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Regulating Short-term Rentals: A Federal Circuit Roundup

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CONTENTS

NOVEMBER / DECEMBER 2024

REGULATING SHORT-TERM RENTALS: A FEDERAL CIRCUIT ROUNDUP
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.
PAGE 6



DEPARTMENTS

14 INSIDE CANADA
Irresponsible Downspouts, Fees to Losing Parties, Non-Vicious Dogs, and More.
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

16 DAY IN THE LIFE
From Thunder Bay to Toronto
By: Avery Morris, IMLA Editorial Staff
The journey to service as lead lawyer in Canada's biggest city.

18 AMICUS
Where We've Been, and What's Ahead
By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy
A review of IMLA's advocacy last Term, and a look forward.

20 CODE ENFORCEMENT
Protecting Health and Safety: Administrative Search Warrants vfor Beginners
By: Katie Leininger, Assistant City Attorney, City of Pearland, Texas
The pivotal role played by ASWs in enforcing code provisions.

24 LISTSERV
Unwanted Visitors on Main Street
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Disaster recovery after *Helene* and *Milton*.

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Regulating Short-term Rentals: A Federal Circuit Roundup

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INTRODUCTION

While short-term rentals are not a new concept – home-sharing platforms like Airbnb have been around since 2008, and property owners have been renting out their properties on a short-term basis for decades – their increasing popularity has resulted in local governments putting forth regulatory frameworks that seek to balance the needs of the municipality with the rights of property owners. This article analyzes recent cases in each federal circuit that have addressed local regulations of short-term rentals. In conducting this analysis, it became apparent that while there are a multitude of ways in which property owners can assert a constitutional violation when their property rights are hindered by a local regulation, the courts will generally defer to the municipality if the regulation is rational and furthers a governmental interest.

First Circuit (Procedural and Substantive Due Process): *Thayre v. Town of Brookline*, no. 120-cv-10910 (D. Mass. 2021) 2021 WL 66042 – The property owner sued the town asserting procedural and substantive due process violations, upon the town's finding that short-term rentals were not a permitted use in the town code.

Procedural Due Process: in order to establish a due process claim, the plaintiff had to identify a protectible property interest. Here, the property owner was not deprived of property or the ability to rent her property generally but rather of the ability to rent the property for 30 days or less. The locality possessed the authority to enact local regulations and registration and licensing requirements for short-term rentals (*see id.* at 4, citing Mass. Gen. L. c. 64G, section 14). Inasmuch as the town did not authorize short-term rentals, the property owner did not have a protected property interest in using her property in that manner.

Takeaway for localities in the First Circuit: *A property owner is not deprived of a procedural due process property interest simply because they are prohibited from using their property in a manner they desire, such as a short-term rental. Instead, the property owner must demonstrate that the protected property interest has been recognized by a state statute or legal contract – express or implied – between the state (locality) and the individual.*

Substantive Due Process: The property owner asserted that the locality violated her substantive due process rights by interpreting its code in a manner beyond the scope of its authority. The court found that the conduct of the government must "shock the conscience" or infringe upon rights "implicit in the concept of ordered liberty" (*see id.* at 6, citing *Commonwealth v. Wilbur W.*, 479 Mass 397, 403 (2018)). The court noted that the First Circuit routinely rejects substantive due process claims in zoning and land use contexts, although relief may be provided in "truly horrendous situations" (*see id.*, citing *Brockton Power LLC v. City of Brockton*, 948 F. Supp. 2d 48, 69 (D. Mass 2013)). The court found that the town properly used its authority to interpret its own zoning bylaws, and that any review of the interpretation must be deferential to the legal conclusion reached by the board. Even if the board interpreted its zoning code improperly, such an interpretation does not violate substantive due process rights (*see id.* at 7). The court also concluded that the interpretation of a zoning code does not rise to the "shocks the conscience" standard required in the First Circuit.

Takeaway for localities in the First Circuit: *Property owners have a heavy burden to overcome by demonstrating that a locality's interpretation of its code shocks the conscience. Even improper zoning code interpretations do not rise to the level of shocking the conscience, nor do they violate substantive due process rights.*

Second Circuit (Fair Housing Act, NYS Town Law, Due Process, Fourth Amendment): *Weisenberg v. Town Board of Shelter Island*, 404 F. Supp. 3d 720 (E.D.N.Y. 2019) - Shelter Is-

land adopted a short-term rental law in 2017 that imposed licensing and advertising requirements on certain vacation rentals, prohibited rentals more than once in a 14-day period, imposed civil penalties for violations, and authorized the town board to review any issues associated with the short-term rental law. Short-term rentals predating the law could apply for a waiver to authorize more than one stay in the 14-day timeframe through the end of 2017, after which no waivers were allowed. The law applied only to vacation rentals, which were explicitly distinguished from owner-occupied rental properties. Various property owners filed suit, alleging, among other things, that the local law violated the Fair Housing Act (FHA), New York State Town Law and the United States Constitution.

