
Coates' Canons Blog: The Airbnb Gold Rush: What's a City to Do?

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Article: <https://canons.sog.unc.edu/airbnb-gold-rush-whats-city/>

This entry was posted on February 15, 2018 and is filed under Land Use & Code Enforcement, Ordinances & Police Powers, Police Power Regulations

Most of us know that Airbnb is popular, but how big is it really? Well, the statistics are mind-boggling. Airbnb is currently valued at \$31 billion. By mid-2017, it had 4 million listings in 191 countries worldwide, which surpassed the number of available rooms in the top five hotel brands combined, with a mere 3.3 million global listings. According to the News & Observer, Asheville residents earned nearly \$20 million in 2017 by renting their homes to nearly 160,000 guests. Charlotte, Raleigh and Durham also profited—residents in these cities made 8.7 million, 3.8 million and 3.1 million respectively. And approximately 25% of leisure travelers are expected to book a stay on Airbnb at least once. The answer: it's HUGE.

It is not just Airbnb that is exploding. As the sharing economy continues to grow, web-based booking sites like VRBO, Homeaway and FlipKey are also gaining momentum. These booking platforms are here to stay. Local governments have begun to ask what, if any, steps they should take to regulate the short term rental market? To be clear, a short term rental ("STR" for short) is usually for a term of 30 days or less. Both nationwide and locally, the regulation of these properties has become a hot topic as some cities have opted to ban these rentals while others have chosen to let sleeping dogs (or houses) lie.

This is my first of two blogs on STR regulation. It discusses the key issues surrounding regulation and highlights how a few North Carolina municipalities are responding to this changing market. The second blog goes into more detail on how to regulate STRs and discusses the tax implications. You can find it here.

What is a STR?

Generally, there are two types of short-term rental accommodations available through web-based platforms like Airbnb. The first type of STR involves a home-sharing situation often called a "homestay." A homestay allows the homeowner or permanent resident (a.k.a. the host) to rent individual rooms within his/her residence for overnight lodging. The second type involves the rental of an entire dwelling unit, often called a "whole-house" STR. Some whole-house properties are primarily used as vacation rentals, while other are the host's primary residence and rented only during temporary absences. It is common for municipalities to regulate the two types of STRs differently. For example, Asheville permits homestays but not whole-house STRs in residential neighborhoods.

Why regulate?

There are four chief policy justifications for bringing STRs into the regulatory fold: (1) the desire to provide for the safety of renters, (2) the generation of transient occupancy tax revenue, (3) the duty to ensure that permanent residents have affordable housing options, and (4) the need to preserve neighborhood character (e.g. limit parking and overcrowding). There is also an equity argument to be made—STRs are viewed as unfairly competing with hotels and B&B's, which are required to pay local taxes and are subject to inspection for compliance with local health and safety codes.

When challenged by lawsuits, municipalities outside of our state have argued that regulating for these purposes constitutes a valid exercise of the police powers. Courts have ruled both ways. A California court upheld a municipal ordinance prohibiting transient occupancy because the city's goals of securing affordable housing for permanent residents and of preserving neighborhood character were legitimate government interests. *Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1-81 (1993). In contrast, a New Jersey court held that prohibiting the rental of residential real estate to cure perceived socio-economic problems, including the need to provide permanent residents with affordable housing options,

fell outside the scope of the police powers and unlawfully infringed on property owners' rights. *Repair Master, Inc. v. Borough of Paulsboro*, 352 N.J. Super. 1, 11 (App. Div. 2002). These cases are not binding on North Carolina courts.

Do North Carolina cities have authority to regulate STRs?

Probably, but to what extent is still unknown. We do know that municipalities have the authority to control the location and use of property through zoning regulations. N.C. Gen. Stat. § 160A-381. And zoning ordinances enjoy a strong presumption of validity if they serve a public purpose related to the “public health, safety, morals, or general welfare” of the communities they regulate. *City of Wilmington v. Hill*, 189 N.C. App. 173, 177, 657 S.E.2d 670, 673 (2008). It seems likely that our courts would hold that municipalities are vested with authority to regulate STRs under the police powers, just as they may regulate hotels, motels, boarding or rooming houses, and B&B's.

What are the possible issues surrounding STR regulation?

There is some concern that municipal regulation of these rentals is not a valid exercise of the police power. The first concern is that STR regulations which, for example, control the duration of a private lease or the nature of occupancy of a private residence, go beyond regulating a property's use and instead restrain the manner in which the property is owned, which is prohibited by North Carolina case law. See *City of Wilmington v. Hill*, 189 N.C. App. 173 (2008) and *Graham Court Associates v. Town of Chapel Hill*, 53 N.C. App. 543 (1981). But communities have long used zoning to regulate temporary residential uses such as hotels, inns, boarding houses, and B&Bs. However, it is possible that certain limitations placed on STRs may be found to be unlawful restrictions on ownership.

