



Regulating Short-term Rentals at the Local Level

IMLA Webinar Series

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Topics to Discuss

- Introduction of short-term rentals in the United States
- Tools to regulate short-term rentals
- Case law update – Federal Circuit edition
- Drafting a local law that will *likely* survive court scrutiny
- Any other questions!

Short-term Rentals

- Not a new concept; however – popularity has skyrocketed over the last decade
 - Pandemic brought short-term rentals into the mainstream
- Variety of short-term rental platforms in United States – Airbnb, Homestay, VRBO
- Airbnb- founded in 2008
 - 2014- \$10 billion valuation
 - 2016- \$30 billion valuation
 - 2018- had more listings than top three hotel chains combined
 - 2024- \$89.6 billion valuation, with income of \$264 million in Q1 2024- its most profitable first quarter ever
- 2023 short-term rental market: \$64 billion in revenue (source: AirDNA)

Short-term Rentals

- Potentially more profitable to owners than long-term rentals
 - In Ithaca, NY, 2017 estimates found that a two-bedroom unit would need to be rented 23% of the time to equal long term rental rate
- All of this to say that popularity continues to increase and it is likely your jurisdiction has encountered short-term rentals
- NYC biggest market in US for Airbnb; however, it is everywhere!

Why Regulate Short-term Rentals?

“Well, you know, you have to have zoning codes or else the whole thing could be chaos”

-Leslie Knope, Parks & Recreation



Why Regulate Short-term Rentals?

- No regulation = no say and chaos abounds
- Zoning is not a four letter word (literally and figuratively)
- If no zoning- turn to police power
- Accept that STRs are here and then craft regulations that suit your locality's needs
- Positives?
 - Increased tourism
 - Incentivize development

Why Regulate Short-term Rentals?

- Loss of residential feel of neighborhood / community feel
- Nuisances for neighbors (light, noise, trash, fire safety)
- Parking issues / safety concerns
- Address access to housing (STR means that abode is not rented out long-term)
- Not subject to same safety / health codes as hotels / motels
- Declining year round population can result in largely vacant properties
- Increased demands on infrastructure

Options for Local Regulation

Local governments have many tools at their disposal to regulate short-term rentals!

- Comprehensive/master/general plan
- General zoning authority
- Special use permits
- Broader, outside the box authority – police power and general health and welfare of community

Options for Local Regulation- Comprehensive Plan

- Comprehensive plan / General plan / Master plan:
- The comprehensive plan is important! Provides the framework and backbone for zoning code
- Necessary to adopt zoning legislation
- Does not need to be in one “comprehensive” document or even written at all (?), so long as a court can ascertain that the plan exists and locality acting in furtherance of plan and public interest (Matter of Skenesborough Stone, Inc. v Village of Whitehall, 254 AD2d 664 [1998])

Options for Local Regulation- Comprehensive Plan

- Why address short-term rentals in comprehensive plan? Locals are empowered to adopt regulations that align with the comprehensive plan
- If short-term rentals are covered in plan and zoning regulations are aligned in furtherance of the plan – solid legal ground if challenged
- STRs not covered in comprehensive plan?
 - Adopt temporary moratorium to modify and address STRs going forward

Options for Local Regulation- Comprehensive Plan

- **Moratorium** on STRs – should be reasonable in length and have a valid basis
 - Locality needs time to develop STRs within comprehensive plan and zoning structure and failure to implement moratorium might result in unrestricted growth that detrimentally impacts the character of the community
 - Should be able to point to meaningful legislation as a result of moratorium that furthers long-range goals

Options for Local Regulation- Comprehensive Plan

- Moratorium on STRs – should be reasonable in length and have a valid basis
 - Reasonable timeframe
 - Valid public purpose
 - Actually address the issue
 - Definitive end date
- Local law via home rule authority
- Consider any environmental conditions to comply with when enacting land use controls – NYS has State Environmental Quality Review Act

Options for Local Regulation- Comprehensive Plan

- Do STRs have to be explicitly addressed in comprehensive plan in order to adopt local laws addressing STRs?
- No, not exactly
- To ensure the locality is on solid legal ground, the best scenario is to adopt a local law that is in alignment with the comprehensive plan

