HOT TOPICS IN LAND USE LAW

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In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Vice Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board. In August 2015 he was appointed a member of the Board and in September 2019 Mayor Eric Johnson appointed him as the Chair of the Civil Service Board.

In his free time, Terry enjoys long distance running, having competed in 90 half-marathons as well as many other long-distance races. He completed his 52nd marathon in Austin in February 2020. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons.

I.

Introduction

Local governments are often an incubator for novel land use practices—sometimes not because local governments themselves are necessarily innovative, but because local governments must respond to proposed innovative land uses. For example, most local governments did not adopt short-term rental ordinances in advance of the Airbnb or VRBO phenomenon; rather, short-term rental ordinances usually were adopted in response to the burgeoning short-term rental business already occurring in the community. The purpose of this paper is to identify several current hot-button land use topics and analyze how cities across Texas and the nation have endeavored to address these issues. In no particular order, I have attempted to provide a synopsis of those topics.

II.

Short-Term Rentals in Texas and the Evolving Law

As I referenced in my 2017 presentation to this conference,[1] lodging platforms, such as Airbnb, HomeAway, and VRBO, facilitate the rental of private residences on a short-term basis. Generally, prospective hosts register a residence with a platform – providing descriptions, pictures, available dates, and other information useful to prospective renters. The platform provides the app, links to relevant information, advice regarding how to advertise and provide lodging services, and some rules for participants using the site. The platform may inform prospective hosts of potentially applicable regulations, but leaves compliance up to the hosts. Prospective renters also can register as users with a short-term lodging platform, allowing them to search, identify options, contact hosts, and reach a rental agreement. The platform receives and holds the rental payment, disbursing the amount after deducting its fee and only after the renter has arrived. The platform also provides an opportunity for both hosts and renters to rate their transactions.[2]

A. What Are Texas Cities Doing?

Not surprisingly, local governments in Texas have struggled (and still struggle) about how to address short-term rentals ("STRs") and the multitude of issues that they present—what length of stay qualifies as a short-term rental, whether "owner occupancy" or "owner presence" is required for such rentals, inspections and licensing fees for rental property, insurance requirements, payment of local hotel occupancy taxes, and a host of

[1] *See Land Use Issues in a "Sharing Economy,"* presented to the 21st Annual Land Use Conference at The University of Texas at Austin (April 6, 2017).

[2] *Id*. at 4 (citations omitted).

enforcement issues.[3] Municipal regulation in Texas runs the gamut from no regulation of STRs, the outright banning of all STRs, limiting the location of STRs, to the comprehensive, restrictive regulation of STRs.

Houston and El Paso, for example, have adopted no regulations about short-term rentals of property. In February of this year, Dallas appointed a task force to study the issue and make recommendations to the city council—specifically, whether to strengthen enforcement of current STR registration regulations[4] or to adopt additional regulations regarding STRs. While Dallas for years opted not to regulate short-term rentals, the financial impact of such an approach is fairly staggering:

- $64 million in supplemental income was generated by Airbnb hosts in North Texas, of which $37 million was earned by homeowners in Dallas County;
- A typical Airbnb host in North Texas earns $6,800 per year from short-term rentals; and
- There are 466,000 Airbnb guests per year in North Texas, which includes 253,000 in Dallas County.[5]

As of January 31, 2020, there were 400 registered STRs in the City of Dallas, and city staff estimates that there is a total of 1,200 STRs in Dallas.[6] The Dallas task force will present regulatory options to the City Council for consideration.[7]

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[3] *Id*. at 8-12.

[4] Operators of short-term rentals in Dallas must register the STR with the City Controller's Office and pay the hotel occupancy tax on any income derived from the rental. *See*, *generally*, City of Dallas Code of Ordinances, ch. 27, art. VII (registration requirements and payment of applicable hotel occupancy taxes levied on the property, pursuant to ch. 44, art. V of the City of Dallas Code of Ordinances). *See also* "Short Term Rentals Regulations," Power Point Presentation to the Quality of Life, Arts & Culture Committee of the Dallas City Council, by Kris Sweckard, Director of Sustainable Development and Construction, February 18, 2020 (hereinafter "Dallas STR Presentation"), found at https://cityofdallas.legistar.com/LegislationDetail.aspx?ID=4333016&GUID=2FBC2230-E685-474C-9D75-64F896F65C51&Options=&Search=.

[5] Dallas STR Presentation at 4 (referencing a *Dallas Morning News* article from January 10, 2019).

[6] *Id*. at 7.

[7] *See Dallas Morning News*, "Dallas eyeing more rules," at 1 (February 20, 2020).

Several cities in Texas—Hurst,[8] Southlake,[9] Sugar Land,[10] Grapevine[11] and Westlake[12]—have outright banned the short-term rental of property. Locational-restrictive regulations are found in Arlington, for example, where short-term rentals are prohibited in single-family residential zoning districts except in the city's entertainment district (Six Flags, AT&T Stadium—home of the Dallas Cowboys, and Globe Life Field—new home of the Texas Rangers), and in other zoning districts subject to certain regulations.[13]

Limitations on the permitted location of short-term rentals have been addressed by several Texas cities. Fort Worth, for example, requires property owners to obtain a bed-and-breakfast permit only available to homes built before 1993. STRs are not permitted in residential areas, and no hotel occupancy taxes are collected and no registration is required.[14] Nevertheless, it is reported that Fort Worth had anywhere from about 800 to more than 1,200 listings a month in 2019.[15] Galveston ordinances require owners of short-term rentals to pay a $50 fee and provide guests with a brochure on the city's

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[8] *See* Hurst, Tex., Code of Ordinances § 5-396.1. The author wishes to thank Matthew C. G. Boyle for this listing of cities, contained in his presentation to the 23rd Annual Land Use Conference at The University of Texas at Austin (April 25-26, 2019), entitled *Short-Term Rentals—Regulatory Options to Protect Neighborhoods*.

[9] *See* Southlake, Tex., Code of Ordinances § 11-94.

[10] *See* Sugar Land, Tex., Development Code § 2-71 (matrix of uses). *See also* https://www.sugarlandtx.gov/1571/Short-Term-Rentals.

[11] *See* Grapevine, Tex., Code of Ordinances §14-151 (prohibiting single-family dwelling transient rentals).

[12] *See* Westlake, Tex., Code of Ordinances § 18-112.

[13] *See*, *e.g.*, Arlington, Tex., Unified Development Code §§ 3.4.5 (location and other restrictions) and 12.3.6(E) (definition of "short-term rental"). The short-term rental ordinance was adopted on April 23, 2019, and a copy may be found at https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/341586/_att_i__Ordinance-UDC_Amendment-Short-term_Rentals_rev04052019.pdf.

[14] *See*, *e.g.*, Fort Worth, Tex., Code of Ordinances, Appendix A, § 4.603 (Short term rental of homes not permitted in residential zoning districts, as referenced in Use Table).

[15] *See* https://communityimpact.com/dallas-fort-worth/keller-roanoke-northeast-fort-worth/housing-real-estate/2020/01/29/fort-worth-officials-contemplate-rules-on-short-term-rentals/.