Fair Housing Act: The court found that the law did not violate the FHA, which makes it unlawful to discriminate against any person in the sale or rental of a "dwelling," given that the short-term rental law excludes properties rented for more than 14 days at a time, it does not apply to dwellings for FHA purposes.

Takeaway for localities: *Short-term rental regulations will not violate the FHA, which applies to "dwellings," and a short-term rental cannot be considered a dwelling when the use is transient.*

Local Zoning Authority: The property owners also alleged that the local law violates New York's Town Law § 261, which authorizes towns to regulate and restrict "the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." The court noted that the authority granted by Town Law § 261 is not a general police power but instead a power to regulate land use, rather than regulating the individual that owns or occupies it. Here, the short-term rental law addressed the use of the land; that is, the number of days the property is rented at a certain time, as opposed to the identity of the owners or renters.

Takeaway for localities: *Regulating the length of stays in short-term rentals is a proper exercise of zoning authority, as durational requirements regulate the use of the land and not owners or users. Accordingly, localities can feel confident imposing durational restrictions using their zoning authority in a short-term rental local law.*

Due Process: The plaintiffs asserted that they were denied Due Process because they had a fundamental right to rent out their homes under New York law. The court found that under New York law, a property owner has no vested right to the existing zoning status of their property unless they made substantial expenditures in reliance on the zoning status. As the property owners could not demonstrate any substantial expenditures, their Due Process claim failed.

Takeaway for localities: *This case suggests that if property owners can demonstrate that they made substantial expenditures on their properties they may have a due process claim if a short-term rental local law changes the status of the property that deprives them of the ability to use the property as intended. This appears to be a tenuous link, but the local government attorney should consider the case law as it relates to vested rights when drafting and implementing a short-term rental local law.*

Fourth Amendment: Lastly, the property owners asserted that the record-keeping and search requirements violated their right to privacy under both the Fourth Amendment and Article I, § 12 of the NYS Constitution. Specifically, the local law required short-term rental owners to maintain rental registries for the town to examine at any point, subject to automatic fines and license forfeiture for non-compliance. While the law allowed owners to demonstrate compliance before any license revocation, fines were automatically issued. The court allowed these claims to proceed; the town amended its law to comply with the Fourth Amendment, and both parties agreed to discontinue the action.

Takeaway for localities: *When drafting a local law, ensure that property owners are afforded the ability to comply with requests for records and respond before fines are issued. Any requests for records should be reasonable, and a monthly reporting requirement has been construed as excessive and an unlawful search and seizure violation of the Fourth Amendment.*

Third Circuit (Takings, Contract and Due Process Clauses): *Nekrilov v. City of Jersey City*, 45 F.4th 662 (3d Cir. 2022) –The property owners asserted that the city ordinance limiting short-term rentals violated their rights under the Takings, Contract, and Due Process

Continued on page 8



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clauses of the United States Constitution. The plaintiffs operated short-term rentals using online home-sharing platforms. After previously adopting an ordinance authorizing short-term rentals and requiring permits for owners with more than five short-term rentals, Jersey City adopted a more restrictive ordinance essentially limiting short-term rentals to owner-occupied units if the owner wanted to rent the properties more than 60 nights per year (*see id.* at 667). In the timeframe from the initial ordinance (2015) through the adoption of the more restrictive measure (2019), the plaintiffs purchased several properties and entered into long-term leases on other properties with the intention of subleasing on a short-term basis. They filed suit upon the adoption of the more restrictive ordinance.

Takings Clause: The plaintiffs first asserted that the city violated the Takings Clause by limiting their ability to engage in a future short-term rental business. As the city did not physically take any property, the plaintiffs had to demonstrate a regulatory taking by showing that either: 1) the city engaged in a total taking by denying all economically beneficial productive use of the property; or 2) the regulation constituted a partial taking that, while not rendering the property completely economically unviable, would require compensation under the *Penn Central* test (*see id.* at 669, citing *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978)).

The plaintiffs argued that the city's regulation deprived them of a forward-looking right to pursue their short-term rental businesses. The court disagreed, finding that the Constitution does not create property interests, and zoning regulations are classic examples of permissible governmental regulations that do not require compensation even where they restrict or prohibit the property's most beneficial use. A property owner is not vested with a cognizable property right simply because a municipality legalized a business activity that the property owner seeks to undertake (*see id.* at 669).