Local Regulation Options – General Zoning Authority

- **General zoning authority**
 - Town Law sections 261, 264
 - Village Law section 7-700
 - General City Law section 20 (24), (25)
- These statutes give localities broad authority to adopt zoning regulations that suit the municipality's unique needs

Local Regulation Options – General Zoning Authority

- **General zoning authority**
 - Adopt zoning regulations consistent with comprehensive plan
 - STRs – authorized in certain zones, not authorized at all (consistent with comprehensive plan), impose density requirements
 - Ensure that you are regulating the USE, not the OWNER
 - Weisenberg case- durational time limit appropriate because regulating use of the land, not the owner (in contrast to owner-occupied restrictions)
 - No use variance unless you want the use to run with the land (most likely)

Local Regulation Options – General Zoning Authority

- Permitting pursuant general zoning authority:
 - Does not run with the land as a variance may- is tied to the applicant / owner
 - Permits can be non-transferable
- ****Indicate in enabling legislation that permits are a privilege not a right and can be revoked for failing to comply****
 - Hignell-Stark case (2022)

Options for Local Regulation – Permits

- Considerations for permits:
 - Designate where applications are filed
 - **Definitions** – what constitutes an STR (eg, any dwelling rented for a period of less than 30 days that excludes hotels, motels, bed and breakfasts and the like)
 - **Inspection** by fire / code officials / property owner's own professional before permit granted (**4th Amendment**)
 - Safety requirements - smoke / carbon monoxide detectors / fire extinguishers
 - Maximum occupancy requirements
 - Permit process – length of time to process, reasons why it can be denied
 - Give enforcing officer broad authority to impose reasonable conditions on permit so long as consistent with code and directly related to use of STR

Options for Local Regulation – Permits

- Considerations for permits:
 - Impose quiet hours (reasonable)
 - Permits displayed on property
 - Require filing of “Health and Safety Policy Guidelines” – include emergency evacuation plans / diagrams and provision of safety equipment
 - Ensure garbage removal is addressed
 - Notify adjacent property owners?
 - Enforcement / penalties addressed
 - Complaint filed with owners or operator - if they fail respond within two hours or reasonable period complaint goes to CEO to enforce
 - Reasons for revoking permit
 - Length of license / renewals / revocable at any point
 - All primary contacts listed

Options for Local Regulation – Special Use Permits

- Special use permits are a powerful tool to regulate STRs (conditional use permits)
 - Town Law section 274-b, Village Law section 7-725-b, General City Law section 27-b
- Allows localities to require authorization of a particular use that is otherwise permitted in zoning code subject to requirements imposed by special use permit
- Allows for tracking of the use on properties
- Can / should place conditions on special use permit
- Can require annual / biennial renewal (etc)

Permitting - Fees

- Frequently asked question – what can we charge for STR permits? Can we charge based on the assessed value of the property? A sliding scale based upon the nightly room rate?
- In short, no – permit fees have to bear a direct relation to the costs of issuing the permit and inspecting / enforcing STR activity
- Can have sliding scale but has to be rationally related to administrative / inspection costs to the locality – not based upon assessed value of the property or the room rates
- Fees must be rational!

Options for Local Regulation – Creative Methods

- Additional authority to regulate STRs – police power and licensing authority
- Town Law section 130 – adopt ordinances that:
 - Promote the public welfare
 - Address health and safety regulations
 - Regulate hotels, motels, boarding rooms, etc, specifying their manner of running and ensuring cleanliness and fire protection
- Require rental properties to register
- Impose conditions not related to land use

Options for Local Regulation – Creative Methods

- Town Law section 136:
 - Authority to license and regulate inns, boarding houses, rooming houses and the like
- Village Law section 4-412 – general authority of the Board of Trustees:
 - “Good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice. . .”

