Hotels in the Neighborhood

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Hotels in the Neighborhood:

How municipalities are addressing Airbnb vacation rentals, group homes, and other transitory-lodging uses in residential districts



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A Tale of Two Cities



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Two Cities (cont'd.)



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STR Policy Tensions

- Encourage tourism
- Expand tax base
- Embrace new economies (peer-to-peer/sharing)
- Support property rights
- Less government regulation
- Encourage economic innovation

On the other hand ...

- Change the nature of single-family neighborhoods
- Safety
- Insurance
- Fraud



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The Basics: What is an STR?

- Whole house rental
- Room rental (hostel/boarding house model)



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Legal Foundation: Authority to Regulate STRs

- Regulations fall under traditional police powers

- Zoning regulations that restrict STRs in residential areas have been upheld where they are substantially related to land use impacts in the area.

  (*Brown v. Sandy Bd. of Adjustment* (Utah Ct. App. 1998) 957 P.2d 207; *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579.)



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Legal Foundation: Challenges to STR Regulations

- **Takings**: Prohibiting or restricting STRs in most cases will not constitute a taking.
  - Economic impacts and deprivation of all economically viable use.

    (*Penn Central Transportation Co. v. City of New York City* (1978) 438 U.S. 104.)

  - Difficult to argue that prohibition denies all economically viable use of land when longer-term rentals are still allowed.

    (*Cope v. City of Cannon Beach* (Or. 1993) 855 P.2d 1083.)

  - Grandfathering and amortization



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Legal Foundation: Challenges to STR Regulations

- **Due Process – Substantive**: Regulation must advance a legitimate government purpose.

  Ewing v. City of Carmel-by-the-Sea (1991) 234 Cal.App.3d 1579

  - Legitimate interests driving the regulation
  - Interests of residents *and* guests



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Legal Foundation: Challenges to STR Regulations

- **Due Process – Procedural**
  - Property rights are implicated – 14th Amendment protections
    - Notice,
    - opportunity to be heard,
    - fair hearing

    all required before revoking any approved STR permit.



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Legal Foundation: Challenges to STR Regulations

- **Equal Protection**: Rational-basis test, as no suspect class implicated

(If there is any "reasonably conceivable state of facts that could provide a rational basis . . ." *United States Railroad Retirement Bd. V. Fritz* (1980) 449 U.S. 166.)

  - If a legit interest for regulating, should survive
  - Avoid intentional unequal enforcement (see *Village of Willowbrook v. Olech* (2000) 528 U.S. 562)



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To Ban or Not to Ban

- Threshold question for policy-makers (informed by us)
- Options:
  - Outright ban (all prohibited)
  - No regulation (all permitted)
  - Permit subject to regulations
- Factors to consider:
  - External requirement to permit (e.g., California Coastal Commission)
  - Revenue (e.g., TOT, BID)



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Blanket Ban/Permission

- Ban
  - Consider legal challenges discussed above
  - Articulate legitimate purpose with strong findings
  - Consider grandfathering or amortization
- Permit
- Do nothing



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STR Regulations: Threshold Issues

- Statement of legitimate government interests supported by documented evidence.
- Support citywide regulation with evidence of citywide problem.



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Types of STR Regulations

- **Quantitative Restrictions**
  - Raw number caps (per street; per zone; citywide)
  - Maximum STR to long-term occupancy ratios (e.g. 1:13 in Mendocino County, CA)
  - Maximum percentage caps (per street; per zone; citywide)
- **Proximity Restrictions**
  - 300 feet (San Clemente, CA)
  - 800 feet (Prescott, AZ)



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Types of STR Regulations

- **Operational Restrictions**
  - *Occupancy Cap*
  - *Rental Period Restrictions*
  - *Owner Occupancy*



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Types of STR Regulations

- **Licensing, Registration, Permitting**
- **Compliance with Building Code**
- **Inspection**



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Types of STR Regulations

- Quiet Hours (same as neighbors)
- Condition of approval
  - House Rules: posted, term of contract, enforced by management
  - Supervision and Accountability
    - Owner-occupied (home sharing)
      - Owner present
    - Primary dwelling or domicile
      - Absent but returns to face neighbors
    - 24/7 Contact
      - Immediate by phone
      - On-site within X minutes



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STR Ordinance: Definitions

- Definitions can make or break your STR Ordinance
  - “Short-term rental”
  - “Hotel”
  - “Boarding House”
  - No unintended overlap and no gaps



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Enforcement

- Options:
  - standard code enforcement vs. special process
- Special process:
  - Call STR owner or manager first?
  - Higher fines for violations?
    - Need to justify different treatment
  - Due process



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Enforcement

- Information is key, but how to get it?
- Addresses hidden behind paywalls
- NY sued Airbnb for information, resulting in settlement and disclosure of “anonymized data”
- Vigilant neighbors are vital



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Enforcement

Suggest:

- “Any violation of any federal, state, or local law or regulation is a public nuisance per se.”
- Advertising illegal activities or uses
  - Often easiest to prove
  - Advertisers and booking companies accountable, or just STR operator and owner?



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Regulating Online Platforms

Communications Decency Act

- Prohibits treating websites that host or distribute third-party content like online platforms, “as the publisher or speaker of any information provided by another information content provider,” and
- provides immunity from liability under inconsistent state or local laws.

(47 U.S.C. § 230(c)(1), (e)(3).)

