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## Coates' Canons Blog: STR Regulations Found Unconstitutional in Texas: Renting Property is a Fundamental Privilege of Property Ownership

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Understandably, COVID-19 has certainly slowed the demand for short-term rentals (STRs). In fact, at least one county in North Carolina has prohibited STR operators from renting their properties to out-of-county and out-of-state guests while the state is under the stay-at-home order. However, once COVID is far behind us and people are comfortable traveling again, I suspect local governments will continue to explore options for regulating these properties. And for those local governments, there is a case in Texas that is worth following: *Zaatari v. City of Austin*, 2019 WL 6336186 (Tex. App. Nov. 27, 2019). (Importantly, the conclusion reached by the Texas court does not affect emergency restrictions on STR operations. The holding was issued before COVID-19.)

In *Zaatari v. City of Austin*, a divided appellate court found that the City of Austin's prohibition of new dedicated short-term rentals (i.e., full-time STRs) in residential neighborhoods—as well as the accompanying sunset provision for existing full-time STRs—was unconstitutional. Why? In short, because STRs were historically allowed in Austin, and because the city failed to show the law advanced public purpose. In addition, the court held that the ordinance's occupancy and assembly regulations violated property owners and guests' rights to freedom of assembly guaranteed under the Texas constitution.

Like Austin, several municipalities in North Carolina have used their zoning powers to limit or prohibit dedicated STRs in residential zones. For example, Asheville has banned whole-house STRs in all residential zones. The Town of Blowing Rock bans whole-house STRs all but handful of zones. And Wilmington caps the number of whole-house STRs allowed in residential zones at 2% of properties, plus imposes a 400-foot separation requirement. Like the Austin ordinance, these ordinances could be challenged on constitutional grounds. If our courts apply the same logic set forth in *Zaatari*, local authority to regulate STRs will forever be altered.

### Overview of Austin's STR Regulations

Although STRs have had a place in Austin for many years, the city officially began regulating these properties in 2012. The 2012 ordinance allowed STRs (defined as the rental of residential property for fewer than 30 days) to operate provided the property owner secured a license from the city. In 2016, the city amended the STR ordinance to help curtail some of the alleged negative effects STRs had on local neighborhoods. The amended ordinance classified STRs into three different types: Type-1 STRs are "owner occupied" properties, meaning a permanent resident must live on-site a minimum of 51% of the year. Type-2 STRs are "not owner-occupied" single-family residences (i.e., dedicated STRs without a primary resident located in residential zoning districts). Lastly, Type-3 STRs are "not owner-occupied" residences in multifamily buildings located in commercial zoning districts.

In addition to distinguishing between different types of STRs, the 2016 ordinance prohibited the issuance of new STR licenses to operators of Type-2 STRs. The ordinance also included a sunset provision requiring owners of existing Type-2 rentals to cease operations by April 1, 2022. As such, the city effectively banned dedicated STRs from operating in residential zones but allowed these rentals to continue if the property was the host's primary residence.

The 2016 ordinance also placed restrictions of the types of assemblies allowed both within and on the grounds of short-term rentals. The city defined "assembly" to include weddings, bachelor parties, concerts, sponsored events, or similar group activities other than sleeping. The specific restrictions included:

- prohibiting assemblies other than sleeping between 10 p.m. and 7 a.m.;
- prohibiting outdoor assemblies of more than six adults between 7 a.m. and 10 p.m.;
- restricting occupancy to no more than six unrelated or ten related adults; and

- requiring that no more than two adults per bedroom, plus two additional guests, may sleep at the rental.

## The Lawsuit

Plaintiffs, a group of aggrieved short-term rental operators, filed suit against the City of Austin, alleging that the new regulations violated their constitutional rights to freedom of assembly, association, and privacy. The State of Texas intervened as a plaintiff in the lawsuit. The state argued that the ban on Type-2 rentals was unconstitutionally retroactive because owners of Type-2 STRs had reasonable, settled expectations of their right to operate. (Retroactive laws are generally disfavored because they either impair a previously vested right or impose new obligations not previously required.)

### I. Termination of Type-2 rentals is unconstitutional

The first issue raised on appeal was whether the city's ban of Type-2 rentals was unconstitutional (the parties agreed the law was retroactive). The city cited a variety of public-interest reasons in support of the law, including: public health concerns about over-occupancy and "bad-actor" tenants who littered and urinated in public; public safety concerns stemming from strangers in neighborhoods, public intoxication, and open drug use; and general welfare concerns such as preserving neighborhood character, stabilizing property values, and minimizing noise and parking issues for long-term residents.

