Avoiding The Walk of Shame: Short-Term Rentals in Miami Beach

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Miami Beach Draws a Line in the Sand

Between March and October, 2016, the City of Miami Beach issued a remarkable $4 million in fines for violations of the City's ordinance restricting short-term rentals (STRs).[1] The ordinance, originally passed in 2010 and found at City Code Section 142-1111 (Ordinance), prohibits leases "for periods of less than six months and one day" in all single-family areas of the City and in 95% of its multi-unit buildings.[2] Revised in February 2017 to include massively-increased penalties, it is clearly aimed at online services like Airbnb.com, which the City's Mayor, Phillip Levine, believes have no place in the City.[3] The prohibitions not only punish owners of illegal STRs, but also apply to unwitting renters who may be evicted spontaneously--giving rise to the Miami Beach ad campaign advising visitors to "avoid the walk of shame" by being unceremoniously discharged onto City streets.[4]

Although the local Hotel Association hopes that the fines will reduce illegal STRs, which compete with the hotel industry,[5] the City takes the position that the enhanced penalties for violating the STR restrictions were not imposed to protect hotels. According to City Commissioner Michael Grieco, "the city is fighting for the residents who do live on the Beach year-round."[6] But as a local luxury property broker points out, a significant number of City residents are themselves transient tourists.[7] He cites lost business when potential purchasers are informed that the City will impose fines if they rent their properties for less than six months and one day.[8]

It is evident why buyers interested in living in the City for part of the year, but who need to defray mortgage costs through short-term renting, would shy away. Even a first-time violation can result in a $20,000 fine, the highest in the United States--more than twice that charged by New York City for violating its STR law.[9] The Ordinance not only applies to rentals themselves, but also to advertisements for illegal STRs.[10] In fact, some of the largest fines imposed by the City – $40,000, $60,000, and even $80,000 – have resulted from advertising violations.[11]

These sanctions may sound repugnant to free-market proponents. However, neither the draconian penalties, nor the dissatisfaction of City residents who rely on incremental rental income, nor the intense lobbying of the STR industry, inherently renders the Ordinance susceptible to challenge. Under the Florida Constitution, "municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."[12] While it has been suggested that "the fines [do] nothing but protect the hotel industry from fair competition," and that "[i]t just shows the hotel lobby has a much stronger hold on [the City]],"[13] The Florida Supreme Court has held:

> It is settled that the courts will not inquire into the motives of the legislature in enacting laws. And by analogy to this rule it is very generally held that the courts cannot inquire into the motives of members of a municipal council for the purpose of determining the validity of ordinances enacted by them.[14]

The United States Supreme Court has also pronounced, in the context of a zoning ordinance, that "exercise of discretion...is a legislative, not a judicial, function."[15]

Courts can, of course, review the validity of an ordinance on other grounds, such as whether it has been preempted or infringes upon fundamental Constitutional rights. While the original Ordinance, passed in 2010, rests on firm legal ground in many respects, its post-2011 amendments may attract preemption challenges under Florida Statute 509.032 (Florida STR Law), and might be argued to implicate the First, Fifth and Eighth Amendments to the U.S. Constitution as well as 47 U.S.C. § 230–Section 230 of the Communications Decency Act (CDA).

A Destiny with Tourism

In the beginning there was a slender sand-spit of mangroves and swamp, mosquitoes and crocodiles, palmetto scrub and sea-stroked beach.[16]

In 1870, during a sailing trip up the east coast of Florida from Key West, Henry Lum and his son, Charles, discovered three coconut trees on the spit of land that would become Miami Beach.[17] Finding those trees "on the weed-, mosquito-, rat-, and rabbit-infested island, they came up with the idea of developing a coconut plantation," which led them to "purchase a good deal of land from the government for 35 cents an acre."[18] With the help of investors, they eventually acquired vast tracts and "planted somewhere in the vicinity of 155,000 coconuts along the beach."[19] But the future of Miami Beach was not in agriculture.

Ezra Osborn and Ethan Field, the investors who bought-out the Lums, eventually "realized that they could not and would not become rich by farming," so, "they elected to sell their acreage to others."[20] One of those others, John Collins, "realized that a bridge to connect the then-named Ocean Beach to the mainland was a necessity."[21] When Collins ran out of money, Carl Fisher, "generally considered to be the founder and builder of Miami Beach," finished the Collins Bridge, which opened on June 12, 1913.[22] The persona of Miami Beach as a tourist mecca began to emerge following the bridge's opening:

> There would soon be several companies selling Miami Beach land, and they would all be consolidated into the Miami Beach Improvement Company. Eventually, the first hotel, Brown's, would be built at what became First Street and Ocean Drive, and four great bathing casinos would, for many years, be part of the landscape.[23]

On March 26, 1915, two years after the opening of the Collins Bridge, the City of Miami Beach incorporated.[24] Since then, tourism has driven the City's economy, and that of the greater Miami-Dade area. In 2014, almost a century after the City's incorporation, some 14.6 million people visited the area, spending an estimated $23.8 billion, according to the Greater Miami Convention and Visitors Bureau.[25]