While the forward-looking right to pursue short-term rentals was not a valid Takings Clause claim, the court also examined whether the regulation constituted a taking of: 1) the use and enjoyment of the purchased properties; 2) their long-term leases; and 3) their short-term rental contracts. The court found that despite the fact that the plaintiffs cannot use their properties as short-term rentals, they have not been rendered economically idle and can be used to generate income in other manners, including living at the properties, entering into long-term leases, or selling the properties (*see id.* at 672). For a total taking, the question is not "whether the regulation allows operation of the property as 'a profitable enterprise' for the owners, but whether others 'might be interested in purchasing all or part of the land' for permitted uses" (*see id.*, citing *Park Ave Tower Associates v. City of New York,* 746 F. 2d 135, 139 (2d Cir. 1984), quoting *Pompa Construction. Corp v. City of Saratoga Springs*, 706 F. 2d 418, 424 (2d Cir. 1983)). Because other uses of the property remained, there was no taking.

Takeaway for localities: *Prohibiting short-term rentals does not constitute a taking under the Constitution even if it deprives the owner of the property's most beneficial or income-generating use, so long as other uses are available.*

As for the takings claim, the court again found that other uses were available, including occupying the premises or entering into a sublease. For short-term rental contracts existing at the time the more restrictive ordinance was adopted, the court found that the ordinance did not outright ban short-term rentals, authorized up to 60 nights per year, and excepted short-term rental contracts that were in place at the time of adoption. Accordingly, the plaintiffs' total takings claims failed on all accounts.

Assessing the plaintiffs' partial takings claim, the court looked to the three-factor analysis elucidated by *Penn Central* and found that the ordinance did not constitute a partial taking. *Penn Central* partial takings claims require the court to look to: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interfered with distinct investment-backed expectations; and 3) the character of the governmental action (*see id.* at 672). Even though the plaintiffs may have lost over half of their potential revenue due to the short-term rental ordinance, they did not account for the other ways they could generate income from their properties. Moreover, the economic impacts of regulations are typically measured in the effect on the property value; here, the properties did not decrease in value but instead, the plaintiffs argued they were denied the ability to profit from and receive a reasonable return on their investment (*see id.* at 673). The court found that lost profits are not an appropriate measure of economic impact for a takings claim, and that the only loss in "value" was speculative lost revenue.

Takeaway for localities: *Property owners are unlikely to prevail on a takings claim in the event they cannot operate a short-term rental due to legislative action unless they can demonstrate that their property value was drastically reduced as a result.*

Regarding interference with the plaintiffs' distinct, investment-backed expectations, the court found that while the city had initially encouraged short-term rentals with its first ordinance, the revised ordinance still did not rise to a taking because the city had the authority to regulate residential housing in the public interest. While the city initially promoted itself as friendly to short-term rentals, that did not mean that short-term rental owners could run their

businesses indefinitely and without any future restrictions (*see id*. at 675).

Takeaway for localities: *In the event that a locality initially encourages short-term rentals, it still retains the authority to amend the regulation in furtherance of the public interest.*

As to the character of the governmental action, the court found that the ordinance was a general zoning regulation that restricted the permissible uses of residential housing in order to protect the residential housing market and promoted public safety by reducing nuisance behaviors associated with short-term rentals, and as such, did not rise to a taking.

Takeaway for localities: *Promoting housing affordability and reducing nuisance behaviors are valid reasons to restrict short-term rentals, although the locality should be prepared to demonstrate evidence of how the regulation achieves its stated goals.*

Contract Clause: The plaintiffs argued that the ordinance interfered with their existing short-term rental contracts and potential uture contracts. The court found that while the Contract Clause of the Constitution prohibits the state from passing any laws that impair the obligations of contracts, it does not disrupt the state's ability to exercise its police power to serve the public interest – even if it impacts existing contracts (*see id*. at 678). To this end, the regulation will be upheld if it: 1) has a significant and legitimate public purpose, and 2) is drawn in an appropriate and reasonable way to advance the legitimate public purpose. Noting that the Contract Clause applies to municipal ordinances, the court found that it generally defers to the locality's legislative authority, and that the plaintiffs failed to demonstrate that the city did not have a substantial public purpose in limiting short-term rentals and, additionally, such ordinance was drawn in an appropriate and reasonable manner.

Takeaway for localities: *If a short-term rental regulation impacts existing contracts, the locality should ensure that the regulation promotes a public purpose and is drawn as narrowly as possible to avoid any constitutional scrutiny.*

Substantive Due Process: Legislative due process claims are subject to rational basis review, and the city had to demonstrate in adopting the short-term rental regulation, there was: 1) a legitimate state interest, that 2) could be rationally furthered by the statute (*see id*. at 680). As amendments to zoning laws are legislative in character, the court afound that the city easily satisfied rational basis review with legislation that protected the long-term housing supply, reducing deleterious effects of short-term rentals, and protecting the residential character and density of neighborhoods; accordingly, it dismissed plaintiffs' substantive due process claims.