Options for Local Regulation – Creative Methods

- Key tenet of zoning – regulate the use, not the owner
- Can you regulate the owner (eg, impose owner-occupancy restrictions) if regulating pursuant to police power or licensing authority?
 - More likely to withstand court scrutiny as an exercise of police power; **proceed with caution**

Case Law Update – Federal Circuit

- Plethora of constitutional issues that property owners raised when denied ability to operate short-term rental
- **Due Process** (procedural and substantive): First, Second, Third, Fifth, Eighth, Tenth, Eleventh Circuits
 - Legislative Due Process claims subject to rational basis review – is there a legitimate state interest that is furthered by the regulation?
 - Action of the locality has to “shock the conscience” – STR regulations have not met this standard
- **Unreasonable Search and Seizure:** Second and Seventh Circuits
 - This is an area where a locality is most likely to violate constitutional rights – ensure inspection requirements are reasonable

Case Law Update – Federal Circuit

- **Takings Clause:** Third, Fifth, Sixth, Eighth, Eleventh Circuits
 - More common argument amongst property owners- courts generally find property owner is not entitled to most economically beneficial use of property
- **Dormant Commerce Clause:** Fifth, Sixth, Eighth, Tenth, Eleventh Circuits
 - These arguments mainly arose after property owners successfully made this argument in *Hignell-Stark* in 2022
 - Ninth Circuit- Operator / primary resident on-site requirement relieves locality of dormant Commerce Clause violation

Case Law Update – Federal Circuit

- **Contract Clause:** Third, Eighth, Eleventh Circuits
 - The Contract Clause does not protect future contracts and earnings and if current contracts are implicated, courts will look to whether regulation is necessary and reasonable
- **Equal Protection:** Fourth, Fifth, Seventh, Tenth, Eleventh Circuits
 - Rational basis test, since STR regulations generally do not implicate fundamental rights or characterize based on suspect classifications

Case Law Update – Federal Circuit

- **First Amendment Free Speech Implications: Fifth and Eleventh Circuits**
 - Property owners likely unsuccessful on assertions that STR restrictions render them unable to advertise their rentals and talk about the property as an STR
- **Non-Constitutional Zoning Authority: Second, Fifth, Sixth, Eighth, Tenth, Circuits**
 - Localities are generally authorized to enforce standards for land use

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
 - August 2022 Fifth Circuit decision
 - Property owners challenged city’s short-term rental law asserting:
 1. Violation of Takings Clause of the Constitution, since owners had “vested property interest” in renewal of their licenses
 2. **Violation of the Dormant Commerce Clause of US Constitution by imposing residency requirements on any STR, thereby discriminating against interstate commerce**

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
 1. Violation of Takings Clause - to prevail on takings claim owners have to demonstrate:
 - Property interests were so deeply rooted in custom that just compensation for appropriating license includes monetary damages
 - No property interest – **regulation provided that licenses were “a privilege not a right” and that even applicants that qualified for a license were not necessarily entitled to one**
 - **Regulation also provided that that license could be revoked or not renewed due to non-compliance**
 - Property interest was not longstanding because licensing structure began in 2017
 - ****No Takings Clause violation****

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
- *Important Takeaway #1* – Ensure regulation establishing permit system includes language indicating permit is a privilege not a right that is subject to revocation
- This language will help locality avoid any claims of violating the Takings Clause for failing to issue or not renew a license

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
 2. Violation of the Dormant Commerce Clause of US Constitution by imposing residency requirements on any STR, thereby discriminating against interstate commerce
 - Commerce Clause gives federal government the authority to regulate commerce with and between the state
 - Dormant commerce clause – prohibits states (and localities) from passing legislation that discriminates against or excessively burdens interstate commerce

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
 - STR regulation in New Orleans only authorized permits for resident property owners that resided on the premises by way of a homestead exemption
 - Court found residency requirement was invalid on its face because it treated in-state and out-of-state economic interests differently, benefitting in-state and burdening out-of-state – even when city asserted police power

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
 - In order to survive claim, city had to demonstrate
 - Legislation advanced legitimate local purpose
 - That could not adequately be served by reasonable nondiscriminatory alternative
 - City argued that the residency requirement prevented nuisances, promoted affordable housing and protected the character of the neighborhood
 - Court disagreed- other, less discriminatory options available, including increased enforcement and restricting number of permits granted