But not all of those travelers stayed in hotels. While the City's fabled beach-front continued to add ever more lodging capacity year after year, other forces were rocking the hospitality industry. By 2013, one hundred years after the Collins Bridge first connected Miami Beach to the mainland, Airbnb.com – with 250,000 rooms in 30,000 cities, in 192 countries – was already renting private dwellings to 40,000 people a night.[26] The online, peer-to-peer sharing economy had fundamentally altered the nature of tourism.[27]

Tallahassee versus the City Council

We, the people of the City of Miami Beach, in order to secure for ourselves the benefits and responsibilities of home rule and in order to provide for a municipal government to serve our present and future needs, do hereby adopt this Charter...[28]

Miami Beach is a home rule municipality, meaning – at least since enactment of the Municipal Home Rule Powers Act (MHRPA) in 1973 – that the City retains "governmental, corporate, and proprietary powers," enabling it "to conduct municipal government, perform municipal functions, and render municipal services."[29] The powers granted to the City by the MHRPA "may not be curtailed except as otherwise provided by law;"[30] foreclosing "the preexisting presumption that local government action must be narrowly confined to only the immediate needs of the residents."[31] The MHRPA "further dictate[s] that local governments should be allowed to act if not clearly directed otherwise by the state."[32]

The state does, sometimes, clearly direct otherwise. Preemption may occur where a local government exercises authority that is inconsistent with the state constitution or a state statute.[33] The preemption "may be either expressed or implied."[34] When analyzing the effect of a particular statute, one must realize that, "no magic words exist signifying an express preemption," and a given statute will not always be "explicit as to the breadth of its coverage or as to whether the preemption will preclude the specific proposed action."[35] At a minimum, the "language should make clear that the legislature intended to preempt any local regulation on the subject."[36]

The Florida STR Law

The Florida legislature's intent to preempt the authority of local governments to regulate the duration or frequency of vacation rentals in the Florida STR Law seems clear As words go, paragraph 7 of the statute, titled "Preemption Authority," with its list of activities that are "preempted to the state," leaves little to the imagination.[37] And its statement that "[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals," explicitly precludes local governments from specific actions.[38]

However, the Florida STR Law's scope is not unlimited. It "does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011."[39]

The Ordinance, as Amended

Miami Beach initially enacted the Ordinance on June 19, 2010, nearly a year before the Florida STR Law was passed.[40] It specifically identified areas of the City where STRs were prohibited:

> Sec. 142-1111. - Short-term rental of apartment units or townhomes.
> (a) Limitations and prohibitions.
> (1) Unless a specific exemption applies below, the rental of apartment or townhome residential properties in districts zoned RM-1, RM-PRD, RM-PRD-2, RPS-1 and RPS-2, CD-1, RO, R0-3 or TH for periods of less than six months and one day.[41]

It also required written leases for STRs, terms of not less than seven days, the identification of a named party responsible

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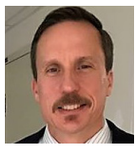

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for the STR who could be contacted at any time, night or day, compliance with all building codes and various additional terms.[42]

The original Ordinance established significant fines for violations. A first infraction would incur a $500 fine; with a second, third or fourth violation within a 12-month period garnering fines of $1,500; $5,000; and $7,500 respectively.[43] Revisions to the Ordinance prohibited "signs advertising the property for short-term rental...on the exterior of the property or in the abutting right-of-way, or visible from the abutting public right-of-way," but no fines for improper advertising were specifically referenced.[44]

Subsequent iterations of the Ordinance[45] would infuse substantial sanctions into the grandfathered original.[46]

Upping the Ante

In February 2017, Miami Beach exponentially raised the penalties for violating the Ordinance. An initial infraction now incurs a $20,000 fine. Penalties for each subsequent violation rise by another $20,000--a fifth violation within 18 months now carries a fine of $100,000, and suspension or revocation of the certificate of use.[47] Fines for repeat violations by the same offender increase regardless of locations.[48]

The February 8, 2017 version also broadened restrictions against advertising the availability of illegal STRs, whether online or otherwise, by prohibiting:

Any advertising or advertisement that promotes the occupancy or use of the residential property for the purpose of holding commercial parties, events, assemblies, gatherings, or the occupancy of a residence for less than six months and one day, as provided herein, or use of the residential premises in violation of this section.[49]

And the 2017 amendments unambiguously made the massive fines for hosting illegal STRs also applicable to advertising them.[50]

A Revision--or a New Law?

Do the increased fines and restrictions on advertising constitute permissible amendments to the grandfathered pre-2011 Ordinance, or so change its character that it is effectively new legislation, and is preempted, at least in part? That question, as yet, has no clear answer.

