LAND USE ISSUES IN THE "SHARING ECONOMY"

21st Annual Land Use Conference
The University of Texas at Austin
Austin, Texas
April 6, 2017

Terrence S. Welch
Brown & Hofmeister, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 (Fax)
www.bhlaw.net
twelch@bhlaw.net

Terrence S. Welch

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 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 and subsequently was appointed to the Civil Service Board in August 2015.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in 69 half-marathons as well as many other long distance races. He completed his 43rd marathon in Austin in February 2017. 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, all of which he ran very slowly!

I.

What is the "Sharing Economy"?

"Sharing economy" is an umbrella term with a wide range of meanings, often used to describe economic and social activity involving online transactions.[1] As the Federal Government writes, a variety of new business models have emerged in the past few years and are dramatically reshaping how services and products are provided in an expanding number of sectors. Fundamentally, sharing economy platforms use internet, smartphone and software technologies to create marketplaces that facilitate transactions between numerous peers—decentralized buyers and sellers who are frequently individuals or small entities.[2] Sharing economy platforms enable "the emergence of marketplaces, . . . meeting point[s] for supply and demand, making it easier for almost anyone to become a supplier of goods and services in exchange for money."[3] They provide transactional services in order to facilitate commercial activity between these participating buyers and sellers, in contrast with internet retailers who themselves sell goods and services directly to buyers.[4]

The pervasive nature of the "sharing economy" has been as described in greater detail by the U.S. Federal Trade Commission:

> PricewaterhouseCoopers estimates that sharing economy marketplaces in five sectors – peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing, and music/video streaming – generated $15 billion in revenues worldwide in 2013, and projects that these revenues will rise more than twentyfold to $335 billion by 2025. The magnitude of the sharing economy's impact has registered in the financial world as well. Some of the largest companies in this space have gone

---

[1] *Sharing Economy*, Wikipedia, https://en.wikipedia.org/wiki/Sharing_economy (last updated Feb. 11, 2017).

[2] Federal Trade Commission, *The "Sharing" Economy* (November 2016) at 10 (hereinafter "FTC Report"). In June 2015 the FTC brought together legal, economic and business experts as well as stakeholders to examine competition, consumer protection and economic issues arising from sharing economy activity. The FTC also issued a request for comments and received over 2,000 public comments in response. The FTC Report describes and summarizes the ideas and issues discussed at the workshop and in comments received from the public. *See* FTC Report at 2.

[3] FTC Report at 10, quoting CATALAN COMPETITION AUTH., PEER-TO-PEER (P2P) TRANSACTIONS AND COMPETITION 2 (2014), *attached to* Catalan Competition Authority Comment.

[4] FTC Report at 10.

> through multiple rounds of funding, in some cases reflecting valuations in the tens of billions of dollars. Based on a round of funding in December 2015, Uber was valued at $62.5 billion, while a November 2015 financing placed Airbnb's valuation at $25.5 billion. . . . Incumbent businesses are also providing financing to sharing economy marketplaces – partnering with, investing in, or acquiring sharing economy platforms. Since the beginning of 2015, General Motors made a $500 million investment in Lyft, valuing Lyft's equity interest at $5.5 billion, and Apple invested $1 billion in Didi Chuxing, China's biggest for-hire transportation platform. Hotelier Hyatt has purchased a stake in British accommodations platform OneFineStay, while Expedia paid $3.9 billion to acquire the lodging site HomeAway.
>
> Two sectors of the travel industry have been at the epicenter of the explosion of sharing economy activity: short-term lodging (specifically, rental stays like those provided by hotels and bed-and-breakfasts) and for-hire transportation service (specifically, services akin to those provided by traditional taxis and limousines). Airbnb has become a leading platform for facilitating short-term rental transactions. Started in 2008 by roommates who rented out space in their apartment during a local convention, Airbnb reported over two million listings in over 34,000 cities, and a cumulative total of 60 million guests by the end of 2015. Platforms facilitating the provision of for-hire transportation service are often referred to as transportation network companies (or "TNCs"). The leading TNC, Uber, began operations in 2009 in San Francisco, and as of 2014 reported providing 140 million rides (including one million rides per day by year-end) and a driver base of over 162,000. Pew Research Center found that by 2015, 11 percent of American adults had used an "on-line home-sharing service" and 15 percent had used "ride-hailing apps."[5]

The term "sharing economy" itself generates criticism. Some commentators have argued that the word "sharing" is a "misnomer" employed to mask the essentially commercial nature of the activity on these platforms. They have argued that the term misleadingly "frames technology-enabled transactions as if they were altruistic or community endeavors"[6] and "create[s] a halo of positive branding to avoid the discussion of what regulatory structures need to be modernized to deal with these platforms."[7] As the United States Department of Commerce notes, "terms such as

---

[5] FTC Report at 12-13 (citations omitted).

