Regulating Short-Term Rentals

PRACTICAL LAW GOVERNMENT PRACTICE

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A Practice Note discussing issues involved in regulating short-term rentals (STR), also called short-term vacation rentals (STVR), short-term rental property (STRP), and home-sharing. This Note includes coverage of policy arguments, use of new or existing regulations, types of regulations, tourist taxes (also called transient taxes or occupancy taxes), and voluntary collection agreement (VCA) issues. This Note also addresses legal arguments against regulations, including arguments based on the First, Fourth, Fifth, and Fourteenth Amendments. It also covers claims based on the Stored Communications Act, the Communications Decency Act, the Dormant Commerce Clause, and preemption by state law.

Short-term rentals refer to a furnished house, apartment, or condominium or portion of a furnished house, apartment, or condominium rented daily or weekly usually to tourists or business travelers. The rentals are usually located in residential neighborhoods. There is frequently tension between the full-time residents and the short-term renters based on quality of life issues. Residents often look to local government to solve the issues caused by these rentals.

This Practice Note discusses:

- The growth of short-term rentals.
- Policy arguments concerning the regulation of short-term rental properties.
- Issues that arise when regulating short-term rentals by using an existing general ordinance that was not specifically written to address short-term rentals.
- Types of new regulations written specifically for short-term rentals.
- Tax issues.
- Enforcement of local regulations and tax payments.
- Claims filed by hosting platforms opposing local regulation.
- Challenges filed against local government regulations by property owners or associations.

GROWTH OF SHORT-TERM RENTALS

Short-term rentals are not new, but they have become more prevalent due to the use of internet host platforms for booking (see Regulating Short-Term Rentals for Local Government Toolkit (W-021-5998)). Short-term rental properties include:

- Residences owned by individuals and rented frequently or only occasionally.
- Apartments leased to individuals who rent them out to short-term guests.
- A portion of a privately owned or leased residence, with the primary resident staying on site during the short-term rental.
- Corporate-owned property (apartments or houses) available for rent throughout the year.

Short-term rentals are also called vacation rentals. Home-sharing can refer to a type of short-term rental where the resident remains on site during the rental period.

Websites operated by various host platforms list the properties and allow a potential renter to choose which one they want to rent. Some of the host platforms include Airbnb, VRBO (Vacation Rental By Owner), FlipKey, and HomeAway.

There are books, articles, websites, and even a streaming television show on how to market your property as a short-term rental. These resources cover issues like design, marketing, and income tax, but they rarely discuss local regulations and taxes. A local government may want to dedicate space on its website (and possibly link to other sites) explaining regulatory and tax requirements for short-term rentals.

During the 2019 novel coronavirus disease (COVID-19) pandemic, lockdowns and less travel meant less use of short-term rentals.

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As use began to grow after the initial lockdowns, the increased use was not in the urban tourist locations that saw the initial growth of short-term rentals. Growth occurred in rural areas and small towns.

POLICY ARGUMENTS FOR AND AGAINST SHORT-TERM RENTALS

Property owners (individuals or companies) are in favor of short-term rentals as a way to make money from their property. They frequently argue that short-term rental regulations interfere with their property rights, violate state and federal constitutional provisions, and run afoul of various statutes. Some communities may be in favor of short-term rentals as a way to boost needed transient lodging, especially for events that happen infrequently, such as a Super Bowl.

Arguments against short-term rentals and other issues for local governments include:

- Taxes.
- Strain on housing stock.
- Public health.
- Negative effect on residential neighborhoods.

TAXES

Tourist taxes (under various names, including hotel occupancy taxes or transient taxes) are common in most states. Most states, counties, and cities tax temporary overnight stays. People in the hospitality industry are usually familiar with these taxes. Short-term rental platforms are usually familiar with the taxes, but individuals who rent their homes may not be aware of them. Short-term rentals have not had a good track record for paying tourist taxes. If short-term rentals do not pay these taxes but hotel operators do pay them, hotel operators see that as unequal treatment.

HOUSING STOCK

In cities that have a shortage of housing stock and high tourist trade, an increase in short-term rentals could further diminish available housing. These shortages could worsen when businesses buy available housing for exclusive use as a short-term rental.

PUBLIC HEALTH

Over time, regulations have evolved to address the health and safety of hotels. For example, hotels must have:

- Marked fire exits.
- Diagrams showing access to fire exits.
- Clean and vermin-free beds and linens.
- Clean bathrooms.
- Procedures to ensure safe and healthy food and beverage handling practices.