Takeaway for localities: *When adopting short-term rental regulations, it is important to elucidate the reason for any restrictions, and such restrictions should actually accomplish the stated goals.*

Fourth Circuit (Equal Protection): *Lowe v. City of Charleston*, 597 F.Supp. 3d. 855 (4th Cir. 2022) – Owners of the only residentially zoned property in the surrounding area – none of which had been rezoned since 1978 – commenced suit against the city upon its denial of their request to rezone their property to a limited business classification, which would enable them to apply for a commercial short-term rental permit under the code. They asserted that the city violated the Fourteenth Amendment's Equal Protection Clause because it treated their property differently from similarly situated properties, without a rational basis. In response, the city argued that there were no similarly situated parcels in the surrounding area and that there was a rational basis for denying the application.

The court noted that when a party has not alleged that it was deprived of a fundamental right or subjected to discrimination based on a suspect classification, a regulation will be upheld if it was rationally related to a legitimate state interest (*see id*. at 859). In this instance, denial of a rezoning--rendering a property owner unable to obtain a commercial short-term rental permit--is not a denial of a fundamental right or discrimination based on a suspect classification, so the city's action must merely be rationally related to a legitimate state interest. Irrespective of the applicable standard, the court found that the Equal Protection Clause was not implicated because the property owners failed to identify any similarly situated properties that applied for a rezoning and were granted the application. Even assuming that the property owners were treated differently, the court found that the city's denial of the rezoning had a rational basis, and that it was not the function of the judiciary to sit as "a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines," quoting *Smith Setzer & Sons, Inc v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1323 (4th Cir. 1994)). Accordingly, the court dismissed the claims and found for the city.

Takeaway for localities: *If the local regulation distinguishes among classes of property or zoning status – e.g., commercial properties receive a different number of short-term rental permits than residential properties– ensure that similarly situated properties are treated the same to avoid any Equal Protection implications and confirm that regulations are rationally related to a legitimate state purpose.*

Fifth Circuit (Durational Requirements, Equal Protection, Due Process, Commerce Clause): *Hignell v. City of New Orleans*, no. 19 cv. 13773 (E.D.

Continued on page 10

Short-term Rentals *cont'd from page 9*

La. 2024) (2024 WL 838217) – this case was remanded back to District Court after the *Hignell-Stark* (46 F.4th 317 (5th Cir. 2022) decision. In that case, the Fifth Circuit found that while owners of short-term rentals did not have a vested interest in short-term rental permits that were proffered by the city as a privilege and not a right, the city's short-term rental law violated the dormant Commerce Clause by requiring short-term rentals to be owner-occupied, thereby discriminating against out-of-state property owners. After the decision, the city revised its short-term rental ordinances by removing the owner-occupancy requirement and instead imposed an operator requirement, whereby an adult operator is required to be on the premises, and limited the number of short-term rental permits. The plaintiffs amended their complaint to challenge the city's authority to regulate the duration of short-term stays and the validity of the operator requirement under the Commerce Clause and asserted, among other things, that the ordinance violated both Due Process and Equal Protection.

Duration: The court found that local governments in Louisiana are authorized to adopt, implement, review, and enforce standards for land use, zoning, and historic preservation and, similar to the *Weisenberg* decision, encompassed within this scope is the authority to impose durational limits on short-term rentals.

Takeaway for localities: *Imposing durational limits on short-term rentals is a valid exercise of a locality's land use and zoning authority.*

Commerce Clause: The plaintiffs argued that the operator requirement violated the dormant Commerce Clause by prohibiting out-of-state corporate entities from operating residential short-term rentals and requiring the operator to reside in the short-term rental (*see Hignell* at 8). The court disagreed, holding that the operators are only required to be temporary residents of the short-term rental while rented, and that the ban on corporate entities acting as operators in residential zones impacted out-of-state and in-state businesses alike (*see id.*).

Equal Protection: The plaintiffs also asserted that the city's ordinances violated the Equal Protection Clause by their unequal treatment of similarly situated homeowners regarding short-term rental permits and regulations. The court disagreed with the plaintiffs' assertion that "all persons who wish to rent their residences for less than thirty days are similarly situated" (*see id.* at 18), finding instead, that the ordinance, which banned corporate entities from short-term rental permits in residential neighborhoods (via the operator requirement) was rational and furthered the city's legitimate aims of limiting commercial impacts in residential areas and reducing the overconcentration of short-term rentals in particular neighborhoods (*see id.* at 20).

Due Process: Finally, the plaintiffs argued that they were denied the "fundamental right to lease" their residential property for whatever length of time they chose (*see id.* at 22). The court disagreed, finding that both federal and Louisiana jurisprudence say otherwise and, further, that short-term rentals are not comparable to a traditional residential lease.

