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Regulating Short-Term Rentals

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Case Summary

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City of Grapevine v. Muns, 651 S.W.3d 317 (Tex. App.—Fort Worth 2021, pet. filed).

The court's analysis in the case largely depends on definitions in Grapevine's comprehensive zoning ordinance and the court also found that the STR operators had pled a valid settled rights claim. This case is currently under consideration at the Texas Supreme Court.

Grapevine passed a comprehensive zoning ordinance in 1982 that prohibited the use of any building in the city except as authorized by the ordinance. Grapevine amended its comprehensive zoning ordinance in 2000 to allow bed and breakfast uses. The 2000 amendment also included a specific prohibition on "single-family transient dwellings," but failed to define the term. Grapevine amended its comprehensive zoning ordinance again in 2018 to specifically prohibit STRs. After passage of the 2018 ordinance, the city sent letters to known STR operators giving them 45 days to wind up operations.

Grapevine took the position that STRs had been prohibited in the city since the passage of the 1982 comprehensive zoning ordinance. The court examined Grapevine's definition of "single-family detached dwelling" in the comprehensive zoning ordinance and found that it did not preclude STRs. Grapevine's ordinance defined "single-family detached dwelling" as "an enclosed building having accommodations for and occupied by only one family." "Family" was defined as "any number of individuals living together as a single housekeeping unit interdependent upon one another." The court noted that these definitions do not require a family to be related by blood or marriage and do not specify any length of time for the occupancy.

After finding that Grapevine's definition of "single-family detached dwelling" did not prohibit STRs from operating in single-family districts, the court ruled that the STR operators did not have a vested right to continue operating their STRs under the comprehensive zoning ordinance. The court instead ruled that the STR operators had pled a facially valid settled rights claim, but did not go into the claim's merits.

The court also noted: "To be clear, we hold that a property owner has a vested right to lease his property. Whether the durational restrictions imposed by the STR Ordinance violate the Homeowners' due-course-of-law rights regarding their right to lease goes to the case's merits, an altogether improper inquiry at this stage of the case."

Tarr v. Timberwood Park Owners Association, 556 S.W.3d 274 (Tex. 2018).

This case revolved around a restrictive covenant (not a city ordinance) that said that all property in the subdivision, with certain exceptions, had to be used for residential purposes and that only single-family residences can be built on lots within the subdivision.

The covenants failed to define "residential purposes" or address leasing property or minimum occupancy durations. Since there was no definition, the court focused on the term's commonly understood meaning and ruled that STRs fall within this meaning. The court ruled that as long as a property owner rented out his or her house for a "residential purpose," regardless of duration, it did not violate the covenants. The ruling in this case was an interpretation of the restrictive covenants for the subdivision and not a general ruling that STRs are allowed in all residential areas.

***Heyman v. Cooper*,** 31 F.4th 1315 (11th Cir. 2022).

In 2019, the Forsyth County, Georgia Board of Commissioners amended its Unified Development Code (UDC) to expressly ban the short-term rental of residentially zoned properties and included a grandfathering clause that allowed the continued operation of any lawfully established use that became nonconforming by the passage of the code amendment. A property owner sued claiming he had nonconforming rights to continue renting his property as an STR. The case turned on whether a residential property could legally be used as an STR under the pre-amendment language.

The pre-amendment UDC permitted an individual to use his or her residential home as a "dwelling unit." A "dwelling unit" was defined as "one or more rooms connected together and constituting a separate, independent housekeeping establishment for use on a basis *involving owner occupancy or lease on a weekly, monthly or longer basis*, with provisions for cooking, eating and sleeping, and physically set apart from any other rooms or dwelling units in the same structure."

The court launched into an examination of the UDC wording under two different canons of statutory interpretation and ultimately ruled that rentals for less than a week were not grandfathered.

***Village of Tiki Island v. Ronquille*,** 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.)

Tiki Island is a resort community on the Gulf of Mexico. STRs had been a common practice on the island for over 20 years and had long been regulated by the Tiki Island Civic Association. The village implemented an ordinance prohibiting any new STRs in 2014, but allowed STRs that were already in operation as of 2011 to continue operating with nonconforming rights. The 2014 ordinance included an exhibit with a list of STR properties that had been operating as of 2011 and therefore had nonconforming rights, however, the list left one of the properties off. This property owner brought suit claiming that she should have been granted nonconforming rights like the other property owners. The court agreed and granted an injunction prohibiting the city from enforcing the ordinance against her.