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At least one Florida landowner has argued that such changes are not permissible under the preemption law: In a Motion for Reconsideration of the order denying his Motion for Final Summary Judgment, the landowner's counsel asserted that the lower court erred when it adopted "Vero Beach's position that since Vero Beach prohibited and/or regulated 'guest house and transient quarters' prior to June 1, 2011, it may continue such prohibition/regulation."[51] He further argued that "[i]f the Florida Legislature intended to allow local governments to prohibit vacation rentals or regulate the frequency or duration of rental of vacation rentals as long as they were doing so prior to June 1, 2011, it would have expressly said so in the statute."[52] In support of that proposition, he cited Florida's 1st Circuit in *Hostetter v. Escambia County*, where the court concluded, in striking a post-2011 STR amendment to a local code, that "[t]he more logical interpretation is that every amendment of the LDC that impacts or prohibits vacation rentals passed after June, 2011 is preempted by § 509.032(7)(b)."[53]

The 19th Circuit, however, ultimately rejected the landowner's argument, finding that Vero Beach's code provisions prohibiting the operation of a "guest house or transient quarters" in a residential area were well established as early as 1977, decades before enactment of the Florida STR Law, and that Vero Beach's post-2011 amendments – modifying and adding definitions – did not substantively change those land use provisions.[54] In particular, the court found that Vero Beach's new definition of "transient occupancy" to include a rebuttable presumption that tenancies of 30 days or less are transient did not affect the efficacy of the original 1977 code language.[55]

A Neighboring Ordinance Under Fire

Where a Florida municipality cannot document the robust history of short-term land use restrictions demonstrated by Vero Beach, the STR proponents may be more aggressive. A current Florida STR case attacks a pre-2011 zoning codification which differentiates "residential" activity from "lodging" as preempted and ineffectual under the Florida STR Law.

In March 2017, the City Council of Miami--Miami Beach's much larger sibling--passed an STR ordinance which it characterized as merely enforcing existing law designed to protect single-family home neighborhoods.[56] The existing law relied upon was Miami's 2009 zoning ordinance known as "Miami 21." It defines "Lodging" in Article 1(b) as a category "intended to encompass land use functions predominately of sleeping accommodations occupied on a rental basis for limited periods of time. These are measured in terms of lodging units: a lodging unit is a furnished room of a minimum two hundred (200) square feet that includes sanitary facilities, and that may include limited kitchen facilities."[57]

"Residential" use, covered in Article 1(a) is "intended to cover land use functions predominantly of permanent housing." Miami 21 had not mentioned short term rentals when written in 2009, and subsequently clarified such applicability in post-2011 codifications.

In April 2017, Airbnb and several Miami STR owners successfully obtained a temporary injunction blocking enforcement of the Miami ordinance, primarily on the basis that Miami's generic definition of "lodging" in an otherwise unspecific zoning law could not now be construed to circumvent the Florida STR Law.[58] The court did not accept Miami's argument that, unless specifically authorized in the zoning law, other uses of property were not permitted.

The Miami court referenced an Opinion construing the Florida STR Law by Florida Attorney General Pam Bondi to the Fort Lauderdale City Attorney,

wherein she stated:

> [w]hile a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. *To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7)(b), Florida Statutes.*[59] (Italics added)

Unlike the Miami law, Miami Beach's Ordinance contained a clear restriction on the duration of vacation rentals when enacted in 2010 and, with respect to that pre-2011 restriction, has unquestionably been grandfathered. The post-2011 amendments raising the fines for violations arguably do not change the substantive regulatory nature of the grandfathered restriction. Similarly, prohibiting advertising of illegal STRs and making such promotion subject to massive fines would seem to survive preemption. A restriction on advertising is, arguably, not a restriction on the duration or frequency of vacation rentals. A court might well characterize the advertising restriction as the kind of regulation the 2014 amendments to the Florida STR Law were intended to permit.

> As further articulated by the Florida Attorney General: "The bill removes the total preemption to the state for the regulation of vacation rentals, and permits local governments to regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals."[60]

But how would the Ordinance fare if challenged on the ground that it violates certain fundamental Constitutional rights?

Police Power, Private Property and Free Speech

Airbnb and VRBO, relying in part on "I own it and can use it as I wish," a traditional real property belief, collide in numerous battlegrounds across the state with another traditional belief, the ability of communities to restrict perceived disruptive uses.[61]

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In his dissent to the majority opinion in *Village of Belle Terre v. Boraas*,[62] Justice Marshall acknowledged that "local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families," since, "[t]he police power which provides the justification for zoning is not narrowly confined."[63]

While residents of a municipality may disagree, "questions of zoning policy, of benefit or detriment, and of what is good or bad for the city and the public are essentially matters within the realm of the legislative power of the city."[64] As the Supreme Court of Florida has stated:

> We will determine the reasonableness of the regulations as applied to the factual situation meanwhile keeping before us the accepted rules that the court will not substitute its judgment for that of the city council; that the ordinance is presumed valid...and that the legislative intent will be sustained if 'fairly debatable.'[65]

The legislative intent behind the Ordinance rises, at a minimum, to the level of "fairly debatable." The Commission Memorandum prepared by the Miami Beach City Attorney, includes the following justifications:

> WHEREAS, single and multi-family residences used on a transient basis, or other form of commercial gathering, creates excessive numbers of guests, vehicles and noise, causing inappropriate impacts on the surrounding residences and residential neighborhood; and WHEREAS, the City has a substantial interest in maintaining the aesthetics, character and tranquility of its residential neighborhoods, as well as in regulating traffic flow; this ordinance directly advances these interests; and this ordinance is narrowly tailored to serve those interests...[66]

Given those justifications, it would prove difficult to argue that the Ordinance's application to vacation rentals within purely residential zones, but not to vacation rentals in zones where hotels operate, renders it arbitrary or unreasonable.