Federal Case Law Update

- *Hignell-Stark v City of New Orleans*
- *Important Takeaway #2* – Do not impose a owner-occupied or residency requirement UNLESS locality can demonstrate that a legitimate public purpose exists for which there is no reasonable non-discriminatory alternative
- Owner-occupied requirements regulates the owner – not the use
- Instead, increase penalties in local law for violations and include language that revokes STR permit upon repeat offenses
- *Commerce Clause applies to all localities!*

Federal Case Law Update

- *Rosenblatt v City of Santa Monica* (2019)
 - City adopted an ordinance prohibiting STRs of 30 days or less, unless primary resident remained in the dwelling
 - City sought to preserve available housing stock and local charm and character that came from local resident population – not the same with a transient population
 - Property owner filed suit, alleging the regulation violated dormant Commerce Clause
 - Two-tiered approach:
 - When regulation directly discriminates against interstate commerce or favors in-state interests, courts will generally strike down (*Hignell-Stark court applied strict scrutiny analysis, which failed*)
 - If regulation is neutral and indirectly impacts interstate commerce, is the locality's interest legitimate and does the burden on interstate commerce exceed local benefit?

Federal Case Law Update

- *Rosenblatt v City of Santa Monica* (2019)
 - STRs generally implicate interstate commerce but the city's regulation did not directly regulate interstate component of STRs – applied even-handedly
 - Court ultimately found that regulation did not discriminate against interstate commerce, as the policy did not require an owner to reside on the premises but instead a primary resident, which could be an owner or non-owner
 - Property could be owned by out of state owner with an in-state primary resident on premises

Federal Case Law Update

- *Rosenblatt v City of Santa Monica* (2019)
- *Important Takeaway* – If locality wants to ensure “responsible adult” is on premises, include primary resident or operator on premises requirement in STR regulation – not owner-occupied
- Does not implicate dormant Commerce Clause
- May still run into regulating “owner” as opposed to use – police power as opposed to zoning authority

Federal Case Law Update

- *Rosenblatt v City of Santa Monica* (2019)
- Land use ordinances are inherently local and not a significant burden on interstate commerce in violation of dormant Commerce Clause merely because they disappoint out of state visitors

Federal Case Law Update

- *Hignell* part two - February 2024 District Court decision (*Hignell v City of New Orleans*, 2024 WL 838217)
- After Fifth Circuit decision, city removed owner-occupancy requirement and instead imposed an operator requirement
- Also limited the number of permits issued in residential areas
- Hignell filed suit challenging, among other things, the ability of the city to impose durational requirements and asserting that their due process rights were violated in denying the “fundamental right to lease” their property for whatever length of time they chose

Federal Case Law Update

- *Hignell* part two
- Court disagreed- as it relates to durational requirements, local governments are expressly authorized to adopt, implement, review and enforce standards for land use, zoning, and historic preservations and structures
 - Encompassed within this broad authority is the ability to impose durational time limits on STRs
- Due Process – both federal and Louisiana state jurisprudence indicate that there is no fundamental right to lease property on a short-term basis
- STR agreements are not comparable to a long-term traditional lease

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - United States District Court- Eastern District of NY 2019
 - Town adopted STR local law in 2017 that:
 - Imposed licensing and advertising requirements on certain vacation rentals;
 - Prohibited STRs from being rented more than once in a 14-day period; and
 - Imposed civil penalties for violations and authorized town board to act as reviewing authority
 - Owner-occupied units not included in definition of vacation rental properties subject to STR local law

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Property owners filed suit, alleging, among other things:
 - Local law violated the Fair Housing Act;
 - Local Law violated Town Law; and
 - Local Law violated US / NY Constitution

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Local law violated the Fair Housing Act;
 - STR local law does not violate Fair Housing Act, as act makes it unlawful to discriminate in sale or rental of a “dwelling,” and STR excludes properties that are rented for more than 14 days at a time
 - Therefore does not constitute a dwelling and thus does not violate FHA

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Local Law violated Town Law section 261;
 - Town Law 261 authorizes towns to regulate and restrict “density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes”
 - Not a general police power but instead a power to regulate land use
 - Town must ensure to regulate land use rather than the individual or owner that occupies it
 - Regulation imposes durational requirement that is an appropriate exercise of land use regulatory authority