Zaatari v. City of Austin, 615 S.W.3d 172 (Tex. App.—Austin 2019, pet. denied).

The City of Austin initially adopted an STR ordinance in 2012. Austin's ordinance was updated in 2016 to create three types of STRs under the city's regulations:

- Type 1 STRs were owner-occupied single-family residences. They were allowed in single-family districts and were not restricted by location or density.

- Type 2 STRs were non-owner-occupied single-family residences. The issuance of licenses for Type 2 STRs was immediately suspended and all Type 2 STRs were required to be phased out by April 1, 2022.

- Type 3 STRs were STRs that were part of a multifamily development.

The 2016 ordinance also imposed operating restrictions on STRs, including:

- Assemblies like weddings and parties were banned, both inside and outside, after 10:00 p.m.

- Outdoor assemblies of more than six adults at any one time were banned.

- Prohibited more than six unrelated adults or 10 related adults from using the property at any one time.

The court held that the termination of Type 2 licenses by 2022 was an unconstitutionally retroactive law under the Texas Constitution. The court used a three-part test in making its determination:

- The nature and strength of the public interest to be served as evidenced by the city council's factual findings.

- The nature of the prior right impaired by the ordinance.

- The extent of the impairment.

The court determined that Austin failed the three-part test because it failed to make any legislative findings to support that banning Type 2 STRs was in the public interest. Another factor that led to Austin's failure of the test was that Austin had specifically authorized the operation of Type 2 STRs in the past, thus giving Type 2 STR operators settled rights in their licenses. Austin's past practice of granting licenses for Type 2 STRs created a situation where their operation had become an established practice and an historically allowed use. The court reasoned that since Austin had previously issued licenses for Type 2 STRs, requiring them to shut down was an extinguishment of a settled right.

The court also held that Austin's 2016 ordinance failed strict scrutiny review for the property owners' freedom of assembly. The right to assemble is a fundamental right under the Texas Constitution. The court ruled that the ordinance was not narrowly tailored and that the ordinance's objectives could be achieved through less restrictive means like the enforcement of existing nuisance ordinances.

Chu v. Windermere Lakes Homeowners Association, Inc., 652 S.W.3d 899 (Tex. App.—Houston [14th Dist] 2022, pet filed).

This case involves restrictive covenants and not a city ordinance. In 2019, 79 percent of the members of the homeowners association voted to approve an amendment to the restrictive covenants to prohibit leasing a property for less than 180 days and required that the lessees intend to remain on the lot and that it become their place of residence. Chu sued the homeowners association claiming that the homeowners association did not have authority to impose new restrictions that extinguish settled rights under previous restrictions. The court held that a validly

passed amendment to a restrictive covenant, for which a property owner had constructive notice of the possibility of amendment, should be enforced if the amendment is not illegal or against public policy. The court found that the amendment was legal because it reinforced the existing single-family use and occupancy restriction.

Draper v. City of Arlington, 629 S.W.3d 777 (Tex. App.—Fort Worth 2021, pet. denied).

Arlington passed two separate ordinances in 2019.

The first ordinance was a zoning ordinance that established a one-mile zone around the city's entertainment district and allowed STRs in this area. The ordinance prohibited STRs in low density residential areas, but allowed STRs in high density residential, non-residential, and mixed-use areas outside the one-mile zone.

The second ordinance regulated the business aspects of STRs by establishing a registration process with an annual permit, an inspection, and regulations regarding things like parking and noise.

Several STR owners outside the one-mile zone claimed they had a vested right in leasing their properties as STRs. The court reviewed the ordinances using a rational basis, due course of law analysis. Under this analysis, an ordinance must be upheld if the ordinance is designed to accomplish an objective within the city's police power. Arlington city leaders held numerous town hall, open house, and small group meetings over a two-year period and discussed the issue at almost 20 city council meetings where residents on both sides of the issue were able to express their opinions. The city built a substantial record to support its position and the court ruled that the objectives of the ordinances were within the city's police power, namely to: (1) safeguard the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public and (2) minimize the adverse impacts resulting from the increase in transient rental uses in neighborhoods planned, approved, and constructed for single-family residences.

