

Update, Status, and Strategies on Short-Term Rental Litigation

Texas City Attorneys Association

SUMMER CONFERENCE

June 16, 2022

**MATTHEW C.G. BOYLE
BOYLE & LOWRY L.L.P.**

4201 Wingren, Suite 108

Irving, Texas 75062

Phone: (972)650-7100

Fax: (972)650-7105

E-Mail: mboyle@boyle-lowry.com

BOYLE & LOWRY, L.L.P.

DISCLAIMER

The events, parties, counsel, and members of the judiciary depicted in this presentation are fictitious. Any similarity to any person, party, lawyers, or judge, living, or dead is merely coincidental. The opinions provided today are my own and do not reflect those of my firm or any of its clients.

BOYLE & LOWRY, L.L.P.

Short-Term Rentals



BOYLE & LOWRY, L.L.P.

Short Term Rentals- Addressing the Commercial Intruder

- **Short term rentals- What are they and what's the big deal?**
- **Neighborhood vs. Commercial Use**
- **Regulatory Options**
- **Legal Challenges-**
 - **Grapevine (Muns)**
 - **Austin (Zaatari)**

Public Policy Debate

- **Proponents**

- STR's no different than other residential uses (*Tarr*)
- STR's provide alternative rental options superior to hotels (hotel conspiracy theory)
- STR's provide income opportunity and increased value to their owners
- STR's are no more impactful on neighborhoods than long-term rentals
- STR owners maintain their properties in better condition than long-term rentals

- **Opponents**

- Noise
- Safety
- Parking
- Trash
- Strangers
- Home inventory impact

Short-Term Rentals in the News

- The Associated Press, April 17, 2022. “2 minors dead, 8 wounded in shooting at party with 200 people in short-term rental in Pittsburgh.” “ ‘It was so obvious that there was going to be a problem – there was a line of 14 year old kids trying to get into this place.’ The house has been rented for bachelorette parties or other events before. In the morning, a neighbor found his wife’s white car smeared with blood, possible from someone fleeing the shooting and trying to hide behind the vehicle.” - <https://www.houstonchronicle.com/us-world/amp/Police-2-dead-11-injured-in-East-Allegheny-17086616.php>
- Fox 4 Kansas City, April 4, 2022. “Court records detail deadly shooting at Overload Park short- term rental.” “As officers questioned witnesses they determined a large group of people were at the house for a birthday party and not everyone knew each other.” - <https://fox4kc.com/news/court-records-detail-deadly-shooting-at-overland-park-short-term-rental/amp/> Woman shot dead in what is typically a quiet neighborhood and a quiet city, that on average sees less than 10 homicides a year.
- Austin, Texas. Illegal short-term rental being used to host orgies, meth addicts, crime scenes, and pop-up brothels.

What is a Short Term Rental?

- **Short term rental (STR)** – the rental of any residence or residential structure or any portion of a residence or residential structure for a period of less than 30 days
- **Rental** – the renting, bartering, trading, letting or otherwise allowing the use of a residence or residential structure or room or rooms within a residence or residential structure. This shall not restrict, limit or interfere with any homeowner from participating in a leaseback upon the sale of a residence or residential structure
- **Leaseback** – is an arrangement where the seller of a home leases the home back from the purchaser. In a leaseback arrangement, the specifics of the arrangements are typically made prior or immediately after the sale of the home
- **Short term rental marketplace** – a platform through which the owner of or authorized agent of the owner of a residential property, including a single-family dwelling or a residential unit, offers a short term rental for rent

Long Term v. Short Term Rentals

- Why 30 days?
- 92.001 Property Code- residential tenancies
 - Dwelling-Permanent residence under single lease
- 156.101 Tax Code
 - Hotel occupancy tax applies to rentals of less than 30 days
 - Exemption for permanent residents with rental terms of at least 30 consecutive days

What is a neighborhood?

