homes." (see *Author's Statement*; Assem. B. 3182, 2019-2020 Reg. Sess. (Cal. 2020)).

California YIMBY, a housing advocacy organization, primarily sponsored AB 3182 which becomes California law on January 1, 2021. YIMBY's core purpose is to promote housing reform ("California YIMBY is a community of neighbors who welcome more neighbors"). Supporters who backed AB 3182 argued that HOA rental prohibitions "act as a prohibition against the production of important types of housing needed to solve California's housing crisis because if that housing cannot be occupied by a tenant, it is unlikely in many cases to be built". According to the legislative history, bill supporters referenced the state's Stay-at-Home orders to underscore its position that "California is ill-positioned to house all of its people."

This article shows how AB 3182 compares with existing California law. Our evaluation is based upon a review of the statute's legislative history, our firm's knowledge of the intent underlying AB 3182, and the efforts of those who played roles in advocating for and developing AB 3182's language.

Previously, California courts held that HOAs could adopt reasonable restrictions to curb HOA rentals. Those restrictions were designed to address problems that typically arise in planned communities with significant renter populations, such as more rules violations, more assessment delinquencies, more non-compliance with maintenance standards, and more insurance claims. Subject to existing California law, boards of directors considered rental bans, lease requirements (e.g. no lease may be less than thirty (30) days), and rental caps that would place a cap on the number of properties that may be rented or leased at any one time, among other things.

SUMMARY OF EXISTING CALIFORNIA LAW

Existing California law regarding rental restrictions is set forth at *Civil Code* Section 4740. It provides the following, in relevant part:

- A homeowner is not subject to a rental or leasing prohibition, unless that prohibition was effective before the homeowner acquired title to their separate interest.
- A homeowner may expressly consent to be subject to a rental or leasing prohibition.
- Section 4740 applied only to HOA restrictions that became effective on or after January 1, 2012.

The existing version of Section 4740 includes two (2) grandfather provisions. First, it expressly states that Section 4740 does not apply to homeowners who acquire property before the HOA rental restriction became effective ("Grandfather Clause #1").

Second, it is not applicable to HOA restrictions that were adopted before 2012 ("Grandfather Clause #2"). Therefore, prior HOA rental bans could potentially live on despite existing California law which discontinued that practice moving forward from January 1, 2012.

SUMMARY OF AB 3182

On January 1, 2021, AB 3182 will amend Section 4740 and introduce new California law - *Civil Code* Section 4741. "An owner of a separate interest in a common interest development shall not be subject to a provision in a governing document or an amendment to a governing document that prohibits, has the effect of prohibiting, or unreasonably restricts the rental or leasing of any of the separate interests, accessory dwelling units, or junior accessory dwelling units in that common interest development to a renter, lessee, or tenant." (*Civil Code* § 4741 (a)).

Those sections will further limit an HOA's ability to ban or restrict rental living within a community association by:

- Eliminating a homeowner's ability to expressly consent to be subject to rental or leasing prohibitions.
- Eliminating all HOA rentals bans regardless of their adoption dates, except for 30-day or less short-term rental bans of separate interests and rental caps that restrict rentals to not less than twenty-five percent (25%) of the total number of separate interests (collectively, "Exceptions").

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- Eliminating that grandfather restriction which provided that Section 4740 was not applicable to HOA rental bans before 2012 (i.e. Grandfather Clause #1).

A homeowner will no longer have the ability to consent to an HOA restriction that prohibits the rental or leasing of a separate interest. More importantly, AB 3182 will claw back and remove HOA rental bans or restrictions that were adopted before 2012, subject to Grandfather #1. "In accordance with Section 4740, this section does not change the right of an owner of a separate interest who acquired title to their separate interest before the effective date of this section to rent or lease their property." (*Civil Code* § 4741 (h)).

In sum, the only HOA bans or limitations now permissible will be 30-day or less short-term rental bans and rental caps (not less than 25% of the total number of Lots or Units). It should be noted that those restrictions apply only to separate interests. Reference to that term is significant because AB 3182 provides that ADUs and JADUs are not considered to be 'separate interests.'

"…only HOA bans…now permissible will be…short-term rental bans and [some] rental caps…"

ACCESSORY DWELLING UNITS (ADUs) & JUNIOR ACCESSORY DWELLING UNITS (JADUs)

Accessory Dwelling Units ("ADUs") and Junior Accessory Units ("JADUs") are largely independent living spaces which are attached/detached or incorporated within separate interests, respectively. Under relatively new California law, HOA governing documents which prohibit or unreasonably restrict those structures are deemed void and unenforceable (*Civil Code* Section 4751).