[6] *Id*., quoting Natasha Singer, *Twisting Words to Make 'Sharing' Apps Seem Selfless*, N.Y. TIMES (Aug. 8, 2015).

[7] FTC Report at 10-11, quoting Adam Chandler, *What Should the 'Sharing Economy' Really Be Called?*, THE ATLANTIC (May 26, 2016).

'sharing' and 'collaborative'" incorrectly "impl[y] services being provided for free" although "service providers are simply using their assets to earn money."[8]

While for-hire transport and short-term lodging are the two sectors of the sharing economy that generate the most public controversy and debate, including the degree to which government should regulate them, this paper will attempt to address the broader concept of "sharing" land use issues, focusing on those issues associated with peer-to-peer commercial transactions such as short-term rentals and homestays.

II.

Short-Term Lodging and Land Use/Regulatory Issues

Lodging platforms, such as Airbnb,[9] 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.[10]

Short-term lodging platforms greatly reduce the barriers to supplying short-term rental lodging. Hosts have low costs of supply because they can rent out their own homes, and can obtain access to a wide pool of potential customers simply by listing their residences. Renters benefit from the increased supply and variety of lodgings. In the short-term lodging sector, platforms such as Airbnb have had an enormous impact on the number and variety of short-term rentals in many cities across the country and around the world. Some analyses suggest that previously many of the customers

---

[8] Rudy Telles, Jr., Office of Chief Economist, U.S. Dept. of Commerce, *Issue Brief #01-16, Digital Matching Firms: A New Definition in the "Sharing Economy" Space* 4 (June 3, 2016).

[9] Airbnb, a San Francisco startup, was founded in 2008 by roommates who offered space on air mattresses to help pay their rent. Erich Eiselt, *Airbnb: Innovation and Its Externalities*, MUNICIPAL LAWYER (November/December 2014) at 6 (hereinafter "Eiselt Article").

[10] FTC Report at 69 (citations omitted). In this paper, the terms "short-term rental," "homeshare" and "homestay" are used interchangeably.

served would not otherwise have rented lodgings, and that competitive impacts have been concentrated on lower-end hotels and bed-and-breakfasts. For a period, some major hotel industry leaders downplayed the degree of competition between their businesses and Airbnb.[11] At the June 2015 FTC Workshop, Airbnb's representative expressed a similar view, stating that Airbnb is "not competing" with hotels, and that, despite Airbnb's success, "hotels are as full as they've ever been, and are able to charge historically high rates." There is evidence, however, that Airbnb hosts currently place competitive pressure on hotels and bed-and-breakfasts. FTC Workshop commenter Hudson Area Lodging reported that "more than a dozen legitimate B&Bs have closed since Airbnb's inception in 2008." Another commenter, the Hotel Association of New York City, commissioned a study that concluded New York City hotels lost nearly 2.9 million room nights, or over $450 million, to Airbnb hosts over a one-year period. Indeed, some industry sources report that some hotels are opening to compete directly with Airbnb's offerings, learning how to adopt some of Airbnb's business strategies, and others are even listing their available rooms on Airbnb.[12]

It is evident that short-term lodging platforms and Airbnb in particular have revolutionized the short-term rental market, much to the consternation of traditional hotels, motels and bed-and-breakfasts. At the end of 2015, it was estimated that Airbnb had 600,000 "hosts" across 192 countries around the world. As one columnist noted, Airbnb has "become especially proficient in the alchemy of urban lodging, converting downtown residential condos and apartments into gold-mines."[13] Airbnb positions itself in the middle of the rental transaction, charging the renter a commission of between 6% to 12% on top of the rental price, while exacting a 3% listing fee from the host. State and local taxes may be added onto the final price.[14]

A. Battling the Hotel Industry and Landlords

As referenced above, it is not surprising that the hotel industry feels threatened by Airbnb and other similar platforms. Municipalities with large hotel constituencies (New York City, Las Vegas, New Orleans, and San Francisco, among others) are in the forefront of these battles. New York City, for example, is estimated to generate a staggering $1.4 billion annually in real estate and hotel occupancy taxes, as well as hundreds of millions of dollars in annual payroll taxes. New York City hotels employ 400,000 union employees—a potent political force—and hotel industry groups complain

[11] *Id*. at 69-70 (citations omitted).