"minimum standards of conduct," including noise limits, parking instructions and occupancy limits.[16]

San Antonio recently amended its Code of Ordinances to address short-term rentals of residential dwellings, specifying Type 1 rentals (a residential dwelling unit, or a portion thereof, which is either occupied by the owner, as reflected in title records, or an operator as reflected in a valid lease agreement, and with the express permission of the property owner") and Type 2 rentals (a residential dwelling unit, or a portion thereof, which is either not occupied by the owner or operator, or the owner or operator does not occupy another dwelling unit, or portion thereof, on the same property, as reflected in title records). The regulations further provide density limitations; mandate that the operator may not provide prepared food or beverage for consumption for a fee; and STRs in residential zoning districts shall not include venues for weddings, events, restaurants, or meeting halls either as an accessory use or a primary use.[17] San Antonio does not collect hotel occupancy taxes from short-term rentals through sites like Airbnb.[18]

The City of San Angelo adopted a short-term rental ordinance on January 17, 2017. Prior to that date, short-term rentals were not authorized by the zoning ordinance; however, after lengthy deliberation, San Angelo revised its zoning ordinance to allow short-term rentals. In brief, the ordinance mandates a conditional use permit for a short-term rental (in San Angelo's zoning ordinance, a conditional use is approved by the planning commission, and if denied, may be appealed to the city council); defines a "short term rental" as a dwelling rented for 30 days or less, and meets certain other criteria; implements a parking standard to ensure a minimum amount of parking on the site; mandates no more than two adults per bedroom; outdoor gatherings for parties, picnics, family reunions, and similar activities are limited to the hours of 7:00 a.m. to 10:30 p.m. and may not include more than 20 people total; hotel occupancy tax registration; an annual fire safety inspection; requires that the owner of a short-term rental must designate an "operator" who resides within Tom Green County and a telephone number for that person; the short-term rental may not be located on a street with a pavement width less than 30 feet, although existing registered uses may continue; may not be located within 500 feet of another short-term rental; and posting of certain notices within the short-term rental property.[19]

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[16] *See*, *e.g.*, Galveston, Tex., Code of Ordinances, § 19-113 *et seq*. (short-term rental provisions for residential dwelling units) and Appendix A, § 2.360. *See also* http://www.star-telegram.com/news/local/community/fort-worth/article134996934.html.

[17] *See* San Antonio, Tex., Code of Ordinances § 35-374.01.

[18] http://news4sanantonio.com/news/local/city-to-consider-regulating-airbnb-other-short-term-rentals-in-neighborhoods.

[19] *See* San Angelo, Tex., Code of Ordinances, Exhibit A, Zoning Ordinance, § 406.

Austin arguably has adopted the most comprehensive short-term rental ordinance in the state—and is currently defending it in court. Austin requires residential homeowners to obtain a license prior to leasing out their property for a period of less than 30 days (by definition, a "short-term rental"). The City has established three different categories of short-term rentals and corresponding licenses: Type 1 (owner-occupied residential rentals); Type 2 (residential rentals not part of a multifamily residential use, the unit is not owner-occupied and not associated with an owner-occupied principal residential use); and Type 3 (rentals that are part of a multifamily complex).[20] While the Austin ordinance provides for a fairly detailed licensing and regulatory scheme (licensing, local contacts, occupancy limits, general limitations on uses and prohibited activities on short-term rental properties), a February 2016 short-term rental ordinance amendment was adopted in response to an outcry by neighbors living near short-term rental properties. Perhaps the most controversial provision of that ordinance amendment related to Type 2 rentals, phasing out all such rentals by April 1, 2022.[21]

After the adoption of the February 2016 short-term rental ordinance amendment, several landowners, represented by the Texas Public Policy Foundation, sued the City of Austin, attacking virtually all of the ordinance's provisions.[22] While the "phase out" of Type 2 rentals is alleged to violate state constitutional law[23] (the state constitutional "due course of law" provision, arbitrary and capricious actions by the City, unconstitutional taking of property), much of the plaintiffs' wrath is directed at Section 25-2-795 of the ordinance,[24] asserting that the occupancy regulatory provisions violate state

[20] *See* Austin, Tex., Code of Ordinances §§ 25-2-788-790.

[21] *See* Austin, Tex., Ordinance No. 20160223-A.1. The "phase out" provision related to Type 2 short-term rentals is now found in § 25-2-950 of the Austin Code of Ordinances.

[22] *Ahmad Zaatari, et al. v. City of Austin, Texas, and Steve Adler, Mayor of the City of Austin*, Cause No. D-1-GN-16-002620, in the 53rd Judicial District Court of Travis County, Texas.

[23] No federal causes of action were asserted in the lawsuit, thus foreclosing removal to federal court.

[24] Austin, Tex., Code of Ordinances § 25-2-295, "Occupancy Limits for Short-Term Rentals," provides, in part, that not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.; a licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.; a licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m., and an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.

constitutional equal protection provisions, authorize unreasonable warrantless searches, and exceed the City's constitutional power to zone property.[25]

On October 5, 2016, the attorney general intervened in the Austin lawsuit, alleging the following:

> Short-term rentals ("STRs") are an increasingly popular feature of the sharing economy. They allow property owners to earn income by renting spare bedrooms, or their entire homes or apartments. And they provide guests the convenience of staying in a furnished residence. Many turn to STRs for group vacations or extended business travel. They also attract interested homebuyers who wish to explore new neighborhoods and existing homeowners whose homes are under renovation.
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> The City of Austin . . . now effectively seeks to end STRs in non-owner occupied homes. In Ordinance No. 20160223-A.1 ("Ordinance"), the City halted the issuance of new STR licenses for such residences, imposed strict restrictions on existing licenses, and set a deadline when these licenses would be terminated, except in specified areas. . . . The Ordinance does not purport to compensate affected property owners. Several property owners who rely on income from STRs to pay for their homes filed this lawsuit, alleging that they will be forced to sell their homes as a result of the Ordinance.
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> Government officials, however, may not use their authority to violate constitutional rights. The Ordinance raises significant constitutional questions, because it functionally ousts homeowners and investors from real property without just compensation. Thus, Texas intervenes.[26]

The attorney general contended that the Austin short-term rental ordinance constituted an unconstitutional regulatory taking of property under both state and federal law, depriving owners of their reasonable, investment-backed expectations—that is, the loss of future short-term rental income reduced the value of the property and without the short-term rental income, the plaintiffs "lack the means to pay their property taxes, mortgages, maintenance, and expenses on their homes. . . . Thus, a question is

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[25] Interestingly, an article in the *National Review* contended that there have not been significant complaints referred to Austin municipal court for alleged violations of the short-term rental ordinance, and as a consequence, additional regulations by the City are "incentivizing people to act illegally"—if only licensed operators are being regulated, more operators will opt not to be licensed. *See* http://www.nationalreview.com/article/437154/overregulation-austin-texas-tries-shut-down-airbnb.