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
- *Important Takeaway #1*– Regulating length of stay in a STR local law is proper exercise of zoning authority
Shelter Island STR local law prohibited more than one stay in a 14-day timeframe – regulates the length of the stay
- Durational requirement regulates the use, not the owners or users
- Locality can feel confident in using zoning authority to impose durational limits

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Local Law violated US Constitution
 - Owners asserted they were denied Due Process under Fourteenth Amendment because they established fundamental right to rent their homes under NY law
 - Court found that owners have *no vested right to existing zoning status of their property unless they can demonstrate that they made substantial expenditures in reliance on zoning status – eg, entitled to a permit*
 - Owners could not demonstrate this and thus were not denied due process

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
- *Important Takeaway #2*– if a property owner can demonstrate substantial expenditures in reliance on the zoning status of their property, they may have a Fourteenth Amendment due process claim if STR changes the status of their property that deprives them of their intended use
- Vested rights seems to be a high standard to meet but should still be considered when drafting and implement STR local law

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Local Law violated US / NY Constitution
 - Owners also asserted that the record-keeping and search requirements in the local law violated their right to privacy under both the Fourth Amendment of the Constitution
 - Local Law required STR owners to maintain rental registries for the town to examine at any point, subject to automatic fines and license forfeiture for non-compliance
 - Owners could demonstrate compliance before license revocation but fines were automatically issued

Federal Case Law Update

- *Weisenberg v Town Board of Shelter Island*
 - Local Law violated US / NY Constitution
 - Court allowed these claims to proceed, which resulted in the town amending their local law to comply with the Fourth Amendment
 - *Important Takeaway #3* – Ensure property owners are afforded the ability to comply with requests for records and respond before fines are issued
 - Any requests should be reasonable – monthly reporting requirement has been construed as excessive and violation of the Fourth Amendment (unlawful search and seizure)

Case Law Update

- Fourth Amendment Issues with STR permits:
 - Property owners have asserted that requiring a search of the premises prior to issuance of permit constitutes an unreasonable search and seizure in violation of the Fourth Amendment
 - Administrative search – need owner consent or an emergency situation to inspect, otherwise an administrative search warrant is required

Case Law Update

- Fourth Amendment Issues with STR permits:
 - Requiring an inspection prior to issuance of permit does NOT constitute an unreasonable search and seizure, so long as the option for property owner to provide certificate of evidence of own inspection is available
 - Municipality either inspects premises itself OR property owner has the ability to produce certificate of inspection from a licensed engineer
 - *Infinite Green, Inc. v Town of Babylon*, 2022 NY Slip Op 00407
- Supreme court (NY) has found that a locality can require inspection if property owner is expanding current use / occupancy (*People v Bifulco* [2003] – Suffolk County garage inspection for ADU)

Case Law Update

– Fourth Amendment Issues with STR permits:

- Can you impose inspection requirements? Not unreasonable to ensure premises are up to code and have requisite safety features
- Avoid court scrutiny – provide for inspection by locality OR accept certificate of inspection that meets locality's requirements
 - This ensures that locality will not run afoul of any potential Fourth Amendment claims

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - City ordinance originally had a very STR-friendly component and mayor encouraged short-term rentals (2015)
 - 2019 – city adopted more restrictive ordinance limiting short-term rentals to owner-occupied units (caution: dormant Commerce Clause) if owner wanted to rent properties more than 60 nights per year
 - In the interim, plaintiffs invested in properties or entered into long-term leases with intention of operating/subleasing properties as STRs

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - **Takings Clause:** Plaintiffs asserted Takings Clause violation by limiting ability to engage in future short-term rental business
 - Non-physical taking: Regulatory taking that
 - 1) Denied all economically beneficial productive use of the property or
 - 2) Partial taking that would require compensation under *Penn Central* test

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - No total taking with forward-looking right to future STR business – Constitution does not *create* property interests
 - Zoning regulations are classic examples of permissible governmental regulations that do not require compensation even though they restrict or prohibit most economically beneficial use of property
 - Plaintiffs also failed to demonstrate that properties were rendered economically idle – other uses available to generate income (long-term lease, sale of the property)