Takeaway for localities: *Imposing an operator requirement is much more likely to withstand constitutional scrutiny over an owner-occupancy requirement, as it does not implicate the dormant Commerce Clause by requiring an owner to stay on site and accomplishes the often-stated goals of ensuring timely responses to any issues that may arise during short-term rental stays and promoting safety on the premises by having a "responsible adult" on site.*

Sixth Circuit (Zoning Authority, Dormant Commerce Clause, Takings Clause): *Purple Munky Property Co. LLC v. Walnut Township*, no. 23-cv-853 (S.D. Ohio 2023) 2023 WL 3069752 –The plaintiffs were renting their properties as short-term rentals when they received notice from the town to cease operations, as the properties were in residential districts not zoned for tourist home use. The plaintiffs filed suit, arguing that the zoning code was silent on short-term rentals, thereby allowing the use and, further, that prohibiting them from using their property as a short-term rental violated both the dormant Commerce Clause and the Takings Clause.

Zoning Authority: The plaintiffs asserted that their properties could be used as short-term rentals because the town's zoning code did not explicitly prohibit the use. The court disagreed, finding the silence does not equate to permission, as the code provided that "any unlisted use shall be prohibited" (*see id.* at 2).

Takeaway for localities: *if the local code is silent on short-term rentals, that does not mean the use is authorized. To ensure this is the case, the code should explicitly indicate that any use not listed is prohibited.*

Dormant Commerce Clause: The court struck the plaintiffs' argument that the town's zoning code violated the dormant Commerce Clause, as: 1) the plaintiffs were in-state; and 2) the zoning resolution was not discriminatory on its face and did not purposefully discriminate against out-of-state interests – that is, it did not authorize in-state property owners to operate short-term rentals in residential zones while prohibiting out-of-state property owners from operating.

Takeaway for localities: *A dormant Commerce Clause argument is unlikely to succeed if the regulation does not distinguish between in-state and out-of-state property owners.*

Takings Clause: The court distin-

guished between actual, physical takings of property and regulatory takings. As the properties in question were not physically taken, the court looked to whether the government went "too far" in restricting land use (*see id*. at 5, quoting *Lingle v. Chevron USA Inc*. 544 US 528 (2005)). Applying the *Penn Central* test, the court found that the plaintiffs had not exhausted their remedies at the local level in applying for the permit and, thus, their claim was unripe. Additionally, they failed to demonstrate that they had any reasonable investment-backed expectations that were disrupted by the township, as they purchased their properties under the current zoning structure, where neither short-term rentals nor tourist homes were permitted.

Takeaway for localities: *this opinion suggests that if the plaintiffs had reasonable investment-backed expectations – like the plaintiffs in the Third Circuit Nekrilov case – they may have had a claim under the Takings Clause. It is important to examine the case law in the jurisdiction when drafting a local short-term rental law.*

Seventh Circuit (Fourth Amendment Unreasonable Search and Seizure, Equal Protection): *Murphy v. Walworth County,* 383 F.Supp. 3d. 843 (7th Cir. 2019) - In 2017, Wisconsin – a home rule state – adopted Act 59, which prohibited local governments from outlawing short-term rentals within their jurisdiction but gave them the authority to regulate short-term rentals through zoning and licenses (*see id*. at 846). Walworth County adopted licensing and zoning regulations regarding short-term rentals, including requiring a guest registry, requiring adequate sanitation facilities, and limiting occupancy, applicable to all short-term rentals. The plaintiff, who was not prohibited from operating a short-term rental, sued on the basis that the ordinance violated the Fourth Amendment by requiring an unreasonable search of the guest book, and violated the Equal Protection Clause of the Fourteenth Amendment because it treated single-family homes that rent out for less than 30 days differently from properties with long-term leases or owned single-family homes.

Fourth Amendment: The county asserted that the plaintiff lacked standing, since he did not yet comply with the ordinance by obtaining a license, nor had the county enforced the ordinance against him, but the court found that the plaintiff did have standing to pursue a pre-enforcement challenge, since the county would eventually enforce the ordinance. Regardless, the county had repealed the section of the ordinance that addressed the guest registry and accordingly, the Fourth Amendment claims were dismissed as moot.

Takeaway for localities: *As previously discussed in the Weisenberg case, to avoid Fourth Amendment issues, ensure that property owners have time to comply with requests for records, and that such requests are reasonable.*

Equal Protection: The court noted that local laws generally withstand an Equal Protection challenge if the classification drawn is rationally related to a legitimate state interest (*see id*. at 850, quoting *City of Cleburne v. Clerburne Living Center*, 473 US 432 (1985)). To succeed on an Equal Protection claim, plaintiffs have to demonstrate that: 1) they were intentionally treated differently from others similarly situated; 2) they were treated differently because of the class in which they belonged; and 3) the difference in treatment was not rationally related to a legitimate state interest (*see id*. at 850, quoting *Smith v. City of Chicago*, 457 F3d. 643 (7th Cir. 2006)). The court noted that single-family homes used for short-term rentals are not similarly situated to single-family homes used for long-term use, as there is a different rate of electricity, plumbing, and gas usage, as well as a variable number of automobiles on short-term rental properties. Even assuming, *arguendo*, that the properties were similarly situated, the ordinance would survive rational basis review, as protecting the health, safety and general welfare of the public from seasonal over-occupancy is "an obvious and rational justification" for the requirements (*id*. at 852). The court found for the county and dismissed the property owner's case.

