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## Regulating Short-term Rentals: A Federal Circuit Roundup

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NOVEMBER / DECEMBER 2024

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*By: Katie Hodgdon, Association Counsel, Association of Towns of the State of New York, Albany, New York*
Airbnb and other short-term rental apps have revolutionized lodging worldwide—in the process reducing the stock of residential housing and driving rents skyward. Local governments across the US have instituted a range of mechanisms to slow the negative impacts, often encountering legal challenges.
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# LISTSERV

*By:* BRAD CUNNINGHAM,
*Municipal Attorney, Lexington, South Carolina*

## Unexpected Visitors on Main Street

Well, we are only one month past the 2024 IMLA Annual Conference in Orlando, Florida and kudos to IMLA for yet another outstanding event! It was well attended and well run, and again offered first rate CLE opportunities which were applicable to virtually everyone's practice.

We had a guest from Australia this time, Mr. Dan Best who relayed the housing situation in Australia to us. We are hoping to use this opportunity to build a communication bridge to our counterparts in Australia and ultimately someday arrange through the International Committee to visit "Down Under."

But we also had another guest at this conference, one of the unwanted variety. No last name… She only went by *Helene*, and her presence dominated the talks at the conference forcing alternative event plans, alternative travel plans and even alternative plans back home. It was hurricane time again.

Hurricanes can have a dramatic and lasting effect on operations of local governments. Years ago largely through the listserve, we formed an ad hoc Disaster Preparedness Committee. One main goal was to establish a "library" of resources for municipal governments to review to help prepare and respond to natural disasters such as this one. You may find the Disaster Preparedness materials in the Resource Library tab on the IMLA Website, www.imla.org.

Often in hurricanes, the bulk of the attention goes toward the beach municipalities and surrounding areas. This time, however, effects spread quite far inland. As a beach bum myself, I remember folks evacuating as far inland as Asheville, North Carolina--which everyone knows absolutely got hammered this time around by rains from *Milton*. I am told that many of the hundreds of electrical "line employees" we saw stationed at our Conference hotel preparing to assist in Florida ended up traveling to North Carolina to help out instead. Florida got its share of devastating weather, but what happened in North Carolina was unprecedented for that area.

As many of you know, I profess to be a beach bum and still hold to that claim. However, my childhood years were mostly spent in the lovely hamlet of Hendersonville, North Carolina, just south of Asheville. The reports I received from relatives and friends in the area were awful. One elderly aunt, recently widowed, had no power, water, or cellular phone service and the drive from her home was blocked by fallen trees. We did manage to connect on the phone after about two days, as she had discovered a very small spot in her driveway where a cell phone signal popped up. She had discovered it after walking around the yard for several minutes surveying the carnage.

For days I could not reach many relatives or friends. Finally, as cell service sporadically became available, pictures and stories were sent. The water level was over the roof of the hamburger restaurant I frequented as a teenager. The small town of Chimney Rock, one of our playgrounds growing up, was literally swept downhill and deposited into Lake Lure. And Lake Lure? Well, it was turned into a menagerie of scrap wood, metal and other debris. If you didn't know there was a lake there, the pictures would lead you to believe you were looking at the county landfill.

These pictures of my childhood home were hard to look at in many cases. The Caro-Mi Restaurant, a favorite of my family and many others for four generations was completely knocked off its foundation. The website reflects a "Permanently Closed" banner if you visit there now.

These are only memories for me, but the really difficult stories can be heard from the permanent residents. Some, like my aunt, still at least had a roof over their heads. Others had partially damaged homes and some simply lost everything. One family in a remote area of Western North Carolina sought refuge in the general store they operate because it is uphill from their nearby residence. A heartbreaking video shows them speechless and stunned as they look out the store window and watch literally their entire house and belongings float down the river--everything they owned but the store and the shirts on their backs.

There were plenty of folks who were not given a timetable for return of municipal services such as power, water, and/or gas. As of a month after the storm, many of them still have no idea when these "luxuries" of life will be returned. I am now fully in touch with all of my family members and friends, and they have begun the rebuilding and restarting efforts to their properties and their lives.

Here in the Midlands of South Carolina, we did not escape the storm. We

had widespread power outages due to downed trees and minor flooding, but all things considered we did very well. At the office and at home, we may have been out of power for about 12 to 15 hours. My city's crews were out early in the morning clearing roads and raising power lines, but we were really lucky. It could have been much worse.

All of this brought me back to my days as a beach bum. I have been threatened with the loss of everything on several occasions. The closest call of them all was in 1989 when Hurricane *Hugo* threatened by hometown of North Myrtle Beach. I wander back to that time.

I was working for a golf course in Myrtle Beach and given the ORDER to evacuate my home. It was a Thursday morning. We were excused from work. I left to go inland and stay with a friend. The first problem arose that morning when the friend was ORDERED to evacuate too. This storm had drawn a bead on my hometown and almost everyone was told to evacuate.

I drove to Columbia figuring I would stay the night there and go to the ballgame the next day. I thought surely this was far enough inland. This was not good enough according to the authorities. Although not ordered to evacuate (Columbia is 140 miles inland), these residents were given all other hurricane preparedness cautions. I also could not find a place to stay. Being on Interstate 20, I then decided I would ride all the way to Atlanta and stay with my girlfriend's family. I was safe there as it didn't even rain.