When short-term rentals are unregulated, they may or may not meet those standards.

NEGATIVE EFFECT ON RESIDENTIAL NEIGHBORHOODS

Owners and residents of neighboring properties often request that local governments regulate short-term rentals because of the effect on their neighborhood. Transient use of the short-term rental property may result in problems with noise, crime, drug and alcohol use, trash, damage to property, and parking issues. (See Legal Update, To Host or Not to Host: The Shared Housing Question (W-004-0665).)

USE OF EXISTING REGULATIONS TO REGULATE SHORT-TERM RENTALS

Short-term vacation rentals have existed for many years, but the use increased due to internet hosting platforms like Airbnb. In response to the increase of short-term rentals, some local governments have passed new regulations to target specific problems caused by this use. Other jurisdictions rely on existing regulations, which were not written with short-term rentals in mind. Regulations written before the use of hosting platforms for short-term rentals may not specifically address the issues caused by the increase in short-term rentals.

Since some state laws limit new local government regulations, cities in those states may have no other choice than to rely on existing regulations.

TYPES OF NEW REGULATIONS WRITTEN FOR SHORT-TERM RENTALS

Several cities have passed regulations in response to the growing use of short-term rentals in residential neighborhoods (see Sample Short-Term Rental Ordinances (W-020-4851) and Standard Document, Short-Term Rental Permit Application (W-021-5130)). These regulations generally may be categorized as:

- Prohibitions of short-term rentals.
- Minimal regulations of short-term rentals, such as registration.
- More extensive regulations of short-term rentals.

PROHIBITION OF SHORT-TERM RENTALS

Some regulations completely ban short-term rentals anywhere in the jurisdiction (see Standard Document, Short-Term Rental Regulations: Prohibiting Short-Term Rentals (W-020-3405)). Other regulations prohibit short-term rentals according to:

- Area (prohibited in certain parts of the city or county or in certain zoning districts) (see Standard Clauses, Short-Term Rental Regulations: Allowing Short-Term Rentals in Limited Areas (W-020-4188)).
- Time (prohibited if over or under a certain number of days) (see Standard Clauses, Short-Term Rental Regulations: Operational Issues (W-020-8314)).
- Type (for example, allowing home-sharing rentals where the host is present but disallowing rentals without the host, disallowing if the property does not meet code requirements, and disallowing if the property has code violations or delinquent taxes) (see Standard Clauses, Short-Term Rental Regulations: Operator Residency Requirements (W-020-4482) and Short-Term Rental Regulations: Ineligible Properties (W-020-4836)).

MINIMAL REGULATION OF SHORT-TERM RENTALS

Some cities choose to allow short-term rentals in all or most of their residential areas with minimal regulation (see Standard Clauses, Short-Term Rental Regulations: Broadly Allowing Short-Term Rentals (W-020-3938)). Regulations sometimes consist only of a

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registration or permit requirement and payment of applicable taxes (see Standard Clauses, Short-Term Rental Regulations: Permitting Process (W-020-4882) and Short-Term Rental Regulations: Taxes and Fees (W-020-8793)).

MORE EXTENSIVE REGULATION OF SHORT-TERM RENTALS

More extensive regulations cover several issues, including:

- Registration or permit requirements (see Standard Clauses, Short-Term Rental Regulations: Ineligible Properties (W-020-4836)).
- Health and safety requirements, including:
  - food handling requirements;
  - sanitation requirements, for example, requirements to provide soap and clean linens;
  - evacuation diagrams;
  - smoke and carbon monoxide detectors;
  - notifying the police of any illegal activity; and
  - identification (name, telephone number, and address) of a local contact person or entity.

  (See Standard Clauses, Short-Term Rental Regulations: Operational Issues (W-020-8314).)
- Location limitations regarding where all short-term rentals can be located in the city or where a short-term rental without the owner present can be located but allowing home-sharing (see Standard Clauses, Short-Term Rental Regulations: Allowing Short-Term Rentals in Limited Areas (W-020-4188)).
- Recordkeeping requirements (see Standard Clauses, Short-Term Rental Regulations: Recordkeeping (W-021-1597) and Short-Term Rental Regulations: Administration (W-021-1650)).
- The number of days per year the property can be leased as a short-term rental (see Standard Clauses, Short-Term Rental Regulations: Operational Issues (W-020-8314)).
- Requirements that the property owner be present (see Standard Clauses, Short-Term Rental Regulations: Operator Residency Requirements (W-020-4482)).
- Insurance and indemnity requirements (see Standard Clauses, Short-Term Rental Regulations: Permitting Process (W-020-4882)).
- Payment of applicable taxes (see Standard Clause, Short-Term Rental Regulations: Taxes and Fees (W-020-8793)).