The legislative history reflects an apparent goal to encourage the growth of ADUs to address the housing crisis. "Supporters [of AB 3182] argue that "the bill is necessary to ensure the development of ADUs and promote a diversity of housing options." (Assem. B. 3182, 2019-2020 Reg. Sess. (Cal. 2020)). In explaining the purpose behind AB 3182, a statement from Assemblyman Phil Ting's (D-San Francisco) web site provides that "… rental bans prevent homeowners from adding an Accessory Dwelling Unit (ADU) onto their property."

The goal to promote ADU/JADU is reflected in the language of *Civil Code* Section 4741. Section 4741 excludes ADUs and JADUs from the rental cap exception described above because the law specifically provides that "an accessory dwelling unit or junior accessory dwelling unit shall not be construed as a separate interest." (*Civil Code* § 4741 (d)).

With respect to short-term rental prohibitions, it remains unclear as to whether the ADU/JADU exception could mean that an HOA may lack the ability to prevent short-term rentals of ADUs/JADUs.

OWNER-OCCUPANCY OR 'HOSTED RENTALS'

Section 4741(e) introduces the concept of owner-occupancy or hosted rentals into the Davis-Stirling Act. Specifically, it states, "[F]or purposes of this section, a separate interest shall not be counted as occupied by a renter if the separate interest, or the accessory dwelling unit or junior accessory dwelling unit of the separate interest, is occupied by the owner." (*Civil Code* § 4741 (e)). Section 4741 therefore draws a distinction between hosted rentals and non-hosted rentals that is significant in the following scenarios:

- **Separate Interest Occupied by Owner.** If the separate interest (other than an ADU or JADU) is occupied by the owner, then a separate interest (other than an ADU or JADU) shall not be counted as occupied by a renter – or considered to be a rental or rental property. This would keep the separate interest from being considered 'rented' for purposes of any rental cap or short-term rental restriction.

- **ADU or JADU Occupied by Owner.** If an ADU or JADU of the separate interest is occupied by the owner, then a separate interest

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shall not be counted as occupied by a renter. This language describes a hosted rental situation where a homeowner is occupying the ADU/JADU at the same time a renter is occupying the primary residence on the separate interest. That type of hosted rental with owner-occupied ADUs or JADUs would not be considered a rental or rental property where rental caps or prohibitions against short-term rentals would apply.

AMENDMENT OF GOVERNING DOCUMENTS TO CONFORM TO AB 3182 & LEGAL COUNSEL ASSISTANCE

On and after January 1, 2021, common interest developments shall comply with the prohibition on rental restrictions specified in Section 4741, regardless of whether the common interest development has revised their governing documents to comply with this section. A common interest development shall amend its governing documents to conform to the requirements of this new law no later than December 31, 2021 (*Civil Code* § 4741 (f)).

In view of that December 31st date, there is no immediate need to amend HOA's governing documents. Boards of directors should consult with the Association's legal counsel as soon as possible to evaluate the following:

- ***Do my governing documents include a rental prohibition or unreasonable rental restriction?***
- ***If so, where does that prohibition or restriction reside in the governing documents?***

Each HOA should conduct their own independent legal review because no two (2) HOAs are the same. Amendment may not be necessary if the governing documents do not include unlawful rental restrictions.

Understanding where rental prohibitions or limitations are housed is critical to understanding the type of amendment that may be needed to conform to California law. An unlawful rental restriction may only be set forth in the HOA's operating rules and not the HOA's CC&Rs. An operating rule change (without soliciting Member approval) could be used to strike the violative provision.

Is Member approval necessary to amend an HOA's CC&Rs if an unlawful restriction is set forth in that document? That question is the subject of current debate within the HOA industry. A discussion with the HOA's legal counsel is critical before an HOA embarks on what could be an expensive and time-consuming CC&R amendment process which will require use of the secret ballot procedures set forth by California law.

A decision not to seek legal advice could present challenges for the HOA because of the possibility of money damages and civil penalties. A common interest development that willfully violates Section 4741 shall be liable to the applicant or other party for actual damages and shall pay a civil penalty to the applicant or other party in an amount not to exceed one thousand dollars ($1,000) (*Civil Code* Section 4741 (g)).

AB 3182's chaptered statutory language is murky; an understanding of it doesn't have to be. Boards of directors are strongly encouraged to consult with experienced HOA legal counsel to evaluate the impact of this new legislation on their respective communities.

-Authored by TLG Senior Attorney, Kumar Raja, Esq.-

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