Justice Marshall's dissent in *Village of Belle Terre*, however, went on to emphasize that "deference does not mean abdication," since the "[c]ourt has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights."[67] The Fifth Amendment guarantees one such right.[68]

The Fifth Amendment and Florida Landlords

In *City of Venice v. Gwynn*, a Florida court decided an appeal by Venice from a ruling that the Venice STR ordinance was unconstitutional as applied.[69] That ordinance mandated that "owners of single-family dwellings may rent their property for a period of less than thirty days only three times in a calendar year unless they had complied with the preexisting use requirements of the ordinance prior to July 14, 2009."[70]

Gwynn, who purchased her property in 2004, failed to comply with the preexisting use requirements, yet continued to advertise her property as available for lease for less than 30days, in violation of the ordinance.[71] The City of Venice Code Enforcement Board found her in violation.[72] Gwynn appealed to the Circuit Court, which rejected her argument that the ordinance was facially unconstitutional but accepted her challenge that "the ordinance's prohibition on short-term rentals substantially interfered with her rightful use of and reasonable expectation for her property without substantial advancement of any legitimate governmental interest," ruling in her favor.[73]

On appeal, the Second District acknowledged that "[a] use restriction on real property may constitute a taking 'if it has an

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unduly harsh impact on the owner's use of the property.'"[74]

But the court also explained that a proper analysis "includes a comparison of 'the value that has been taken from the property with the value that remains in the property,'" and that "[a] party challenging the constitutionality of a regulation has the burden to establish that he or she has suffered significant financial loss from the imposition of the regulation."[75]

The Second District observed that the Circuit Court improperly "focused on Gwynn's loss of the potential rentals available before the enactment of the ordinance but did not weigh this loss with the property's value based on the residual uses after the enactment."[76] It quashed the Circuit Court's order.

City of Venice v. Gwynn thereby strongly suggests that the Ordinance would withstand a challenge based on economic valuation grounds.[77] A challenge arguing that the Ordinance's advertising prohibition violates the First Amendment or Section 230 of the CDA may prove more difficult to answer.

The First Amendment (and Section 230 of the CDA)

On November 8, 2016 the U.S. District Court for the Northern District of California denied the request for preliminary injunction filed by Airbnb and HomeAway (STR Companies) against the City and County of San Francisco, California.[78] The STR Companies sought to bar "enforcement of a City and County of San Francisco ordinance that makes it a misdemeanor to provide booking services for unregistered rental units."[79] They argued that the ordinance violated Section 230(c)(1) of the CDA, which states "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[80]

The STR Companies argued that "a criminal penalty for providing and receiving a fee for Booking Services for an unregistered unit requires that they actively monitor and police listings by third parties to verify registration," which is "tantamount to treating them as a publisher because it involves the traditional publication functions of 'reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.'"[81]

Finding that the STR Companies had not demonstrated a likelihood of success on the merits, the court concluded that "the text and plain meaning of the Ordinance demonstrate, it in no way treats plaintiffs as the publishers or speakers of the rental listings provided by hosts," since it neither regulates "what can or cannot be said or posted in the listings," nor creates an "obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."[82] Rather, the court accepted San Francisco's argument that the "[o]rdinance holds plaintiffs liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with an unregistered unit."[83]

The STR Companies also argued that the practical effect of the ordinance "will be to burden speech, and that it is subject to 'heightened' scrutiny because it restricts particular content, namely advertisements for unlawfully registered rentals."[84] Again finding that the plaintiffs failed to demonstrate likelihood of success of the merits, the court stated, "[t]o the extent the Ordinance can be said to affect speech at all, it involves speech that 'does no more than propose a commercial transaction' and consequently is 'commercial speech.'"[85] The ordinance survives scrutiny, the court found, because if "'the transactions proposed in the forbidden [communication] are themselves illegal in any way,'" then "the speech is unprotected and the government may freely regulate it."[86]

The facts in Miami Beach are slightly different. The Ordinance prohibits "any advertising or advertisements," for short-term rentals "through various media including...websites," without defining a class of advertisers in such a way to limit liability to property owners rather than web service providers like the STR Companies.[87] In fact, the City fined Airbnb five times for advertising between March 19 and August 15, 2016, for a total of $120,000.[88]

Unlike San Francisco's ordinance, which made it "a misdemeanor to collect a fee for providing booking services for the rental of a unit not registered with the city,"[89] the Ordinance does not limit liability to the conduct of web service providers, as distinct from the content of an advertisement. Consequently, the City has little basis to argue, as San Francisco did, that the "[o]rdinance holds plaintiffs liable only for their own conduct..."[90]

In fact, consistent with the STR Companies' argument against San Francisco, the Ordinance regulates "what can or cannot be said or posted in the listings,"[91] and therefore creates an "obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts"[92] in order to avoid fines. A plaintiff might conceivably argue that the Ordinance treats a "provider...of an interactive computer service...as the publisher or speaker of any information provided by another information content provider,"[93] in violation of Section 230 of the CDA.

As to the First Amendment, however, the Ordinance's prohibition against advertising "involves speech that 'does no more than propose a commercial transaction' and consequently is 'commercial speech.'"[94] Since the prohibited advertisements propose transactions that "are themselves illegal," then "the speech is unprotected and the government may freely regulate it."[95]

If the Ordinance's prohibition on illegal commercial speech survives scrutiny, do its large fines also pass constitutional muster?