Eighth Circuit (Legal Non-conforming Use, Takings Clause, Dormant Commerce Clause, Contract Clause, Procedural and Substantive Due Process): *MDKC, LLC v. City of Kansas City*, no. 23 cv 00395 (W.D. Mo. 2023) 2023 WL6406403 –In 2018 Kansas City adopted an ordinance authorizing short-term rentals in residentially zoned areas, so long as the applicant submitted required documentation that included signatures from 55% of the surrounding neighbors and, additionally, allowed short-term rentals as a matter of right in business zones so long as the applicant paid the permit fee (*see id*. at 1). Thereafter, the city conducted a survey of its residents regarding the impact of short-term rentals and, after a public hearing and meeting in 2023, adopted new ordinances overriding the former short-term rental ordinance. The 2023 ordinances distinguished between resident short-term rentals and non-resident short-term rentals. Resident short-term rentals were authorized in residential and non-residential zones, while non-resident short-term rentals were prohibited in residential zones and subject to density restrictions in non-residential zones. The city allowed pre-existing short-term rental permittees to continue their operations, even if they did not meet the new requirements.

Based on the 2023 ordinances, the city denied the plaintiffs' pending short-term rental permit applications. They sued, alleging that their properties were legal non-conforming uses and that the 2023 ordinances violated the Takings Clause, the dormant Commerce Clause,

Continued on page 12

the Contract Clause, as well as substantive and procedural Due Process.

Legal non-conforming use: The court dismissed the plaintiffs' claim that their short-term rentals were legal non-conforming uses under Missouri law, as they had not exhausted their administrative remedies before seeking relief in court.

Takeaway for localities: *Property owners that fail to exhaust administrative remedies at the local level will likely not prevail when challenging short-term rental regulations.*

Takings Clause: The plaintiffs also asserted that the 2023 ordinances resulted in an unconstitutional taking by: 1) depriving them of all economically viable use of their property, 2) depriving them of vested property rights acquired before the 2023 ordinances were enacted; 3) depriving them of vested property rights in investment properties that were made in reliance on the 2018 ordinance; and 4) depriving them of vested property rights because the city delayed processing their short-term rental applications. As three of the four claims required the plaintiff to exhaust administrative remedies, the court only examined whether the ordinances deprived the plaintiffs of all viable economic uses of their property. Predictably, this claim failed, as plaintiffs had other ways to generate economically beneficial uses of the property, including leasing the properties on a long-term basis, living on the premises, or selling the property (*see id*. at 6, citing *Nekrilov*, *supra*).

Takeaway for localities: *As the Third Circuit indicated, to succeed with a Takings Clause claim the property owner has the burden of demonstrating that all economically beneficial uses of their property have been extinguished by a regulatory action.*

Dormant Commerce Clause: The court noted that if a state law discriminates against interstate commerce, it has to withstand strict scrutiny and be drawn as narrowly as possible to advance a legitimate local interest. But the court found that the 2023 ordinances did not discriminate against interstate commerce, as the primary resident in the residential short-term rental did not have to be the owner, as discussed in *Hignell*, *supra*, and *Rosenblatt*, *infra*. Indeed, nothing prevented an out-of-state property owner from leasing a portion of their property to a long-term tenant and leasing the remainder as a short-term rental, among other things. Even if the ordinance did discriminate against interstate commerce, the court found that the burden on interstate commerce was not significant enough to outweigh valid government interests.(*see id*. at 8).

Takeaway for localities in the Eighth Circuit: *Unlike the Hignell-Stark Fifth Circuit decision in 2022, this court appeared to find the locality's justifications in enacting the short-term rental restrictions for the benefit of the community far outweighed the minimal impact on interstate commerce. (The court also deemed the plaintiffs' brief conclusory and without evidence to support their assertions, which may have had an impact).*

Contract Clause: The court disagreed with the argument that the 2023 ordinances prevented plaintiffs from fulfilling contracts for future guest reservations, to the tune of $200,000. While the Contract Clause prohibits states from interfering with contractual obligations, the plaintiffs could not rely on the Contract Clause to protect contracts not yet entered into on properties that had never obtained a valid short-term rental permit. Again referring to *Nekrilov, supra*, the court found that it is unreasonable to conclude that one could rely upon an earlier, less restrictive ordinance indefinitely without additional restrictions (*see id*. at 9). Additionally, the city provided legitimate purposes for the 2023 ordinance and the court would not second guess the reasonableness of a zoning ordinance enacted to promote the public health and interest (*see id*.).