[26] *Zaatari* lawsuit, *supra* note 22, Plea in Intervention of Texas, at 1-3.

presented as to whether the City may pull the rug from under homeowners who invested in STR properties."[27]

As will be addressed *infra*, the Austin Court of Appeals issued an opinion in the *Zaatari* case on November 27, 2019.[28]

B. Limited Texas Case Law on STRs Prior to 2018

Prior to 2018, Texas case law addressing short-term rentals was indeed sparse. In *Friedman v. Rozzlle*,[29] an unreported Corpus Christi Court of Appeals case, Gail Rozzlle, the owner of a home in Sun Harbour Cottages in Rockport and the operator of a business that rented cottages there for nineteen years, filed a lawsuit against the property owners' association and the homeowners in the Sun Harbour subdivision. Ms. Rozzlle sought a determination of whether Section 11.3, the short-term rental provision of the Declaration of Covenants, Conditions, and Restrictions for Sun Harbour, should be enforced. Section 11.3 provided, in part, that the term of any lease of a residence may not be for a period of less than thirty 30 days, with no transient tenancy or occupancy and no hotel purposes allowed.[30] Ms. Rozzlle claimed that the homeowners consented to and waived any right to object to the use of the Sun Harbour cottages for short-term rentals and requested that the trial court declare Section 11.3 unenforceable, void, and waived by the homeowners.[31]

Ms. Friedman answered and filed a counter-claim against Ms. Rozzlle and a cross-claim against the property owners' association and all other homeowners, asserting that they had violated the short-term rental provision. Ms. Friedman claimed that the homeowners "continued to offer their properties for short-term rental" and that the property owners' association had "taken no steps to stop this ongoing violation."[32]

At a summary judgment hearing, the trial court determined that violations of the short-term rental prohibition in Section 11.3 were extensive and material, concluding that the homeowners' acquiescence in these violations of Section 11.3 amounted to an abandonment of the provision or a waiver of the right to enforce it. Specifically, the evidence showed that the homeowners in the subdivision had rented properties on a

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[27] *Id*. at 7.

[28] __ S.W.3d __, 2019 WL 6336186 (Tex. App.—Austin 2019).

[29] 2013 WL 6175318 (Tex. App.—Corpus Christi 2013, pet. denied).

[30] *Id*. at *1.

[31] *Id*.

[32] *Id*.

short-term basis for over a decade, signs had been posted throughout the subdivision about the availability of short-term rentals, both Ms. Rozzlle and Ms. Friedman had short-term rented their cottages, and association meetings had occurred where short-term rentals were discussed and no objections had been raised.[33] The appellate court affirmed the trial court, similarly holding that the short-term rental prohibition in the covenants was void.

In the next case to address short-term rentals, the Austin Court of Appeals in 2015, in another unpublished decision, held that a subdivision's restrictive covenants were unenforceable relative to short-term rentals by residents of the subdivision. In *Zgabay v. NBRC Property Owners Association*,[34] an issue arose whether the restrictive covenants in the River Chase subdivision in Austin, which provided that properties in the subdivision are only to be used "for single family residential purposes," prohibited the short-term rental of homes in the subdivision. The Zgabays bought land in the subdivision in 2000, built a house on it, and lived there for a number of years. In 2014, they began to rent the house when they were not in occupancy, for terms of fewer than thirty days. They later moved to a different home, retaining their house in the subdivision as a rental property. At the time of trial, the house was rented under a one-year lease, and the Zgabays intended to continue advertising and renting the house for varying lengths of time, paying hotel and lodging taxes when the house was rented for fewer than thirty days. In 2014, the homeowners' association demanded that the Zgabays cease short-term and vacation rentals and online advertising of their property, asserting that such use was in violation of the restrictive covenants.[35]

The Zgabays responded by filing suit, seeking declaratory relief that the restrictive covenants do not prohibit short-term rentals or otherwise restrict rentals based on duration, and that renting the house to an individual or single family for residential use is considered a "single family residential purpose" that is allowed under the restrictive covenants. Although the association was successful in the trial court, the appellate court reversed and utilized the general rules of contract construction when interpreting the applicable restrictive covenants.[36] In this litigation, the court wrote that when a restrictive covenant may reasonably be interpreted in more than one way, it is ambiguous, and the court should resolve all doubts in favor of the free and unrestricted use of property, strictly construing any ambiguity against the party seeking to enforce the restriction. Here, the court wrote the Zgabays' house may be used "for single family residential purposes." The homeowners association "asserts that short-term rental of a property is not single family residential use; the Zgabays assert that rental of the property by an individual or a family,

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[33] *Id*. at *4-5.

[34] 2015 WL 5097116 (Tex. App.—Austin 2015, pet. denied).

[35] *Id*. at *1.

[36] *Id*. at *2.

regardless of the term of the lease, is a single family residential purpose."[37] Since the restrictive covenants did not define "single family residential purposes," the appellate court concluded: (1) the leasing or renting of residences in the subdivision is permissible, (2) the covenants themselves do not place any limit on the duration of the leasing of a residence, and (3) the drafters were familiar with the concept of time limits with regard to uses that may be made of structures in the subdivision and did not impose any duration limits with regard to the leasing of homes. Under these circumstances, the absence of a specific minimum duration for leasing at best renders the restrictive covenants ambiguous. Therefore, the court was compelled to resolve the ambiguity against the homeowners' association and in favor of the Zgabays' free and unrestricted use of their property.[38]

The last case, which is reported, is *Village of Tiki Island v. Ronquille*,[39] involved the adoption of a new prohibition on short-term rentals in the Galveston County community. In this litigation, the plaintiffs, property owners in the Village contended that they had been able to engage in short-term leases and rentals of their property for more than 20 years, until such time as the Village adopted an ordinance prohibiting short-term rentals in 2014. Upon adoption of the ordinance, the plaintiffs filed suit, contending that the prohibition of short-term rentals constituted a regulatory taking of their property.[40] Interestingly, the Village "grandfathered" fifteen properties from the prohibition because those properties had been used for short-term rentals before March 1, 2011, and were current in payment of taxes to the Village and the State of Texas.[41]

The trial court entered a temporary injunction on behalf of the plaintiffs, and on appeal the court determined that it lacked jurisdiction to address the injunction for four of the plaintiffs, but affirmed the injunction for one plaintiff, holding that she had

> presented evidence that the enactment of [the short-term rental prohibition ordinance] had an economic impact on the value of her property, and that she had a reasonable, investment-back expectation that she could engage in short-term rentals. [Her] allegations and evidence, taken as true and construed liberally in her favor, establish a viable takings claim for which the

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[37] *Id*.

[38] *Id*. at *3.

[39] 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

[40] *Id*. at 564-65.

[41] *Id*. at 568. The record is not especially clear why those properties beginning short-term rentals between March 1, 2011, and May 20, 2014 (the date of adoption of the ordinance), were not likewise "grandfathered." The Mayor did attempt an explanation, though, on particular houses. *Id*.

Village's sovereign immunity is waived.[42]

It is interesting to note that the *Tiki Island* case involved an interlocutory appeal of an injunction, not a ruling on the merits of the case. Specifically, footnote 7 of that opinion states:

> We do not opine on the reasonableness of the short-term rental ordinance or whether [the plaintiff] can ultimately establish a regulatory takings. Our holding here is limited to the conclusion that [she] presented sufficient evidence to support the trial court's finding of a probable right of recovery.[43]

Notwithstanding the express limited nature of the appellate court's holding in the *Tiki Island* lawsuit, the attorney general's Plea in Intervention in the *Zaatari*[44] case characterizes the *Tiki Island* holding quite differently:

> Recently, the First Court of Appeals held that an STR ordinance in the Village of Tiki Island constituted a regulatory taking. The court considered the economic impact of the ordinance and its interference with reasonable, investment-back expectations. As to the former, it found that the loss of future STR income reduced the value of the homeowner's property. And as to the latter, it concluded that there was a reasonable investment-backed expectation based on the ability to offer STRs before the ordinance.[45]

The attorney general's interpretation of *Tiki Island* seems to contradict the express holding of the appellate court—the appellate court opted not to opine on the ultimate legal issues in the case, and the attorney general concluded in its Plea in Intervention in *Zaatari* that the appellate court in fact had determined that the Village of Tiki Island's short-term rental ordinance was an unconstitutional regulatory taking of property.[46]

As a review of the foregoing case authority clearly reflects, prior to 2018 Texas courts, perhaps contrary to the representations of the attorney general, had not

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[42] *Id*. at 582.