TRANSIENT TAX ISSUES

Most states and many local governments collect taxes on the rental of hotel rooms. Jurisdictions have different names for these taxes, including transient tax, tourism tax, or hotel occupancy tax. In some cases, the state, county, and city may each assess a tax. Collecting these taxes from short-term rentals has been more difficult as it is not always apparent who the short-term rental operators are. Registration and permitting requirements for short-term rentals can also provide notification of tax collection responsibilities.

Some cities attempt to hold hosting platforms responsible for collecting and remitting taxes on short-term rentals. Hosting platforms have argued that the short-term rental owner is responsible for tax collection. However, some host platforms, such as Airbnb, have entered into agreements (Voluntary Collection Agreements or VCAs) to collect the state tax for most of the states. There are also agreements with some local governments to collect their taxes. In some jurisdictions, the host platform may collect some of the taxes (for example, state taxes) but not other taxes (for example, city taxes). In these cases, the host platform maintains that the owner should collect and remit the taxes, but collection and remittance by individual property owners is unlikely.

Tax collection agreements offered by host platforms may have some unfavorable terms for local governments. For example, some agreements waive back taxes. Other potential problem terms with VCAs are:

- Limits on data sharing, which make it difficult for local governments to determine whether taxes are collected for all properties.
- Not providing penalties when companies fail or refuse to share data as required.
- The refusal to allow audits or inability to audit successfully due to lack of information.
- The host platform's insistence on a requirement of anonymity for its users.
- No requirement to update records. Once the government informs the host platform of a change in status for a property (such as loss of license), the host platform should be under an obligation to update its host records.

Some exceptions apply to these taxes. For example, Massachusetts state law provides an exception for payment of tourist taxes for short-term rentals when rented less than 14 days in a calendar year (M.G.L. c. 64G, § 3 (effective July 1, 2019)).

ENFORCEMENT OF LOCAL REGULATIONS AND TAX PAYMENTS

There are several ways local governments enforce the tax collection requirements and local regulations. Enforcement mechanisms include:

- Seeking an administrative warrant or subpoena for information from the host platform.
- Engaging in a sting operation to find non-compliant short-term rentals.
- Utilizing specially designed software to help locate short-term rental property.
- Going door-to-door to investigate complaints indicating the property is a short-term rental.

Before adopting an ordinance, a local government may want to consider whether it has the resources to enforce the proposed regulations. Some cities contract with private companies that specialize in finding and enforcing laws against short-term rentals. Enforcement may take different forms, including permit suspension or revocation, citations, fines, or injunctions.

CLAIMS FILED BY HOST PLATFORMS OPPOSING LOCAL REGULATION

Host platforms have filed lawsuits against regulators in federal and state courts, but there are few appellate cases. Local government attorneys must continue to monitor the case law in their jurisdictions

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as the law evolves. Federal cases filed by host platforms have included causes of action based on:

- The First Amendment (see First Amendment Claims).
- The Fourth Amendment (see Fourth Amendment Claims).
- The Fourteenth Amendment (see Fourteenth Amendment Claims).
- The Commerce Clause (see Commerce Clause Claims).
- The Stored Communications Act (see Stored Communications Act Claims).
- The Communications Decency Act (see Communications Decency Act Claims).

FIRST AMENDMENT CLAIMS

Host platforms argue that a prohibition against booking unlicensed property negatively affects their First Amendment rights. They also argue that requiring listings to have a registration number is forced speech. The courts have rejected this argument, holding that the prohibition against booking unlicensed property:

- Is an economic regulation and that the economic activity:
  - is conduct; and
  - does not have a significant expressive element.
- Does not single out people engaged in expressive activity.

Courts have also held that:

- Even if the prohibition affected commercial speech, it would be subject to and would survive intermediate scrutiny (see Practice Note, Free Speech Limitations on Government Regulation: Overview: Standards of Review (W-015-3053); *Cent. Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).
- Commercial speech about an illegal transaction does not get First Amendment protection (see Practice Note, Free Speech Limitations on Government Regulation: Overview: Unprotected Speech (W-015-3053)).
- The prohibition does not require that the host platforms monitor the advertisements for rentals but allows them to decide how to abide by the ordinance requirements.

(See *HomeAway v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019); *Airbnb, Inc. v. City & County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016), *Tran v. Dep't of Planning for the County of Maui*, 2020 WL 3146584 (D. Hawaii, June 12,2020).)