[12] *Id*. at 70-71 (citations omitted).

[13] Eiselt Article at 6.

[14] *Id*.

that Airbnb engages in unfair competition by not paying lodging taxes, as well as not complying with local zoning and safety regulations.[15]

As the Federal Trade Commission Report reflects, hotels and B&Bs repeatedly have called for state and local regulators to set standards applicable to all participants to create a level playing field. Hotel representatives contend that everyone "should play by the same rules" to protect consumer safety, security and the integrity of neighborhoods and communities. Further, they contend that the failure to enforce such requirements prevents the achievement of regulatory goals and creates an unfair competitive advantage for hosts using Airbnb or similar platforms, thereby creating "an uneven playing field."[16]

Similarly disgruntled are individual or corporate landlords who find that their supposed long-term tenants are making money by offering lodging to strangers.

> A small-time version of this battle unfolded in June [2014], as a New Yorker began eviction proceedings and sought recovery on unjust enrichment grounds where her tenant was re-renting her $1,463 a month, rent-stabilized two-bedroom Tribeca apartment for $250 per night.[17]

Apparently the owner of the apartment building discovered what the tenant was up to after a visitor from Spain strung up a banner from the tenant's fourth-floor fire escape to welcome friends.[18] The tenant is now facing eviction and has started a gofundme page ("Save Eileen from Eviction!") to assist in paying her legal fees.[19] Some larger landlords in New York City have taken a different, more proactive approach. "The Airbnb-enabled illegal sublet movement has led at least one large . . . property owner, the Ideal Companies, to 'deputize' resident managers as 'Airbnb marshals.' Their mission? To identify renters who have become short-term landlords and are skirting rent stabilization laws."[20]

---

[15] *Id*. at 7.

[16] FTC Report at 71 (citations omitted),

[17] *Id*.

[18] http://nypost.com/2015/05/13/artist-who-rented-apartment-on-airbnb-facing-multiple-legal-woes/. The tenant faced additional legal woes—she was going through a divorce and allegedly neglected to show any income derived from her Airbnb rentals. *Id*.

[19] As of late February 2017, the tenant, Eileen Hickey-Hulme had raised $10,130 of her $15,000 goal. *See* https://www.gofundme.com/saveeileenfromeviction.

[20] Eiselt Article at 7 (citation omitted).

B. Renters May Also Experience Problems

It is undisputed that renters benefit from the increased supply and variety of lodgings—a host's residence may be cheaper than a hotel room and better meet the renter's individual preferences, such as an interest in staying in a residential neighborhood with few or no traditional hotels nearby. Airbnb reports that spillover benefits may result from the availability of lower-priced offerings through Airbnb, with travelers visiting cities more often and for longer stays, or spending some of their cost-savings on restaurants or entertainment.[21] On occasion, however, renters have found that their homes or apartments have been trashed or used for illicit activities. While insurance may cover such damage, the use of a home or an apartment for illicit activities is more problematic. An acquaintance of the author described the damage done to her home in Austin that she rented out for the Formula One races in 2015: a large drunken party had been held in her home on a weekend night, the front door had been removed, furniture was stolen or destroyed, carpeting was severely damaged, and an attempt had been made to pry open the garage door to gain entry into the garage, where family heirlooms and antiques had been stored for safekeeping during the rental period. While previous years' rentals had covered the annual mortgage costs for the home, the insurance she maintained did not cover the damage she incurred during the 2015 rental period.