When Fines Become "Excessive"

Excessive bail shall not be required, nor excessive fines imposed...[96]

In November 2004, Ray Locklear appealed a final order of the Florida Fish & Wildlife Conservation Commission which imposed a $5,000 fine for illegal gill net fishing.[97] The District Court of Appeals of Florida, Fifth District, affirmed the Commission's decision holding that "Locklear does not explain how a $5,000 fine following his second conviction for illegal gill net fishing activities is grossly disproportionate to the crime."[98] The court pointed out that "[w]ell-settled Florida decisional authority provides that a statutorily authorized civil fine will not be deemed so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably harsh or oppressive."[99]

While the court did not specifically analyze the harm – "harming mullet, seatrout and other fish populations beyond repair, as well as killing sea turtles, birds and dolphins accidentally ensnared in their nets"[100] – to determine proportionality, other Districts have done so. In *State of Florida v. Jones*, the court, while considering whether a $5,000 fine for solicitation of prostitution was excessive, stated:

> [t]o determine whether a fine is grossly disproportional, a court considers:
> '(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature ...; and (3) the harm caused by the defendant,'" which looks "beyond appellee's immediate actions to the harm the legislature has sought to redress.[101]

In *State of Florida v. Cotton*, the court, also considering whether a $5,000 fine for solicitation of prostitution was disproportional to the harm, noted "[t]he federal government acknowledges the link between prostitution and trafficking in women and children, a form of modern day slavery."[102] In both *Jones* and *Cotton*, the courts found that the $5,000 fines for solicitation of prostitution were not disproportional given the harm.

However, when contrasted to a $5,000 fine aimed at preventing significant environmental damage or human trafficking, a court might consider a $20,000 fine disproportional given harm that merely involves the potential for "excessive numbers of guests, vehicles and noise," which may affect the "aesthetics, character and tranquility" of residential neighborhoods.[103]

Whether the Ordinance can withstand legal assault, however, may ultimately prove less important than its ability to withstand political assault.

A Way Forward?

Airbnb says it wants to work with the city to develop "clear, fair rules" to operate short-term rentals and start paying resort taxes — 6 percent in Miami-Dade County plus a 2 percent tourist development tax on Miami Beach — that in turn supports the local tourism industry.[104]

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Despite politicians' assertions that the Ordinance is designed to protect residents, a February 2017 poll found that "a full 94 percent of South Floridians want Airbnb (and similar home-sharing services) to operate legally in their hometowns."[105] The *Miami New Times* notes that the poll "only fuels critics who argue that city governments are acting to protect wealthy hotel owners rather than average citizens."[106] Those average citizens, according to the results of the poll, "resoundingly told local governments to quit meddling with their local property rights," with a majority of South Florida residents responding that "vacation rentals were a 'very important' component of the local economy."[107]

Airbnb has expressed a desire "to work with the city to develop 'clear, fair rules' to operate short-term rentals and start paying resort taxes."[108] More recently, it has urged Mayors to 'come to the table and consider common-sense regulations consistent with the desires of their residents.'"[109] Although constrained by the preemptive scope of the Florida STR Laws, Miami Beach may have flexibility to adjust its policies. It could, for example, explore the viability of an annual percentage limit on rental use, rather than the current duration restriction– permitting residents within certain zones to rent their property, at any time, for any length of time, up to a cumulative total of six months out of the year.[110] If the City were open to discussing relaxation of current restrictions, analysis might show that the collection of appropriate taxes – perhaps in conjunction with special assessments in some areas – could offset costs of increased traffic and additional police patrols.

Concerns of full-time residents about tranquility and aesthetics could be addressed through regulations that limit occupancy and numbers of vehicles per residence, based on square footage and lot size. Some commentators have suggested that "local governments should enact stricter 'noise limits, property care standards, public gathering ordinances, curfews, and general parking restrictions."[111] Fees, charged to those who engage in short-term renting, could cover the additional cost of administering compliance programs.

The Hotel Association's legitimate concerns with unfair competition could be addressed, in part, through permitting. Permits might "require hosts to meet the same standards as a hotel to protect transient guests--for instance, clearly marked fire escapes and locking windows and doors could be required."[112] Permit fees could pay for administration of the program, including periodic inspections.

The benefits of those changes could inure far beyond owners of vacation rentals. According to a survey conducted by Airbnb, their guests spent about $50 million at Miami area restaurants from 2015 to 2016.[113] That number would, presumably, expand in proportion to an expansion in STR opportunities.

Regardless of opinion polls or potential economic benefit, however, the City may choose to reject Airbnb's offers of compromise. In fairness, the City has a rational basis for its STR restrictions within certain residential zones. And, its Ordinance stands on strong legal footing in many respects. However, it may be vulnerable to challenge with respect to its post-2011 amendments, Section 230 of the CDA, and the size of its fines.

Miami Beach can await and contest those challenges. Or it can bargain from its current position of strength, taking advantage of offered concessions that might be withdrawn if a court were to rule against the Ordinance. In the tradition of its earliest founders – who recognized, and took

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advantage of, the opportunity to shift from an economy based on agriculture to one based on real estate and tourism – Miami Beach has the opportunity to take advantage of the economic shift occurring with peer-to-peer sharing, not just across the country, but all over the world.