The record specifically showed that residents and homeowners wished to maintain the integrity of single-family residential areas while allowing STRs in more dense areas of the city; that the highest ratio of single-family homes used as STRs was in the entertainment district; that there was a mutually beneficial relationship between STRs and entertainment venues in them being located near each other and that having STRs within walking distance of the entertainment venues reduced vehicular traffic during sporting events; and that higher density residential areas are less disrupted by the operation of STRs and provide adequate opportunities to operate outside low density residential areas.

Nekrilov v. City of Jersey City, 528 F.Supp.3d 252 (D.N.J. 2021).

Jersey City approved an ordinance in 2015 explicitly allowing STRs. The STR ordinance was amended in 2019 to ban the short-term rental of subletted properties and limited non-owner-occupied properties to hosting no more than 60 short-term rental nights a year. STR operators brought suit claiming a regulatory taking. The court conducted a *Penn Central* analysis and concluded that while the STR operators had identified traditional rights associated with real estate as part of their claim, their ongoing right to pursue an STR business was not cognizable under

Penn Central. The court explained: "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." The court explained that in cases where an ordinance has been overturned, a key consideration was that the ordinance shifted burdens between the parties without any obvious connection to the public interest. Here the was a public interest: increasing the long-term housing stock and reducing nuisances.

Marfil v. City of New Braunfels, 2021 WL 8082644 (W.D. Tex. 2021); report and recommendation adopted, 2022 WL 18034356 (W.D. Tex. 2022).

New Braunfels established regulations for STRs in 2011. It amended its zoning ordinance later that year to prohibit STRs within residential zoning districts, but allowed STRs that were already legally operating to continue to operate. STR operators sued claiming the ordinance violated substantive due process and equal protection under the Texas and United States Constitutions, and that the ordinance was preempted under Texas law. The STR operators complaints centered on the fact that New Braunfels characterized STRs as a commercial use limited to commercial zoning districts and that STRs that had been legally operating under previous zoning were allowed to continue operating with nonconforming rights.

The court examined Texas case law, including *Zaatari*, and determined that leasing property is not a fundamental right in Texas. The court, therefore, applied a rational basis, due course of law analysis when analyzing the ordinance. This analysis requires the city to prevail if there is any conceivable, reasonable justification for the ordinance. The court ruled that the ordinance had several legitimate municipal purposes, including: protecting residential neighborhoods from the perceived issues that accompany STRs, members of the community oppose STRs, and preserving the residential character of certain areas of the city.

The court also examined claims that the Texas Tax Code and Texas Property Code preempted the New Braunfels ordinance. The court ruled that the fact that STRs are required to pay hotel occupancy taxes does not preempt a city from regulating the permissible location of STRs. The court also held that the fact that the state regulates leases under the Texas Property Code does not preempt a city from imposing stricter regulations.

Hignell-Stark v. City of New Orleans, 46 F4th 317 (5th Cir. 2022).

The City of New Orleans had traditionally prohibited renting homes in residential neighborhoods for less than 30 days. The city began offering licenses for STRs on April 1, 2017. The city amended its STR ordinance in 2019 to prohibit issuing a license unless the property was also the owner's primary residence. The court ruled that the residency requirement violated the dormant commerce clause because it produced differential treatment of in-state and out-of-state economic interests. As the court noted: "The residency requirement discriminates on its face against out-of-state property owners."

Rosenblatt v. City of Santa Monica, 940 S.W.3d 439 (9th Cir. 2019).

Santa Monica passed an ordinance prohibiting STRs unless a primary resident remained in the dwelling ("homesharing"). The ordinance also prohibited undertaking, maintaining, authorizing, aiding, facilitating, or advertising any vacation rental activity. A class action was brought against the city claiming that the ordinance violated the dormant commerce clause.

The court ruled that the homesharing provision did not violate the dormant commerce clause because it did not constitute a residency requirement and did not discriminate against out-of-state property owners. The court offered several examples of how an out-of-state property owner could comply with the homesharing requirement like renting out a property on a long-term basis but reserving a room in the house for short-term rentals, or allowing a long-term renter to sublet a property for short-term rentals in exchange for higher rent.

The court also ruled that the prohibition on advertising did not violate the dormant commerce clause because it did not have extraterritorial application. A California municipality may not exercise its governmental function beyond its jurisdiction. A court interpreting a municipal ordinance will therefore presume that the ordinance only applies to conduct within the territorial limits of the city and that the ordinance does not have extraterritorial application.