One Airbnb renter found out that his New York City apartment had been used to host a "XXX Freak Fest." The prostitution trade also has found that high-end urban apartments, rented from unknowing owners for short periods of time through Airbnb or other platforms, can provide both greater profits and privacy than costly hotels with nosey front desk clerks. As one sex trade worker told the *New York Post*, "[i]t's more discreet and much cheaper than the Waldorf."[22]

C. Municipal Issues with Airbnb and Short-Term Rentals/Homestays

Should local governments treat short-term rentals differently than hotels and bed-and-breakfasts? First and foremost, do short-term rentals even qualify as zoning issues, or are they purely non-zoning regulatory matters involving issues such as inspections, licenses, insurance requirements and other safety concerns? While hotels often offer scores or hundreds of separate rooms in one facility, with a full staff of professionals providing a range of services for guests, B&Bs usually offer more personalized service with multiple rooms. In contrast, Airbnb hosts generally offer a single residential unit (apartment, house or room), often operating on a part-time basis with limited professional training and experience.[23] Not surprisingly, at the June 2015

[21] FTC Report at 69-70 (citations omitted).

[22] Eiselt Article at 7, citing an April 4, 2014, article in the *New York Post*.

[23] FTC Report at 75 (citations omitted).

FTC Workshop, Airbnb described its activities as not being commercial in nature, rather personal, and should not be subject to the regulatory (including zoning) requirements placed on hotels. The hotel industry countered that argument, characterizing Airbnb as both commercial in nature and operating as "a vast illegal virtual hotel, without any of the safeguards provided by real hotels."[24] What's a city to do?

The answer may be—and let me emphasize the word "may"—quite a lot; however, as discussed below, most Texas cities have not ventured into the regulation of short-term rentals such as Airbnb or HomeAway. The areas of municipal regulatory concern for short-term rentals and homestays are numerous.

1. Number of Days of Leasing

In the United States it is not unusual for cities to adopt zoning or similar regulations on the short-term leasing of units in residential neighborhoods as a means of protecting and promoting the quality of residential neighborhoods. A fairly standard restriction in many cities around the nation sets a minimum term for the leasing of residential units, such as 30 days. Such a restriction, however, could substantially inhibit the leasing of residences with Airbnb, for example, by precluding hosts from engaging in short-term rentals of their primary residences or from turning a residential unit into a full-time short-term rental unit.[25] Short-term rentals (for 30 or fewer days, for example) may have an adverse impact on the quality of life of neighbors, particularly in apartment buildings, due to increased noise, traffic, parties, trash, and comings and goings by strangers. In response, several Airbnb hosts contend that such problems can be addressed by giving condominium boards or homeowners associations sufficient authority to address such issues, with the adoption of "Airbnb-friendly" or "Airbnb-free" policies, enabling renters or buyers to choose residences based on their preferences.[26] For example, New York City banned short-term rentals of entire apartments in 2010 while a San Francisco ordinance caps temporary rentals of whole homes at 90 days but allows a room in a home to be rented 365 days a year.[27] In any event, evidence from around the nation certainly suggests that most short-term rentals/homestays are for fewer than 30 days, and the ordinances in Texas that address this issue (Austin and San Angelo, as addressed later in this paper) have utilized 30 days as the demarcation between short-term and long-term rentals.

---

[24] *Id*. at 76 (citations omitted).

[25] *Id*. at 85-86 (citations omitted).

[26] *Id*. at 86-87 (citations omitted).

[27] http://www.dallasnews.com/news/news/2015/05/10/websites-let-dallas-area-homeowners-quietly-dabble-as-hoteliers.

2. "Owner Occupancy" or "Owner Presence" Required?

A sticking point for drafting ordinances that regulate short-term rentals has been the extent to which owners should be involved in the short-term rental or homestay. A distinction between "owner occupancy" and "owner presence" has arisen in some cities: the former requires that the host show proof of occupancy of the room he or she is renting out, and the latter requires that the host be physically present for the duration of the homestay. In many cities, neighborhood groups have advocated for an owner presence requirement, citing concerns that residential neighborhoods could become overrun with "transient populations," or strangers who could rent out residential homes and would not be known by or accountable to neighbors. San Luis Obispo, California, passed a comprehensive ordinance which requires that the dwelling be owner-occupied; however, owner presence is encouraged but not mandated due to difficulties in enforcing such a requirement. To alleviate neighborhood concerns, the city requires homestay hosts or a "designated responsible party" to be within a 15-minute drive of the property and available via telephone 24 hours a day, seven days a week while rentals are occurring.[28] On the other hand, Madison, Wisconsin, mandates that homestays must be owner-occupied, but makes no reference to owner presence or designated responsible parties. The increase in paperwork associated with designated responsible parties may be cost-prohibitive and difficult to enforce. Some cities, such as Washington, D.C., and Indianapolis, have opted not to regulate short-term rentals at all, even foregoing any hotel or room taxes.[29] Regardless whether "owner occupancy" or "owner presence" is required by a local ordinance, this is a critical issue and greatly impacts the number of qualifying properties for short-term rentals.