Notes

1. Chabeli Hererra, *How $20,000 fines have made Miami Beach an Airbnb battleground*, Miami Herald (Nov. 27, 2016) *available at* http://www.miamiherald.com/news/business/biz-monday/article117332773.html.
2. City of Miami Beach Code of Ordinances Sec. 142-1111(a)(1) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO.
3. Hererra, *supra* note 1.
4. The City's "practice safe renting" campaign admonished visitors to "avoid the walk of shame," and portrayed three women towing garments and roller suitcases through a residential neighborhood, presumably after having been ejected from an illegal STR. See, Jerry Iannelli, *Miami Beach Plans to Use Alarming Ads to Scare Away Airbnb-Style Renters*, Miami New Times (Sep. 8, 2016) *available at* http://www.miaminewtimes.com/news/miami-beach-plans-to-use-alarming-ads-to-scare-away-airbnb-style-renters-8757440.
5. Hererra, *supra* note 1.
6. Jerry Iannelli, *Miami Beach's Airbnb Crackdown Might Not Be Legal Under State Law, Opponents Argue*, Miami New Times (Aug. 26, 2016) available at http://www.miaminewtimes.com/news/miami-beachs-airbnb-crackdown-might-not-be-legal-under-state-law-opponents-argue-8722454.
7. *Id.*
8. *Id.*
9. City of Miami Beach Code of Ordinances Sec. 142-1111(a)(1) *supra* note 2, and Hererra, *supra* note 1.
10. *Id.* at Sec. 142-1111(a)(2).
11. Jimmy L. Morales, City Manager, *Letter to Commission 339-2016, Short-Term Rental Violations* (Aug. 17, 2016) *available at* miamibeachfl.gov.
12. West's F.S.A. Const. art. 8 § 2.
13. Jerry Iannelli, *Miami Beach Might Crack Down Harder on Airbnb, Spend Fines on Affordable Housing*, Miami New Times (Dec. 8, 2016) *available at* http://www.miaminewtimes.com/news/miami-beach-might-crack-down-harder-on-airbnb-spend-fines-on-affordable-housing-8978021. In fairness, one must acknowledge the importance of the hotel industry to the local economy. According to the Greater Miami Convention & Visitors Bureau, Miami's hotels sold 1,383,625 rooms in 2015 at an average daily room rate of $250.93. See, Marilyn Bowden, *Hotel room rates for the Miami area nation's highest*, Miami Today (May 10, 2016) *available at* http://www.miamitodaynews.com/2016/05/10/hotel-room-rates-miami-area-nations-highest/.
14. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30 (1935).
15. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In Belle Terre, the ordinance limited occupancy of single family dwellings to traditional families or no more than two unrelated persons. The Court held that the ordinance was "reasonable, not arbitrary and bears a rational relationship to a (permissible) state objective."
16. Andres Viglucci, *The 100-year story of Miami Beach*, Miami Herald (Mar. 21, 2015) *available at* http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article15798998.html.
17. Seth Bramson, Miami Beach, Images of America 7 (Arcadia Publishing, Charleston, SC, 2005
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Ruby Leach Carson, *40 Years of Miami Beach*, Tequesta, Historical Association of Southern Florida 3 (1955).
25. Kyle Munzenrieder, *Miami Tourism Breaks Records Again: 14.6 Million People Visited in 2014*, Miami New Times (May 15, 2015) *available at* http://www.miaminewtimes.com/news/miami-tourism-breaks-records-again-146-million-people-visited-in-2014-7618105.
26. *Peer-to-peer rental, The rise of the sharing economy: On the internet everything is for hire*, The Economist (Mar. 9, 2013) *available at* http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy.
27. *Id.* noting that Airbnb launched in 2008.
28. Charter of the City of Miami Beach, Florida, Preamble (Nov. 3, 1993), *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPACH.
29. Judge James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, Fla. Bar J. Vol. 83, No. 6, 92 (Jun. 2009) *available at* https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/2D1A62818F4C4796852575C5004B3C64. The Municipal Home Rules Power Act (MHRPA) is now codified in Ch. 166 of the Florida Statutes.
30. *Id.*, citing City of Miami Beach v. Fleetwood Hotel, 261 So. 2d 801, 803 (Fla. 1972).
31. *Id.*
32. *Id.*
33. *Id.* at 93.
34. *Id.*
35. *Id.*
36. *Id.*
37. FL ST § 509.032(7), stating "[t]he regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state."
38. *Id.* The "duration or frequency" language was added in a 2014 amendment which modified the original language of para. 7(b), passed in 2011. The relevant amendments to the Ordinance occurred after the 2014 amendment to paragraph 7 of the Florida STR Law.
39. *Id.*
40. City Of Miami Beach Fl. Code Of Ordinances, Sec. 142-1111 (May 16, 2012) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances/174532?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO. The May 16, 2012 version of Sec. 142-1111 is the oldest version of the ordinance archived on municode.com. Paragraph b of the 2012 version of Sec. 142-1111 states that June 19, 2010 was "the effective date of the ordinance enacting this section."
41. City of Miami Beach Fl. Code of Ordinances, Sec. 142-1111 (Feb. 8, 2017) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances?nodeId=SPBLADERE_