- *Airbnb, Inc. v. City of Anaheim*, C.D. Cal., Case no. 8:16-cv-01398
- *Airbnb, Inc. v. City of Santa Monica*, C.D. Cal., Case no. 2:16-cv-06645
- *Airbnb, Inc. v. City and County of San Francisco*, N.D. Cal., Case no. 3:16-cv-03615



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Regulating Online Platforms

Stored Communication Act

- "provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or information pertaining to a subscriber or customer of such service . . . to any governmental entity" without a subpoena or other legal process.
(18. U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).)
- *In Re: City and County of San Francisco et. al.*, San Francisco Superior Court, CPF-16-515136
- *HomeAway.com, Inc. v. City of Portland*, U.S. District Court, D. Or., Case no. 3:17-cv-00091



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Transient Occupancy Tax (Hotel Tax)

- STRs are subject to TOT, but historically have not paid
- Lack of sophistication of STR owner/operators leads to difficulty in collecting TOT
- Airbnb: Voluntary Collection Agreement (VCA)
  - Weigh the benefit of receiving TOT against the concessions made by entering into VCA (waiver and release “any and all actions, causes of action, indebtedness, suits, damages or claims arising out of or relating to payment of and/or collection of TOT



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Transient Occupancy Tax

- Policy Considerations for TOT Enforcement
  - How aggressive will effort be?
  - How will agency handle staff enforcement?
  - How will agency fund enforcement?



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Transient Occupancy Tax

- **Threshold Issues**
  - Who is responsible for collecting TOT (operator only?)
  - Does ordinance apply to STRs?
  - Is ordinance internally consistent?
  - Is the ordinance up-to-date and consistent with state law?
  - Does ordinance contain criminal penalty?
    - Increases burden to uphold ordinance
    - May eliminate requirement to “pay first, litigate later”



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Transient Occupancy Tax

- TOT Collection
  - How to find violators?
    - Complaint only
    - In-house staff / sting operations
    - Third party
  - Once you find them, how do you proceed?
    - Warning letter only?
    - Audit?



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Think Broadly About Lodging Regulation

Keep in mind …

- "Lodging" regs cover many types
  - Traditional vacation-home rentals
  - Airbnb, VRBOs
  - Home exchanges
  - Home sharing
- **But also**
  - "Maternity hotels"
  - Sober-living homes
  - Other group homes, unlicensed and in some cases licensed



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“Sober-living Homes”



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Legal Facts:

In recovery

= disabled



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Legal Facts:

disabled

= protected class

like race and religion



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Legal Facts:

So…

Government may not discriminate against*

*as in, adversely

(in favor? stay tuned)



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Real implications for local regulation

Government

- May not act to discriminate
- Must build a clean record



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California Protections

- State license
  - ≤ 6 : no
    - business
    - special zoning
    - ≈ single family



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California Protections

- State license
  - 7+ : yes
    - business
    - special zoning



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California Protections

- State constitution
  - privacy
    - Not “who”
    - Just use



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So “family” …

- NOT based on relationship to each other
  - Related by blood, marriage, adoption

- But on their *use* of the property
  - Permanent vs. temporary?
  - Revolving door?



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The use = “single housekeeping unit”

- Common
  - Lease
  - Chores
  - Expenses
  - Access
  - Choice (roommates)



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Other Protections

Federal

(and State)



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Anti-discrimination Laws

Federal ADA, FHAA, Rehabilitation Act
and comparable state statutes

1. **Prohibit intentional discrimination**
   - Disparate treatment
     - May not single out ("facial")
       ... except to benefit
       - So: broad, neutral application
     - Unequal enforcement
       - So: even-handed
   - Disparate impact
     - Combat with: statistical evidence
2. **Require reasonable accommodation**



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When it comes to transitory lodgings …

A "reasonable accommodation" =

- "… ***necessary*** to afford
- such person [disabled]
- ***equal*** opportunity to
- use and enjoy a ***dwelling***."



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Reasonable Accommodation

A requested accommodation is

- **necessary** if
  - disabled have no other real or meaningful option
    - e.g., Alzheimer's patients – not independent
    - contrast with
      - “no care or supervision”
      - “just living together” “just like family”



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Reasonable Accommodation

A requested accommodation is **unreasonable** if

- fundamental alteration
  (e.g., turns zoning on its head)
- undue financial, admin burden
  (e.g., requires a lot more legwork, staff time, cost)



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Reasonable Accommodation

Process (HUD and DOJ)

- Iterative
- Dialogic
- Open

So…

- City may get details
- through normal CUP, variance, etc.
- or through special RA



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What does a reasonable accommodation look like?

- Get a small state license (as in California)?
- Use the property as a single housekeeping unit?
- Not subject to zoning at all, ever?

- Minimum-distance requirement = okay in reasonable-accommodation context!
- Still require business license?
- Still pay TOT?



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Best Practices

How to handle yourself … don't discriminate

In public meetings

- Comments
  - Not discriminatory
  - Focus on what is regulated.
  - Rehabilitate if necessary.
- Document your reasons
  - In neutral terms
  - Connect to legitimate governmental concerns
  - Supporting evidence
- Normal practices

What can you do with (and under) local regulation?

- Nuisance (document!)
- Criminal activity (document!)
- Regulate single family generally
- Regulate broader categories
  - Short-term rentals
  - Boarding houses
  - Business in residential
- Consistent, equal enforcement



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Final Thoughts

- Explore and pursue legislative solutions
- Consider whether negative impacts are common to broader class of uses, regulate the broader class and enforce equally
- Update municipal code provisions (e.g., eliminate overlapping use definitions and gaps)
- Be prepared to grant accommodations that are demonstrably necessary and reasonable
- **Rise above the fray, and remain neutral and professional**



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Thank You

“Hotels in the Neighborhood”

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