Coates' Canons Blog: Residential Zoning Ordinances and Short-Term Rentals: Square Peg, Round Hole?

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Attempting to ban short-term rentals (STRs) by shoehorning them into existing single-family residential zoning ordinances may cause significant roadblocks for jurisdictions looking for answers on how to regulate these properties.

Relying on preexisting residential zoning ordinances to ban STRs

The question of whether a single-family residential zoning ordinance necessarily excludes or bans STRs in residential neighborhoods is one that I've been asked with increased frequency. As in most legal questions related to AirBnB, the answer is not yet clear. It is my thinking, however, that if a local government wishes to exclude STRs from specific zoning districts, the best practice is to amend the local code of ordinances to accomplish this—instead of relying on a preexisting ordinance. A recent line of cases in Pennsylvania helps explain why a residential zoning ordinance, as written, may prove ineffective to ban STRs.

Before diving into the Pennsylvania case law, it is important to understand the difference between commercial zoning and residential zoning. Commercial zoning laws are used to place restrictions on businesses from operating in areas where people live. Local governments have authority to classify a certain land use as commercial, and this holds true in the STR context as well. Because STR hosts are renting their dwellings to transients for compensation, and because this land use may arguably change the nature and character of a neighborhood, it would be reasonable to zone STRs as a commercial use. To do so, the ordinance should distinguish a transient use from a residential use, clarifying that renting to transients is considered a commercial use which is prohibited in residential areas.

A STR can also be classified as a residential use if that is the preference of the local government. A traditional single-family residential zoning ordinance in North Carolina generally requires that a single-family dwelling be occupied by a family. The term "family" is usually defined as something like this: "two or more persons related by blood, marriage or adoption living together in a dwelling unit," or "a group of not more than X number of persons, who need not be related by blood marriage or adoption, living together in a dwelling unit."

Most STRs are governed by residential zoning ordinances. This is because many local ordinances do not define STRs as a separate use—either because there is no perceived need to modify the ordinances or because the local government has simply not yet done so. One angle of the STR debate focuses on whether the use of a dwelling as a STR is squarely irreconcilable with the requirement that a dwelling be occupied by a family. The Pennsylvania courts have held in three cases now that the transient rentals do not violate residential zoning codes.

Pennsylvania case law

In 2016, the Pennsylvania Commonwealth Court heard *Marchenko v. Zoning Hearing Bd. of Pocono Twp.*, 147 A.3d 947 (Pa. Commw. Ct. 2016), which is now pending review before the state supreme court. Here, the township ordered the owner of a single-family dwelling located in the low-density residential zoning district to cease using the property for "commercial purposes." The homeowner admitted that she used the property as an STR on most weekends but claimed that this was a residential use permitted under the residential zoning code, particularly because the dwelling was her primary residence.

The zoning ordinance at issue defined the term "single-family dwelling" as a "detached building designed for and occupied exclusively by one family." It defined "family" as: "One or more persons, related by blood, adoption or marriage, living and cooking together in a dwelling unit as a single housekeeping unit" or "a number of persons living and cooking together in a dwelling unit as a single housekeeping unit though not related by blood, adoption or marriage, provided that they live

together in a manner similar to a traditional nuclear family."

The PA courts had previously clarified that for a group of people to constitute a family, "the composition of the group must be sufficiently stable and permanent so as not to be fairly characterized as *purely* transient." *Albert v. Zoning Hearing Bd. of N. Abington Twp.*, 578 Pa. 439, 453, 854 A.2d 401, 410 (2004). The Commonwealth decided that the STR was in fact a permitted use in the residential zoning district. The court placed great weight on the fact that the homeowner used the property as her primary residence and was the only "family" occupying the property when she was there. Thus, the weekend rentals did not change the fact that "the composition of the family living at the Property [was] not purely transient." Although the fact the dwelling was the homeowner's primary residence weighed in the homeowner's favor, the deciding factor in the case was the fact that the zoning ordinance neither prohibited the owner of a single-family dwelling from renting it out, nor did it define or mention short-term rentals elsewhere in the municipal code. Because the ordinance was silent as to short-term rentals, the court was compelled to construe the ordinance broadly and give the owner the benefit of the least restrictive use of the land.