Weisenberg v. Town Board of Shelter Island, 404 F.Supp.3d 720 (E.D.N.Y. 2019).

The town board approved an ordinance in 2017 that prohibited renting an STR more than once in any 14-day period. The court ruled that the 14-day regulation was a valid exercise of the town's statutory zoning power since the law regulated the use of land and regulated STRs based on rental duration, not the identity of the owners or renters.

AirBNB, Inc. v. City and County of San Francisco, 217 F.Supp.3d 1066 (N.D. Cal. 2016).

Transient rentals were banned in San Francisco between 1981 and 2014. The city passed an ordinance in 2015 that lifted the ban and required STRs to be registered with the city. Registration was spotty. 7,046 STRs were listed on AirBNB, but only 1,647 STRs were registered. The city amended its ordinance in 2016 to require platforms like AirBNB to actively monitor listings to ensure STRs were registered with the city before publication. AirBNB promptly brought suit and San Francisco asked for a stay to amend its ordinance.

San Francisco significantly amended its ordinance to make it a misdemeanor for a hosting platform to collect a fee for providing booking services in conjunction with an unregistered STR. "Booking services" was defined as "any reservation and/or payment service provided by a person or entity that facilitates a short-term rental transaction between an Owner . . . and a prospective tourist or transient user . . . for which the person or entity collects or receives . . . a fee in connection with the reservation and/or payment services." A "hosting platform" was defined as "a person or entity that participates in the short-term rental by providing, and collecting or receiving a fee for, Booking Services." Taken together, the ordinance prohibited a hosting platform from collecting a fee for providing booking services to an STR that was not registered with the city.

The ordinance was challenged on three grounds: (1) preemption under the Communications Decency Act, 47 U.S.C. § 230 (CDA), (2) a content-based restriction under the First Amendment, and (3) imposition of criminal strict liability.

The CDA challenge failed because it does not regulate hosting platforms as publishers or speakers of user content or force them to remove or edit listings. While the plaintiffs claimed it was likely that they would monitor and remove listings for unregistered STRs, the court said this was not a requirement of the ordinance and that the hosting platforms could pursue other alternatives like charging fees for listings similar to classified ads.

The First Amendment challenge failed because the ordinance regulates booking services, a business transaction, not conduct with an significant expressive element.

The strict liability claim failed because intent is considered to be a required element of criminal liability in California and there was no indication that San Francisco intended to dispense with this element.

AirBNB, Inc. v. City of Boston, 386 F.Supp.3d. 113 (D. Mass. 2019).

In 2018, Boston passed an ordinance allowing STRs, requiring STRs to register with the city, and providing requirements for booking agents. Three portions of the ordinance were challenged: (1) the penalty for collecting a fee for offering an ineligible unit as an STR, (2) a provision providing for enforcement of the ordinance by a booking agent, and (3) and a data sharing requirement.

The challenge to the prohibition on collecting a fee for an unregistered STR failed for the same reasons discussed above in *San Francisco.*

The court ruled the challenge requiring enforcement by a booking agent was likely to be successful. This provision of the ordinance required booking agents to enter agreements with the city that they would remove listings without a valid registration number. A booking agent who failed to enter this agreement was prevented from doing business in the city. A requirement that booking agents monitor and remove listings is preempted under the CDA.

The data sharing provision was partially upheld and partially struck down. The court upheld the ordinance's requirement that STR locations and whether an STR is a single room or whole unit be disclosed because this information is publicly available on AirBNB's website. The ordinance requirement that booking agents provide information on the number of nights an STR is rented was overturned because this information is not publicly available.

Homeaway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019).

Santa Monica approved an ordinance in 2015 authorizing "home sharing," STRs where the host remains onsite with guests, but prohibiting all other forms of STRs. The ordinance was amended in 2017 to place four requirements on hosting platforms: (1) collecting and remitting transient occupancy taxes, (2) disclosing certain booking and listing information, (3) refraining from

completing a booking transaction for an unregistered STR, and (4) refraining from collecting or receiving a fee for facilitating or providing services ancillary to an unregistered STR.

The court's analysis in this case is virtually identical to the analysis in *San Francisco* and *Boston*. The court held that the ordinance was not preempted by the CDA and it did not violate the First Amendment.