

THINKING ABOUT GETTING INTO BED WITH A SHORT-TERM RENTAL? READ THIS FIRST!

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In the past several years, property owners renting their homes as short-term rentals has become commonplace. Short-term vacation rental companies such as Airbnb and VRBO have become popular with all walks of life including tourists, guests, property owners, and investors. Not only have short-term rentals made coordinating travel

easier, but they have also generated billions of dollars in revenue for investors and property owners around the world.

As short-term rentals have become more popular, they have come under attack by neighbors and cities. Impacted neighbors describe short-term rentals as nuisances that generate noise, induce crime, destroy neighborhood character, and facilitate occupant turnover. In response, governments have turned to regulating the industry, claiming they have a mandate to protect the public's health, safety, morals, and welfare. In turn, property owners and investors have countered that such regulation unconstitutionally burdens their property rights.

While the debate rages on, property owners who purchased their property in the hope they could rent their property out on a short-term basis are

caught in the middle. Buying a particular property for short-term rental purposes may turn on whether a city is considering changing its rules. For existing owners, changes in local ordinances can make the difference between a profitable venture and having to sell the property. Likewise, lenders who loan money based on a property's value as a short-term rental or the income received from vacation rents, can find themselves suddenly under water if the city passes more restrictive laws. With so much at stake, short-term property owners are fighting back against the increased and ever-changing restrictions on short term rentals.

The conflict between property owners and local governments relating to short-term rental regulation has increasingly resulted in constitutional challenges across the country with varying results. Recently, property owners have claimed that regulations constitute an unconstitutional taking under the Takings Clause of the United States Constitution. The Takings Clause prohibits the government from taking private property for public use

“without just compensation.” Even when there is not an actual physical taking of property, courts have determined that the Takings Clause requires just compensation to property owners when regulation amounts to either a (1) total taking or (2) partial taking. A total taking occurs where a regulation denies a property owner all economically beneficial productive use of a property. A partial taking occurs when a regulation does not render a property completely idle but nevertheless requires compensation for the partial taking. See *Nekrilov v. City of Jersey*.

Some high-profile courts have rejected these Takings arguments, suggesting an uphill battle for like claims. For example, in *Nekrilov v. City of Jersey*, several property owners filed a lawsuit that challenged a Jersey City ordinance that capped owners’ rights to operate short-term rentals for more than 60 nights per year. The owners highlighted that Jersey City had originally passed a favorable zoning ordinance legalizing short-term rentals within the city, which enticed the owners to purchase and invest in the rental properties. The

owners argued they were prejudiced after Jersey City changed its position and implemented the 60-night cap on non-owner-occupied short-term rentals after Jersey City's mayor had a falling out with Airbnb after an alleged dispute relating to the mayor's reelection campaign. The owners argued that their investment return was significantly diminished considering the change in law.

The lawsuit was ultimately appealed to the Third Circuit Court of Appeals, which ruled against the property owners. The Court found no unconstitutional taking, reasoning that there was no partial taking because even though the properties lost potential short-term rental revenue, there were alternative ways to put the properties to economic use. And, on top of that, the Court declined to recognize a general right to do business as being protected by the Takings Clause. The Court also rejected the property owners' other arguments, finding that the property owners' due process rights were not violated and there was no violation under the Contracts Clause of the

Constitution.

Even when property owners lose on a takings question, they may prevail on other grounds. For example, in *Hignell-Stark v. City of New Orleans*, the Fifth Circuit Court of Appeals ruled in favor of property owners that challenged New Orleans' limitation. There, New Orleans passed a law that prevented property owners in residential areas from renting their properties for less than 30 days a year without a license. After a few years, the City imposed a residency requirement, requiring that property owners use the property as their "primary residency" as a condition for obtaining a permit. The Court determined that this statute violated the United States Constitution's Commerce Clause because it discriminated against out-of-state residents, manifesting a clear preference for in-state residents. Although the ordinance was struck down on Commerce Clause grounds, the court agreed that the owners did not have a sufficient property right to receive protection under the Takings Clause.

And, in the backdrop of constitutional

challenges, there are also state laws to consider, which could change the analysis by modifying the scope of a regulation or recourse for owners. For example, in Hawaii, an organization representing short-term renters was granted an injunction that prevented the City of Oahu from enacting a zoning ordinance that increased the minimum renting period from 30 days to 90 days. The Court found that an existing state statute “barred a county from passing a law that discontinues any previously lawful use of any property.” On top of that, the Court also noted that the zoning ordinance likely violated constitutional takings principles. As another example, Arizona adopted the Private Property Rights Protection Act as part of a voter initiative to protect property rights more fully in Arizona. This statute can be used to limit a government’s justification for enacting short-term rental limitations for reasons other than strict public health and safety justifications. Indeed, state-specific policy impacts the government’s approach to regulating the industry.

Overall, the legal landscape

surrounding the constitutionality of short-term rentals is not settled. There have been many constitutional challenges to short-term regulation in various forms, including the Takings Clause, the Contracts Clause, and the (dormant) Commerce Clause. There have also been due process and equal protection challenges. And, on top of that, the statutory or municipal landscape could change any individual analysis. Courts have not agreed across the board, and it is likely that the practice will be subject to increased litigation in the next few years as the demand for short-term rentals continues to grow.

If you have any questions about this article, any specific short term rental laws or if you are thinking about diving into the short-term rental space, please feel free to contact Branden Kartchner at bkartchner@wrightlegal.net.

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