Another First Amendment challenge to a short-term rental ordinance is that the ordinance was impermissibly vague (see Practice Note, Free Speech Limitations on Government Regulation: Overview: Imprecise Laws (W-015-3053)). One court found that:

- Short-term rental ordinances regulate economic activity. The vagueness test for economic regulation is less strict than a vagueness test for other First Amendment activity.
- The ordinance did not affect any fundamental rights and was only subject to an as-applied challenge.
- The ordinance was not vague.

(Helms Realty v. City of New York, 320 F. Supp. 3d 526 (S.D.N.Y. 2018).)

FOURTH AMENDMENT CLAIMS

Some ordinances require host platforms or owners to keep records and allow inspection of those records by the local government. Fourth Amendment arguments against ordinances regulating short-term rentals are usually based on those recordkeeping requirements. Fourth Amendment challenges have been the most successful challenges.

The Supreme Court struck down a requirement that hotel operators allow non-consensual inspection of registration records on Fourth Amendment grounds (*Patel v. City of Los Angeles*, 135 S. Ct. 2443 (2015)). In *Patel*, the City of Los Angles Municipal Code required hotel operators to keep records of guests' names, addresses, vehicle information, date of arrival and departure, room number assigned, rate charged, method of payment, the number of people in their group, and other information. The ordinance also required hotel operators to allow inspection of these records by any police officer. The requirement to keep records was not at issue in the case, but the issue to allow inspection was decided by the Court. The Court held that the mandatory inspection requirement was facially unconstitutional because it did not provide an opportunity for precompliance review, as there would be if a warrant was obtained.

Although *Patel* concerned hotel records, it has been important in Fourth Amendment challenges to recordkeeping requirements in regulations for short-term rentals. In a subsequent case involving a short-term rental ordinance, the court used the *Patel* case to analyze New York City's ordinance (N.Y.C. Admin. Code § 26-2102). That ordinance required the host platform keep records and provide those records to the city. The required records included:

- The physical address of the short-term rental.
- The name, address, phone number, uniform resource locator (URL), and email address of the host of the short-term rental.
- Whether the short-term rental was for an entire dwelling unit or a portion of a unit.
- The number of days the unit was rented as a short-term rental.
- The amount of fees received by the booking service.
- The amount of rent for the short-term rental if the booking service collects the rent.

The court found that, like the hotel operators in *Patel*, the host platform had a Fourth Amendment protected interest in these records. The court stated that an administrative subpoena or warrant usually would require "a limited scope, a relevant purpose, and specificity in its demands" and that the ordinance's inspection provision did not meet any of those requirements. Relying on *Patel*, the court found that the lack of precompliance review meant that the ordinance violated the Fourth Amendment. The court granted an injunction that prevented the ordinance from taking effect. (*Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019).)

In another case, a court found that certain data requirements were not protected by the Fourth Amendment because the requested information was in part public. The challenged ordinance required Airbnb to give information about the location of the listing, whether it was a room or whole unit, and how often it was occupied. Since the first two pieces of information were part of the public listing for the rental, the court found no privacy interest in those two items.

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The court did find that the third requirement was protected by the Fourth Amendment as a private business record. (*Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113 (D. Mass. 2019).)

FOURTEENTH AMENDMENT CLAIMS

Courts use the rational basis test when considering Fourteenth Amendment claims involving short-term rentals. Plaintiffs claim they deserve equal protection because the short-term rental usage is being treated differently from other similarly situated properties (single-family homes that are not used as short-term rentals). Plaintiffs argue that the difference is not rationally related to a legitimate state interest. (See Practice Note, Section 1983: Equal Protection Claims (W-002-6708).) At this time, most cases have been decided on other grounds (see Eighth Amendment Challenge).

COMMERCE CLAUSE CLAIMS

Host platforms may argue that short-term rental regulations impose a substantial burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution (U.S. Const. art. 1, § 8, cl. 3). One court has held that a host platform is not a proper entity to bring a commerce clause claim as it is not a party to the transaction (*HomeAway, Inc. v. City & County of San Francisco*, 2015 WL 367121 (N.D. Cal. Jan. 27, 2015)).

STORED COMMUNICATIONS ACT CLAIMS

Host platforms have also brought lawsuits against local government ordinances based on the Stored Communications Act. These claims assert that:

- The host platform is a covered service.
- The ordinances require the host platform to provide electronic communications to a governmental entity.
- The host platform does not have customer permission and cannot provide that information without customer permission.