3. Inspections or Licenses

In cities that have opted to regulate short-term rentals or homestays, adherence to building codes has emerged as a major safety concern. Cities generally want to protect the integrity of buildings, especially by regulating fire escapes, energy usage and occupancy limitations, among others. As a consequence, some cities require inspections or licenses for short-term rentals. Madison limits how often people can rent space, how many rentals must occur before the city can collect taxes, and how often hosts must rent out their space before inspections are required. After a certain number of rentals, the city requires inspection to ensure adherence to building codes. Cities such as Indianapolis and Philadelphia have not adopted short-term rental ordinances, choosing instead to rely on reports from neighbors to resolve issues on a case-by-case basis.[30] The City of Austin arguably has adopted the strongest regulatory scheme in

---

[28] National League of Cities, *Cities, the Sharing Economy and What's Next* (2015) at 22 (hereinafter "NLC Report").

[29] NLC Report at 22-23.

[30] *Id*. at 23-24.

Texas for short-term rentals and homestays, and its detailed licensing scheme is described later in this paper.

4. Insurance

A major concern for hosts and renters is whether there is adequate property and liability insurance, either to protect the injured renter or the host who returns home to find his or her residence trashed. Personal homeowners or renters insurance policies generally exclude most or all liability arising out of the use of the insured's property for commercial purposes. As the FTC Report notes, "[u]nfortunately, sharing economy participants often do not recognize their potential exposure for injury," with a California PUC Commissioner warning that "those renting from hosts need to ask, if 'you get a place through Airbnb and you have a slip and fall, are you covered?'"[31]

In response to such concerns, Airbnb offers two insurance policies covering major risks faced by the parties transacting over the site. First, Airbnb offers a "host guarantee" protecting hosts from loss due to damage to their residence caused by renters. Second, Airbnb offers insurance coverage for hosts' liability for injuries to guests during a stay booked through Airbnb. While this insurance initially covered only losses not covered by other insurance (*e.g.*, by renters or homeowners insurance, if applicable), Airbnb subsequently expanded it to provide primary coverage for all losses.[32] Several cities around the nation, including Austin, have requirements for at least minimal amounts of insurance, whether through the host's personal insurance carrier or the lodging platform.

5. Payment of Hotel Occupancy Taxes

A major concern of state and local governments is whether they are receiving payments of applicable taxes from sharing economy providers. The foremost motivation for becoming a platform supplier is to earn an income, which is generally subject to state and federal income taxes. The principal concern for local governments, of course, is sector-specific taxes—most often, the payment of hotel occupancy taxes by the renter. Short-term rentals of hotel rooms or bed-and-breakfast rooms are subject to such taxes, but as the Federal Trade Commission considered, Airbnb hosts largely fail to pay them, thus depriving local governments of a source of tax revenue and placing "traditional" providers (hotels and B&Bs) at an unfair competitive disadvantage.[33] As one FTC Workshop participant stated about the failure of hosts to

[31] FTC Report at 83 (citations omitted).

[32] *Id*.

[33] *Id*. at 84 (citations omitted).

collect taxes, "[w]e don't always think that the tax is owed, because someone doing this a week a year is not a hotel."[34]

Airbnb does collect local taxes in some jurisdictions—for example, in Portland, Oregon, San Francisco and San Jose—but hotel industry representatives have noted that Airbnb offers to collect taxes only if the municipality agrees to change its regulations to ease restrictions on short-term rentals.[35] In Texas, the City of Austin by ordinance requires that short-term rentals are subject to and must show proof of payment of the city's hotel occupancy tax.[36]