- Neighbor- One who lives in close proximity to another
- Neighborhood- a district forming a community with relation to its inhabitants or interests
- Neighbor to neighbor issues are a constant source of challenges for cities and homeowners associations
 - Parties Parking Noise
 - Yard/Trees Pets/Animals Fences
 - Boundaries Kids Visual
 - Code Enforcement Police Calls
 - Zoning Violations Animal Control
- Commonalities and relationships

How Do STR's Threaten Neighborhoods?

- Some examples of “super density” “party houses”:
 - ❖ A 2,100 sq. ft. house advertised to sleep 18 adults, (\$375 avg. night); \$210,000 income 3yrs
 - ❖ A 3,400 sq. ft. home that can host up to 20 adults, (\$625 night); \$325,000 inc. 3yrs
 - ❖ A 1,800 sq. ft. home-26 guests, (\$275 avg. night); \$160k/3yrs.
- A poll by WFAA TV in Dallas revealed more than 84 percent of residents oppose STR's in their neighborhood.



How Do STR's Threaten Neighborhoods?

- STR's typically turn over the entire occupancy of the residence multiple times per month and sometimes during the same week. With such turnover, the new guests move in their luggage, groceries, coolers, speakers, and vehicles while the outgoing guests remove same.
- STR's regularly utilize the residence for a much greater density of use than traditional residential.
Noise: higher in volume due to the number of guests
- Cleaning crews
 - Security: STR's typically attract large groups of unknown strangers who are not subject to background checks or other screening which means that the guests can include criminals and sex offenders
 - Parking and Traffic issues: most residential neighborhoods have limited parking, particularly for the large groups which utilize STR's, resulting in overcrowded parking and associated traffic issues
 - ❖ Calls for police service to STR's include noise violations, fighting, parking violations, theft, drug sales and use, intoxication and more.

How Do STR's Threaten Neighborhoods?

Larger short-term rental that has six bedrooms and offers to sleep 26 people.

Excessive amounts of cars. 17 at one time.

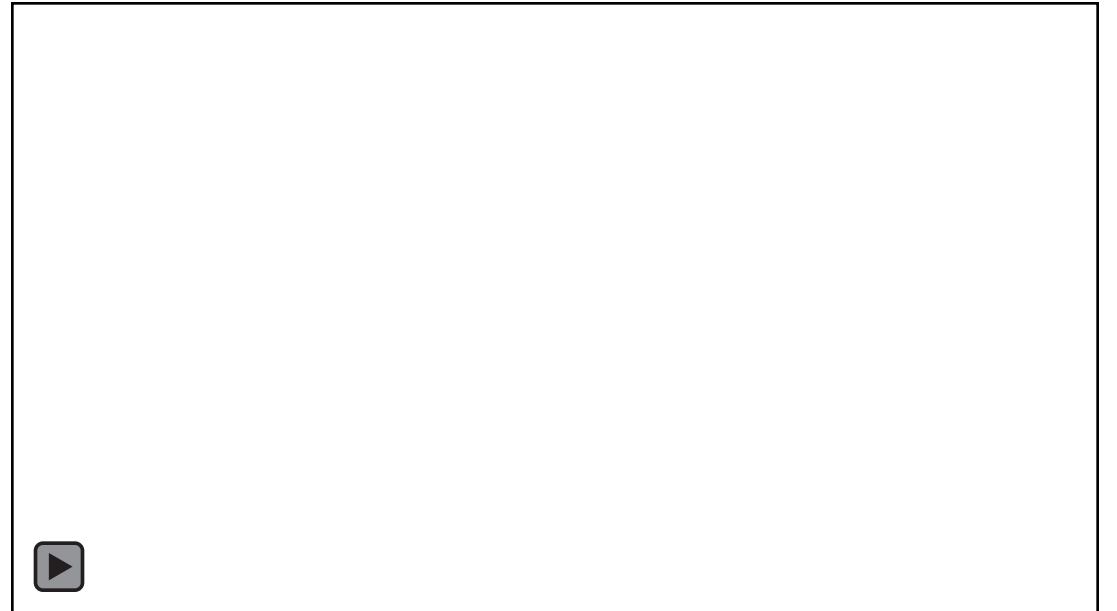
16 people coming and going all day and all night.