Whether this claim is applicable depends on the particular facts. When the host platform has informed the customer that the communications will be accessible to the government, one court has found that there was consent (*Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019)).

COMMUNICATIONS DECENCY ACT CLAIMS

Host platforms argue that short-term rental regulations make them liable for third-party postings in violation of the Communications Decency Act (CDA) (47 U.S.C. § 230; see Practice Note, Communications Decency Act: Section 230 Immunity (W-001-4731)). The issue usually arises when there is a requirement to display a registration number in the listing. Registration number requirements vary. Some local governments:

- Require the listing to show the number.
- Prohibit booking unregistered property.

The host platforms say that both requirements force them to monitor and remove listings in violation of the CDA. However, there is a distinction between the two types of requirements.

The host platforms argue that:

- Section 230(c) of the CDA provides immunity for service providers when the content comes from a third party (see *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)). They argue that a host platform is not a publisher or speaker of content. The content comes from the short-term rental owners or operators.
- The immunity extends to a state law cause of action or a city ordinance requirement (see *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006)).
- They are immune from prosecution for a registration number requirement because that requires monitoring third-party content.

The local government typically responds that the regulations:

- Only regulate the host platform's actions and do not regulate the publication of the content of another person.
- Do not require the platform to monitor or remove listings.

Different courts have upheld or struck down registration number requirements, depending on the ordinance. The courts have:

- Upheld an ordinance that prohibited a host platform from booking an unregistered property. The court stated that a host platform might chose to remove this listing based on the ordinance, but the ordinance did not require that action. (*HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).)
- Enjoined enforcement of a regulation that prohibited host platforms from conducting any business in the city unless they entered in agreements to remove listings of ineligible listings (see *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113 (D. Mass. 2019)).

In those cases, the ordinances had different requirements. In:

- *HomeAway.com, Inc. v. City of Santa Monica*, the court found that the city's regulation addressed the act of booking a reservation for the property and not the content on the website (918 F.3d 676 (9th Cir. 2019)). Courts are more likely to uphold an ordinance if it regulates activity.
- *Airbnb, Inc. v. City of Boston*, the court stated that the city's ordinance is regulating content. The city's initial argument was that Airbnb was a content creator and that Airbnb participated in creating content and did not only post third-party content. According to the opinion, that position changed during oral argument and the city agreed that the ordinance required Airbnb to monitor and remove listings based on third-party content. Because of the city's statements at oral argument, the court found that there was a likelihood that Airbnb would prevail on its CDA claims. (386 F. Supp. 3d 113 (D. Massachusetts 2019).) If the ordinance regulates third-party content, it is more likely to fail.

CHALLENGES FILED AGAINST LOCAL GOVERNMENT REGULATIONS BY PROPERTY OWNERS OR ASSOCIATIONS

In challenges to short-term rental regulations, property owners or associations may assert some of the same causes of action as hosting platforms (see Claims Filed by Host Platforms Opposing Local Regulation). Federal cases filed by property owners or associations have included causes of action based on:

- The First Amendment (see First Amendment Challenges).
- The Fourth Amendment (see Fourth Amendment Challenge).
- The Fifth Amendment (see Fourth Amendment Challenge).
- The Eighth Amendment (see Eighth Amendment Challenge).

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- Equal protection under the Fourteenth Amendment (see Eighth Amendment Challenge).
- Procedural due process under the Fourteenth Amendment (see Fourteenth Amendment Procedural Due Process Challenges).
- Substantive due process under the Fourteenth Amendment (see Fourteenth Amendment Substantive Due Process Challenges).
- The Commerce Clause (see Fourteenth Amendment Procedural Due Process Challenges).
- The Fair Housing Act (see Fair Housing Act).
- State constitutions or statutes (see Fair Housing Act).

FIRST AMENDMENT CHALLENGES

Individual property owners raise the same objections to including registration numbers in advertisements that host platforms do (see First Amendment Claims).

Property owners have also raised First Amendment objections to the requirement to provide their names and addresses at public hearings about short-term rental ordinances. One court found that there were several good reasons for the requirement. However, the opinion did provide that a narrowly tailored injunction to prevent retaliation against speakers could be possible. (*City of Miami v. Airbnb, Inc.*, 260 So. 3d 478 (Fla. 3d DCA 2018).)

In *Karol v. City of New York*, the plaintiff made a First Amendment argument based on a claim of retaliation. He claimed that he was subjected to ordinance enforcement for speaking at a city council meeting, handing out leaflets, and meeting with his council representative (396 F. Supp. 3d 309 (S.D.N.Y. 2019).)