6. Impacts on Affordable Housing Stock

As commentators note, the interplay between short-term rentals/homesharing and affordable housing is indeed complicated. On one hand, homesharing can provide supplemental income to homeowners or lessees who might otherwise be unable to afford their current rental or mortgage payments. On the other hand, short-term rentals can potentially yield landlords more profit than standard rentals, thus risking a reduction of long-term rental stock in general, and affordably-priced housing stock in particular.[37] The National League of Cities stated that the cities it surveyed "did not broach the topic of the socioeconomic status of the neighborhoods in which homesharing customers generally choose to board" and "[a]cquiring more information on these patterns would allow stakeholders to achieve better clarity on which communities are receiving supplemental income and perhaps experiencing enhanced affordability."[38] At the present, it is safe to say that more information is needed to determine what, if any, effect short-term rentals have on affordable housing stock. Nevertheless, this is an issue for local governments, particularly in the event that a city demonstrates that short-term rentals may have an adverse impact on affordable housing in the community.

7. Enforcement

Notwithstanding how a local government opts to address short-term rentals—whether adopting a purely regulatory, non-zoning ordinance or treating all short-term rentals as a traditional zoning matter—the single largest issue facing local governments is enforcement. "It is difficult to catch scofflaws in the act, expensive to deploy already-

---

[34] *Id*. at 85 n.537, quoting David Hantman.

[35] *Id*. at 85.

[36] *See*, *e.g.*, Austin, Tex., Code of Ordinances § 25-2-791(B)(6) (proof of payment of hotel occupancy taxes to obtain a short-term rental license).

[37] NLC Report at 18.

[38] *Id*.

busy code enforcement officers, and time-consuming to litigate when Airbnb and its free-market disciples take to the courts."[39] The most effective way to enforce a short-term rental ordinance may be to follow the example of Philadelphia and Indianapolis—rely on reports from neighbors to resolve issues on a case-by-case basis. Otherwise, the cost impact of enforcement may be large and financially prohibitive.

III.

The Texas Experience: Municipal Regulation—and Austin Goes To Court!

Before addressing the current Texas legislative attempt to limit local control over short-term rentals, it is abundantly clear that the overwhelming majority of Texas municipalities have few, if any, regulations on the short-term rental of property. The limited number of cities that have any marginally significant regulations relative to short-term rentals are Austin, San Antonio, San Angelo, Galveston and Fort Worth. Fort Worth, for example, requires property owners to obtain a bed-and-breakfast permit only available to homes built before 1993 and a Galveston ordinance requires owners of short-term rentals to pay a $50 fee and provide guests with a brochure on the city's "minimum standards of conduct," including noise limits, parking instructions and occupancy limits.[40] San Antonio does not offer guidance specific on short-term rentals, vacation rentals, or homesharing, outside of traditional bed-and-breakfasts, when it comes to property zoned residential. The San Antonio city code provides that residentially-zoned property shall not have accessory uses, except for home occupations. The use of a home as a temporary rental is not one of the prohibited uses for home occupations listed in the San Antonio city code. Consequently, it can be argued that earning income from renting out a home qualifies as a home occupation. The city code includes houses in the definition of hotel under the hotel occupancy tax provisions; however, San Antonio does not collect this tax from short-term rentals through sites like Airbnb.[41]

The City of San Angelo adopted a new short-term rental ordinance on January 17, 2017. Prior to that date, short-term rentals were not authorized by the zoning ordinance; however, after months of deliberation and many long planning commission and city council meetings, San Angelo revised its zoning ordinance to allow short-term rentals. In brief, the new 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;

---

[39] Eiselt Article at 32.

[40] http://www.star-telegram.com/news/local/community/fort-worth/article134996934.html.

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

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.[42] City staff did note several concerns about the draft ordinance, including the 30-foot pavement width issue as well as the 500-foot locational prohibition.

Austin, though, is perhaps light years ahead of any other Texas municipality in terms of the magnitude of regulation of short-term rentals. Whether this is good or bad ultimately will be determined by the state courts. The City of 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, 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).[43] 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.[44]

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.[45] While the "phase out" of

---

[42] http://sanangelotx.boardsync.com/Web/UserControls/DocPreview.aspx?p=1&aoid=54 (on-line version of the San Angelo agenda packet for January 17, 2017).

[43] Austin, Tex., Code of Ordinances §§ 25-2-788-790.