Loud music.

I just want our neighborhoods back.

How Do STR's Threaten Neighborhoods?

“Hello. My name is ... I'm an 8th grader ... The STR that backs up into my home has anywhere from 30 to 40 new strangers every week. These strangers come to party at this STR behind my house just a few feet away from where myself and my family sleep, eat and live. I have a learning disability, dyslexia. I also have sleep issues. This Airbnb situation has not only been stressful, but also hard for me. In the afternoons after a long day of school, a home should be a safe haven. This is not the case in my scenario. Home has been a place where I do not feel safe nor am I able to focus on my studies due to the loud noise from the outdoor swim parties and activities occurring at the STR ... STR has also ruined my family's summer. I haven't swimmmed nearly as much as I usually do. Please help my family and others like us escape the nightmare our communities and residential neighborhoods



STR Advocates Have Asserted a Myriad of Challenges to STR Regulations

- In an effort to perpetuate their operations, STR owners and operators have raised a number of challenges to STR regulations. They include Declaratory Judgment actions regarding the interpretation and application of traditional zoning and code enforcement regulations to STR's.
- STR operators have asserted Vested Rights protection.
- STR advocates have also made Due Process claims. STR owners have urged takings claims.
- STR proponents have relied on Spann, Tarr, and Tiki Island

What Options Are Available to Regulate STR's?

- Public Policy Challenge: private property rights v. right to peaceful enjoyment of home and neighborhood.
- Contentious debates about whether STR's are beneficial to the community.
- Balancing Act with proponents urging that their property rights should not be infringed and that the few bad apples (e.g. "party houses") should not prevent those responsible owners from utilizing their properties for a commercial use which is claimed to be no different from long-term rentals.
- Regulatory and enforcement burden?

Legal authority for municipal regulation of STR's?

- **54.004** LGC- Home-rule municipality may enforce ordinances necessary to protect health, life, and property
- Chapter 211 LGC-zoning enabling statute. City is entitled to regulate the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes 211.003(5)
- **Section 211.004**
 - (a) Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:
 - 1) lessen congestion in the streets;
 - 2) secure safety from fire, panic, and other dangers;
 - 3) promote health and the general welfare;
 - 4) provide adequate light and air;
 - 5) prevent the overcrowding of land;
 - 6) avoid undue concentration of population; or
 - 7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

What about Tarr?

- *Tarr v. Timberwood Park Homeowners' Ass'n*, 556 S.W.3d. 274 (Tex. 2018).
- TX S. Court held deed restrictions in the HOA's covenants did not ban STR's.
- STR have described this decision as the “death knell” for the enforcement in Texas of bans by cities and HOAs of STR's.
- *Tarr* was decided based on the text of the HOA covenant which was being challenged and which had been relied upon by the HOA in efforts to prohibit STR's within that HOA.
- Use limited to “residential purposes” (undefined)
- “[n]o building, other than a single-family residence” could be “erected or constructed” on the property, but did not state it had to be occupied by only one family.
- The Court pointed out that amending “the deed restrictions to specify a minimum duration of leasing” was “an option available to both [the home owner and the association] under the deed's amendment restrictions.”

Critical defined terms in zoning ordinances & STR's

- “Residential use”: a structure or use designed or used for occupancy as a human dwelling or lodging place, such as single family dwelling.
- Other terms:
 - bed and breakfast,
 - hosted primary residence,
 - primary residence,
 - single family
 - dwelling
 - short-term rental,
 - and vacation rental.

Use Determination Process- What are STR's?

- Building Official determination
- Review the Zoning Ordinance and definitions
- Permissive v. restrictive?
 - “[n]o . . . use of any building, structure or land . . . shall hereafter be established, altered, moved, divided or maintained, in any manner except as authorized by the provisions of this ordinance”
- Danger- Presuming STR's are a permitted use
- Bed and Breakfasts v. STR's?