FOURTH AMENDMENT CHALLENGE

Individual property owners raise many of the same Fourth Amendment objections as host platforms (see Fourth Amendment Claims).

Requiring an owner to maintain records of short-term rentals and to provide those records for examination on request of the local government was not allowed. The court refused to agree that the law would be adequate even with a pre-compliance review. (*Weisenberg v. Town Board of Shelter Island*, 404 F. Supp. 3d 720 (E.D.N.Y. 2019).)

Requiring monthly reports creates a Fourth Amendment claim, but since the local government amended the ordinance and removed the requirement, the claim was moot. (*Wheelahan v. City of New Orleans*, 2020 WL 1503560 (E.D. March 30, 2020).)

FIFTH AMENDMENT INVERSE CONDEMNATION TAKINGS CHALLENGE

Local governments should be prepared to respond to takings challenges brought by property owners against short-term rental regulations. A property owner alleging that the government has taken property without compensation may bring a § 1983 claim in federal court. (See *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019); see also Practice Note, Inverse Condemnation: Overview (W-015-3038).)

Williamson County Regional Planning Commission v. Hamilton Bank set out a two-prong test for bringing a takings claim in federal court. This test required:

- A takings claim in federal court.
- A final decision by the government and exhaustion of state remedies.

(473 U.S. 172 (1985).)

The second prong of this test was overturned in *Knick* (139 S.Ct. 2162 (2019)). *Wheelahan v. City of New Orleans*, discussed the first requirement, that there be a final decision by the government, and found that it was still valid (2020 WL 1503560 (E.D.La. March 30, 2020); see Practice Note, Inverse Condemnation: Asserting the Ripeness Defense in Federal Courts (W-007-4853)).

EIGHTH AMENDMENT CHALLENGE

The constitutional prohibition against excessive fines clause is incorporated by the due process clause of the Fourteenth Amendment and applies to cities and states (*Timbs v. Indiana*, 139 S.Ct. 682 (2019)). In *Wheelahan,* the plaintiff claimed that the fine for violating the city ordinance regulating short-term rentals was excessive. The court found that a city ordinance fine does not violate the Eighth Amendment if it does not exceed the limits set by state statute for city fines. (2020 WL 1503560 (E.D.La. March 20, 2020).)

FOURTEENTH AMENDMENT EQUAL PROTECTION CHALLENGES

Property owners challenge short-term rental regulations through claims based on the Fourteenth Amendment's Equal Protection Clause (see Practice Note, Section 1983: Equal Protection Claims (W-002-6708)). Plaintiffs argue that use of the property as a short-term rental should not be treated differently from other residential uses. One court found that:

- The rational basis test applied.
- A long-term residential use by a family is not similarly situated to a short-term use by tourists.
- Even if similarly situated, the ordinance would be constitutional under a rational basis review based on "evidence that short-term rentals actually do erode the sense of community, result in increased drug use, and overload septic systems."

(*Murphy v. Walworth County*, 383 F. Supp. 3d 843 (E.D. Wis. 2019); *King v. City of Marion, Arkansas*, 2020 WL 534173 (E.D. Ark Feb. 3, 2020).)

Plaintiffs have also claimed that local regulation ran afoul of the Fourteenth Amendment due to vagueness (see *Helms Realty*, 320 F. Supp. 3d at 532).

FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS CHALLENGES

To make a claim for failure to receive procedural due process, a plaintiff must show:

- The plaintiff was entitled to a constitutionally protected life, liberty, or property interest.
- The plaintiff was deprived of that interest.

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- The procedures provided to the plaintiff did not satisfy constitutional requirements (notice, opportunity to be heard).

(See Practice Note, Section 1983: Procedural Due Process Land Use Claims (W-004-1682).)

Homeowners have made claims against local governments for failure to receive procedural due process for enactment or enforcement of short-term rental ordinances. The results of those cases are fact dependent. The court denied the claim where the plaintiff admitted she had a hearing. (*Wheelahan*, 2020 WL 1503560). However, the court found in favor of the plaintiff in another case where the local government failed to prove the plaintiff had received a hearing (*Sullivan v. Town of Stockholm*, 402 F. Supp. 3d 534 (W.D.Wis. 2019)).

FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CHALLENGES

The Due Process Clause of the Fourteenth Amendment does not allow local governments to deprive anyone of life, liberty, or property without due process of law. The substantive component of the Due Process Clause generally protects rights guaranteed by the Constitution.