[43] *Id*. at 582 n.7.

[44] *Zaatari* lawsuit, *supra* note 22.

[45] *Id*., Plea in Intervention of Texas at 6 (citations omitted).

[46] For a more detailed discussion of the *Tiki Island* decision, *see* Matthew C. G. Boyle's presentation to the 23rd Annual Land Use Conference at The University of Texas at Austin (April 25-26, 2019), entitled *Short-Term Rentals—Regulatory Options to Protect Neighborhoods*, at 11-12.

addressed "head on" municipal prohibitions of short-term rentals or the extent to which a municipality may regulate them. But, in 2018, the ground started to shift because of a property rights case out of San Antonio and the *Zaatari* case out of Austin.

C. *Tarr v. Timberwood Park Owners Association*: Gumming Up the Works for Cities?

On February 6, 2018, the Texas Supreme Court issued its opinion in *Tarr v. Timberwood Park Owners Association*.[47] *Tarr* did not address any attempted municipal regulation of STRs; rather, it analyzed the meaning of a restrictive covenant being enforced by a homeowners' association against a resident who utilized his property in the subdivision as an STR.

Mr. Tarr purchased a single-family home in San Antonio's Timberwood Park subdivision in 2012. Two years later, after being transferred by his employer to Houston, he began advertising his home for rent on short-term lodging platforms such as VRBO. Between June and October of 2014, he entered into 31 short-term rental agreements, ranging from 1 to 7 days each. Mr. Tarr's rentals were fairly standard for shared lodging rentals: no requirement that renters be part of the same family; the entire home was rented, not rooms; no on-site services (cooking, room service or housekeeping) were provided; and no business office or leasing office, signage or other business activities were on-site. Mr. Tarr, however, did pay applicable hotel occupancy taxes.[48]

Mr. Tarr's neighbors apparently were not happy with the short-term rentals of his home, and in 2014 the Owners Association notified him that his rentals "violated two deed restrictions: (1) the residential-purpose covenant, and (2) the single-family-residence covenant."[49] The residential-purpose covenant provided, in part, that "[a]ll tracts shall be used solely for residential purposes" and the single-family-residence covenant provided, in part, that "[n]o building, other than a single family residence . . . shall be erected or constructed on any residential tract. . . ."[50] The Owners Association determined that Mr. Tarr had violated the covenants because the short-term rentals "rendered the tract 'a commercial rental property,'" and thereafter imposed fines after Mr. Tarr did not comply with the Owners Association's requirement that he remove all online advertisements and no longer use the home for commercial purposes.[51]

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[47] 556 S.W.3d 274 (Tex. 2018).

[48] *Id*. at 276-77.

[49] *Id*. at 277.

[50] *Id*.

[51] *Id*.

While the Owners Association was successful in the trial court and court of appeals, the Texas Supreme Court reversed and remanded, interpreting the restrictive covenants in question in favor of Mr. Tarr. After a very detailed discussion on the law pertaining to restrictive covenants in Texas, the Court held that neither restrictive covenant in question prohibited Mr. Tarr's use of his home for short-term rentals:

> The single-family residence restriction merely limits the structure that can be erected upon Tarr's tract and not the activities that can permissibly take place in that structure. . . . Because the single-family-residence limitation is not relevant to the short-term rentals at issue, we turn to the question of whether paragraph one—the paragraph restricting use—bars such activity.
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> * * *
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> The covenants in the Timberwood deeds fail to address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose."[52]

The Supreme Court summarized its holding in *Tarr* as follows:

> [W]e hold that so long as the occupants to whom Tarr rents his single-family residence use the home for a "residential purpose," no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds. Moreover, Tarr's use does not qualify as commercial use.[53]

So, what should local governments glean from the *Tarr* decision? I believe the following are some of the "takeaways" from that decision:

- *Tarr* addressed specific deed restrictions, which on their face were somewhat vague and did not specifically prohibit short-term rentals. Consequently, any municipal land use regulations addressing STRs definitely should be more detailed than those restrictions in *Tarr* which were vague.

- Specific municipal zoning restrictions addressing short-term rentals are preferable rather than reliance upon vague terms like "single-family residential purposes" or similar phrases to prohibit STRs; however, most zoning ordinances provide that if a use is not specifically allowed in a city, then it is prohibited—an unlisted use is therefore a prohibited use.

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[52] *Id*. at 290-91.

[53] *Id*. at 291-92 (footnotes omitted).

- Cities that have defined short-term rentals (usually in their zoning ordinances) and provided a regulatory framework for such rentals in all likelihood will not run afoul of the vagueness issues addressed in *Tarr*.

D. *Zaatari* has its Day in Court: The Austin Court of Appeals Strikes Down Portions of Austin's Short-Term Rental Ordinance

As noted above, the Austin STR ordinance, as amended, was challenged in 2016 by property owners as well as the Texas Attorney General's Office. The challenge specifically related to "Type 2" rentals—any single-family residence that "is not owner-occupied and is not associated with an owner-occupied principal residential unit," immediately suspending the licensing of any new Type 2 short-term rentals and establishing an April 1, 2022, termination date for all Type 2 rentals.[54] The Austin ordinance also imposed several conditions on properties operated as STRs: (1) banning all assemblies, including "a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping," whether inside or outside, after 10:00 p.m. and before 7:00 a.m.; (2) banning outdoor assemblies of more than six adults at any time; (3) prohibiting more than six unrelated adults or ten related adults from using the property at any time; and (4) giving City officials authority to "enter, examine, and survey" the short-term rentals to ensure compliance with applicable provisions of the City's code of ordinances.[55] Failure to comply with these provisions was punishable by a fine of up $2,000 per day and possible revocation of the operating license.[56]

Although Austin was successful in the trial court, on appeal the appellate court (in a 2-1 opinion) struck the provisions related to Type 2 rentals of non-homestead properties, declaring them to be unconstitutional as a retroactive law[57] and an uncompensated taking of private property. The majority opinion concluded "that owners of type-2 rental properties have a settled interest in their right to lease their property short term," and Austin's ordinance provision eliminating "type-2 short-term rentals is unconstitutionally retroactive."[58]

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[54] *Zaatari*, 2019 WL 6336186 at *2.

[55] *Id*. *See also* Austin, Tex., Code of Ordinances §§ 25-2-795(D)–(G), 25-12-213-1301.

[56] *Zaatari*, 2019 WL 6336186 at 2, citing Austin, Tex., Code of Ordinances §§ 25-1-462.

[57] The Texas Constitution, in Article I, Section 16, provides, in part, that "[n]o . . . retroactive law . . . shall be made."

[58] *Zaatari*, 2019 WL 6336186 at *10.