Another concern is that it is unlawful to regulate residential rental property by implementing permitting programs or by requiring homeowners to pay a special fee. Specifically, N.C. Gen. Stats. §§ 153A-364(c) and 160A-424(c) clearly provide that a county/city may not adopt or enforcing a local ordinance that requires owners of residential rental property to: (1) obtain a permit or permission to operate, (2) register a rental property, or (3) levy a special fee or tax on residential rental property that is not also levied against other commercial and residential properties. Some local governments have adopted (or are considering) registration programs and are levying fees in connection therewith. Specifically, a few jurisdictions have imposed business registration requirements on owners of short term vacation rentals. They argue that STRs are used for hospitality, not as a residence, during the vacation rental season. As such, these jurisdictions contend that the IPR statutes' prohibition on residential rental property registration would not apply to short term vacation rentals. The IPR statutes do not clarify how a STR should be characterized. The bottom line is that it is important to be aware of these statutes and know that they could render certain regulatory action unlawful. For more information, see here.

The final concern is the possibility that the North Carolina Vacation Rental Act preempts the local regulation of vacation rental agreements in residential properties. The Act defines “vacation rental” as being the “[t]he rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days . . .” The contention is that the Act covers the field and leaves no room for cities to regulate leases of shorter duration or to enact outright bans on vacation rentals in residential neighborhoods. However, there are other state rules regulating of real estate transactions that do not strip zoning authority from local laws (e.g. Planned Community Act and the Condominium Act). Thus, it seems unlikely that the Vacation Rental Act preempts local regulation, particularly because it makes no mention of municipal regulation. Its primary purpose is simply to regulate the competing interests of landlords, tenants, and real estate brokers. Our courts have yet to weigh in on these issues.

How are NC cities regulating the STR market?

For the most part, they're not. The great majority of cities and counties within our state have taken no regulatory action to date. Below, I've set out where few cities stand in the regulatory process.

Asheville: When it comes to having a model for STR regulation, the spotlight is primarily on Asheville. The city (and Buncombe County) initially began to regulate STR use to help curb its affordable housing crisis, which developed in part due to an increased demand for STRs in residential neighborhoods. Asheville decided to restrict the rental of entire dwelling units (sometimes called “whole-house” STRs) to those zones that allow “lodging facilities,” like hotels and motels. This means that the homeowner or permanent resident (a.k.a. the host) may not rent out his/her entire home in a residential district. This ban has been extremely controversial, but it remains in place as of now.

The city also regulates STRs that involve home-sharing situations called “homestays.” A homestay allows the host to rent individual rooms within his/her residence for overnight lodging for a term not to exceed thirty days. A homestay host must apply for a permit, pay an annual \$208 registration fee, make the property available for inspection, and agree not to rent more than two bedrooms in the dwelling unit simultaneously. Hosts must also remain on-site during the homestay (e.g. no overnight travel allowed). Hosts who violate the whole-house or homestay regulations are subject to a \$500 per night fine. The city now uses an independent company to identify violations.

Blowing Rock: The Town of Blowing Rock has also recently begun to regulate STRs, which it defines as the rental or lease of an attached or detached residential dwelling unit for a duration that is less than 28 consecutive days. Specifically, the town has limited whole-house STRs to its business districts, the town center, and office-institutional zoning districts. A short-term overlay district can be approved by Town Council within particular zoning districts. Violators are subject to a \$500 per night fine. For more information, see [here](#).

Wilmington: The city is currently hammering out how it wishes to proceed with STR regulation. In the January 29, 2018 Planning Commission meeting, the commissioners agreed it is a good idea to allow homestays in residential areas and agreed to require all STR hosts to register their properties with the city. However, the commissioners did not come to a conclusion on how to define whole-house STRs or how to limit the number of them in residential neighborhoods. The matter now rests with City Council.

Raleigh: Technically the practice of renting STRs in residential neighborhoods is prohibited in Raleigh. However, Raleigh officials are allowing hosts to operate while they consider adopting new regulations.

Beach Communities: It's worth mentioning that most (if not all) of the state's beach towns have not taken steps to regulate STR use. This is likely because either they see no need for additional regulation or because a preexisting ordinance sufficiently regulates this area. These towns generally welcome STRs given that their economies are largely based on tourism. In fact, the Town of Duck considered amending its list of permitted uses to clarify that STRs on a daily basis are a permitted use (as opposed to only allowing weekly rentals). The Town decided to hold off in case such action would unlawfully restrain the ownership of property. From what I can tell, the rest of the Outer Banks, as well as Holden Beach, Carolina Beach, and Topsail Beach, and Wrightsville Beach also currently allow unregulated STRs.

Summary:

In North Carolina there are still many unanswered questions about the scope of a local authority to regulate STR use. For more detail on how to approach STR regulation, see my second blog on this topic. I welcome comments and would like to know of other municipalities that are regulating STRs. My email is rbadgett@sog.unc.edu.

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