To prevail at trial, the plaintiff must meet a two-part test and prove that:

- The government infringed on either a fundamental right or a non-fundamental property right that the plaintiff was entitled to under state law.
- The infringement on the protected right does not meet constitutional scrutiny.

(See Practice Note, Section 1983: Substantive Due Process Land Use Claims (W-002-4377).)

In *Weisenberg v. Town Board of Shelter Island*, Plaintiffs' argument that they had a fundamental right to use their home for short-term rental purposes was struck down. The court found that the plaintiffs "failed to adequately allege a federally protectable property interest in the unlicensed renting of their homes for periods less than fourteen days." (404 F. Supp. 3d 720 (E.D.N.Y. 2019).)

DORMANT COMMERCE CLAUSE CHALLENGES

For a dormant commerce clause cause of action, plaintiffs claim that a state or local law discriminates against interstate commerce (see Practice Note, Defending Against a Dormant Commerce Clause Challenge: Overview (W-008-5716)). The claim may be that the law discriminates on its face or in effect. Even if there is no discrimination shown, a plaintiff may argue that the negative effects are excessive compared to any benefits.

One court rejected dormant commerce clause claims, finding that:

- The ordinance did not treat out-of-state residents different than in-state residents.
- The residency requirement did not discriminate against out-of-state owners, as residents did not have to be owners.

(*Rosenblatt v. City of Santa Monica*, 2016 WL 8904416 (C.D. Cal. Dec. 1, 2016).)

FAIR HOUSING ACT

In *Weisenberg*, Plaintiffs claimed that the ordinance making it illegal to rent property for less than 14 days violates the Fair Housing Act (FHA). The court found that short-term rentals were not dwellings subject to the FHA. (404 F. Supp. 3d 720.)

LAWSUITS BASED ON STATE CONSTITUTIONS OR STATUTES

Some state constitutions or statutes provide more protection than the federal constitution or statutes. For example, a state may provide more protection against searches than the federal government. In that case, the elements of a challenge alleging an unlawful search would not be the same as a federal claim.

State claims that have been filed against short-term rental regulations include:

- **Regulatory taking.** A plaintiff's argument depends on the state law. For example, "[a] regulatory taking occurs when regulation (1) compels the property owner to suffer a physical invasion of his property, (2) denies all economically beneficial or productive use of land, or (3) does not substantially advance legitimate state interests" (*Village of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015)).
- **State due process challenge.** A state due process challenge usually claims that the law is not rationally related to a legitimate government purpose or is overly burdensome. The local government should respond by showing the basis for the law and explaining why it is no more burdensome than necessary.
- **Discrimination against families.** In *Weisenberg*, Plaintiff claimed that a law regulating short-term rentals discriminated against women and children in violation of New York State Human Rights law. The court found that the plaintiff failed to allege anything that would support a disparate impact claim. (404 F. Supp. 3d 720.)
- **Preemption.** Some state laws specifically preempt local government regulation of short-term rentals (see State Laws Limiting Local Government Regulation of Short-Term Rentals). However, some plaintiffs claim preemption based on any incidental state regulation, such as taxation. In an indirect preemption claim, courts usually require an area be expressly preempted.
- **Vested rights.** Owners claim they only need to follow rules in existence when the property was initially developed. Local governments may counter a vested rights argument by asserting there never was a right to operate a short-term rental.
- **Legally nonconforming or grandfathered use.** A nonconforming use occurs when a use was legal but a change in a zoning ordinance means the use is not legal under the new zoning ordinance. Plaintiffs argue that the use can continue or be grandfathered. Zoning regulations may require a nonconforming or grandfathered use discontinue after a defined period. However, some state laws allow a legally nonconforming use to continue indefinitely if there is no break in the use. Short-term rental operators may claim these laws allow them to continue renting to guests.
- **Anti-monopoly claim.** If a state or local government limits the number of short-term rentals allowed, a plaintiff may file this cause of action. An anti-monopoly claim fails if the limit is based

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on police power and is for the public good. (See *Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, 2018 WL 527104 (Tenn. Ct. App. Jan. 23, 2018).)

- **Search or seizure claim.** State constitutions may have similar or stronger protections against unlawful search and seizure.
- **Vagueness.** Some local governments do not specifically address short-term rentals in their zoning ordinances. Many jurisdictions argue that if a use is not allowed, it is prohibited (*Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886 (Pa. 2019) ("This excluded-unless-expressly-included standard, combined with *Miller*'s 'functional analysis,' is the only workable standard.")). Other courts may defer to the property owner when existing regulations do not explicitly prohibit short-term rentals (*Wade v. Patterson*, 2009 WL 211878 (Tenn. Ct. App. Jan. 29, 2009)). Arguing vagueness is difficult for a plaintiff since a local government could amend the challenged ordinance during the litigation. An amendment is not an available option in states where new regulations are prohibited (see State Laws Limiting Local Government Regulation of Short-Term Rentals).