The court of appeals also struck the "assembly" provisions contained in the Austin STR ordinance.[59] In doing so, it relied on both the federal and the state constitutional right of assembly:

> [The Austin regulation] plainly restricts the right to assemble and does so without regard to the peaceableness or content of the assembly—as emphasized above, the word "assembly" is used to describe what is being banned or severely restricted temporally, quantitatively, and qualitatively. Even if it the ordinance did not expressly use the word "assembly," section 25-2-795 represents a significant abridgment of the fundamental right to peaceably assemble—i.e., to get together or congregate peacefully. It forbids owners (i.e., "licensees" in the ordinance) and tenants from gathering outdoors with more than six persons, at any time of day, even if the property is licensed for occupancy of six or more. And it prohibits use by two or more persons for any activity "other than sleeping" after 10:00 p.m.
>
> Moreover, in contrast to traditional cases that invoke the right to assemble on *public* property, here the right concerns the freedom to assemble with the permission of the owner on *private* property, implicating both property and privacy rights. , , , Surely the right to assemble is just as strong, if not

[59] Section 25-2-795 of Austin's short-term rental regulations provides that:

> (B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.
>
> (C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.
>
> (D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.
>
> (E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.
>
> (F) For purposes of this section, an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.
>
> (G) A short-term rental use may not be used by more than:
>
> (1) ten adults at one time, unless a stricter limit applies; or
>
> (2) six unrelated adults.

> stronger, when it is exercised on private property with the permission of the owner, thereby creating a nexus with property and privacy rights. . . . [60]

In sum, holding that the Austin ordinance's Type-2 short-term rental provisions infringed on short-term rental owners' and their tenants' constitutional rights to assembly and did not serve a compelling government interest, the Texas Constitution's guarantee to due course of law was violated.[61] Nonetheless, the court wrote that Austin is not powerless to regulate short-term rentals and negative side effects—the City's various nuisance ordinances could be applied—noise ordinances, ordinance prohibiting public urination and defecation, littering ordinance, parking ordinance, disorderly conduct regulations and the public intoxication statute.[62]

On January 13, 2020, Austin filed a motion for reconsideration *en banc*. As of the date this paper was prepared, there had been no action taken by the Austin Court of Appeals on the motion for reconsideration.[63] In its motion for reconsideration, Austin has asserted that the decision (1) undermines the City's zoning powers because the Texas Supreme Court has never struck down a zoning or property-use law as unconstitutionally retroactive; and (2) the majority opinion misconstrued the right of assembly.

So, what should local governments glean from the *Zaatari* decision? I believe the following are some of the "takeaways" from that decision:

- Be mindful of the Texas Constitution's Retroactivity Clause and case law interpreting it.[64] As the dissent in *Zaatari* notes, "[n]ever has the [Texas Supreme] Court struck down a zoning or property-use law as unconstitutionally retroactive, though Texas municipalities have been zoning and regulating property for decades."[65] Did the Austin

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[60] *Zaatari*, 2019 WL 6336186 at *17 (emphasis in original) (citations omitted).

[61] *Id*. at *18.

[62] *Id*. at *17.

[63] *See* City of Austin and Mayor Steve Adler's Motion for *En Banc* Reconsideration, *Ahmad Zaatari, et al. v. City of Austin, Texas, and Steve Adler, Mayor of the City of Austin*, Cause No. 03-17-00812-CV, in the Third District Court of Appeals, Austin, Texas.

[64] *See Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126 (Tex. 2010), for the proposition that not all retroactive laws are unconstitutional (*id*. at 139); however, a retroactive law is unconstitutionally retroactive only so long as 3 factors weigh against the challenged law: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings," (2) "the nature of the prior right impaired by the statute," and (3) "the extent of the impairment." *Id*. at 145, cited in *Zaatari*, 2019 WL 6336186 at *20.

[65] *Zaatari*, 2019 WL 6336186 at *19.

ordinance in fact *prospectively* alter a property owner's future use of the property by setting a date by which to come into compliance? The prospective/retroactive distinction is critical and the further expansion of that concept into the zoning sphere could drastically alter current understanding of fundamental property rights.

- Most cities in Texas that do regulate STRs have adopted ordinances that are not as comprehensive as Austin's STR ordinance. Indeed, the "outright ban" ordinances generally are limited to nothing more than a statement prohibiting the short-term rental of residential property.

- As the *Zaatari* opinion reflects, including limitations on the assembly of persons on property where there is a short-term rental is a regulation that should be carefully considered before adoption, including the practical ability to enforce such a provision.

- Not unlike many municipal code enforcement matters, enforcing a detailed STR regulatory scheme may be difficult, if not impossible, for most cities. Reliance upon "traditional" nuisance regulations may curtail many of the negative side effects associated with short-term rentals, as discussed in the majority opinion in *Zaatari*.

- Stay tuned to *Zaatari*. With a strong dissent in *Zaatari*, a pending motion for reconsideration *en banc*, and some novel legal theories addressing the regulation of short-term rentals by local governments, there is a strong possibility that the Texas Supreme Court will accept review of the case.

E. A Postscript: Will the Legislature Again Tackle Short-Term Rentals?

For the last two legislative sessions, it seemed that the Legislature was poised to adopt legislation preempting municipal regulation of STRs. Senate Bill 451, introduced in the 85th Texas Legislature (2017) by North Richland Hills State Senator Kelly Hancock, would have prevented Texas cities and counties from banning or restricting short-term rentals of property. SB 451 would have amended Chapter 250 of the Texas Local Government Code, "Miscellaneous Regulatory Authority of Municipalities and Counties," by adding a new Section 250.008, "Regulation of Short-Term Rentals." A "short-term rental" was defined to mean "a residential property, including a single-family dwelling or a unit in a condominium, cooperative, or time-share, that is rented wholly or partly for a fee for a period not longer than 30 consecutive days." According to SB 451, a municipality or county could not "adopt or enforce a local law that expressly or effectively prohibits the use of a property as a short-term rental" and "may not adopt or enforce a local law that restricts the use of or otherwise regulates a short-term rental based on the short-term rental's classification, use, or occupancy." SB 451 also would have authorized adoption and enforcement of certain short-term rental ordinance regulations, including those addressing: fire and building codes; health and sanitation; traffic control; and solid or hazardous waste and pollution control. During the chaotic ending of the 85th Legislature thanks to the "bathroom bill," SB 451 died in the final days of the regular session.

In the 86th Legislature (2019), two identical bills were introduced in the House and Senate—HB 3778 filed by Richardson State Representative Angie Chen Button and SB 1888 by Prosper State Senator Pat Fallon—both of which generally preempted most municipal regulation of short-term rentals; however, neither bill made it out of committee and died. It is likely, particularly after *Zaatari*, that further legislative attempts will be made to preempt most municipal regulation of STRs.

III.

Accessory Dwelling Units

With increasing residential affordability issues in larger cities, coupled with either a desire to have parents residing in close proximity or a desire to realize income from the rental of an on-site accessory dwelling, cities are confronting the issue of how to address accessory dwelling units. Should they be encouraged or outlawed, and are there any unique land use issues associated with them?