However, the record showed that in the four years preceding the 2016 regulations, the city had not issued a single citation to a licensed short-term rental owner or guest for violating local noise, trash or parking ordinances. And the city had issued just ten notices of violations (not citations) to licensed STRs during the same period—seven for over-occupancy, two for failure to remove trash receptacles from the curb, and one for debris in the yard. The city did not revoke any licenses as a result of complaints about parties or noise disturbances.

Given the lack of evidence that short-term rentals contributed to the public-interest concerns cited by the city, the court found there was not a compelling public interest to support the Type-2 ban. The court noted that the right to rent one's property on a short-term basis was a fundamental privilege of private property ownership, particularly when, as in Austin, short-term rentals had been an "established practice" and an historically allowable use. Thus, the court concluded the ban on Type-2 rentals was unconstitutional, as it "significantly affects property owners' substantial interests in well-recognized property rights while, on the record before us, serving a minimal, if any, public interest." *Id.* at 1. To deal with disruptive STR guests, the court suggested the city enforce its existing nuisance ordinances, which included regulations for parking, public intoxication, disorderly conduct, littering, and noise.

The dissent took issue with the fact that the majority opinion faults the city for only issuing ten notices of violation and asks, "why is ten not enough?" *Id.* at 21. The dissent also argued that there was no violation of property rights—owners can designate the property as their primary residence and rent it or opt to make it a full-time rental with a minimum lease term of thirty days.

### II. Assembly regulations violate constitutional right to freedom of assembly

In the second issue on appeal, the city argued that the assembly regulations, which limited the number of persons allowed to gather on-site, both inside and outdoors, and prohibited activities other than sleeping after 10:00 p.m., were necessary to stop party houses and preserve neighborhood character. Again, the court was not persuaded. In contrast to traditional cases that involve the right to assemble on private property, the right in this case raised the question of freedom to assemble on *private* property *with the permission of the owner*. The court opined that the right to assemble is surely "just as strong, if not stronger, when exercised on private property with the permission of the owner, thereby creating a nexus with property and privacy rights." *Id.* at 17.

The court held that the city's goal of limiting party houses and reducing possible strain on neighborhoods did not qualify as compelling interests in a constitutional sense. Further, the law banned nearly all types of assemblies on private property "without regard to the peacefulness of or reasons for the assembly." Once again, the court suggested that the city's regulatory goals could be achieved by less intrusive means, including the enforcement of existing nuisance ordinances.

The dissent argued that the majority erred in applying strict-scrutiny review, instead of a rational basis review. And the

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assembly and occupancy restrictions were assembly-neutral zoning regulations that have a rational basis in protecting public health, safety, and general welfare.

### **Relevance to North Carolina**

Cities have authority to adopt zoning regulations if they serve a valid public purpose such that they preserve the public health, safety, morals, or general welfare of a community. And courts have traditionally found that legitimate regulatory objectives include preventing nuisances and incompatible land uses, protecting property values, and preserving the character of a community. The City of Austin cited these objectives to support the ban of Type-2 rentals—and the fact that the city's argument didn't fly makes this case particularly interesting. Instead, the lack of evidence that STRs disrupted neighborhoods, the fact that STRs were historically allowed, and the court's recognition of the fact that the right to rent property is a fundamental privilege of private property ownership, tilted the scale in the State's favor. TBD on Texas Supreme Court decision.

This case raises some interesting questions: How will our state decide whether an STR ordinance serves a valid public purpose? Is the right to rent property on a short-term basis a fundamental privilege of private property ownership? How important is it that STRs were/were not a permitted use prior to the adoption of an STR ordinance? Just what evidence will suffice to show that STRs disrupt neighborhood character?

For now, local governments may use their zoning powers to decide where short-term rentals are a permitted use. In addition, it is likely permissible to limit the overnight occupancy of a STR, provided the reason for doing so is guest safety. One thing I wouldn't recommend is adopting overly burdensome assembly restrictions such as those advanced by the City of Austin—it's a bit tricky to enforce an ordinance that bans all activities other than sleeping after 10 p.m.

### **Links**

- [www.journalpatriot.com/news/settle-expands-short-term-lodging-order/article\\_0dd018fc-75f1-11ea-b245-cb1b153a9457.html](http://www.journalpatriot.com/news/settle-expands-short-term-lodging-order/article_0dd018fc-75f1-11ea-b245-cb1b153a9457.html)
- [www.leagle.com/decision/intxco20191127a54](http://www.leagle.com/decision/intxco20191127a54)