STATE LAWS LIMITING LOCAL GOVERNMENT REGULATION OF SHORT-TERM RENTALS

Some states have passed statutes concerning a local government's ability to prohibit or regulate short-term rentals. For example:

- Arizona has one statute for cities (A.R.S. § 9-500.39) and one statute for counties (A.R.S. § 11-269.17). Arizona's statutes do not allow a local government to prohibit short-term rentals. Local governments can:
  - regulate health and safety issues;
  - enforce residential use regulations, including noise, maintenance, and nuisance regulations, if short-term rentals are not treated differently; and
  - limit or prohibit rental for sex offenders, sober living facilities, drug or alcohol control, or sexually oriented businesses.
- Florida's statute provides that a local regulation cannot prohibit short-term rentals or regulate the frequency or length of short-term rentals (§ 509.032(7)(b), Fla. Stat.). This preemption does not apply to an ordinance passed before June 1, 2011.
- Idaho's state law does not allow cities or counties to have regulations that have the effect of prohibiting short-term rentals. Local governments can pass health, safety, and welfare regulations for short-term rentals. (Idaho Code § 67-6539.)
- Indiana's state law provides that local governments can only regulate, prohibit, or limit short-term rentals to protect public health and safety or promote residential uses (for example, reducing noise) (Ind. Code § 36-1-24-10). If the short-term rental property is not owner-occupied, the local government may require a special exception, special use, or zoning variance with some limitations (Ind. Code § 36-1-24-9).
- Tennessee's statute does not allow a local government to prohibit or regulate a short-term rental if the property was already in use as a short-term rental before the passage of the regulation (T.C.A. § 13-7-603). This restriction does not apply to regulations passed before 2014. There is also an exception for properties with ongoing violations of other general laws (T.C.A. § 13-7-604).
- Wisconsin's statute does not allow a local government to prohibit a short-term rental of seven days or longer (Wis. Stat. § 66.1014).

ADDITIONAL DEFENSES

PULLMAN ABSTENTION

The Pullman abstention doctrine allows federal courts to postpone hearing a case and deciding federal constitutional issues if the case could be resolved or changed by a decision on state issues by a state court (*Railroad Commissioner v. Pullman*, 312 U.S. 496 (1941)). The three factors determining whether or not a court may abstain are whether:

- The case involves a sensitive area of social policy that the federal courts should avoid, if possible.
- A decision about the constitutional merits can be avoided because a decision on the state issue could end the case.
- It is unclear what the effect of a final decision about state law would be on the case.

In *Thinh Tran v. Department of Planning for the County of Maui*, which challenged the county's short-term rental ordinance, the court found that those three requirements were met. (2020 WL 3146584 (D. Hawai'i, June 12, 2020)).

MOOTNESS

A case is dismissed for mootness when there is no live controversy.

The court in *Sullivan v. Town of Stockholm* did not find the case moot due to a change in state law. When the state passed a law that gave plaintiffs the right to use property as a short-term rental, plaintiffs still had a claim for two years of lost rents. (402 F. Supp. 3d 534, (E.D.Wis. 2019).) However, in another case, a Fourth Amendment challenge was found moot when the ordinance was amended (*Murphy*, 383 F. Supp. 3d 843).

STANDING

Article III Standing

If a law does not affect a plaintiff, the plaintiff will not have standing to challenge it. Standing requires:

- The plaintiff must have suffered an injury in fact.
- The injury can be traced to the defendant's conduct.
- The injury is likely to be remedied by a favorable judicial decision.

(*Spokeo v. Robins*, 136 S.Ct. 1540 (2016).)

The court in *Weisenberg* found a plaintiff lacked standing when the plaintiff stated in her pleadings that the law regulating short term rentals did not apply to her (404 F. Supp.3d 720). In the same case, a real estate agent's claim that the law affected her ability to broker short-term rentals was sufficient for the court to find that she had standing (*Weisenberg*, 404 F. Supp.3d 720).

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Prudential Standing

Prudential standing is the rule that a party generally must argue their own legal rights and interests and not the legal rights and interests of another. (*HomeAway, Inc.*, 2015 WL 367121). There are exceptions, particularly where a statute provides a party the right to argue on behalf of a third party.

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07-20

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