A. What is an Accessory Dwelling Unit?

An accessory dwelling unit ("ADU") is generally defined as a smaller, independent residential dwelling unit located on the same lot as a stand-alone (*i.e.*, detached) single-family home. ADUs go by many different names throughout the United States, including accessory apartments, secondary suites, and granny flats. ADUs can be converted portions of existing homes (*i.e.*, internal ADUs), additions to new or existing homes (*i.e.*, attached ADUs), or new stand-alone accessory structures or converted portions of existing stand-alone accessory structures (*i.e.*, detached ADUs). Internal, attached and detached ADUs all have the potential to increase housing affordability (both for homeowners and tenants), create a wider range of housing options within the community, enable seniors to stay near family as they age, and facilitate better use of the existing housing fabric in established neighborhoods. Consequently, many cities and counties have signaled support for ADUs in their plans and adopted zoning regulations that permit ADUs in low-density residential areas.[66]

B. A Short History of ADUs

The development of accessory dwelling units can be traced back to the early twentieth century, when they were a common feature in single-family housing. After World War II, an increased demand for housing led to a booming suburban population. Characterized by large lots and an emphasis on the nuclear family, suburban development conformed to Euclidean zoning codes, a system of land-use regulations that

[66] *See* https://planning.org/knowledgebase/accessorydwellings/.

segregate districts according to use.[67] The rapid growth of suburbs reinforced the high demand for lower-density development, and ultimately led most local jurisdictions to prohibit ADU construction. In spite of zoning restrictions, illegal construction of ADUs continued in communities where the existing housing stock was not meeting demand.[68] In response to suburban sprawl, increased traffic congestion, restrictive zoning, and the affordable housing shortage, community leaders around the nation began advocating a change from the sprawling development pattern of suburban design to a more traditional style of planning. Urban design movements, such as Smart Growth and New Urbanism, emerged in the 1990s to limit automobile dependency and improve the quality of life by creating inclusive communities that provide a wide range of housing choices. Both design theories generally focus on reforming planning practices to create housing development that is high density, transit-oriented, mixed-use and mixed-income through infill and redevelopment efforts.[69]

In the late 1970s to the 1990s, some municipalities adopted ADU programs to permit the use and construction of accessory units. Many of these programs were not very successful because they often lacked flexibility and scope. As the U.S. Department of Housing and Urban Development acknowledged in a 2008 report, although a number of communities still restrict development of accessory dwelling units, there is a growing awareness and acceptance of ADUs as an inexpensive way to increase the affordable housing supply and address illegal units already in existence.[70] Now, on to Texas.

C. Plano and Austin Adopt New ADU Regulations

In February 2019, Plano approved new ADU regulations, allowing ADUs (termed "backyard cottages" by the Plano zoning ordinance) in all single-family, duplex, multifamily, mixed use and downtown business/government zoning districts.[71] A "backyard cottage" is defined as "[a] detached dwelling unit subordinate to and located on the same lot as a Single-Family Residence (Detached) dwelling unit"[72] and Plano's zoning regulations generally provide that the backyard cottage must be located on the

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[67] *See Accessory Dwelling Units: Case Study*, United States Department of Housing and Urban Development Office of Policy Development and Research (June 2008) at 1, found at https://www.huduser.gov/portal/publications/adu.pdf.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] Plano, Tex., Code of Ordinances, Appendix A, Comprehensive Zoning Ordinance §§ 14.100 and 14.200.

[72] *Id*., § 8.200.

same lot as the main dwelling unit; may not be sold separately from the main dwelling unit and a maximum of one backyard cottage per lot is allowed. The minimum lot size is 6,000 square feet and must be architecturally designed to be compatible with the main dwelling unit, including consistent architectural design elements, building materials, and colors.[73] The property owner must occupy either the main dwelling unit or the backyard cottage as a permanent residence, and must at no time receive rent for the owner-occupied unit. Prior to issuance of a building permit, the property owner must provide a signed and notarized affidavit affirming occupancy of either the main dwelling unit or the backyard cottage.[74] The recent ordinance amendment also requires that

> the building-permit applicant must provide to the city a covenant suitable for recording with the county, providing notice to prospective owners of the subject lot that the existence of the backyard cottage is predicated upon the occupancy of either the accessory dwelling or the main dwelling unit by an owner of the property for as long as the City of Plano requires such occupancy to comply with the City's Code of Ordinances. The covenant must restrict the backyard cottage from being sold separately from the main dwelling unit. The covenant must require owners of the property to notify a prospective buyer of the limitations of this section. The covenant must also require all owners to remove the backyard cottage and restore the site to a single-family dwelling in the event that any condition of the covenant is violated. After city review and approval of the covenant, the applicant must record it. Proof of recording is required prior to issuance of a building permit.[75]

Not surprisingly, Austin also has ventured into ADU regulation. For example, in November 2015, Austin adopted new regulations related to secondary apartments. A secondary apartment must be located in a structure other than the principal structure and must be contained in a structure other than the principal structure. It may not exceed a height of 30 feet, and is limited to two stories. Further, it may not exceed 1,100 total square feet or a floor-to-area ratio of 0.15, whichever is smaller; and 550 square feet on the second story, if any. The ADU may not be used as a short-term rental for more than 30 days in a calendar year if the secondary apartment was constructed after October 1, 2015.[76]

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[73] *Id*., § 15.1800. In light of recent legislation, the building materials component is not enforceable. *See* Tex. Gov't Code § 3000.001 *et seq*.

[74] *Id*.

[75] *Id*., § 15.1800,4(B),

[76] Austin, Tex., Code of Ordinances § 25-2-1463.

D. Dallas: A Current Case Study in ADU Regulations

One of the cities in Texas that is reevaluating its ADU regulations is Dallas. ADUs could be a tool to increase affordable housing units without changing the character of neighborhoods and Dallas has recognized a need for housing choices for those with an income below $50,000; nevertheless, as a general proposition, ADUs would increase density in a neighborhood.[77]

ADUs have been the subject of consideration by Dallas over the years, and the historical treatment of ADUs in Dallas is emblematic of how many municipalities have addressed this issue. Beginning in 1929 with the adoption of the City's first zoning ordinance, dwelling districts allowed both single-family and two-family dwellings; however, after 1946 additional dwelling units were allowed in the newly created single-family districts only as "bona fide servant's 'quarters not for rent." In 1965 the terminology changed and the additional units were called guest houses (without kitchens) or servant's quarters and neither could be rented. By 1973 additional dwelling units were only allowed by Board of Adjustment approval and not for rental. From the late 1980s to 2018, if the Board of Adjustment approved an additional dwelling unit, the property owner was required to deed restrict the subject property to prevent use of the additional dwelling unit as rental accommodations.[78]

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[77] *See* "Overview of Accessory Dwelling Units," Power Point Presentation to the Housing & Homelessness Solutions Committee of the Dallas City Council, by Kris Sweckard, Director of Sustainable Development and Construction, February 24, 2020 (hereinafter "Dallas ADU Presentation"), found at https://cityofdallas.legistar.com/LegislationDetail.aspx?ID=4338916&GUID=42790831-09BA-4A31-99D5-3F9E30883E58&Options=&Search=.