Procedural and Substantive Due Process: The plaintiffs' procedural due process claim was dismissed as they failed to make supporting arguments. In terms of substantive due process, the court looked to the "shocks the conscience" standard referenced in the First Circuit in *Thayre*, *supra*, and found that the 2023 ordinances did not shock the conscience. On the contrary, the city identified legitimate reasons in enacting the changes, including protecting the residential character of the neighborhood and reducing nuisance activity associated with short-term rental (*see id*. at 11).

Takeaway for localities: *When invoking substantive due process violations, land use regulations have to be truly irrational and egregious before they "shock the conscience." When drafting short-term rental regulations, rely upon legitimate reasons for enacting any restrictions.*

Ninth Circuit (Dormant Commerce Clause): *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) –A property owner filed suit against the city, alleging that its short-term rental ordinance requiring primary residents to remain in the dwelling unit in order to operate a short-term rental violated the dormant Commerce Clause and discriminated against interstate commerce. The ordinance prohibited short-term rentals of 30 days or less, but excepted home sharing from this requirement, or those properties where a primary resident (as opposed to owner) remained in the dwelling (*see id*. at 442). In adopting the ordinance, the city indicated that it sought to preserve available housing stock and the local

character and charm that result from its resident population (*see id.*). The plaintiff, who had previously rented her property on a short-term basis, commenced an action alleging that the ordinance violated the dormant Commerce Clause and was not enacted to preserve local housing stock and character of the community but instead, to drive tourists back to hotels to increase the declining revenue from the transient occupancy tax – which hotels paid and short-term rentals did not.

Dormant Commerce Clause: At the outset, the court noted that under California law, it must presume that the local legislative body did not intend to violate the Constitution when enacting ordinances. Following this principle, the court further indicated that the dormant Commerce Clause required a two-tiered approach: 1) when the regulation directly regulates or discriminates against interstate commerce, or when the regulation favors in-state economic interests over out-of-state interests, the court will strike down the regulation without further review; and 2) if the regulation is evenhanded and only indirectly impacts interstate commerce, the court will look to whether the regulator's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits (*see id.* at 444, citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 US 573 (1986)).

Applying this analysis, the court found that while vacation rentals generally implicate interstate commerce, the ordinance itself did not directly regulate the interstate aspect of the vacation rental business, as it only penalized conduct in the city, regardless of whether the visitors were from in-state or out-of -state and, additionally, the law was applied evenhandedly (*see id.* at 445, 446).

Takeaway for localities: *a local regulation will be struck down if it directly regulates or discriminates against interstate commerce. A local law is much more likely to withstand constitutional scrutiny if the interstate commerce components are incidental to regulating pursuant to municipality's police power or land use authority.*

As to whether the city's interest was legitimate and whether the burden on interstate commerce exceeded the local benefits, the court found that the ordinance did not discriminate against interstate commerce for a number of reasons. Importantly, the court held that the primary resident on-site requirement did not violate the dormant Commerce Clause because, in contrast to the 2022 *Hignell-Stark* decision from the Fifth Circuit, the city's policy did not require an owner to reside on premises but rather, a primary resident. That is, the dwelling could have an out-of-state owner yet a primary resident that is not the out-of-state owner on the premises, thereby complying with the city's policy.

Takeaway for localities: *in the event that the jurisdiction wants to ensure responsible adult supervision of short-term rental dwellings, it is constitutionally acceptable to require a "primary resident" to remain on premises, as this does not implicate the dormant Commerce Clause, given that out-of-state owners do not have to be the primary resident in question and still own the property.*

The court concluded that land use ordinances are inherently local and not a significant burden on interstate commerce merely because they disappoint out-of- state visitors (*see id.* at 452, citing *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005)).

Tenth Circuit (Substantive Due Process, Equal Protection, Dormant Commerce Clause): *Colorado Property Owners for Property Rights v. Town of Breckenridge,* no. 23-cv-03171 (D. Colo. 2024) 2024 WL 3345230 –Breckenridge, Colorado adopted short-term rental regulations capping short-term rental licenses to 2,200 non-exempt units. Exempt units – for which there were no caps – included properties that provided certain twenty-four-hour services, including a staffed front desk and private security, while non-exempt units did not provide these services. The town indicated that exempt units required substantially less time to monitor and regulate than non-exempt units (*see id.* at 1). The plaintiffs sued asserting, among other things, that the ordinances violated substantive due process, equal protection, and the dormant Commerce Clause.