The dissent in the case argued that the definition of "family" could never be stretched to include renting to multiple parties because, for a group of people to be a family in a residential area, "some level of permanence is required." The dissenting judge argued that whenever a homeowner offers a property for rent to transients, the homeowner "is not occupying the home as a single-family dwelling, but instead is operating a business of renting out the property." Stay tuned for the Pennsylvania Supreme Court's decision in this case.

Shortly after issuing the *Marchenko* decision, the Commonwealth heard *Shvekh v. Zoning Hearing Board of Stroud Township,* 154 A.3d 408 (2017). In this case, property located in the recreational zoning district was used as an STR three-weeks per month. The township alleged that the homeowner was operating a "tourist home," which was not a permitted use in the recreational zone. The zoning ordinance defined a tourist home as a "dwelling in which one but no more than six rooms are offered for overnight accommodations for transient guests for compensation." The court concluded that a STR differed from the room-by-room rental associated with a tourist home and cautioned the township against advancing a "new and strained interpretation of its zoning ordinance to effect what it would like the ordinance to say without an amendment."

The homeowner argued that the use fell squarely within the residential zoning ordinance, which defined single-family dwelling as "a detached building *designed for* or occupied exclusively by one family." The court applied the ordinance as written and held that because the structure itself was "designed for" use as single-family dwelling, the fact that it was mostly rented to transients did not violate the ordinance. The Commonwealth noted: "Enterprises such as AirBnB have expanded the possible uses of single-family dwellings and a township can address such uses in the zoning ordinance." Thus, the court reaffirmed that it was bound apply the ordinance as written and must resolve any ambiguities in favor of the least restrictive use of the land.

In *Slice of Life, LLC v. Hamilton Township Zoning and Hearing Board*, 164 A.3d 633 (2017), a property owner purchased a single-family residence to use *exclusively* as a STR. The township cited the owner for violating the single-family residential zoning ordinance because the property was being used as a "Hotel and/or other types of transient lodging [or for] transient tenancies" The problem was that the residential zoning ordinance did not define "transient lodging" or "transient tenancies" and a "hotel" was required to have an outside common area. The Commonwealth concluded that the township had cited the homeowner for offenses that were either non-existent in the code (i.e. operating transient lodging) or not applicable to the current situation (i.e. operating a hotel). Once again, the court held that township was required to apply to the terms of the ordinance as written, rather than deviating "based on unexpressed policies of the Township regarding permitted uses."

Relevance to our local governments

As evidenced in the Pennsylvania cases, the courts are required to interpret zoning ordinances as written and to resolve any ambiguities in favor of the landowner. The same is true in North Carolina. *See Byrd v. Franklin Cty.*, 368 N.C. 409, 778 S.E.2d 268 (2015) (holding that a land use is allowed unless an ordinance clearly prohibits it). The takeaway here is that if a municipality wants to restrict or ban STRs in a specific zoning district, the local ordinances should be amended to effect the change. As the townships in the Pennsylvania cases learned the hard way, relying on preexisting ordinances to restrict STRs to certain zoning districts may not pass judicial muster.

The City of Asheville is one jurisdiction that has amended their ordinances to define and regulate STRs. Specifically, the

City has classified whole-house STRs as a commercial lodging use and has defined them as: “a dwelling unit with up to six guest rooms that is used and/or advertised through online platform, or other media, for transient occupancy for a period of less than one month.” STRs are permitted as a use by right only in the Resort District. Property owners must apply for a conditional zoning permit to operate an STR in other the zoning districts; however, whole-house STRs in residential districts are prohibited.

Across the country many local governments have placed restrictions on STRs, but these vary greatly from place to place. For example, New York City has banned STRs entirely (although enforcement have been problematic). Savannah has placed a 20% per-ward cap on the number of whole-house STRs located in the Historic, Conservation, and Residential zoning districts. For now, it is up to the local government to decide whether there is a need to amend the local ordinances account for short-term rentals. The short-term rental of vacation homes is the backbone of the thriving tourist economies in many local communities and restricting the location of these rental properties or otherwise regulating them may be unnecessary. For those municipalities that are interested in regulating short-term rentals, more information can be found in this webinar: What To Do About Short-Term Rentals? Local Regulation and Occupancy Taxes.

Links

- www.sog.unc.edu/courses/webinars/what-do-about-short-term-rentals-local-regulation-and-occupancy-taxes