[78] *See* https://cityofdallas.legistar.com/MeetingDetail.aspx?ID=712597&GUID=45CA7A1A-1066-407D-900F-BCCDF9E74863&Options=info&Search= (Dallas City Council Meeting, June 27, 2018, Agenda Item 85). Dallas city staff undertook a detailed review of how ADUs were treated by Texas cities and larger cities in the US. Thirteen cities in the Metroplex were researched: Allen, Arlington, Cedar Hill, Duncanville, Garland, Grand Prairie, Irving, Mesquite, McKinney, Plano, Richardson, University Park and Highland Park. All the cities except Allen allowed additional dwelling units, however, none of them allowed ADUs to be rented. Fourteen additional cities around the nation were researched: Austin, Atlanta, Baltimore, Boston, Columbus, El Paso, Fort Worth, Philadelphia, Phoenix, San Antonio, San Jose, San Diego, Vancouver and Birmingham. Eleven cities allowed accessory dwelling units for rental purpose. Specifically, 6 cities required owner occupancy on the same lot; 8 cities had regulations regarding the ADU size, lot size, and setback requirements; and 7 cities had parking requirements. In Fort Worth, ADUs in single-family districts were not allowed for rental while ADUs in transition zones could be rented. Baltimore and Boston did not allow accessory dwelling units. *Id*.

Public comments about ADUs mirror those of most cities. The reasons asserted in opposition to ADUs in single-family residential districts included:

- Code enforcement is already overwhelmed and has difficulty enforcing ADUs being rented now.
- ADUs create additional burden on existing infrastructure (water, sewer, sanitation, schools, road capacity, etc.).
- Excess on-street parking will reduce access for emergency vehicles and increase congestion.
- Some neighborhoods have worked hard to remove multifamily properties.
- Allowing ADUs in single-family residential neighborhoods will "un-do" this work.
- ADUs will decrease property values.
- Too many illegal garage/shed conversions already.
- Construction quality for ADUs may be poor.

Public comments supporting ADUs in single-family residential districts included:

- ADUs can help slow down gentrification, increase density, and optimize existing infrastructure utilization.
- ADUs can provide additional income to seniors and help them to remain in their homes (age in place).
- ADUs should be allowed with restrictions, such as number of people allowed in ADU, parking, lot size, etc.[79]

On June 27, 2018, Dallas amended its ADU unit regulations in two significant ways. First, it allowed the Board of Adjustment to grant a special exception to authorize an additional dwelling unit to be rented. This authority was granted in limited single-family districts when: the additional rental unit would not adversely affect neighboring properties; the owner would deed restrict the subject property to require owner occupancy on the premises; the Board of Adjustment would determine if an additional parking space is required; and register the rental property with the Single Family Non-Owner Occupied Rental Program of the City annually.[80]

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[79] *Id*.

[80] Dallas, Tex., Code of Ordinances § 51A-4.209(b)(6)(E)(iii).

Second, at the same time Dallas also created an Accessory Dwelling Unit Overlay District, which is initiated via either (i) a neighborhood-driven process or (ii) by the City Council or Plan Commission authorizing a public hearing process, for property located only in an area that allows single-family uses and which does not prohibit accessory dwelling units. An overlay district must contain at least 50 single-family structures in a compact, contiguous area, or be an original subdivision if the subdivision contains fewer than 50 single-family structures. The City adopted a fairly detailed zoning scheme for such overlay districts that addresses, among others, yard, lot, height and space requirements, owner-occupancy of the principal dwelling, utility connections for the ADUs, parking and registration.[81]

As of late February 2020, Dallas had only granted two applications (both on January 22, 2020) through the Board of Adjustment special exception procedure.[82] Although there were informal inquiries about the ADU Overlay process, no overlay has been approved to date.[83] Options for Dallas include (1) allowing ADUs by right in all districts where single-family use is allowed; (2) allowing ADUs by right and create a process to allow neighborhoods to "opt out" of ADUs being allowed by right; and (3) making no changes to existing ordinances.[84] As of the date this paper was prepared, no final decision had been made by Dallas on which option to pursue.

E. Where Are We with Accessory Dwelling Units?

Unless the State Legislature opts to intervene, as occurred in both California and Oregon where new legislation became effective in January of this year,[85] local governments in Texas are free to impose whatever reasonable limitations on ADUs that they believe are appropriate. Common components of many local ADU ordinances include forbidding the sale of an ADU from the primary dwelling unit; an ADU must be located on the same lot as the primary dwelling; separate utility connections for ADUs; owner occupancy of either the primary dwelling or the ADU; parking requirements (usually

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[81] *Id*., § 4.510.

[82] *See* Dallas ADU Presentation at 14.

[83] *Id*. at 16.

[84] *Id*. at 20.

[85] *See* Cal. S.B. 13 (2019-20 Leg., R.S.) (allows ADUs up to 800 square feet, two units per lot, side and rear setbacks for ADU buildings reduced to 4 feet, and owner occupancy not required) and Or. H.B. 2001, 80th Leg., R.S. (2019) (in cities with more than 25,000 residents, allows duplexes, triplexes, fourplexes and "cottage clusters" in single-family districts, and in cities with at least 10,000 residents, duplexes are allowed in single-family districts). *See* Dallas ADU Presentation at 19.

at least one parking space); minimum lot size; no short-term rentals are permitted (fewer than 30 days); maximum/minimum square footage requirements for the ADU; height requirements (the ADU's height cannot exceed the primary dwelling's height); and restrictions on the zoning district(s) in which ADUs may be located, although some cities allow ADUs in any residentially-zoned districts. Absent state intervention, Texas local governments are free to exercise broad discretion in enacting local ordinances regulating accessory dwelling units.

IV.

Contract Zoning

With the advent of new state legislation prohibiting the enforcement of building materials ordinances[86] found in a significant number of municipal codes (at least prior to September 1, 2019), coupled with increasing use of development agreements and similarly detailed financing agreements (such as public improvement districts and tax increment financing agreements), the question arises whether local governments perhaps have crossed the line and entered into the forbidden territory of illegal contract zoning.

A. What is Contract Zoning?

Contract zoning is an unlawful activity whereby a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves an enforceable promise on the part of either the owners or zoning authority to rezone property. When a city binds itself to enact a requested ordinance, the municipality acts without legislative power. Therefore, contact zoning is invalid because the city surrenders its authority to determine proper land use and bypasses the entire legislative process.[87] Conditional zoning, however, should not be confused with contract zoning. Traditional conditional zoning is the granting of a zoning change by a governing body which is subject to agreed upon specific conditions which limit permitted uses in a zoning district. The typical scenario is that a governing body secures a property owner's agreement (1) to limit the use of the subject property to a particular use (or uses) or (2) to subject the tract to certain restrictions as a precondition to any rezoning. Unlike contract zoning, under conditional

[86] *See* Tex. Gov't Code § 3000.001 *et seq*. (municipalities, and other specified governmental entities, may not adopt or enforce a rule, charter provision, ordinance, order, building code, or other regulation that prohibits or limits the use or installation of building materials).

[87] *See* 77 Tex. Jur. 3d, *Zoning* § 73 and cases cited therein.

zoning a zoning authority requires an owner to perform some future act in order to receive rezoning, but does not enter into an enforceable agreement promising such rezoning.[88]

The seminal Texas case on contract zoning is *Teer v. Duddlesten*,[89] with its somewhat convoluted procedural history.[90] Wayne Duddlesten applied for an amendment to a planned development district in Bellaire, Texas, requesting that the PD ordinance be amended to allow for an office, hotel and restaurant complex on a 38-acre tract; however, Duddlesten's plans did not comply with many of Bellaire's standards, including minimum setbacks, building heights and parking requirements. As part of the zoning approval Bellaire ultimately gave to Duddlesten, Duddlesten was required to execute an "Acceptance Agreement" in which he accepted certain conditions required by the City, including the dedication of 10.2 acres as passive open space, open to the public.