Determination and Deadlines

- Appeal deadline- by Ordinance (aka Snooze you Lose!)
- any person aggrieved or affected by any decision of the building inspector or other administrative officer of the city relative to the zoning ordinance must appeal within fifteen (15) days of the date of such determination
- Grapevine v. CBS Outdoor, Inc.
 - 2013 WL 5302713
 - “move, alter, or adjust”- 7 times
 - No threatened enforcement

Determination Letter? No appeal

Re: Short Term/Transient Rental Prohibition

Dear [STR Owner/Operator],

Be advised that short term/transient rentals (“STR’s”) are prohibited in the City of . **STR’s are not listed as a permitted use in any Zoning classification in the City, and as such, are not allowed.** Following a lengthy observation and study period which began in November of 2017, on September 4, 2018...

In order to give the STR owners and operators a reasonable time to honor commitments that have already been made, and/or to market their home(s) for other, permitted uses, the City will allow for a forty-five (45) day conditional grace period for compliance. Please be advised that the grace period will end on October 22, 2018. **After that time, any person found to be in violation of the Zoning Ordinance regarding STR’s will be issued a citation, and upon conviction thereof shall be fined in a sum not to exceed \$2,000.00. A separate offense shall be deemed committed upon each day during or on which a violation occurs or continues.**

Violations of City Ordinances will not be tolerated during the conditional grace period. Any violation of City Ordinance will result in the termination of the conditional grace period, including but not limited to: disturbing the peace, obscenity, littering, building code violations, high weeds and grass, lighting, noise, nuisance violations, parking on unimproved surfaces, blocking sidewalks or driveways, etc. Such violations during the conditional grace period will result in an order to immediately cease the STR, and will result in prosecution as described above.

BOYLE & LOWRY, L.L.P.

Muns v. Grapevine

- 1) Constitutional taking;
 - 2) Due process/ due course of law;
 - 3) Preemption;
 - 4) Unconstitutional retroactivity.
-
- Waiver of immunity?

Due Process

- For economic regulations, including zoning ordinances and restrictions on land use, can be ruled unconstitutional under Article I, § 19 of the Texas Constitution's due course of law requirements if either:
 1. The statute's purpose could not arguably be rationally related to a legitimate governmental interest; or
 2. When considered as a whole, the statute's actually, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of the governmental interest.
- P's urge that cities have alternative means to address noise, traffic, or trash issues and that an outright ban on STR's is irrational and oppressive. The rational basis threshold presents a low bar as to the defense of an ordinance under due process.

Legislative Findings

- A great amount of deference is given to a legislative body when making such legislative findings of fact and determinations as to the need or legitimacy of a particular ordinance. See *Hunt*, 462 S.W.2d at 538.
 - presumed to be valid unless they are arbitrary or capricious. *Id.*
 - plaintiff “**must convince the court that the legislative facts on which the [decision] is apparently based could not reasonably be conceived to be true by the governmental decision-maker.**” *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996) (quoting *Shelton v. City of College Station*, 780 F.2d 475, 49 (5th Cir.) (en banc), cert. denied, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 and 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986)).
 - The **judiciary cannot act as a super-legislature** to determine whether the City Council correctly made a particular legislative finding. See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)(holding that the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.).

Example Legislative Findings

- WHEREAS, STR's are not specifically defined, permitted, or listed in any zoning category; and
- WHEREAS, there has been a proliferation of STR's within residential areas of the City; and
- WHEREAS, STR's are not consistent with the character or nature of single-family residential uses under the Zoning Ordinance; and
- WHEREAS, STR's are not suitable in residential neighborhoods, are not compatible with residential uses, and the neighborhood adjacency of STR's in residential neighborhoods is harmful; and
- WHEREAS, in the absence of being listed as a permitted use in any Zoning District, STR's are prohibited under the City's Zoning Ordinance; and
- WHEREAS, STR's in the City, with their attendant traffic, parking, noise, and litter is incompatible with the intent of residential districts in the City and the desires and expectations of the City's residents and is contrary to the long-standing character of the community; and