[44] *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.

[45] *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, pending in the 53rd Judicial District Court of Travis County, Texas.

Type 2 rentals is alleged to violate state constitutional law[46] (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,[47] asserting that the occupancy regulatory provisions violate state constitutional equal protection provisions, authorize unreasonable warrantless searches, and exceed the City's constitutional power to zone property.[48]

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.
>
> 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.

---

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

[47] Section 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.

[48] Interestingly, an article in the *National Review* contends 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.

> 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.[49]

The attorney general contends that the Austin short-term rental ordinance constitutes 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 reduces 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 presented as to whether the City may pull the rug from under homeowners who invested in STR properties."[50]

IV.

The Limited Texas Case Law to Date

While the *Zataari* lawsuit ultimately may define the parameters of the state and federal constitutional and regulatory issues associated with short-term rentals in Texas, other Texas case law on point is sparse. In *Friedman v. Rozzlle*,[51] 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.[52] 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.[53]

---

[49] *Zaatari* lawsuit, *supra* note 45, Plea in Intervention of Texas, at 1-3.

[50] *Id*. at 7.

[51] 2013 WL 6175318 (Tex.App.—Corpus Christi 2013, pet. denied).

[52] *Id*. at *1.

[53] *Id*.

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."[54]

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 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.[55] 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*,[56] 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.[57]

The Zgabays responded by filing suit, seeking declaratory relief that the restrictive covenants do not prohibit short-term rentals or otherwise restrict rentals

---

[54] *Id*.

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

[56] 2015 WL 5097116 (Tex.App.—Austin 2015, pet. denied).

[57] *Id*. at *1.

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.[58] 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, regardless of the term of the lease, is a single family residential purpose."[59] 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.[60]

The last case, which is reported, is *Village of Tiki Island v. Ronquille*,[61] 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.[62] 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.[63]

---

[58] *Id*. at *2.

[59] *Id*.

[60] *Id*. at *3.

[61] 463 S.W.3d 562 (Tex.App.—Houston [1st Dist.] 2015, no pet.).

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

[63] *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

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 Village's sovereign immunity is waived.[64]

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.[65]

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*[66] 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.[67]

---

ordinance), were not likewise "grandfathered." The Mayor did attempt an explanation, though, on particular houses. *Id*.

[64] *Id*. at 582.

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

[66] *Zaatari* lawsuit, *supra* note 45.

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

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.

As a review of the foregoing case authority clearly reflects, Texas courts, perhaps contrary to the representations of the attorney general, have not addressed "head on" municipal prohibitions of short-term rentals or the extent to which a municipality may regulate them. But, it may all be moot (or mostly moot), if Senate Bill 451 is enacted by the Texas Legislature.

V.

Senate Bill 451

Senate Bill 451, introduced this year in the 85th Texas Legislature by North Richland Hills State Senator Kelly Hancock, would prevent Texas cities and counties from banning or restricting short-term rentals of property. SB 451 would amend 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."

In brief, a "short-term rental" is 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 authorize 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. It would be permissible for a local government to require the designation of an emergency contact for the property. One of the provisions of the bill would permit local governments to regulate the short-term rental of property to sex offenders or to those who sell illegal drugs or alcohol to guests, or use the property for a sexually oriented business purpose.

Reaction to the bill has been mixed. Critics say the bill will lower property values and allow Texans to rent houses to people who might host disruptive parties and increase traffic in their neighborhoods. Proponents believe the bill will protect landowners from strict local laws that infringe on property rights while still allowing local

regulations that prohibit certain short-term rentals, such as those to sex offenders or selling alcohol or illegal drugs to guests.[68]

VII.

Conclusion

The "sharing economy" presents a host of new issues for local governments in the land use context. As this paper hopefully has shown, local governments around the nation have reacted very differently, with some cities, such as Austin, enforcing strict regulations that strongly regulate short-term rentals, and many cities opting not to enforce or otherwise address short-term rentals. With litigation pending in state district court in Travis County, and Senate Bill 451 currently being considered by the Texas Legislature, it is clear that in a short period of time, the "sharing economy" may directly impact Texas local governments in a significant manner.

68 https://www.texastribune.org/2017/02/25/bill-would-overrule-local-legislation-over-short-term-rentals/.