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[88] *See*, *e.g.*, Bronin & Merriam, *Rathkopf's The Law of Zoning and Planning* § 44:12 at 44-46 (2019).

[89] 641 S.W.2d 569 (Tex. App.—Houston [14th Dist.] 1982), *rev'd*, 664 S.W.2d 702 (Tex. 1984).

[90] The original Texas Supreme Court decision was published in 26 Tex. Sup. Ct. J. 544 (July 20, 1983). Thereafter, the Texas Supreme Court granted a motion for rehearing. *See Teer v. Duddlesten*, 27 Tex. Sup. Ct. J. 246 (Feb. 22, 1984). The Supreme Court vacated and withdrew its original opinion and substituted a new opinion in its place. The new opinion in *Teer* adopts the position of the dissent in the original opinion. In that opinion, Justice Ray, joined by Justice McGee, argued that the court should dismiss the appeal for want of jurisdiction. Justice Ray's argument was based on the fact that the trial court judgment purported to grant summary judgment relief to the defendant City of Bellaire when the city failed to file a motion requesting such relief or to produce evidence showing itself entitled to such relief. Consequently, the dissent concluded that although the majority's conclusion as to the merits of the case was correct, the trial court's order was not final and, therefore, nonappealable. 26 Tex. Sup. Ct. J. at 550. The majority, however, rejected this argument because the issue in *Teer* was the validity of the two zoning ordinances. Having concluded that the disputed ordinances were valid, the majority reasoned that the trial court had disposed of all material issues in the case and that the declaratory judgment order was appealable. *Id.* In the court's new opinion the dissent's position in the original opinion was adopted as the majority position, and the case was remanded for trial as to the City of Bellaire. The Texas Supreme Court held that the trial court should have granted a partial summary judgment in favor of the defendant-developers but not the City of Bellaire. 27 Tex. Sup. Ct. J. at 248. Justice Robertson, joined by Justice Kilgarlin, dissented in the new opinion on the basis of the original majority opinion and argued that a remand would needlessly waste the time and efforts of the trial court and the party litigants. *Id* at 249. Thus, the majority and the dissent were in agreement as to the merits of the case. Joseph W. Geary & David Mark Davenport, *Local Government Law*, 38 Sw. L.J. 463 n.1 (1984) (hereinafter "*Local Government Law* Article").

The City's approval of the site plans for the project provided that if Duddlesten did not execute the Acceptance Agreement within 90 days, then the City's approval of the project would become null and void. Further, Duddlesten was required to offer the City a right of first refusal to purchase the passive open space area should he ever attempt to sell the area or have it rezoned.[91]

The Texas Supreme Court distinguished between illegal contract zoning and legally authorized conditional zoning, finding that contract zoning is a bilateral agreement where a city binds itself to rezone land in return for the landowner's promise to use (or not to use) the land in a certain manner. Conversely, conditional zoning occurs when a city unilaterally requires a landowner to accept certain restrictions on the land without a prior agreement to rezone the land as requested.[92] The Supreme Court stated:

> This attempt to tie the zoning change to Duddlesten individually directly contravenes the fundamental principle that a zoning body regulates the use of land and not the person who owns it. . . . Zoning determinations should be based solely upon the real estate and its use, and not in any way turn on who owns or intends to occupy it. Consequently, courts disfavor stipulations of this type in zoning ordinances which make the legislation personal to the applicant.[93]

Therefore, the "Acceptance Agreement" and its terms constituted illegal contract zoning because (1) the City required Duddlesten to perform certain obligations as a condition of zoning approval; (2) the zoning was personal to Duddlesten as the owner; and (3) Duddlesten could not transfer his development approval with the City's express consent by ordinance.[94] The Supreme Court's withdrawn opinion is consistent with its prior holdings that bilateral agreements to rezone (or not to rezone) would be illegal since government cannot sell or trade away its police powers.[95]

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[91] *Local Government Law* Article at 465.

[92] *Id*.

[93] *Teer*, 26 Tex. Sup. Ct. J. at 549-50, cited in *Local Government Law* Article at 465-66.

[94] *See* Mixon, Dougherty & McDonald, *Texas Municipal Zoning Law* (3d ed. 2019), § 11.902 at 11-150.

[95] *See Urso v. City of Dallas*, 221 S.W.2d 869 (Tex. Civ. App.—Dallas 1949, writ ref'd) (for the general proposition that any city promise to rezone property would be void on its face); *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (an agreement not to rezone property also would be void since municipalities cannot bargain away legislative functions or their police powers).

B. Contract Zoning: Practical Implications

With the increased use of development agreements in local government land use practice in Texas, coupled, for example, with the new legislation prohibiting the enforcement of municipal building materials requirements through rules, charter provisions, ordinances, orders, building codes, or other regulations, is the judicial prohibition of contract zoning somehow implicated? Perhaps more importantly, how can Texas cities ensure that the development agreements they frequently utilize *not* be deemed to constitute illegal contract zoning, and thus invalid? A few thoughts:

- Contract zoning should not be an issue for most cities and developers as long as the process is open and there is no bilateral agreement of "if you do something, the city will rezone your property";

- Contract zoning is not an issue as long as a city does not contract away its legislative power or surrender its power to make future changes in the zoning laws;

- Public appearance is important—a rezoning that appears to be the result of deal-making or that benefits a private party, but appears to be contrary to the public interest, should be avoided;

- Nothing in Texas law prevents a municipality from negotiating with a private landholder or developer to bring about desirable public purposes, assuming that those benefits have some reasonable relationship to the site being zoned or rezoned;

- Absent specific statutory authorization,[96] avoid entering into development agreements where the uses of property, or traditional zoning matters, such as setbacks, specific or conditional uses, building heights, etc., are included in the development agreement. It will be more difficult to defend the inclusion of such terms in a development agreement, especially where the developer/owner is undertaking other obligations, such as property dedications or financial obligations to the city. Traditional zoning matters should be contained in the ordinance and not necessarily imported into a development agreement.

- The limited case law in Texas is clear—a local government's unilateral imposition of conditions on a project should be upheld (absent arbitrary and capricious or otherwise illegal conditions) as long as the public process is followed and the local government has not bargained away its future legislative or police powers; and

[96] *See*, *e.g.*, Tex. Local Gov't Code § 212.172 (development agreements for property located in a municipality's extraterritorial jurisdiction may specify the allowed use(s) of the property before and after annexation).

- A development agreement that includes provisions about the use (or prohibition) of certain building materials should not run afoul of the "illegal contract zoning" principle of Texas law—such a requirement is not a traditional zoning requirement, but rather a building or design standard; the legislative history of the building materials bill (now found in Chapter 3000 of the Texas Government Code) does not support a contention that the Legislature viewed the bill as a zoning matter; and had the Legislature indeed viewed local regulation of building materials as a traditional zoning matter, it arguably would have placed the prohibition in Chapter 211 of the Texas Local Government Code.

V.

Conclusion

With a recent legislative session that most local government practitioners would consider devastating for local control (of land use issues along with other municipal issues), and courts becoming seemingly more active in restricting municipal authority, it is reasonable to anticipate that the deference formerly given municipal prerogatives will continue to evaporate. With the reduction of municipal authority, hot topics in land use law will continue to be "front and center" for the foreseeable future.