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - *Penn Central* and partial takings analysis:
 1. Economic impact of regulation: typically measured in property value decrease- not the case here
 2. Extent regulation interfered with distinct investment-backed expectations: even though city initially encouraged STRs, it still retained authority to regulate in public interest (ensure regulation is in public interest)
 3. Character of governmental action: ordinance was general zoning regulation restricting permissible uses of residential housing to protect housing stock and promote public safety by reducing nuisances

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - **Contract Clause:** Contract Clause of the Constitution prohibits state from passing any laws from impairing obligations of contracts
 - Locality can still regulate exercising its police power to serve the public interest so long as:
 - 1) Regulation has a significant and legitimate public purpose and
 - 2) It is drawn in an appropriate and legitimate way to advance that public purpose

Federal Case Law Update

- *Nekrilov v City of Jersey City* (2022)
 - **Contract Clause:** Applying this analysis, court found that it will defer to a locality when it exercises its legislative authority
 - Plaintiffs failed to establish that city did not have a substantial public purpose in limiting STRs and that the ordinance was not drawn in an appropriate and reasonable manner
- *Important takeaway:* If STR regulation impacts existing Ks, ensure regulation promotes public purpose and is drawn as narrowly as possible to avoid constitutional review

Federal Case Law Update

- *Colorado Property Owners for Property Rights v Town of Breckenridge, Co* (July 9, 2024)
 - Town capped licenses to 2200 non-exempt units
 - Exempt units (no cap) included properties that had 24 hour services, a staffed front desk and private security
 - Exempt units required substantially less time to monitor and regulate
 - Property owners filed suit alleging, among other things, that the ordinance violated Equal Protection under the laws, as it applied unequally to owners of real property in the town

Federal Case Law Update

- *Colorado Property Owners for Property Rights v Town of Breckenridge, Co* (July 9, 2024)
 - Town noted that STRs caused a reduction in workforce housing, imposed a change in character of the area, and created significant negative impacts, including noise, improper parking, and sanitation issues

Federal Case Law Update

- *Colorado Property Owners for Property Rights v Town of Breckenridge, Co* (July 9, 2024)
 - Court applied rational basis test, as the ordinance did not use suspect or quasi-suspect classifications, nor were fundamental rights impacted
 - “The right to dispose of one’s property is not fundamental for Equal Protection purposes”

Federal Case Law Update

- *Colorado Property Owners for Property Rights v Town of Breckenridge, Co* (July 9, 2024)
 - Plaintiffs failed to demonstrate that there was no plausible basis to support the ordinances
 - Ordinances enjoy a strong presumption of validity
 - Restrictions in limiting number of permits could mitigate stated purposes of reducing noise, parking issues, and waste disposal issues

Federal Case Law Update

- *Short-term Rental Owners Association of Georgia, Inc. v Cooper* (2021)
 - County amended its STR regulation by prohibiting rentals of less than 30 days in most residential zones, although pre-existing STRs were allowed to continue, so long as the rental was no less than a week
 - Plaintiffs filed suit alleging, among other things, that the regulation violated the Free Speech Clause of the First Amendment and the Takings Clause

Federal Case Law Update

- **Takings Clause:** Plaintiffs failed to demonstrate that the regulation deprived them of all economically beneficial or productive use of their property
- A mere diminution in property value is insufficient to demonstrate a taking that requires just compensation

Federal Case Law Update

- **Free Speech:** Plaintiffs argued that the regulation impinged upon their right to free speech by discouraging persons seeking to use their property as a STR to advertise or communicate about the STR to family, friends and the general public
- Court disagreed – any impact on speech is incidental

Local Law – Tips to Survive Court Scrutiny

- Clear, concise definitions in code – what constitutes a short-term rental?
- Regulate the use – not the property or user
 - *Weisenberg* and *Hignell 2.0* -Durational limits regulate the use- acceptable!
 - Town Law 261 durational requirements appropriate use of zoning authority
- Include language in LL indicating that license/ permit is a privilege, not a right that is subject to revocation
 - Sets expectations and avoids invoking Takings Clause / vested rights claims