Although I was safe from the weather, the worry was consuming. Mind you, this was before the internet and cell phones. I could only get what news was on TV. As usual, the television crews broadcast from the worst spot they could find. They described devastation, torrential flooding, and worse. There were several tornadoes and rising waters inland. I spent three days in Atlanta with no news, wondering if I had a home left to go to.

I returned on Sunday and the drive back was very worrisome. As soon as I got to the east side of Columbia - remember its about 140 miles inland – I began to see damage. There were trees down across the interstate which I had to navigate around about a dozen times. I saw a mobile home completely obliterated. It was obvious there was no power. Discovering that I was one of the few cars on the road, there was doubt in my mind as to whether I should even be trying this.

Time marched on and after dodging a few more trees I reached a point where I would go off interstate. I thought I would seize the chance to get gas before I did this. But not so fast! There was no power in the area and no way to pump gas. I tried every sta-

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*serves Group, Inc v. Kansas Power and Light Co*, 459 US 400 (1983)).

***Takeaway for localities:*** *Property owners are unlikely to prevail when asserting a contracts claim if such claim is based on future contracts and, even if contracts exist, the court will likely uphold the municipality's regulation so long as it is necessary and reasonable.*

**Dormant Commerce Clause:** The court dismissed this claim, finding that the impact on out-of- state and in-state renters was the same and, further, that any burden on interstate commerce was incidental and "not clearly excessive in relation to the local benefits of enhancing and maintaining the residential character of a community" (*id. at* 1351).

## Conclusion

As the local government practitioner can see, regulating short-term rentals can leave the municipality ripe for constitutional challenges, be it an assertion of engaging in unreasonable search and seizures under the Fourth Amendment through inspection requirements, discriminating against interstate commerce through the dormant Commerce Clause, engaging in a regulatory taking through the Takings Clause, inhibiting contracts through the Contracts Clause, and violating Due Process and Equal Protection, among other potential challenges. However, despite the plethora of pleadings and challenges, each case in this federal circuit roundup ultimately found for the local government, as the localities took steps to demonstrate the rational and non-discriminatory bases for enacting their short-term rental regulations. Local government practitioners should feel confident in adopting short-term rental regulations that further demonstrate governmental interests in a rational manner. ML

**Listserv** *cont'd from page 27*

tion I could find, eight in all, until I ran across a small country store with two gas pumps. I saw a man outside and yelled out the window. "Do you have power?" He responded that he did. "Can I buy gas?" He nodded affirmatively…. Hooray! After a 10-100 and a snack and filling my gas tank, I hit the road again feeling a little better but still wondering what I would find ahead.

I found much carnage and many surprises. the first of which was when I got within radio distance of my hometown. I tuned in and found there was an 8 p.m. curfew. You are not to be on the road at all after 8 p.m. Great! Here I am in my vehicle with a stereo, microwave, and various electronics items, but without any proof I own them, and I will be out during a period which virtually was Martial Law. Nerves and blood pressure hiked up, and so did my speedometer as I figured the police had a lot more important things to do than issue a two-point speeding ticket.

I did not even stop the car for the final 90 miles of the trip. No traffic lights were working and there were virtually no vehicles going in my direction. Fearful and worried about what I might find, I finally turned the sand-covered corner down the road from my house and proceeded nervously toward the driveway, reaching it at 7:57 p.m. (Three minutes to spare)

What I found to my astonishment was my roommate's car in the driveway. All the lights were on and he was sitting on the deck drinking a beer. "Ready to watch the ballgame?" He cracked a nervous smile. "Looks like we survived!"

In fact, I had power, water, and cable TV. A survey of the area the next morning revealed some slight damage in the area, and a pretty good bit at the ocean front. I got stuck in the sand on Ocean Boulevard, but was able to free myself. All in all, it could have been worse. At the last hour, the storm had wobbled back to the West and slammed into our state just above Charleston.

I found that the damage I surveyed on the way home was much worse than it actually was at the beach. The hurricane had spawned multiple tornadoes and had traveled much farther inland than one would expect. As far inland as Charlotte, North Carolina, they had fared a lot worse than we did at the beach.

Circle back to our conference in Orlando. Everyone was calling me to see how I was doing in Florida, but then a few days later I was calling them to see how they were doing in the Carolinas. The point here is that all the attention is on a few areas that are closer to the water, but we cannot ignore the inland areas that are prone to tornadoes and flooding from swollen rivers. They can be equally affected, or even worse. So, if your city is inland, do not ignore the emergency preparedness measures for a hurricane. The preparations may be different than at the coast, but they are no less important.

The last lesson I learned from all this is to investigate claims of destruction and catastrophe beyond what you hear on the news. Here I was ready to go to work on the morning of September 26, but folks from out of town were coming into the shop stating "We didn't expect anything to be open. We were told the entire town was flattened. We just came down here to gawk."

I couldn't help but wonder why they ventured my way if they thought everything was closed. However, I remained civil and replied "No sir. We are alive and well and please tell that to everyone when you go back home. We need the business."

Well, hurricane season officially ends December 1. Let's hope we can all avoid a recurrence of this tragedy.

The prosecution rests, your honor… ML