Unconstitutional Taking

- Tex. Const. art. I, § 17(a) “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made”
- To establish a takings claim, the claimant must seek compensation because the defendant intentionally performed actions that resulted in taking, damaging, or destroying property for public use without the owner's consent.” *Tex. Parks and Wildlife Dep’t v. the Sawyer Trust*, 354 S.W.3d 384, 390-91 (Tex. 2011).
- Bedrock principal: “[t]he objective of the judicial process under the constitution and statutes is to make the landowner whole and to award him only what he could have obtained for his land in a free market.” *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 831 (Tex. 1974).
- “[f]or a regulatory taking to occur, a governmental regulation must, at a minimum, diminish the value of an owner's property.” *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, No. 03-08-00790-CV, 2010 WL 143418, at *3 (Tex. App. Jan. 12, 2010) (citing *Sheffield Dev. Co. v. City of Elgin Heights*, 140 S.W.3d 660, 670 (Tex. 2004)).

A ‘sophistic Miltonian Serbonian Bog’

- Compare the value that has been taken from the property with the value that remains in the property. *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (2004)
- Takings claim where no compensation is sought? *Tx. Parks & Wildlife Dept. v. Sawyer Trust*, 354 S.W.3d 384 (Tex. 2011)
- Takings claim with no diminution in value?
- Takings claim where value of property has gone up?
- Distinct investment-backed expectations?

Unconstitutional Taking

- Standard- compare the value that has been taken from the property with the value that remains in the property. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935–36 (Tex. 1998)
- Future potential losses or profits are not usually considered. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).
- “[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim. *Andrus*, 444 U.S. at 66. This is especially true when dealing with speculative ventures like real estate development.”
- “The takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority.” *See Sheffield*, 140 S.W.3d at 677 (quoting *Taub v. City of Deer Park*, 882 S.W.2d 824, 826(Tex. 1994))

Preemption- Article XI, Section 5(a) of the Texas Constitution

- Chapter 156 of the Texas Tax Code- Hotel Occupancy Tax
- Chapter 92 of the Property Code
- Legislature’s intent to impose a limitation must appear with unmistakable clarity. *City of Laredo v. Laredo Merchants Assoc*, 550 S.W.3d 586 (Tex. 2018)
- The mere entry of the state into a field of legislation does not automatically preempt that field from city regulation. Rather, local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable. Absent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other’s toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency. *City of Laredo*, 550 S.W.3d at 593

Unconstitutional Retroactivity

- Article I, Section 16 of the Texas Constitution prohibits the creation of retroactive laws. *See* Tex. Const. art. I, § 16- “No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.”
- Objectives- protecting reasonable, settled expectations and of preventing legislative abuses
- Three factors
 - (1) “the nature and strength of the public interest served by the statute as evidenced by the Legislature’s factual findings;”
 - (2) “the nature of the prior right impaired by the statute;”
 - and (3) “the extent of the impairment.”

Unconstitutional Retroactivity

- “[P]roperty owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made.” *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972)
- But see- The Homeowners do not have a vested right arising under the Zoning Ordinance to use their properties as STRs, we conclude that they have a fundamental leasing right arising from their property ownership. Private property ownership is a fundamental right. *Hearts Bluff*, 381 S.W.3d at 476 (*Muns v. Grapevine*)

Muns v. Grapevine Update

- Trial Court (Judge (not Justice) Mike Wallace (See *Draper v. Arlington*) -
 - Competing Motions for Summary Judgment Denied
 - City's Amended Plea to the Jurisdiction Denied
- Court of Appeals (Justice Elizabeth Kerr (*Draper*))- Interlocutory Appeal
 - Preemption Claim dismissed
 - 1) takings;
 - 2) due process;
 - 3) unconstitutional retroactivity
- Supreme Court- Petition for Review
Briefing Requested- Amicus Support

Austin's Phase-Out Plan Challenged

- The Austin City Council first regulates short-term rentals in 2012 and 2013. Then in February 2016, the City significantly tightened its regulations.
- The rules impose strict occupancy and time-of-day limits on STR's in Residential neighborhoods.
- No more than 10 adults can gather in a vacation rental at a time – the limit is six if the adults are unrelated (i.e. not a family).
- The ordinance prohibits outdoor activity at STR's located in residential neighborhoods be between 10 p.m. and 7 a.m.