Continued on page 33

CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO (last visited Feb. 14, 2017).
42. *Id.*
43. *Id.* at para. e(1). The listed fines were, expressly, for violations of paragraph b. That disconnect was not addressed until the September 22, 2014 version which stated, "[v]iolations of [sub]section 142-1111(a) or (b) shall be subject to the following fines." See CITY OF MIAMI BEACH FL. CODE OF ORDINANCES, Article IV, Supplementary District Regulations, Division 1, Generally, Sec. 142-1111. - Short-term rental of apartment units or townhomes (Sep. 22, 2014) *available at* https://www.municode.com/library/fl/miami_beach/codes/code_of_ordinances/219510?nodeId=SPBLADERE_CH142ZODIRE_ARTIVSUDIRE_DIV3SUUSRE_S142-1111SHRMREAPUNTO. The September 22, 2014 version of Sec. 142-1111 also raised the fines for the first time (from $500 to $1500 for a first violation).
44. *Id.*
45. *Id.* Municode.com does not list any pending amendments. However, Miami Beach Mayor Philip Levine told the Miami Herald on November 27, 2016 that he thinks "[the fines] can be increased," and that "$20,000 is not enough." See, Hererra, *supra* note 1.
46. Sec. 142-1111 (May 16, 2012), *supra* note 40. 47
Sec. 142-1111 (Feb. 8, 2017), *supra* note 41.
48. *Id.*
49. *Id.* "'Advertising' or 'advertisement' shall mean any form of communication for marketing or used to encourage, persuade, or manipulate viewers, readers or listeners for the purpose of promoting occupancy of a residential property . . ."
50. *Id.*
51. Plaintiff's Motion for Reconsideration of Order Denying Plaintiff Charles Fitz's Motion for Final Summary Judgment and Incorporated Memorandum of Law, Charles Fitz v. City of Vero Beach, Florida, No. 312015CA000266, Fla. 19th Cir. Ct. (Mar. 14, 2016).
52. *Id.*
53. *Id.*, citing Hostetter v. Escambia County, No. 2015-CA-1383, L.T. No. CE#15-02-00416, Fla. 1st Cir. (Dec. 16, 2015).
54. Fitz v. City of Vero Beach, No. 312015CA000266, Fla. 19th Cir. Ct. (May 3, 2016). The decision was affirmed in February 2017, in Fitz v. City of Vero Beach, No. 4D16-1587, Fla. 4th Dist. Ct. App. (Feb. 9, 2017).
55. *Id.*
56. Katherine Kallergis, "City of Miami passes Regalado's resolution, could sue platforms like Airbnb" THE DAILY DEAL, March 23, 2017.
57. http://www.miami21.org/PDFs/Amended_Codes/Miami_21_May_2017.pdf.
58. Airbnb Inc. v. City of Miami, No. 17-08999 CV 43 (11th Judicial Cir., Miami-Dade Cty. May 30, 2017).
59. Mr. Kerry L. Ezrol, Fla. AGO 2016-12 (2016), citing House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, dated June 19, 2014. Ms. Bondi was responding to a question from the Fort Lauderdale City Attorney regarding "whether the city could limit vacation rentals through a proposed ordinance (1) imposing distance separation requirements or (2) limiting the percentage or number of vacation rentals, in light of the preemption language regarding vacation rentals in s. 509.032(7), Fla. Stat."
60. *Id.*
61. William P. Sklar, Jerry C. Edwards, *Florida Community Associations versus Airbnb and VRBO in Florida*, 91 FLA. B.J. no. 2, at16 (Feb. 2017).
62. Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974).
63. *Id.* at 13-14.
64. City of Coral Gables v. Sakolsky, 215 So. 2d 329 (Fla. Dist. Ct. App. 3d Dist. 1968).
65. City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 486 (1941).
66. Raul J. Aguila, City Attorney, Commission Memorandum, *An Ordinance of the Mayor and City Commission of the City of Miami Beach, Florida*, Amending the Code of the City of Miami Beach (Jan. 13 2016) *available at* www.miamibeachfl.gov.
67. Village of Belle Terre, *supra* note 62.
68. U.S. CONST. amend. V.
69. City of Venice v. Gwynn, 76 So. 3d 401, 402 (Fla. 2d DCA 2011).
70. *Id.* at 403.
71. *Id.*
72. *Id.*
73. *Id.* at 403-404.
74. *Id.* at 404, citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
75. *Id.* at 404-405.
76. *Id.* The Second District noted that "In focusing on Gwynn's denied expectations for the use of her property, the court failed to recognize record evidence that Gwynn's property had continued value as a monthly rental, as a short-term rental for three periods, or as investment property which could be sold." The court then pointed out that "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land," citing Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072–73 (11th Cir.1996).
77. According to Zillow.com, the home value index in Miami Beach has risen from $244,000 in June 2010, when City Code Section 142-1111 was enacted, to $402,000 as of April 2017. See, Miami Beach Home Prices & Values, *available at* https://www.zillow.com/miami-beach-fl/home-values/.
78. Airbnb, Inc. v. City and County of San Francisco, 2016 WL 6599821 (Nov. 8, 2016).
79. *Id.* at 1.
80. *Id.* at 3.
81. *Id.*
82. *Id.* at 4.
83. *Id.*
84. *Id.* at 6.
85. *Id.* at 8.
86. *Id.*, citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995). The Judge also noted that, "the Supreme Court has consistently held that speech proposing an illegal transaction is excluded," citing United States v. Williams, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).
87. Sec. 142-1111(a)(2), *supra* note 2.
88. Jimmy L. Morales, City Manager, *Letter to Commission 339-2016, Short-Term Rental Violations* (Aug. 17, 2016) *available at* web.miamibeachfl.gov.
89. Practical Law Real Estate, *Airbnb Loses Communications Decency Act Argument in San Francisco, Wins Temporary Block* (Nov. 28 2016) *available at* https://1.next.westlaw.com/w-004-6547?__lrTS=20170414155115182&transitionType=Default&contextData=(sc.Default).
90. Airbnb, Inc. v. City and County of San Francisco, *supra* note 78 at 4.
91. *Id.*
92. *Id.*
93. *See* 47 U.S.C.A. § 230(c)(1).
94. Airbnb, Inc. v. City and County of San Francisco, *supra* note 78 at 8.