Equal Protection: Consistent with other circuits, the court found that the proper standard of review is the rational basis test, as the ordinance did not characterize based on suspect classifications or implicate fundamental rights (*see id.* at 4). Applying rational basis, the court found that the property owners failed to demonstrate that there was no plausible basis to support the ordinances. Given that the ordinances enjoyed a strong presumption of validity and that the restrictions in limiting the number of permits could advance the stated purposes of reducing noise, parking, and waste disposal issues, the court denied the plaintiff's equal protection claims.

Takeaway for localities: *the court included the quote that "federal courts have concluded uniformly that the right to dispose of one's property is not fundamental for equal protection purposes" (see id. at 4, quoting 211 Eighth, LLC v. Town of Carbondale, 922 F. Supp. 2d 1174 (D. Colo. 2013)). To this end, property owners are likely to be unsuccessful in any equal protection claims that arise out of property rights associated with short-term rentals unless the locality treats similarly situated classes differently.*

Substantive Due Process: The plaintiffs did not separately argue

Continued on page 34

any substantive due process claims and instead asserted that the court should simply overturn the ordinances. Finding that, as with an equal protection claim, absent the presence of a fundamental constitutional right, legislation that bears a rational relationship to a legitimate governmental interest will survive a due process challenge (*see id.* at 6, quoting *People v. Zinn*, 843 P.2d 1351 (Colo. 1993)), the court dismissed the substantive due process claims.

Dormant Commerce Clause: The court found that the plaintiffs failed to demonstrate how the ordinances treated in-state and out-of-state interests differently. While there was no cap on exempt properties, there was nothing that prohibited out-of-state owners from owning a short-term rental that provided 24-hour services that would render their property exempt.

Eleventh Circuit (Equal Protection, Due Process, Takings Clause, First Amendment, Contracts Clause, Dormant Commerce Clause): *Short-term Rental Owners Association of Georgia, Inc. v. Cooper*, 515 F.Supp. 3d 1331 (11th Cir. 2021) –The county modified its short-term rental regulations by prohibiting rentals in most residential zones for less than 30 days, although the regulations allowed short-term rentals that were in existence prior to the enactment of the regulations to continue, so long as the rental was no less than a week (*see id.* at 1337). Plaintiffs filed suit asserting that the ordinance violated the Fourteenth Amendment, the Takings Clause, the Free Speech Clause, the dormant Commerce Clause and the Contracts Clause.

Initially, the court opined that inasmuch as the initial short-term rental regulation did not authorize short-term rentals for less than a week, the plaintiffs did not have a vested interest in continuing to rent their properties for less than a week.

Takeaway for localities: *if a property owner's use of their property is not lawful in the first instance, they will have a heavy burden to overcome when trying to assert a vested interest in a non-conforming use.*

Equal Protection: Applying rational basis, the court found that the ordinance limiting short-term rentals was rationally related to the legitimate government purpose of mitigating the adverse impacts on the quality of life on neighboring residents and increasing affordable housing. Inasmuch as the federal circuit courts have previously held that short-term rental regulations are justified, given that municipalities have legitimate interests in ensuring permanent housing stock and maintaining the character of neighborhoods (*see Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579 (Ct. App. 6th Dist. 1991)), the court dismissed the Equal Protection claim.

Due Process: The court found that while the Eleventh Circuit has recognized a tailored substantive due process right of property owners to not have their property restricted by land use controls that have no substantial relation to the public health, safety, morals, or general welfare (see *Short-term Rental Owners Association* at 1348, citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 [11th Cir. 1993]), this right could not be invoked in this case because the county had demonstrated a relationship between the regulations and the general welfare of the community.

Takings Clause: The court found that the property owners failed to demonstrate that the short-term rental regulation deprived them of all economically beneficial or productive uses of their property. Additionally, the court confirmed that a mere diminution in property value is insufficient to demonstrate a taking requiring just compensation (*see id* at 1349, citing *Lucas*, 505 US 1003 (1992)).

Takeaway for localities*- a property owner is unlikely to prevail on a regulatory takings claim that results from short-term rental prohibitions if other means to derive economic use out of their property exist, including long-term rentals, selling the property, or residing on the property.*

Free Speech: The plaintiffs argued that the regulation violated First Amendment free speech rights by discouraging persons seeking to rent their property to advertise or communicate the availability of the short-term rental (*see id.* at 1349). The court dismissed, saying that any impact on speech is incidental to the regulation of commerce or commercial conduct.

Takeaway for localities: *Property owners will be unsuccessful in challenging short-term rental regulations on the basis of free speech when the regulations govern commerce or commercial conduct.*

Contract Clause: Inasmuch as the plaintiffs failed to even allege the existence of a specific contract impacted by the ordinance, the court dismissed this claim. Indeed, the Contracts Clause does not provide a right to enter contracts in the future but rather protects the impairment of existing contracts. Even if the plaintiffs had existing contracts, the court deferred to the county's judgment as to the necessary and reasonableness of the ordinance (*see id.* at 1350, citing *Energy Re-*

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