Zaatari v. Austin

- As of April 2022, only owners of single-family homes or multifamily dwellings who live on their property and who want, for example, to rent out their house while they're temporarily away or use a garage apartment or an adjoining unit as a vacation rental can continue to operate in a residential neighborhood.
- In response to the new rules, the Texas Public Policy Foundation, sued the City in June 2016. The Foundation was joined by the Attorney General's Office and argued that Austin's rules go far beyond standard-issue licensing, health, safety and taxation rules and violate property owners' constitutional rights.
- The trial court denied the City's Plea to the Jurisdiction but granted the City's No-Evidence Motion for Summary Judgment. The trial court also denied the Plaintiffs' Motion for Summary Judgment.

Zaatari v. Austin

- Both sides appealed and the court determined that retroactive city ordinance provisions banning short term rentals of single family residences that were not owner occupied was an unconstitutional infringement on settled property rights; and city ordinance provisions restricting assembly in short term rental property was an unconstitutional restriction on the fundamental right to assembly.
- It is important to note that the court's holdings are based on ordinances that were enacted after short term rentals were established in the City and were designed to phase them out. This is in stark contrast to the city ordinances that have proactively eliminated or regulated short term rentals

What about Village of Tiki Island?

- STR supporters heavily rely upon on *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App. –Houston [1st Dist] 2015, no pet.) to support their position that STR bans constitute a regulatory taking.
- In 2015, the Houston Court of Appeals upheld a temporary injunction in a case involving the Village’s regulations of STR’s.
- In 2014 the Village passed an ordinance barring STR’s outright and included a grandfathering for existing STR’s.
- The *Tiki Island Court* held that a municipal ordinance which prohibited STRs constituted a regulatory taking but did so based solely on the specific and limited facts of that case. *Tiki Island*, 463 S.W.3d at 582.

Regulatory Options for Addressing STR's continued...

- Requiring that STR's be limited exclusively to the principal residence of the owner or operator can be used to reduce the number of STR's and to increase the neighborhood sensitivity for the operator.
- Applying safety provisions similar to other commercial operations will provide enhanced safety for both guests and neighbors. This can include a prohibition against convicted sex offenders, a requirement for adequate fire protection, ingress and egress, and the like. So the basic regulatory options for STR's are listed as follows
 - ~ Prohibition-
 - ~ Hotel Occupancy Tax-
 - ~ Location Restrictions-
 - ~ Conditional or special use permits-
 - ~ Operator License or Registration
 - ~ Density
 - ~ ADA
 - ~ Operator/License Fees-
 - ~ Principal Residency Requit.-
 - ~ Night Cap-
 - ~ Safety Provisions-
 - ~ Nuisance Provisions-
 - ~ Smoke/fire/CO monitors

Regulatory Options for Addressing STR's continued...

- Chance Weldon- Texas Public Policy Foundation
- IF your city wants to ban STR's, do so only prospectively

Conclusion

- If the answer to STR's was simple, there would not be so much consternation and litigation regarding them. Finding the right balance between the competing interests of STR advocates and those neighbors seeking to enjoy the peace and tranquility of traditional neighborhood presents both policy and legal challenges.
- Once the governing body provides their policy direction, the starting place for analysis is the city's existing zoning ordinance.
- Therein the threshold issue is whether or not STR's are already barred or instead permitted.
- There are indeed plenty of regulatory options. So unless and until the Legislature acts to strip cities of their basic prerogative to protect the health, safety, and welfare of the public utilizing Chapter 211 zoning take advantage of the available tools to address these issues.