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95. *Id.*
96. U.S. CONST. amend. VIII.
97. Locklear v. Florida Fish & Wildlife Conservation Comm'n, 886 So.2d 326, 327 (Fla. 5th DCA 2004).
98. *Id.* at 329.
99. *Id.*
100. Jim Waymer, *Net ban turns 20 on July 1, but was it a success?*, Florida Today (Jun. 30 2015) *available at* http://www.floridatoday.com/story/news/local/2015/06/30/net-ban-turns-july-success/29532739/.
101. State v. Jones, 180 So.3d 1085, 1089 (Fla. 4th DCA 2015), citing Gordon v. State, 139 So.3d 958, 960 (Fla. 2d DCA 2014).
102. State v. Cotton, 198 So.3d 737 (Fla. 2d DCA 2016), citing Coyote Publ'g, Inc. v. Miller, 598 F.3d 592, 600 (9th Cir.2010) (citing U.S. Department of State, The Link Between Prostitution and Sex Trafficking (November 24, 2004)).
103. Aguila, *supra* note 66.
104. Hererra, *supra* note 1.
105. Jerry Iannelli, *Unlike Miami Beach Mayor Levine, 94 Percent of South Floridians Want Legal Airbnb*, MIAMI NEW TIMES (Mar. 7, 2017) *available at* http://www.miaminewtimes.com/news/unlike-miami-beach-mayor-levine-94-percent-of-south-floridians-want-legal-airbnb-9190438.
106. *Id.*
107. *Id.*
108. Hererra, *supra* note 1.
109. Iannelli, *supra* note 105.
110. Miami Beach should seek a State Attorney General's opinion to ensure the State does not view an annual percentage restriction as regulating the frequency of vacation rentals, implicating 509.032 preemption.
111. Lara Major, Comment, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 503 (Spring 2016). Citing, Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the "Industry"?*, 65 PLAN. & ENVTL. L. 4, 6 (2013).
112. *Id.*
113. Laine Doss, *Fighting Back: Airbnb Says Its Guests Spent $50 Million at Local Restaurants Last Year* MIAMI NEW TIMES (Oct. 24, 2016) *available at* http://www.miaminewtimes.com/restaurants/fighting-back-airbnb-says-its-guests-spent-50-million-at-local-restaurants-last-year-8866832. ML

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applicable county – and if the county passes a local law declining enforcement, the New York Department of State would seek to enforce the building code. N.Y. Executive Law §381. But under these provisions, even if the local government does not pass a local law declining enforcement of the state's building code, the municipality or county will have to pass a local ordinance empowering a local enforcement program for the building code.

Impact of Local Enforcement. Clearly, counties and municipalities in the United States are generally required to follow state law in enacting their own ordinances, if not enforce state law directly, as in New York. In some cases, there is little local option, such that the presumption is that "one size fits all," regardless of local preferences. Even so, anyone involved in the code enforcement process knows that discretion in actual enforcement almost always remains. Indeed, the person who as a practical matter has the most discretion when it comes to code enforcement is the inspector or code enforcement officer – the person out in the community, interacting directly with persons who may be complaining about violations as well as those who are allegedly committing code violations.

What this means is that despite state and federal mandates in the United States – or, for that matter, provincial mandates in Canada – it still remains a matter of local discretion how a law will be enforced. It remains for the inspector, the person initially communicating with the alleged violator, to determine whether a violation exists. It falls to that inspector or code enforcement officer to attempt to solve the problem – to gain compliance – and then to follow up to check on that compliance. And it falls to that inspector or officer to conclude whether an alleged violator is, in good faith, making sincere and effective efforts to address the problem leading to the complaint. The primary focus of any successful code enforcement effort will always remain: to solve the problem by having the violation corrected. Thus, state, provincial or federal law may specify the standard to be enforced, but cannot dictate how a violation of that standard is addressed, such as requiring immediate issuance of citations, any more than it can dictate the actual facts or what steps will actually solve the problem. That still falls to those of us in the trenches, if you will, in towns, cities and counties, where we can – mandates aside – still make a difference. ML



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