Local Law – Tips to Survive Court Scrutiny

- Do NOT impose a residency requirement – likely violation of dormant Commerce Clause
 - Instead, impose an operator/dwelling requirement (*Hignell 2*) or primary resident requirement (*Rosenblatt*) – owners can be in state or out of state while operator / primary resident is on the premises
 - Residency requirement regulates the owner, not the use

Local Law – Tips to Survive Court Scrutiny

- Inspection requirements: if locality requires inspection prior to permit issuance, provide option to have inspection conducted by private certified inspector
 - Avoids any Fourth Amendment complications
- Any requirements that the STR operator turn over registration lists- provide ample time to comply and frequency of request should not be unreasonable

Drafting a Short-term Rental Local Law

- Identify the issues you want to address in the community
 - Look to your comprehensive plan
- Create clear definitions
- Designate enabling officer (Code enforcement officer)
- Require applicants to maintain “House Rules” that are provided to renters
- Durational requirements zoning authority?
- What has to be included in advertisements (registration or permit number?)
- No primary residency in county or area – designate local contact that will handle issues

Drafting a Short-term Rental Local Law

- Number of vehicles authorized (reasonable) parking on street authorized?
- What will fee for license / permit be?
- When do applicants need to renew?
- What to include in application for permit?
- Will there be a limit on amount of permits one person or entity can hold?
- Where can complaints be filed?
- What constitutes a violation and what are the sanctions?
 - Shelter Island – reasonable time limit to comply
 - Officer that will issue cease and desist order (CEO)

Definitions to Include

- Include length of time / number of times a house or part of house / property must be rented out to constitute STR
- Could define a “**vacation rental**” as a residence or room available for rent for periods of less than 14 days totaling more than 30 (or however many) days of a calendar year
- **Transient rental occupancy** – use of a dwelling unit by a person or group of persons who occupies it or is entitled to occupy a dwelling unit for remuneration for a period of less than 14 calendar days, counting portions of days as full days

Why are Definitions Important?

- Matter of Friedman v Town of Dunkirk, 221 AD3d 1581(4th Dept 2023)
 - Property owner in “single-family dwelling” zone began renting property as short-term rental
 - ZBA – group of tenants that is transient or temporary in nature does not meet definition of a “family” – found STR was not authorized by code
 - Court disagreed- transient nature of stay is only one factor that can be considered for “family” purposes
 - Rental to four persons related by blood – meets code definition of family even though temporary stay
 - Consider every definition in the code!!

Why are Definitions Important?

- Fruchter v Zoning Bd. of Appeals of Town of Hurley, 133 AD3d 1174 (3d Dept 2015)
 - Property owner in residential zone began listing property for rent for timeframes ranging from one night to an entire season
 - Rents the entire residence and does not stay on the premises
 - Code enforcement officer issued order to remedy for illegally operating bed and breakfast or hotel
 - ZBA found property owner should have obtained special use permit
 - Property owner asserted the type of rentals he provided did not require special use permit

Why are Definitions Important?

- Fruchter v Zoning Bd. of Appeals of Town of Hurley, 133 AD3d 1174 (3d Dept 2015)
 - Court found that property owner's short-term rental activity did not fall neatly into the town code's definitions
 - Analysis turned upon whether the use removed the property from the definition of residential one-family and whether activity fit under another definition
 - Activity not a bed & breakfast or hotel – no food served and no common exterior entrance
 - Also not an owner-occupied dwelling, which was included in code
 - Court found the use does not fall within definition of what town required for special use permit

Why are Definitions Important?

- Important takeaway- definitions matter!
- Town can amend code to include short-term rentals in permitting scheme, expand definition of tourist accommodations, transient rental occupancy . . .
- Property owner unlikely to prevail on a vested rights claim if challenged once definitions amended since property owners would still be able to operate property – just under regulatory structure

How Do Locals Regulate?

- How do we know if someone is even running a short-term rental? How can we regulate them if we don't know the STR exists?
 - Neighbor complaints
 - STR websites- presumption of operation (include in code) if property is listed
 - Google search
 - County /state registry if county has VCA with short-term rental platform – should have a list of properties
 - Software programs that track STR listings



Questions?

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